

IN THE COURT OF APPEAL OF THE
DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

*In the matter of an Application for Writs
in the nature of Certiorari, Mandamus
and Prohibition under Article 140 of the
Constitution of the Democratic Socialist
Republic of Sri Lanka.*

D S R Weerakoon,

No. 75, Hathbodhiya Road,

Kalubowila,

Dehiwala.

PETITIONER

CA Writ Application No. 382/2015

Vs

1. Lt. Gen. A W J C De Silva,
Commander of the Sri Lanka Army,
Army Headquarters,
Colombo 03.
2. Maj. Gen. Jagath Dias
Col. Commandant.
Vijayabahu Infantry Regiment,

Boyagane,
Kurunegala.

3. Maj. Gen. Channa Gunathilake
Commandant
Sri Lanka Army Volunteer Force,
Salawa,
Kosgama.
4. Maj. Gen. M Senanayake
Military Secretary,
Army Headquarters,
Colombo 03.
5. Karunasena Hettiarachchi
Secretary,
Ministry of Defence,
No. 15/5, Baladaksha Mawatha,
Colombo 03.
6. Maj. Gen. E M M Ambanpola
Sri Lanka Army,
Army Headquarters,
Colombo 03.
7. Maj. Gen. B A Perera
Sri Lanka Army,
Army Headquarters,
Colombo 03.
8. Maj. Gen. M Hathursinghe

Sri Lanka Army,
Army Headquarters,
Colombo 03.

RESPONDENTS

Counsel: J. C. Weliamuna for the Petitioner

Vikum de Abrew, DSG for the Respondents

Argued on: 2016-02-16

Decided on: 2016-05-23

JUDGMENT

P PADMAN SURASENA J

The Petitioner is a Lieutenant Colonel (temporary) who is presently serving as the Civil Coordinating Officer of the 66th Division of Sri Lanka Army based in Poonerin. In these proceedings he challenges the decision of the 1st and/or the 2nd, 4th, 6th – 8th Respondents to retire him from Sri Lanka Army with effect from 28th November, 2015 without confirming him in the rank of Lieutenant Colonel.

It is for that purpose that the Petitioner in his petition has prayed for *inter alia*,

- a) a mandate in the nature of Writ of Certiorari quashing any decisions and/or determinations made against the Petitioner reflected in **P 5(a)** and/or **P 7(a)** and/or **P 7(b)** and/or any other document incidental thereto;
- b) a mandate in the nature of Writ of Certiorari quashing the decisions reflected in **P 5** and/or **P 7(a)** and/or **P 7(b)** placing the Petitioner under retirement.
- c) a mandate in the nature of Writ of Certiorari quashing the decisions reflected in **P 5** and/or **P 7(a)** and/or **P 7(b)** in so far as they affect the Petitioner.
- d) a mandate in the nature of Writ of Certiorari quashing the decisions and/or the determinations made against the Petitioner by the Army Selection Board No. 2 reflected in **P 5** and/or **P 7(a)** and/or **P 7(b)** and/or any other document/s incidental thereto;
- e) a mandate in the nature of Writ of Mandamus compelling anyone or more of the Respondents to confirm the Petitioner in the rank of

Lieutenant Colonel w.e.f. 2010-09-02 together with his consequential entitlements thereto;

- f) a mandate in the nature of Writ of Prohibition on the Respondents prohibiting the Respondents from retiring, discharging or removing the Petitioner from SL Army without confirming him in the rank of Lieutenant Colonel w.e.f. 2010-09-02;

This court, when this application was supported for notices, having being satisfied that there is sufficient ground, has granted the interim relief as prayed for in the petition, suspending the operation of the impugned documents marked **P 5**, **P7(a)** and **P 7(b)**. Thereafter, as the Respondents had objected to the extension of the stay order, this court fixed the inquiry for 2016-02-16 to decide whether or not the stay order should be further extended. On the said date of inquiry, extensive submissions made by the learned counsel for both parties setting out their respective positions in this case amounted to a full argument of this case.

They dealt with all the issues that should be argued in this case. Hence, the inquiry relating to the extension of the stay order admittedly turned out to be the 'argument proper' of this case. In view of this, both counsel

agreed that they will supplement their arguments with a set of written submissions only and rely on the submissions they made on 2016-02-16 and then leave the matter in the hands of the court thereafter to fix a date for the pronouncement of the judgment.

It is the submission of the learned counsel for the Petitioner that this decision, namely the decision of the 1st and/or the 2nd, 4th, 6th – 8th Respondents to retire the Petitioner from Sri Lanka Army with effect from 28th November, 2015 is *ultra vires* the authority of that decision making body.

The purpose of convening the said Army Board is clearly mentioned in **R 7** and that is "recommending suitable senior officers for confirmation in the rank of Lieutenant Colonel of SLAVF".

It is interesting to note that the paragraph 1 of this document reads as follows. "... Board having assembled pursuant to the order proceeded to consider criteria and pre requisites laid down and perused following documents for the purpose of recommending suitable T/Lt Cols who have completed more than 01 x year SVC in the temporary rank up to BolInt 10

and backlog Offer of SLAVF seniority for the rank confirmation..." This clearly shows that the task assigned to, and the power conferred on this Board, had been to make recommendations of suitable officers for confirmation in the rank of Lieutenant Colonel of Sri Lanka Army Volunteer Force.

Learned counsel for the Petitioner drew our attention to the document marked **R 6** which is a regulation made under Section 155 of the Army Act. Regulation 16 sets out the requirements that a candidate should have fulfilled for promotion to the rank of Lieutenant Colonel.

According to regulation 17, recommendation for promotion under regulation 16, shall be made by the commander of the army on the advice of a Board of Volunteer Force officers consisting of not less than 3 officers (Volunteer) of the rank of Lieutenant Colonel or above.

The said Board appointed for the above purpose in its recommendation appears to have proceeded out of the perimeter of its authority, and stated in its recommendation "...therefore based on past poor disc reasons, Offer could not be recm for the rank confirmation in this attempt. Further, Army Board no. 2, considering the gravity of severe offence of misappropriation

and monetary irregularities in the PRI and Canteen, directed the Offr to be retired with effect from 28. 11. 2015; 1 x year period from the date the board assembled at AHQ..."

It is clear that the effect of this recommendation is to have the Petitioner retired from service against his will. It is the submission of the learned counsel for the Petitioner that such a step could only be taken through regulation 32 of the Sri Lanka Army (Volunteer Force and Volunteer Reserve) Regulations 1985 (the document marked **R 6**)

Respondents have not adduced any material before this court to show that such a procedure has been followed against the Petitioner.

The document marked **R 7** and produced by the Respondents is the document which contains the Sri Lanka Army Board decision which the Respondents had sought to enforce by the letters marked **P 5**, **P 7(a)**, **P 7(b)**.

In the course of the argument learned Deputy Solicitor General who appeared for the Respondents sought to argue that there is no decision in the documents marked **P 5**, **P 7(a)**, and **P 7(b)** as they are mere communications.

It should be borne in mind at this stage that the Petitioner has had no access to the said Board decision and that it was the reason as to why he referred to this decision in his prayers (a), (b) and (c) as "...decisions reflected in **P 5** and/or **P 7(a)**, **P 7(b)** placing the Petitioner under retirement..."

It is a common occurrence that a person filing a writ application seeking to obtain a remedy against a decision by a public authority does not generally have access to all the documents pertaining to such decision by that authority. Such public authority also do not generally make available all the documents to aggrieved persons voluntarily. It is therefore understandable that the Petitioner may not have had an opportunity to peruse and then file in court, all the documents relevant in order to more fully explain the injustice caused to him. However, this court is of the view that the Petitioner has adequately described in his prayers, the decision he has chosen to challenge. Indeed in his petition it is not at all difficult for this court to understand the purpose of the documents marked **P 5**, **P 7(a)** and **P 7(b)**. These documents have sought to enforce the decision that was taken by the Army Board in the document marked **R 7**.

Learned Deputy Solicitor General who appeared for the Respondents relied on the documents **R 1**, **R 2**, **R 3**, **R 4(a)**, **R 4(a)**, **R 4(b)** and **R 5** to argue that the Petitioner is not a fit officer to be retained in the Sri Lanka Army. These documents themselves show that all those acts (referred to in those documents) alleged to have been committed by the petitioner have been considered as breaches of discipline, and had been dealt with at those respective moments by the Respondents. The Respondents had only chosen to warn the Petitioner and had not chosen to do anything more at those respective moments. The conclusion that this court can reasonably arrive from these facts, contained in these documents, which have been relied upon by the learned DSG, is that it was not the considered view of the Respondents that any of these breaches of discipline was serious enough to have the Petitioner retired from the service at any of those previous occasions. Indeed at this instance the petitioner would not have faced this situation of losing his job, if he did not go before this Promotion Board for no such recommendation referred to in **R 7** would ever have been emanated.

For the foregoing reasons we hold that the decision of the Respondents to have the Petitioner retired with effect from 28th November 2015 referred to

in the Army Board decision marked **R 7** has been made by that board without any such lawful authority conferred on that Board. Therefore that decision is *ultra vires* the power conferred on that Board. A writ of Certiorari is therefore issued to quash that decision. As that decision stands quashed, the directives contained in the documents marked **P 5**, **P 7(a)**, and **P 7(b)** should also stand quashed. We order no costs.

JUDGE OF THE COURT OF APPEAL

Vijith K. Malalgoda PC J

I agree,

PRESIDENT OF THE COURT OF APPEAL