

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

**In the matter of an Application for a mandate in the
nature of *Writ of Certiorari* under article 140 of the
Constitution of the Democratic Socialist Republic of
Sri Lanka**

K.D.T.D.Kapila Kodagoda,
No. 237/D,
Bothale Pahalagama,
Ambepussa.

PETITIONER

C.A. Writ 151/2016

Vs,

1. A.W.J.C. de Silva RWP USP NDU PSC,
Lieutenant General,
Commander of the Sri Lanka Army,
Army Head Quarters, P.O Box 553, Colombo
And 6 others

RESPONDENTS

Before: Vijith K. Malalgoda PC J (P/CA)

Counsel: Eraj de Silva for Petitioner
Manohara Jayasinghe SC for the AG

Support On: 27.05.2016

Order on: 13.06.2016

Order

Vijith K. Malalgoda PC J

Heard the Learned Counsel for the Petitioner and the Learned State Counsel representing the Respondent.

The Petitioner who is a retired military officer had alleged before us that a part of his pension had been deducted with effect from January 2016 without giving any valid reason and/or conducting an inquiry against him.

He further submitted before this court that when he has attached to the Ordinance Unit Maradana as the officer in charge of the Issue Bay, he came to know of some misappropriation committed by one Cpl. Somadasa attached to Diyathalawa Army Camp with regard to certain items issued by the said Issue Bay.

A Court of Inquiry was appointed and the Petitioner too was summoned to give evidence at the said Court of Inquiry. The position taken up by the Petitioner before this court was that he was never treated as a suspect at that time and was not given any opportunity to cross examine witnesses at the said Court of Inquiry.

The Petitioner, who is a disable officer due to the war, had been permitted to retire from the service with effect from 05.01. 2014 and was entitled to draw a pension of Rs.76 694.20.

However when he received his pension for the month of January 2016 he observed a deduction of Rs.21 521, 33 from his salary without any notice and when inquired he was informed by P-7 (a) that subsequent to the Court of Inquiry held the Commander of the Army had decided to deduct Rs. 258,

255, 96 from the Pension of the Petitioner and the said money will be deducted in installment from his salary.

The main submission of the Learned Counsel was that the said decision to deduct the said amount is made arbitrary and ultra virus since the said decision was taken without holding an inquiry against the Petitioner.

In response to the said argument, Learned State Counsel brought to our notice "Special Rules Made Under **Note 2** of the Financial Regulation No. 102 Relating to Losses of Three Armed Forces" which was produced before this court by the state marked X and the decision by Sri Skandaraja J in *Premakumara V. Army Commander CA/Writ / 1153/ 2006 C.A. minute dated 29.10.2010.*

Rule 4 (a) of the said regulation read thus;

.... In the case of a loss exceeding Rs. 500000.00 value the Board/ Court of Inquiry will be appointed by the Service Commander with the concurrence of the Chief Accounting Officer. The Board/ Court of Inquiry should consist of at least 3 commissioned officers where the President of the Board/ Court of Inquiry should be an officer of rank of Major or equivalent or above, a civilian officer will be nominated by Secretary, Ministry of Defence to serve on the Board.

Under rule 9 the Service Commander is empowered to determine the degree of responsibility for the loss from any service concerned and the amount to be recovered from each of them.

Whilst referring to the convening order produced marked X2 and X3 Learned State Counsel submitted that there is a 4th person who is a civil officer appointed to the court and that clearly indicates the fact that the Court of Inquiry referred to this case is convened under the special Regulation referred to above and therefore under Rule 9 Commander is empowered to decide the degree of responsibility on each officer.

In the said case of *Premakumara V. Commander of the Army* Sri Skandaraja (J) had observed that, “The first Respondent under section 27 (d) of the Army Act read with Rule 6 mentioned above (most probably it should Rule 9) has the power to deduct the said sum from the pay or allowance due to the officer. The burden of proof as to the recovery of this sum is stipulated in the said section The Commander of the Army had arrived at the afore said decision after considering the court of Inquiry Proceeding and finding. When an authority empowered by law to arrive at a decision after consideration of the material before it, this court cannot in these proceedings interfere in that decision.”

The Learned State Counsel further drew our attention to the following paragraph of the said Judgment, “A Court of Inquiry is different form a disciplinary inquiry. In a disciplinary inquiry a charge sheet will be served and the person accused will have an opportunity to answer the charge and defend himself. In a Court of Inquiry there is no accused or charge sheet all those who appear before the Court of Inquiry are witness as it is a fact finding inquiry....”

Based on these submissions the Learned State Counsel submitted that apart from seeking interim relief, the Petitioner has failed to satisfy that there is a prima facia matter to be looked into by this court and moves to dismiss the present application in limine.

However when going through the said decision, I observed that the Petitioner in the said case who faced a Court of Inquiry was physically present throughout Court of Inquiry and permitted to cross-examine the witnesses even though he had failed to do so. On the finding of the Court of Inquiry the Petitioner has faced a summery trial and had pleaded guilty.

Immediately after the paragraph referred to above in the said judgment, Sri Skandaraja J had further observed “... only in instances where the inquiry affects the character or military reputation of an office or a soldier the officer or soldier was afforded an opportunity of being present throughout the inquiry and all-out to cross examine any witness.....

It is further observed by this court that under Rule 4 (a) of the Special Rules there is requirement “the Board/ Court of Inquiry will be appointed by the Service Commander with the concurrence of the Chief Accounting Officer.”

Under the definition clause of the said Rules Service Commander had been defined as, the Commander of the Army to Sri Lanka Army.....

When considering these matters this court observes that there are matters to be looked into by this court with regard to the appointment of the special Court of Inquiry and manner in which the said court of Inquiry conducted and whether the proper procedure was followed in deciding the deductions referred to in P-7(a) and P-8.

It is further observed by this court that if the decision reflected in P-7a and P-8 was taken arbitrary and in a manner unreasonable as alleged by the Petitioner, the said decision result in an irreparable loss or damage to the Petitioner since it involves the deduction of a fair percentage of his pension.

Considering all the matters discussed above, I decide to issue notices on all the Respondents in the 1st instance and also to issue interim relief as prayed by the petitioner in paragraph ‘d’ to the prayer of the petition until the conclusion of this case.

PRESIDENT OF THE COURT OF APPEAL