

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

In the matter of an application for
Mandates in the nature of a Writs of
Certiorari in terms of Article 140 of the
Constitution read with Section 79 of the
Army Act No. 17 of 1949.

Herath Mudiyansegedara Navarathna

Banda Herath,

No. 54, Pasal Mawatha, Weragama,

Kaikawala, Matale.

PETITIONER

C.A.(Writ) Application No. 232/2009

Vs

1. Commander of the Army
Army Headquarters
Colombo 03.
2. Col. G.K.B. Dissanayake
Colonel Coordinating
22, Division, Trincomalee.
3. Commandant Sri Lanka Army
(Volunteer) Force
Battaramulla.
4. Secretary
Ministry of Defence
Colombo 03.
5. Hon. Attorney General

Attorney General's Department
Colombo 12.

RESPONDENTS

BEFORE : Deepali Wijesundera J.

COUNSEL : M. Samarakoon for the Petitioner.
Milinda Gunathilaka D.S.G. for the
Respondents.

ARGUED ON : 14th December, 2015

DECIDED ON : 22nd July, 2016

Deepali Wijesundera J.

The petitioner has filed this application praying for a writ of Certiorari to quash the decision of the first respondent to discharge the petitioner from the Army and the decision to recover a sum of Rs. 66,474/= from the petitioner.

The learned counsel for the petitioner submitted the court of inquiry held against the petitioner recommended that disciplinary action be taken against the petitioner under the Army Act, but the first respondent without following the correct legal procedure dismissed the petitioner. The petitioner stated that he was a second Lieutenant attached to the second battalion of the Sri Lanka

National Guard serving in the Civil Defence Force when he was dismissed by the first respondent the Commander of the Army by letter marked P2.

The counsel for the petitioner cited the judgment in **CA writ 1765/2006 Urugoda Appluhamilage Ananda Wimalaweera vs Lt. Gen. Kottegoda, Y B A M Premakumara vs Army Commander and 34 others, CA writ 1153/2006 and Lieutenant Hetti Gamage Harischandra vs Commander of the Army and 3 others CA writ 895/2007** and said that it had been decided that even the President and Commander in Chief of the Armed Forces enjoys no unfettered right to dismiss an officer at his whim and fancy. It was also held in these cases that the authority of the Army Commander to submit recommendations for removal or discharge of an officer under *regulation 2 (1) (a) of the Army Officer's Regulations* can not be based on the mere opinion formed on a military police investigation or on facts found by a court of inquiry and that an officer can be discharged from service only upon conviction after due trial, in compliance with the rules of natural justice and any attempt to discharge an officer consequent to a military police investigation or on recommendation of a court of inquiry is illegal and ultra vires. The petitioner stated that the respondents acted without jurisdiction.

The petitioner further submitted that sec. 10 of the Army Act which, states that every officer shall hold his appointment during the Presidents pleasure entitled the President to dismiss an officers from the army at his will is to west such arbitrary and absolute power in the President. The petitioner cited the judgments in **Bandara vs Premachandra 1994 1 SLR 301**, **Senasinghe vs Karunathilake 2003 1 SLR 172**.

The counsel for the petitioner argued that the order of the first respondent that the petitioner should be discharged from the *SLA (V) F* on account of a disciplinary violation committed by him amounts to a punishment, which is included in the scale of punishment given under a court martial. A person can not be punished without a proper hearing and a charge sheet. The petitioner stated that the first respondent has not convened a court martial against the petitioner for the offences alleged to have been committed by him.

The learned counsel for the respondents submitted that in terms of Regulation 29 (2) of the *Sri Lanka Army (Volunteer Force and Volunteer Reserve) regulations* a Lieutenant shall be transferred to the Volunteer Reserve upon reaching the age of 45 years and the petitioner's transfer to the Volunteer Reserve was compulsory, under the proviso the said regulation stated that if an officer has reached the maximum in that rank

his services can be extended by one year at a time up to a maximum of three years. The respondents stated that the petitioner could have served for a maximum of three years after reaching the age of 45 years in the rank of Lieutenant but he has served over seven years when he was transferred to the Volunteer Reserve in May 2009. The respondents stated that the petitioner while giving evidence at the court of inquiry has admitted in evidence that he had reached the maximum in the rank of Lieutenant. (P 27 of R2a). The respondents stated that in these circumstances the petitioner was not discharged but transferred to the Volunteer Reserve.

The petitioner has been commissioned as Lieutenant in the Sri Lanka Army (Volunteer Force) in July 1997 and he was transferred to the Volunteer Reserve in May 2003. A court of Inquiry (marked as R2) was held in April 2008 against the petitioner although the petitioner argued there was no inquiry held against him. According to the petitioner's own evidence at the court of Inquiry he was 52 years of age at that time which shows that he had served 12 years in the rank of Lieutenant when he was transferred to the Volunteer Reserve.

Regulation 29 (2) of the Sri Lanka Army (Volunteer Force and Volunteer Reserve) regulations reads as;

“An officer shall be transferred to the Volunteer Reserve with the approval of the President upon his reaching such age as is specified below as is applicable to his rank:

<i>Rank</i>	<i>Age</i>
<i>Lieutenant Colonel and above</i>	<i>57 years</i>
<i>Major</i>	<i>55 years</i>
<i>Captain</i>	<i>50 years</i>
<i>Lieutenant/Second Lieutenant</i>	<i>45 years</i>

Provided, however, that the President may, on the recommendation of the Commander of the Army, if he is of the opinion that the services of the officer should be so extended in the interests of the Army, extend by one year at a time but not exceeding three years, the period of service of an officer in the Volunteer Force who according to the preceding provisions of this regulation, has to be transferred to the Volunteer Reserve”.

According to the above regulation the petitioner’s transfer to the Volunteer Reserve was compulsory. Petitioner himself giving evidence at the court of inquiry has admitted that he reached the maximum in his rank of Lieutenant, and that he was discharged from active service and that

after he appealed to the first respondent he was absorbed to the Civil Defence Force. the petitioner was not discharged but transferred to the Volunteer Reserve after reaching the maximum age limit in the rank of Lieutenant therefore he can not be reappointed to the same position. The main relief sought by the petitioner in the instant application can not be granted in view of the afore stated reasons. The application of the petitioner is dismissed with costs fixed at Rs. 25,000/=.

JUDGE OF THE COURT OF APPEAL