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

Major Jagath Madawattage,
No. 443/1,
Himbutana Patumaga,
Angoda.
Petitioner

CASE NO: CA/WRIT/211/2015

Vs.

1. Secretary,
   Ministry of Defence,
   Colombo 3.
2. Lt. General A.W.J.C. De Silva,
   Commander of the Sri Lankan Army,
   Army Headquarters,
   Colombo 2.
   And 8 Others
   Respondents

Before: Mahinda Samayawardhena, J.

Counsel: Anuja Premaratne, P.C., with Naushalya Rajapaksha for the Petitioner.

Manohara Jayasinghe, S.S.C., for the Respondents.
(No written submissions have been filed on behalf of the Respondents.)

Decided on: 12.09.2019

Mahinda Samayawardhena, J.

The petitioner filed this application seeking to quash the order of the Commander of the Army marked P6 whereby the petitioner was discharged from service.

In P6 the Commander has enumerated several reasons why that decision was taken for the greater benefit of the Sri Lanka Army.

The main reason is committing a criminal offence by getting married to a Tamil lady posing himself as an unmarried man whilst his lawful marriage is in existence. There are two boys out of the lawful marriage and two girls out of the aforesaid second marriage, which is a nullity in the eyes of the law. The Tamil lady had filed a divorce action in the Mt. Lavinia District Court, and it appears from P7 that the lawful wife has filed a maintenance case against the petitioner seeking maintenance in respect of the wife and the two children. In addition, it seems from P7 that Colombo Fraud Bureau has also filed an action in the Chief Magistrate's Court against the petitioner on a criminal charge wherein, I assume, upon pleading guilty and upon conviction, the petitioner has been warned and discharged upon payment of Rs. 100,000/= as compensation presumably to his

lawful wife. The Magistrate has acted under section 306 of the Code of Criminal Procedure Act. Again, I assume, the charge is the criminal offence of bigamy under section 362C of the Penal Code where a person convicted shall be punished with imprisonment of either description for a term which may extent to ten years and shall be liable to fine.

I shall pause for a while to state that writ is a discretionary remedy and therefore the petitioner when presenting facts to Court shall act with *uberrima fides*—utmost good faith. He must make full disclosure of facts material to the case. But the petitioner in this case when producing P7 had been extremely careful to tender only the parts of the legal proceedings which are favourable to him. P7 consists of parts of two criminal proceedings, but the Court is unaware what the real charges are or the offences committed. It is also relevant to note that even in the body the petition the petitioner does not disclose the offences. That is a material fact for this Court in exercising writ jurisdiction.

Suppression of material facts warrants dismissal of the writ application *in limine* without going into the merits of the matter.

In the Supreme Court case of *Namunukula Plantations Limited v. Minister of Lands*[1] it was held that:

> *It is settled law that a person who approaches the Court for grant of discretionary relief, to which category an application for certiorari would undoubtedly belong, has to*

[1] [2012] 1 Sri LR 365 at 376. Vide also Fonseka v. Lt. General Jagath Jayasuriya [2011] 2 Sri LR 372

> *come with clean hands, and should candidly disclose all the material facts which have any bearing on the adjudication of the issues raised in the case. In other words, he owes a duty of utmost good faith (uberrima fides) to the court to make a full and complete disclosure of all material facts and refrain from concealing or suppressing any material fact within his knowledge or which he could have known by exercising diligence expected of a person of ordinary prudence.*

The Supreme Court[2] further held that:

> *If any party invoking the discretionary jurisdiction of a court of law is found wanting in the discharge of its duty to disclose all material facts, or is shown to have attempted to pollute the pure stream of justice, the court not only has the right but a duty to deny relief to such person.*

Paragraphs 46 and 47 of the petition read as follows.

> *46. The petitioner states that a case was filed in the Magistrate Court of the Colombo by Fraud Bureau bearing the number 24536/1 before the Hon Chief Magistrate of Colombo and the said case had concluded with the Hon Magistrate warning and discharging the petitioner under section 306 of the Code of Criminal Procedure Act, which order was made after his wife the said Thushari Apsara Modarage informed Court that she did not want to pursue the matter any further or seek any other redress.*

[2] At page 374

> *47. The petitioner states that the civil courts had found the petitioner guilty of the above charges as framed against the petitioner in the above case before the Magistrate's Court of Colombo and a penal order issued on the petitioner, and therefore, that any further imposition of penal sanctions on the petitioner is against the rule of "Double Jeopardy" which recognizes that a person should not be punished more than once for the same offence or wrong doing.*

According to these two paragraphs, "*a case was filed in the Magistrate Court of Colombo by Fraud Bureau*" and "*had found the petitioner guilty of the above charges as framed against the petitioner*" and "*a penal order issued on the petitioner*". Hence the petitioner says that he cannot be punished for the second time by the Commander of the Army by discharging him from service.

I cannot agree with that argument. If that argument is to accepted, even after serving a custodial sentence for a grave crime, the petitioner shall be allowed to continue to serve in the Army.

What matters is not the sentence, but the fact of being found guilty for a criminal offence.

The pivotal argument of the learned President's Counsel for the petitioner is that a person subject to Military Law could only be punished either consequent to a summary trial or a Court Martial but not upon findings of a Court of Inquiry.

In this case, it is true that only a Court of Inquiry has been held. But, according to the own admissions of the petitioner, he has been found guilty for one or more of criminal offences and penal sanctions have been imposed by Court of Law.

The petitioner was admittedly an officer of the Volunteer Force of the Army.

A copy of the Sri Lanka Army (Volunteer Force and Volunteer Reserve) Regulations 1985 made by the President under section 155 of the Army Act read with Article 44(2) of the Constitution and published in the Gazette Extraordinary No. 476/26 dated 20.10.1987 has been marked as R9.

According to Regulation 11(7) thereof "*No person who has been convicted of criminal offence shall be commissioned into a Regular or Unit of the Volunteer Force*." Notwithstanding it appears to be applicable at the stage of recruitment, there is no reason why it shall be inapplicable to an officer in service.

Regulation 62(3) states that:

> *On completion of the proceedings of the Court of Inquiry, the Commanding Officer shall forward a copy of the proceedings, together with his recommendations thereon, through the usual military channels to the Commander of the Army, <u>who shall decide what further action should be taken</u>.*

I do not say that the power so given to the Commissioner is unfettered. He shall exercise that power on sound, time-tested

principles. That power is reviewable by this Court in a properly constituted writ application.

It is my considered view that, in the facts and circumstances of this case, the Commander of the Army has taken the correct decision. That decision, in my view, is not arbitrary or capricious. That decision has been taken on proved facts and not on assumptions.

Unlike in any other institution, if there is no discipline in the members of the Armed Forces including the Police Force, those institutions cannot possibly run. Discipline shall be the top priority in the Armed Forces. In short, if there is no discipline, there is no Army, Navy or Air Force. This is equally true to the Police Force.

I am fortified in this view *inter alia* by Article 15(8) of the Constitution, which states:

> *The exercise and operation of the fundamental rights declared and recognized by Articles 12(1), 13 and 14 shall, in their application to the members of the Armed Forces, Police Force and other Forces charged with the maintenance of public order, be subject to such restrictions as may be prescribed by law in the interests of the proper discharge of their duties and the maintenance of discipline among them.*

Article 12(1) primarily deals with right to equality; Article 13 with freedom from arbitrary arrest, detention and punishment; and Article 14 with freedom of speech, assembly, association, occupation and movement.

Anil Gooneratne J. in *Mangala Pushpakumara v. Air Chief Marshal Roshan Gunathilake* (CA/WRIT/448/2009) decided on 28.3.2013, held that such discharge from service is not made as a punishment and therefore does not violate the doctrine of double jeopardy.

Punishments have been given to the petitioner separately for separate offences by Civil Courts. This discharge from service is to maintain discipline for the greater benefit of the Army.

This Court cannot and shall not interfere with the internal administrative decisions of the Armed Forces unless there are cogent compelling reasons to do so. There are no such circumstances in this case.

For the aforesaid reasons, I proceed to dismiss the application, which I do without costs.

Judge of the Court of Appeal