

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

In the matter of an Application under and in  
terms of Article 140 of the Constitution for  
a Mandate in the nature of a Writ of  
Certiorari and Mandamus.

Lieutenant Uditha Indrajith Sahabandu,  
No. 392/A1, Uluwahukare Road,  
Weliwita, Kakduela.

C.A. Writ Application No.241/16,  
242/16,243/16,244/16,245/16,  
246/16,247/16,248/16

**Petitioner in C.A.No. 241/16**

Second Lieutenant K.N.S. Perera  
No.476/38, Helen Watte, Weliweriya.

**Petitioner in C.A.No. 242/16**

Second Lieutenant D. C. R. N. Silva  
No.261/2F/3,  
Adikariwatte, Ganewatte, Kottunne,  
Biyagama.

**Petitioner in C.A.No.243/16**

Second Lieutenant K.M.D. Bandara  
No.117/2, Sadaham Mawatha, Walpola,  
Angoda

**Petitioner in C.A. No 244/16**

Lieutenant W.A.T.L. Gunarathna,  
No.120/13, Rassagala Road,  
Bulathgama, Balangoda.

**Petitioner in C.A. 245/16**

Lieutenant J. C. Dissanayaka  
No.169/9 Oruwalpitiya Road,  
Athurugiriya.

**Petitioner in C.A. 246/16**

Lieutenant K.A.L. Ariyawasantha,  
No.317/54, Samagi Mawatha,  
Hellawatte, Diyatalawa.

**Petitioner in C.A. 247/16**

Lieutenant M.A.D.N Wijesinghe,  
No.242, Galle Road, Kaluthara North.

**Petitioner in C.A. 248/16**

**Vs.**

1. Lieutenant General Chrisantha de Silva  
Commander, Sri Lanka Army,  
Army Headquarters,  
Colombo 02.

2. Major General H.C.P Goonathilake  
Commander, Sri Lanka Army Volunteer  
Force,  
Salawa Camp,  
Kosgmama.
3. Major Pradeep Liyanage,  
The Commanding Officer, 5<sup>th</sup> Gajaba  
Regiment, Gajaba Regiment  
Headquarters, Army Camp,  
Horowapathana.
4. Hon Attorney General of Sri Lanka  
Attorney General's Department,  
Colombo 12.

**Respondents.**

Before: E.A.G.R. Amarasekara, J.

Council: Eraj de Silva with Manjuka Fernandofulle, Daminda Wijeratna and  
Janagan Sundramoorthi for the Petitioners  
Zuhri Zain SSC for the Respondents

Decided on: 2018.10.02.

**E.A.G.R. Amarasekara, J.**

The Petitioners mentioned above in the caption have filed the writ applications numbered 241/16, 242/16, 243/16, 244/16, 245/16, 246/16, 247/16 and 248/16 respectively seeking inter-alia the following reliefs;

- a) To issue notices on the Respondents.

- b) To issue orders in the nature of writ of certiorari quashing the respective decisions of the Respondents relevant to each application (as evidenced by continuing non-reply to letters marked as P7 in each application)
  - i. To not reinstate the Petitioners
  - ii. To not give the Petitioners their due ranks and services.
  - iii. To not allow the Petitioners their just and due benefits.
- c) To issue orders in the nature of writ of Mandamus directing the Respondents to take steps so that;
  - i. The Petitioners be reinstated duly and/or properly with proper rank and seniority.
  - ii. The benefits applicable to the proper rank and seniority of the Petitioners be given to the petitioners forthwith; and
  - iii. Due and proper back wages be paid to the petitioners.
- d) For costs.

The background circumstances for these applications can be described as follows;

1. All the Petitioners were officers of the Volunteer Force of the Army.
2. An incident occurred in 1997, resulting in the death of a soldier.
3. Subsequently a court of inquiry was held with regard to the aforesaid incident.
4. After that the Army Commander made his recommendation to send the Petitioners on compulsory leave without pay pending the Magistrate's Court Case. -- vide document marked P2 with each application. However, this document does not state that they have to be reinstated if they are acquitted but to withdraw the commission if they are found guilty.

5. Some were discharged after the Non-Summary inquiry by the Magistrate's court and some were committed to the High Court. --(vide document marked P3 with each application.)
6. However, Five of the Petitioners were indicted in the High Court and later they were acquitted.

Some of the petitioners have previously filed writ applications in relation to the same incident. The details of such applications are given below.

Petitioner in C.A.241/16	C. A. Writ 797/2003 (vide R1A)	Withdrawn with liberty to file a fresh action.
	C.A. writ 1329/2003 (vide P4 and R1B)	Withdrawn in view of the High court case that was pending against him.
Petitioner in C.A. 246/16	C. A. Writ 798/2003 (vide R1C)	Application withdrawn with liberty to file a fresh action.
	C.A. writ 1330/2003 (vide R1D)	Application dismissed.
Petitioner in C.A. 247/16	C. A. Writ 799/2003 (vide R1 E)	Withdrawn with liberty to file a fresh action.
	C. A. Writ 1331/2003 (vide R1F)	Application dismissed.

As per the document marked as P3 in each case, following petitioners namely J.C. Dissanayake, (Petitioner 246/2016) S.M.U.I. Sahabandu (Petitioner in 241/2016), K.A.L. Ariyawasantha (Petitioner in 247/2016) were discharged as aforesaid on 24.04.2002 by the Magistrate's court. However, as per P5, the following persons were indicted in the High Court.

1. Koswaththage Nirosh Sashen Perera (Petitioner in 242/2016)
2. S.M.U.I Sahabandu (Petitioner in 241/2016)
3. W.A.T.L. Gunarathne (Petitioner in 245/2016)
4. K.M.D. Bandara (Petitioner in 244/2016)
5. D.C.R. Nimalasena de Silva (Petitioner in 243/2016)

They were acquitted of the charges framed against them on 18.07.2012.

The Petitioner in 248/2016, M.A.D Wijesinghe appears to have been discharged after the Magistrate's court case as he was not indicted.

As mentioned before, the Petitioner in 246/2016 was discharged on 24.04.2002 and thereafter he had filed the writ application No. 1330/2003. The said application was dismissed on 16.06.2005 (vide R1D). He was not indicted in the High court and therefore, the decision of the High court cannot create a new situation for him to file a fresh writ application. He could have taken the same steps that now he refers to in this application with regard to P7 before filing the previous writ application and pleaded the grounds urged in this application even in the said action. A person should not be allowed to file actions in piecemeal causing multiplicity of actions. Same logic shall apply to the petitioner in C.A. Writ application 247/2016 as he too had filed the C.A. Writ application 1331/2003 which was dismissed under a similar situation (vide R1F).

This Court also observes that even the Petitioner in C.A. Writ 241/2016 had previously filed two writ applications, namely C.A. Writ 797/2003 and C.A. Writ 1329/2003. Both were withdrawn by the said petitioner, but he has not reserved his right to file a fresh application when he withdrew the 2<sup>nd</sup> application C.A. Writ 1329/2003, though he withdrew it in view of the pending High Court case. This court shall not encourage the filing of a fresh application when an applicant withdraws one filed previously without reserving the right to file a fresh application.

However, all the Petitioners try to argue as there was no response to the letters marked P7 in each application, it is tantamount to a decision;

- a. To not reinstate Petitioners
- b. To not give the petitioners their due ranks and service.
- c. To not allow the petitioners their just and due benefits.

Even though the Petitioners attempted to convince this court that the indecision of the Respondents is equal to a constructive decision as aforesaid, as per the communications marked as R7A, R7B and R7C and their attachments marked as P10, P12, and P12 respectively in C. A. Writ 1331/03, 1330/03 and 1329/03 tendered with the written submissions of the Respondents, it is clear that as far back as in 2002, the Petitioners in C. A. Writ 241/20016, C. A. Writ 246/16 and C. A. Writ 247/2016 were communicated of the decisions that their applications for reinstatement were rejected. On the other hand, the Respondents point out that P7 in each application is an unsigned document and no postal article receipt was

tendered to show that it was delivered to the Respondents. No one can expect a reply for an unsigned document as it is devoid of responsibility. Therefore, this court cannot give heed to the arguments based on non-response to P7.

However, if there was no duty cast upon the respondents to reinstate the Petitioners, there was no necessity or duty to reply to aforesaid letters marked as P7 in each application.

However, if granted, the outcome of reliefs prayed by the Petitioners will be the reinstatement of the Petitioners with proper rank and seniority along with the back wages and other benefits. The issue that this court has to look into is whether the Respondents have a duty to take such decision to reinstate the Petitioners and, if so, whether they are evading such duty cast upon them to reinstate the petitioners. If a duty is not entrusted to a Respondent, there is nothing to be enforced by the orders of this court. In this regard, I would like to quote from Administrative Law - Eleventh Edition by H.W.R. Wade and C.F. Forsyth.

***"The prerogative remedy of a mandatory order has long provided the normal means of enforcing the performance of public duties by public authorities of all kinds..... The commonest employment of a mandatory order is as a weapon in the hands of the ordinary citizen, when public authority fails to do its duty by him. The quashing order and prohibiting order deal with wrongful action, a mandatory order deals with wrongful inaction."*** (Page 520)

***"Obligatory duties must be distinguished from discretionary powers. With the later mandatory order has nothing to do"*** (page 524)



It is common ground that the petitioners were officers of the Volunteer Force of Sri Lanka Army.

The Section 18 of the Army Act provides that it is only the Regular Force that shall at all times be liable to be employed on active service. As per the Section 19 of the said Act the President of the country may call out on active service, for the purposes mentioned therein, whole or any part of the Volunteer Force by proclamation or by an order. This shows that the Volunteer Force officers cannot, as of right, demand or request them to be employed in active service. There is no doubt that the officers in Volunteer Force are called out on active service when and where it is necessary. The Petitioners do not plead that the proclamation or the order that they were called out on active service is still in force and not have been terminated by the President. As per section 19 (4) of the said act, if such proclamation or order is terminated, the officers or soldiers belonging to the part of the Army, which was called out on active service shall not be deemed to be on active service.

Furthermore, the regulations No. 68 published in the Extra Ordinary Gazette No. 476/26 dated 20.10.1987 state as follows;

“ Where the Regular Reserve, the Volunteer Force, the Volunteer Reserve or any part thereof, has been called out on active service under Section 19 of the Army Act, the Commander of the Army or any other officer authorized by him in writing in that behalf may, by order published in the same manner as the Commander of the Army may deem fit, release from active service for such period as may be specified in that order any officer, any soldier, who had been called out on and is still on active service. Upon being so released

such officer or soldier may return to his civilian occupation during the period such release.

2. An officer or soldier who has been released under paragraph (1) of this regulation, shall not during the period of release so specified be entitled to any pay or allowance, he may be entitled to under any regulation made under the Army Act and for the time being in force, save and except as provided for in regulation 72 to 79”

The aforesaid provisions indicate that the officers and soldiers in Volunteer Force are called out on active service only when there is a necessity to engage them in service and they can be released from service when their service is not necessary. In such circumstances the Petitioner cannot have any legitimate expectation with regard to the reinstatement. This court cannot by mandates in the nature of writ of Mandamus force the respondents to reinstate the petitioners. I do not see that there is a duty upon the Respondents to engage the Petitioners in service. The Respondents in their written Submissions refer to these eight Petitioners as officers of the Volunteer Force released from active service without pay. The following documents demonstrate that they were released from the active service.

1. The document marked 'R3", dated 15.02.2003 contained in the copy of the case record in writ application 1331/2003 – this letter instructs the commanding officer of the Volunteer Force that it is he who should decide whether the Petitioners to be called out to active service if there is a necessity.

2. The document dated 10.09.1998, marked "P3", found in the aforesaid case record. - This letter states that the Petitioner in writ application 247/2016, K.L Ariya Wasantha, has been released from active service.
3. The document marked "P4", dated 14.09.1998 found in the copy of the case record in writ application 1329/2003.- This letter states that the Petitioner in writ application 241/2016, S.M.U.I. Sahabandu has been released from active Service.
4. The document marked P6 L, dated 13.05.2002 – By this aforesaid Petitioner S.M.U.I. Sahabandu request a superior officer to take steps to recruit him for active service.
5. The documents marked "P6 (a)" and "P6 (b)" written by the Petitioner in 247/2016 - By these letters the aforesaid petitioner, K.L. Ariywasantha requests the superior officers to put him back to active service.
6. The document marked "P6h" and "P6J". --- By these letters, the Petitioner in 246/2016, J.C. Dissanayaka, requests superior officers to put him back to active service.
7. The document marked "P2" found in the copy of the case record in writ application 1330/2003.—This letter states that the petitioner in writ application 246/2016 has been released from the active service.
8. The letter, marked P5, dated 03.01.2002 found in the copy of the case record in writ application 1330/2003 –By this letter one of the petitioners urge the Prime Minister to engage all the petitioners in active service.

All the communications mentioned above indicate that the petitioners were not only sent on compulsory leave without pay but were released from the active service. If one in the Volunteer Force is released from active service it naturally encompasses sending him on compulsory leave till he being called out to do active service again. None of these applications challenge the decision of releasing the petitioners from active service. As explained before calling out the petitioners back to active service is within the discretion of the relevant authorities when a necessity to do so arises. There is no obligatory duty entrusted to the respondents to call the petitioners back to active service.

Hence, I decline to issue notices on the Respondents and dismiss the applications.

.....

E.A.G.R. Amarasekara.

Judge of the Court of Appeal