

**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**

Rohan Sujeewa Laksiri Karanduwawala,
No.117/7/A, Tresure Gardens,
Soratha Road,
Nugegoda.

PETITIONER

CA/WRIT/50/2015

Vs,

- 1A. Lieutenant General A.W.J.C.de Silva,
Commander of Sri Lanka Army,
Army Headquarters,
Colombo 03.
2. Lieutenant Colonel H.K.D.W. Waidyathilake,
Sri Lanka National Guard,
PO Box. 18, Regimental Headquarters,
Weherawatte, Kurunegala.
4. Major A.D.C. Dammika,
Sri Lanka National Guard,
PO Box. 18, Regimental Headquarters,
Weherawatte, Kurunegala.
5. B.M.U.D. Basanayake,
Secretary,
Ministry of the Defence and Urban Development,
Baladaksha Mw,
Colombo 03.

RESPONDENTS

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

Counsel: Gamini Hettiarachchi with Sithara Abeywardena for the Petitioner
Priyantha Nawana Senior Deputy Solicitor General for the Respondents

Argument on: 01.11.2016

Written Submissions on: 17.11.2016, 01.12.2016

Judgment on : 15.02.2017

Order

Vijith K. Malalgoda PC J

Petitioner to the present application Rohan Sujeewa Laksiri Karanduwawala had come before this court seeking inter alia,

- c) Issue a mandate in the nature of writ of Certiorari quashing the decision of the 1st Respondent to expel the Petitioner from Sri Lanka Army Volunteer Corp which contained in the document marked P-9.

Petitioner who served as a Major in the Sri Lanka Army in the Army Volunteer Corp had complained of a decision by the 1st Respondent to expel the Petitioner with effect from 09.03.2013.

As revealed before this court, the said decision of the 1st Respondent was taken subsequent to a Court of Inquiry conducted against the said Petitioner, and the Petitioner's argument before this court was mainly based on section 40 of the Army Act and the provisions of the Army Court of Inquiry Regulation 1952.

Whilst relying on the said provisions, the Petitioner argued before this court that the purpose and the functions of a Court of Inquiry is to collect and the record evidence but in the instant case the Petitioner has been dismissed by the 1st Respondent based on a report of the Court of Inquiry which is *ultra vires*.

However as observed by this court the Petitioner whilst raising the said argument before us, was careful in, not referring to the period in which the said Court of Inquiry was held against him.

In paragraph 9 of his petition, the Petitioner refers to the meeting of a civil person by the name Brian Samarasinghe on 23.04.2011, but the Petitioner was silent with regard to the dates on which the subsequent events took place. Thereafter in paragraph 20 the Petitioner refers to the impugned decision dated 08.03.2013.

As further observed by this court the Petitioner filed the present application before this court on 23rd January 2015, 21 months after the said decision.

In this regard the Respondents have placed before us the events took place in between and according to the said material, the Court of Inquiry consist of 2nd to 4th Respondents were appointed by the Commandant of the Volunteer Force on 16th April 2012 to look into a complaint made by the said civil person to the Sri Lanka Corps of Military Police (here in after referred to as SLCMP) on 20th May 2011. The said Court of Inquiry by its report dated 13th July 2012 (R-2) made its findings that the Petitioner had conducted himself in a manner unbecoming of an “officer and gentlemen” by having an unnatural sexual relationship with the complainant.

Having considered the contents of R-2 the 1st Respondent had formed the opinion that the Petitioner should be removed, by his decision dated 8th March 2013, which is challenged before this court in the present application. As observed above the Petitioner was well aware of the preliminary investigation conducted by the SLCMP after the complaint was received in May 2011, the Court of Inquiry appointed on 10th April 2012 and 1st Respondent’s decision is dated 8th March 2013 but the present application had been filed

before this court challenging the said decision of the 1st Respondent only on 16th February 2015, nearly two years after the said decision.

During the arguments before this court the Learned Senior Deputy Solicitor General who represented the Respondent, challenged the Petitioner's case mainly on two grounds firstly on undue delay and secondly on futility.

Whilst explaining the delay the Petitioner in paragraph 30 of his Petition submitted that, he had filed a writ application bearing No. 214/3 in respect of this matter and having heard the submissions made by the Learned Counsel for the Petitioner, the court issued the notices, but since the said application did not bear a date the Petitioner had withdrawn the application reserving his right to file a fresh application.

However with regard to the said submission by the Petitioner, this court observes that the Petitioner had failed to satisfy this court either by attaching copies of the said application or giving proper details with regard to the date on which the said application was withdrawn before this court.

In the said circumstance this court observes that the Petitioner had not given a satisfactory explanation for the delay. In this regard this court is mindful of the decision in the case of *Ashok Kumar V. Collector Raipur AIR 1980 SC 112* that it is well settled that the power of the court under article 226 to issue appropriate writ is discretionary and even if there is no period of limitation prescribed for moving the court invoking the extraordinary remedy under Article 226 if the court finds that there is no satisfactory explanation for the inordinate delay, it may reject the petition

In the case of *Jayaweera V. Assistant Commissioner of Agrarian Service (1996) 2 SLR 70 F.N.D.* Jayasuriya J observed that, "Petitioner seeking a prerogative writ is not entitled to relief a matter of course or as a matter of right or as a routine. Even if he is entitled to relief still court has discretion to deny him relief having regard to his conduct, delay, laches, waiver, submissions to jurisdiction are all valid impediments which stand against the grant of relief."

Question of laches or delay was discussed by *Sir Barnes Peacock in Lindsay Petroleum Company V. Prosper Armstrong Hend etc (1874) 5 PC 221* as follows;

“Now the Doctrine of laches in the courts of equity is not an arbitrary or technical doctrine. Where it would be practically unjust to give a remedy either because the party has, by his conduct done that which might fairly be recorded as equivalent to a waiver of it, or where by his conduct and neglect he has though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were after wards be asserted, in either of these cases, lapse of time and delay are most material. But in every case, in an argument against relief which otherwise would be just, if founded upon mere delay, that delay of course not amounting to a bar by any state of limitation, the authority of that defence must be tried upon principles substantially equitable. Two circumstances always important in such cases are, the length of delay and the nature of act done during interval which might affect either party and cause a balance of justice or injustice in taking the one course or the other, so far as it relates to the remedy.”

As observed above, other than the length of delay which is against the Petitioner in the case in hand, the nature of acts done during interval is also important when deciding the matter before the court.

As revealed during the arguments and from the pleadings before this court, subsequent to the decision of the 1st Respondent to expel the Petitioner from the Volunteer Force of the Sri Lanka Army on 09.03.2013, the said decision was communicated to His Excellency the President and by the letter dated 16.09.2013 Ministry of Defence had informed the 1st Respondent, that His Excellency the President has approved the withdrawal of Commission of the petitioner with effect from 30.07.2013. (R-3)

In these circumstances, it is clear that the document challenged before the court had been superseded by R-3, and therefore in addition to the delay complained of, the acts done during the period, namely approval

granted by His Excellency the President to withdraw the Commission of the Petitioner, prevents the Petitioner from seeking any relief from this court.

In this regard the Respondents have further argued that, the quashing of P-9 will not have any effect because the Commission of the Petitioner had already been withdrawn by the President and therefore principle of futility operates against the grant of any relief in favour of the Petitioner in the absence of any challenge to R-3 by the Petitioner.

In the Case of *P.S. Bus Company Ltd V. Ceylon Transport Board (1958) 61NLR 491* it was held that; "A prerogative writ is not issued as a matter of cause and it is in the discretion of court to refuse to grant it if the facts and circumstances are such as to warrant a refusal. A writ for instance, will not issue where it would be vexatious or futile.

For the forgoing reasons this court observes that the Petitioner is guilty of laches and no purpose would serve by granting any relief prayed by the Petitioner since his Commission had been withdrawn by His Excellency the President and therefore proceeding with the present application is futile.

Therefore this court is not inclined to grant relief as prayed by the Petitioner. Application is therefore dismissed but we make no order with regard to cost.

Application dismissed.

President of the Court of Appeal

S. Thurairaja PC J

I agree,

Judge of the Court of Appeal