

**IN THE COURT OF APPEAL OF THE DEMOCRATIC**

**SOCIALIST REPUBLIC OF SRI LANKA**

In the matter of an application for Writs of Certiorari and Mandamus in terms of Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

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Kahanda Walauwwe Nimal  
Bandara Weragama,  
Retired Brigadier,  
Sri Lanka Army Volunteer Force,  
Officers Mess,  
2<sup>nd</sup> Singha Regiment,  
Raja Veediya, Kandy.

**PETITIONER**

**C.A. (Writ) Application No.125/2009**

**Vs**

1. Director,  
Pay and Records,  
Sri Lanka Army,  
Army Cantonment,  
Panagoda.
2. Kahawatte Plantations Ltd,  
Seva Mandhiraya,

46/38, Nawam Mawatha,  
P.O. Box 60, Colombo 02.

3. Commissioner General of Labour,  
Industrial Relations Division,  
Department of Labour,  
7<sup>th</sup> Floor, Labour Secretariat,  
Colombo 05.

### **RESPONDENTS**

#### **BEFORE**

: Deepali Wijesundera J.

#### **COUNSEL**

: Manohara De Silva PC with  
Avindu Wijesurendra for the  
Petitioner.

Minoli Jinadasa with S.Dewapura  
for the 2<sup>nd</sup> Respondent.

Vikum De Abrew SSC with  
Chaya Sri Nammuni SC for the  
3<sup>rd</sup> Respondent.

#### **ARGUED ON**

: 29<sup>th</sup> August, 2014.

#### **DECIDED ON**

: 05<sup>th</sup> December, 2014.

**Deepali Wijesundera J.**

The petitioner has filed this application praying for a writ of Certiorari to quash the 3<sup>rd</sup> respondent's decision dated 17/05/2006 and for a writ of Mandamus to direct the 3<sup>rd</sup> respondent to inquire into and make a determination or to settle the dispute between the petitioner and the 2<sup>nd</sup> respondent.

The petitioner submitted that he joined the Sri Lanka Army Volunteer Force in 1976. While being employed at M/S Kahawatta Plantation Ltd who is the 2<sup>nd</sup> respondent in this action, the said 2<sup>nd</sup> respondent was requested by the Army by letter dated 07/06/1994 (P4) to release the petitioner for Army active service, accordingly by letter dated 04/07/1994 the 2<sup>nd</sup> respondent released him to report to Army Volunteer Force (P5). The petitioner stated by Public Administration Circular No. 319 dated 20/12/1985 when a member of the Volunteer Force is called for active service the civil employer and the army both are required to pay the full salary of the officer for the first sixty days and thereafter the civil employer is bound to pay the full civil salary and other benefits. Accordingly the petitioner had received emoluments from both the Army and 2<sup>nd</sup> respondent for the first two months and thereafter from the 2<sup>nd</sup> respondent, until June 1999. By P9 and P10 the 1<sup>st</sup> respondent was informed by the 2<sup>nd</sup> respondent that the payments made to the

petitioner was higher than the payments made by the army and has requested reimbursement from the army. Soon after that the petitioner was informed by the 2<sup>nd</sup> respondent that they are withholding the petitioner's civil salary and emoluments. The petitioner has replied to this letter by P12. By P13 the 1<sup>st</sup> respondent had informed the 2<sup>nd</sup> respondent that the army is not bound to reimburse the money as the Government does not own more than 50% of the shares of the 2<sup>nd</sup> respondent company. Thereafter the 2<sup>nd</sup> respondent had asked for further information from the petitioner and he has replied by P14, P15a and P15b. Thereafter the army had paid the petitioner's salary. Sri Lanka Volunteer Force also has written to the 2<sup>nd</sup> respondent on behalf of the petitioner but the 2<sup>nd</sup> respondent had been repeatedly demanding the purported over payment from the petitioner (P19a to P19e). The counsel for the petitioner submitted that the 2<sup>nd</sup> respondent's conduct amounts to constructive termination of the petitioner's employment.

Counsel for the petitioner submitted the petitioner made a complaint to the 3<sup>rd</sup> respondent against the 2<sup>nd</sup> respondent for withholding his salary and allowances and EPF/ETF contributions and for penalizing the petitioner for reporting to Army Active Service in September 2005 (P21). The 3<sup>rd</sup> respondent had fixed the complaint for inquiry and after considering their written submissions on 17/05/2006 had informed the parties that the 3<sup>rd</sup> respondent does not have

jurisdiction to inquire into the complaint of the petitioner (**P25**). The petitioner's counsel stated that the said decision of the 3<sup>rd</sup> respondent is unlawful arbitrary unreasonable and ultra vires of the powers vested in the 3<sup>rd</sup> respondent under the provisions of the Termination of Employment Act, Industrial Dispute Act and Employees Provident Fund Act.

Counsel for the petitioner further submitted that by the Cabinet Directive dated 29/03/1972 it was decided by the Cabinet that each Ministry should inform all departments and corporations that members of the Volunteer Force should not be penalized during their periods of mobilization (**P26 and P27**). He also stated that the Ministry of Defense in April 1991 informed several ministries including the Plantation Industries Ministry that personnel of the Volunteer Force who have been mobilized should not be penalized.

The counsel for the 3<sup>rd</sup> respondent submitted that the petitioner is guilty of laches, the dispute had arisen in 1999 and the petitioner complained to the respondent in 2005. The 3<sup>rd</sup> respondent's decision marked **P25** was by letter dated 17/05/2006 and the instant application was filed on 16/02/2009. The 3<sup>rd</sup> respondent's counsel stated that the petitioner has failed to give an explanation for the delay. Citing the

judgments in *Samaraweera Vs Ministry of Public Administration 2003 3 SLR 64* and *Dahanayake Vs Sri Lanka Insurance Corporation Ltd. 2005 1 SLR 67* stated that this application should be dismissed for unexplained and undue delay.

The 3<sup>rd</sup> respondent's counsel submitted that an application under the Termination of Employment Act has to be filed within six months of the said termination. An application filed after six months can not be considered by the commissioner under Sec. 6B (1). The counsel further submitted that Industrial Disputes Act and the Employees Provident Fund Act has no relevance to the petitioner's grievance in the instant application.

The counsel for the 2<sup>nd</sup> respondent in his very long submissions most of the time repeating the same argument over and over again stated the petitioner's application is inordinately delayed and cited ten judgments. This argument was taken up by the counsel for the 3<sup>rd</sup> respondent also with authorities cited.

The counsel for the 2<sup>nd</sup> respondent submitted that to explain the delay the petitioner has stated in his petition that he was unable to retain

an attorney-at-law due to financial difficulties which is absolutely false as shown by P29 his letter to the Attorney General which was sent by a Presidents' Counsel.

The counsel for the 2<sup>nd</sup> respondent stated that the petitioner's complaint to the 3<sup>rd</sup> respondent is also belated, almost six years late. He stated that after the petitioner was informed by the 2<sup>nd</sup> respondent that he will not be paid by them his salary was paid by the Army and that there was no loss caused to the petitioner and he can not in law demand the 2<sup>nd</sup> respondent to make such a payment. The 2<sup>nd</sup> respondent stated that the petitioner is not entitled for the Provident Fund for the said period under *Sec. 16(1) of the Employees Provident Fund Act*, as he did not earn from the 2<sup>nd</sup> respondent during this period.

The counsel for the 2<sup>nd</sup> respondent citing a long list of judgments stated that the petitioner's application should be refused for suppression of material facts.

The petitioner who was employed by the 2<sup>nd</sup> respondent is a member of the Army Volunteer Force he was called for active service in 1994; he was paid by the 2<sup>nd</sup> respondent till July 1999. The 2<sup>nd</sup>

respondent after informing him that he is not entitled for payments by them stopped paying him. When he informed to the 1<sup>st</sup> respondent, the petitioner's salary was thereafter paid by the army therefore one can not say he was without an income. The petitioner's claim was based on the Circular dated 29/03/1972 and P7 Circular dated 20/12/1985 and P28 letter by the Secretary Ministry of Defense. The Circular dated 29/03/1972 which is addressed to Secretary to the Defense Ministry, Secretary to the Foreign Ministry and Secretary to the Ministry of Public Administration under which the petitioner was paid by the 2<sup>nd</sup> respondent from 1994 to 1999 refers to members of the Volunteer Force who are employee of the Government departments and corporations it does not refer to private sector employees. The 2<sup>nd</sup> respondent has paid the petitioner on this Circular without a proper understanding of the same. P28 letter by the Secretary to the Ministry of Defense refers to the Circular dated 29/03/1972 but it does not refer to the payment of salaries only to promotions and increments of the personnel of the Volunteer Force who have been Mobilized for long periods of time. P7 Circular dated 20/12/1985 also refer to members of the Volunteer Force employed by the State Corporations, Provincial Councils and Government Departments it does not refer to the private sector employees.

The 3<sup>rd</sup> respondent has correctly stated he had no jurisdiction to inquire into the petitioner's complaint on one hand his application was



belated and on the other hand the application was not made following the proper procedure laid down in the statutes. The said complaint was made almost six years later.

Petitioner's instant application is also belated. A party seeking writ jurisdiction has to come to court with clean hands. He has suppressed and misrepresented facts. The petitioner stated his delay was due to lack of finances which is not true his letter to the Attorney General marked **P29** show that he had retained a Presidents' Counsel. Therefore it is a totally false declaration.

Petitioner also claimed the Army Act was violated by the respondents if so he could have taken steps under Section 144 of the said Act.

For the afore mentioned reasons I decide that the petitioner is not entitled to get relief prayed for in his petition to this court. Petitioner's application is dismissed without costs.

**JUDGE OF THE COURT OF APPEAL.**