

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

Sanath Premakumara
Senanayake,
No. 79/2,
Parakum Mawatha,
Mullegama,
Homagama.
Petitioner

CASE NO: CA/WRIT/115/2016

Vs.

Lieutenant General A.W.J.C. De
Silva,
Army Commander,
Sri Lanka Army Headquarters,
No. 553,
Colombo 3.
And 5 Others
Respondents

Before: Mahinda Samayawardhena, J.

Counsel: Vishva Tennakoon for the Petitioner.

Suranga Wimalasena, S.S.C. for the Respondents.

Decided on: 25.07.2019

Mahinda Samayawardhena, J.

The petitioner has filed this application seeking to quash by writ of certiorari the decision to terminate his services from the Sri Lanka Army referred to in P10; and to compel the respondents by writ of mandamus to pay his salaries and pension from the date of suspension of his services until the due date of retirement.

The petitioner has been enlisted to the Sri Lanka Army as a soldier on 14.09.1990. By June 2001, he had been promoted to the rank of a corporal. On 24.06.2001 he had been deployed at the checkpoint in the Technical Junction, Maradana. Whilst being so deployed, he had participated in raiding a nearby lodge with a police constable, which is clearly and admittedly outside the purview of his duty, and obviously done with an ulterior motive. During the course of that unofficial raid, a Tamil lady in that lodge had been arrested and brought to the checkpoint and allegedly raped. He admits participating in the unwarranted raid, but denies rape. Upon the complaint of that lady, the petitioner and some police constables who had been on duty in that checkpoint had been remanded by the Magistrate's Court pending investigations, and later released on bail. Thereafter the petitioner's services have been suspended from 01.12.2001. After non summary inquiry in the Magistrate's Court, they had been indicted before the High Court for abduction and rape—and the petitioner for abduction. However as the prosecutrix was not forthcoming to give evidence, they have later been acquitted by the High Court on 26.08.2013.

It is the position of the petitioner that his contract service in the Army came to an end on 13.09.2012 after 22 years of service, and therefore he is entitled to back wages and pension.

In paragraph 25 of the petition, the petitioner admits that his 12 year service ended on 13.09.2002, and 22 years of service is required for pension. He did not have 22 years of service, and not even 12 years. His services were suspended before completion of 12 year service. In paragraph 26 he says that his request to lift the suspension and to allow him to serve in the Army for another 10 years was turned down.

His main complaint is, according to the petition, that no inquiry was held before termination of his services. R5, the inquiry notes, tendered by the respondents with the objections, belies it. According to R5, there had been an inquiry to which the petitioner has participated. It is also clear from R5, at that inquiry, the victim Tamil lady had not participated because that lady had been on remand upon execution of a warrant (may be due to being absent to give evidence in the Magistrate's Court). However at the end of the inquiry it has been proposed to reinstate the petitioner if the petitioner has been exonerated by the Civil Court. The petitioner now relies on R5 to claim that he is entitled to be reinstated as he was acquitted by the High Court. The petitioner cannot approbate and reprobate. On the one hand he denies inquiry being held. On the other he relies on the inquiry report.

In any event, the Commander of the Army is not bound to act on that observation or recommendation. The Commander of the Army by order dated 05.11.2012 has dismissed him from service on disciplinary grounds.

According to R3, after 12 year enlistment as a soldier, another maximum period of 12 years for “re-engagement” is at the recommendation of the Commanding Officer subject to appeal to the Commander of the Army. The petitioner, as I said earlier, before completion of his initial enlistment for 12 years, got remanded and thereafter charged in the High Court upon indictment for an offence which attracted both national and international attention—vide R10-P12.

According to R11 and R12, the Supreme Court in a Fundamental Rights violation application has decided that the aforementioned Tamil lady’s fundamental rights have been violated by the aforesaid acts and ordered compensation to the victim.

Pending determination of the High Court case, his 22 year service has expired. However he has served less than 12 years at the time of his services were suspended. By R12 it seems that the petitioner is also a respondent to that Fundamental Rights case.

It is also relevant to note that the petitioner together with others was acquitted not after trial but due to the failure of the prosecutrix to be present in Court to give evidence, which is common in rape cases due to various factors.

The decision of the Commander of the Army to dismiss the petitioner from service on disciplinary grounds is justifiable.

Writ is a discretionary remedy. The facts and circumstances of this case do not warrant exercising that discretion in favour of the petitioner merely because he was acquitted by the High Court.

I dismiss the application of the petitioner but without costs.

Judge of the Court of Appeal