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 and Prohibition* under article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka

CA/WRIT/381/2015

Colonel K.N. Perera,

No. 24, Dharshanapura,

Kundasale, Kandy.

PETITIONER

Vs,

1. Lt. Gen. Chrishanthe De. Silva,
   Commander of the Sri Lanka Army,
   Army Headquarters, Colombo 03.

2. Maj. Gen. R. Rathnasinghem,
   Army Headquarters, Colombo 03.

3. Brigadier H.H.A.S. Priyantha Senarathne,
   Army Headquarters, Colombo 03.

4. Lieutenant Colonel H.V. Anil Somaweera,
   Sri Lanka Light Infantry,
   Army Headquarters, Colombo 03.

5. Maj. Gen. H.C.P. Gunathilaka,
   Commandant of Sri Lanka Army,
   Volunteer Force, Sri Lanka Volunteer Force,
   Headquarters, Army Camp,
   Salawa, Kosgama.

RESPONDENTS

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

Counsel: J.C. Weliamuna with Pasindu Silva for the Petitioner
Vikum de. Abrew DSG for the State

Argued on: **29.09.2016**

Written Submissions on: 16.12.2016

Judgment on: 03.04.2017

Order

Vijith K. Malalgoda PC J

Petitioner to the present application Kasadorulage Nihal Perera had come before this court seeking inter-alia,

d) Issue a mandate in the nature of writ of *Certiorari* quashing the decision of the then Army Commander in "P3" so long as it relates to the Petitioner, particularly as specified paragraph '9' of the document marked "P3" together with the subsequent decisions and/or the determinations and/or the inferences against the Petitioner as reflected in "P8" and "P9";

e) Issue a mandate in the nature of writ of *Certiorari* quashing the decisions and/or determinations and/or inferences against the Petitioner as reflected in "P8" and "P9";

f) Issue a mandate in the nature of writ of *Certiorari* quashing the proceedings and/or findings of the said court inquiry so long as it relates in "P8" and "P9";

g) Issue a mandate in the nature of writ of *Prohibition* on the Respondents prohibiting the Respondents from sending the Petitioner on compulsory retirement from the Sri Lanka Army Volunteer Force;

h) Issue a mandate in the nature of writ of *Prohibition* on the Respondents prohibiting the Respondents from taking any steps against the Petitioner based on the findings of the said court of inquiry and the decision of the then Army Commander contained in "P3"

When the application was supported before this court on 12.10.2015, the learned counsel who appeared for the Petitioner, in addition to the notices on the Respondents had moved for an interim relief as prayed in paragraph (b) and (c) to the Petition.

This court after considering the submissions placed by the learned counsel had decided to grant interim relief as prayed in paragraph 'C' only to a limited period but the said interim relief was extended time to time and is in operation until this order is delivered.

The Petitioner was commissioned to the Sri Lanka Army Volunteer Force on or about 27th June 1986 in the rank of 2nd Lieutenant and was holding the substantive rank of "Lieutenant Colonel" and temporary rank of Colonel at the time the present application was filed before this court.

The Petitioner was attached to the Sri Lanka Light Infantry Regiment and was serving between 2007-2009 at the 22nd Division in Trincolalee and between 2010-2015 at the 68th Division in Pudukuduirippu.

As revealed before this court, the Petitioner was granted leave to go to Kandy in his official vehicle යූ.ඔ.49290 and on 1st October 2010 around 1.30 am he left the Pudukuduirippu Army Camp in the said vehicle along with his buddy, Corporal Wasantha Karunathilake, Driver Corporal Bandaranayake, Soldier Lance Corporal M.K.A. Nilantha and reserve Driver Corporal Bandara. Their vehicle was searched at Medawachchiya Military Police Check Point at 6.00 am and during the said search, Military Police had recovered several items said to have stolen or abundant goods collected from the operational area.

Subsequent to the said recoveries the inmates of the said vehicle were placed on open arrest, including the Petitioner and an inquiry was conducted by the Military Police.

During the search operation and the subsequent investigations conducted by the Military Police the items recovered were identified under 4 persons custody, including the Petitioner and since the inmates including the Petitioner were acting in violation of the instructions issued by the Security Forces Headquarters Wanni dated 17.01.2009 and 11.02.2009 (R1 and R2), a Court of Inquiry under the Army Court of Inquiry Regulations 1952 was convened. As observed by this court the said Court of Inquiry was convened to decide on several matters referred to in the said convening order including to make recommendation as to what steps should be taken to those who were responsible for transporting un authorized goods.

Even though the convening order, statement made by the Petitioner before the Court of Inquiry and the findings of the Court of Inquiry are produced by the Respondents along with the statement of objection filed by the Respondents, the entire proceedings of the Court of Inquiry is not before me to consider the procedure adopted by the Court of Inquiry when recording evidence. It was submitted on behalf of the Petitioner that,

a) The president of the Court of Inquiry, the 2nd Respondent was not present at the COI when the proceedings were taken place,
b) The Petitioner was not present when the other witnesses were called and he was not given an opportunity to cross examine the witnesses.

However at the conclusion of the Court of Inquiry the said Court of Inquiry had recommended disciplinary action against the inmates including the Petitioner as follows,

"භයවන හා හත්වන නිරීක්ෂණයන්ට අනුව කර්නල් කේ.එන්. පෙරේරා අනවසර හාන්ඩ රැගෙනයාම හා සංවිධානය කල ජේෂ්ඨතම නිලධාරියා වශයෙන් ඔහුහට තදින් විනයානුකූලව ක්‍රියාකලයුතු අතර, ඔහුගේ එම වැරදි ක්‍රියාමාර්ගය ප්‍රයෝජනයට ගනිමින් අනවසර හාන්ඩ රැගෙනයාමට උත්සාහදැරූ

අනෙකුත් අයවලුන් වන සෙ/9ඩි00519 කෝප්‍රල් කරුනාතිලක එච්.එම්.ඩබ්.9(සෙව්) ශ්‍රී.ල.පා.හ සෙ/627653 ලා.කෝ. නිලන්ත එම්.කේ. 1 ශ්‍රී.ල.පා.හ ඉ හටද තදින් විනයානුකූලව කටයුතු කලයුතු බැව් මූ.ප.උ. නිගමනය කරයි."

The said recommendation was made by the Court of Inquiry on 29th November 2011 and the 1st Respondent as the Commander of the Army, after considering the report of the Court of Inquiry had decided to produce the Petitioner before the Coronel of the Regiment and to be warned and thereafter to compulsorily retire from the Army.

Even though the said decision of the 1st Respondent was not immediately implemented considering the redress of grievance (ROG) submitted by the Petitioner, this court is not interested in considering several steps taken thereafter, but will only consider the said decision of the 1st Respondent which was to be finally carried out, was made according to the provisions of the Army Act and the regulations made there under.

As revealed before this court, the said opinion of the 1st Respondent was reached only after a Court of Inquiry convened under the provisions of the Army Courts of Inquiry Regulation 1952.

Regulation 2 of the Army Courts of Inquiry Regulation 1952 reads thus,

"Court of Inquiry means an assembly of officers or of one or more officers together with one or more warrant or non- commissioned officers, directed to collect and record evidence and if so required, to report or make a decision with regard to any matter or thing which may be referred to them for inquiry under this regulations"

Regulation 162 of the said regulation further reads thus,

"Every Court of Inquiry shall record the evidence given before it, and at the end of the proceedings it shall record its findings in respect of the matter or matters into which it has assembled to inquire as required by the convening authority."

The effect of the findings of a Court of Inquiry was discussed in the case of ***Boniface Perera V. Lt, General Sarath Fonseka and others CA Writ Application 705/2007*** (CA minutes dated 10.09.2009) by Anil Goonarathne J as follows,

"This court having considered the case of either party is of the view that proceedings before a Court of Inquiry in terms of the Army Act is a preliminary step prior to a proper trial, which is more or less a fact finding inquiry to collect and record evidence and to submit a report. On receipt of such Court of Inquiry proceedings or report, the Commander of the Army could decide whether to initiate formal disciplinary proceedings by a Court Material or Summary Trial in terms of provisions of the Army Act. Court of Inquiry proceedings on the basis of terms of reference issued regarding allegation against the officer concerned. There are no formal charges framed. Therefore based on the Court of Inquiry proceedings it would not be within the purview of the 1st Respondent to impose any punishment as in the case in hand.

It is essential that a person concerned should be tried on formal charges and no punishment could be imposed prior to framing formal charges at a legally constituted Court Material or Summary Trial. As such any decision to punish based on the Court of Inquiry proceedings would be illegal and *ultra vires* the provisions of Army Act."

In this regard this court further observe the provisions of section 40 of Army Act which discusses the cause of action available when a person subject to the Military Law is accused of an offence and taken into custody,

i) Take steps for the trial of that person by a court martial

ii) Where a person is an officer of a rank below that the Lieutenant Colonel or is a warrant officer, refer the case to be delt with summarily by the Commander of the Army or by such officer not below the rank of Colonel as may there to be authorized by the Commander of the Army.

iii) Where that person is a Soldier other than a warrant officer, deal with the case summarily.

As revealed before this court, subsequent to the Court of Inquiry held against the Petitioner and several others including ඉස/9ඩි00519 Corporal Karunathilake එච්.එම්.ඩබ්.9 (ඉසව්) ශ්‍රී.ල.ප්‍ර.හ, (vide the recommendation referred to above in the judgment) a summary trial was held and on the recommendations of the said summary trial Corporal Karunathilake was demoted to the rank of Lance Corporal over the same incident.

The above conduct of the Respondents have clearly indicated the cause of action available when the findings of a Court of Inquiry is available and as revealed, in the Case in hand, the Respondents have failed to use the same yardstick against the Petitioner to hold a disciplinary inquiry as recommended by the Court of Inquiry. In this regard my attention was further drawn to the provisions of sections 42 and 45 read with 133 of the Army Act, where a person subject to the Military Law could only be punished either consequent to a summary trial or a court martial.

In the case of ***K.S. Fernando V. Sarath Fonseka and four others CA Writ 1826/2006*** (CA minutes dated 10.09.2008) the validity of a finding of a Court of Inquiry and the provisions of section 133 of the Army Act was discussed by W.L.R. Silva J as follows;

"The Court of Inquiry appointed by the Commander of Armed Forces was to collect and record evidence in respect of a complaint made by the complainant against the accused-Petitioner. The Court of Inquiry Regulations have been marked as 1R3. It is to be noted that section 133 of the Army Act, prescribes how punishment could be imposed on an accused. According to that section punishments could be imposed only upon the decision of a court martial...."

When considering the matters referred to above it is clear that the decision referred to in P8 and P9 based on the finding of the 1st Respondent in P3 was reached without following the relevant legal provisions of the Army Act and therefore the said decisions have been made *ultra vires*.

The learned Deputy Solicitor General raised an objection for granting any relief as claimed by the Petitioner on the ground of lashes but this court is not inclined to uphold the said objection since this court observes that the Petitioner has sufficiently explained his delay before this court.

For the reasons referred to above this court decides to grant the relief as claimed by the Petitioner in paragraphs (d) and (e) but refrain from making any relief as claimed by the Petitioner in paragraphs (f) and (h) to his petition. Question of issuing a writ of Prohibition as claimed by paragraph (g) will not arise since the decisions referred to in P8 and P9 have already been quashed by this court. I further refrain from making any order with regard to cost.

Application is allowed by granting relief as claimed by the Petitioner in paragraphs (d) and (e) to the Petition.

PRESIDENT OF THE COURT OF APPEAL