

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

*In the matter of an application for mandates in
the nature of Writs of Certiorari, Writ of
Mandamus and Prohibition under and in terms
of Article 140 of the Constitution of the
Democratic Socialist Republic of Sri Lanka.*

Maj. J. A. T. P. K. Jayakody.

No: 37/12/C2,

Kurunduwatta Road,

Aluthgama, Bogamuwa, Yakkala.

PETITIONER

C.A. Case No.WRT-224/19

Vs.

1. Lieutenant General Mahesh

Senanayaka.

Retired Commander of the Army,

Army Head Quarters,

Colombo 03.

1(a). General L. H. S. C. Silva.

Retired Commander of the Army,

Army Head Quarters,

Colombo 03.

1(b). Lieutenant General H. L. V. M.

Liyanage.

Commander of the Army,

Army Head Quarters,

Colombo 03.

2. Maj. General Sathyapriya Liyanage.
Ex-Commandant,
Sri Lanka Army Volunteer Force,
Head Quarters,
Sri Lanka Army Volunteer Force,
Army Camp, Salawa
Kosgama.

2(a). Maj- General N. A. Dhamaratne.
Ex – Commandant

2(b). Maj- General Vikum Liyanage.
Ex – Commandant

2(c). Maj- General D. G. S. Senarath Yapa.
Ex – Commandant,
Sri Lanka Army Volunteer Force

2(d). Maj- General S. U. M. N. Manage.
Commandant,
Sri Lanka Army Volunteer Force

The 2nd to 2(d) Respondents Above, ALL

Head Quarters,
Sri Lanka Army Volunteer Force,
Army Camp, Salawa,
Kosgama.

3. General S. H. S. Kottegoda (Rtd).
Ex-Secretary to the Ministry of
Defence, Ministry of Defence,
No. 15/5, Baladaksha Mawatha,
Colombo 03.

- 3(a). General Kamal Gunaratne.
Secretary to the Ministry of
Defence, Ministry of Defence,
No 15/5, Baladaksha Mawatha,
Colombo 03.
4. Maj. Gen. W. B. D. P. Fernando (Rtd).
(President of the Interview Board 02)
Former Chief of Staff.
5. Maj.Gen. L. H. S. C. Silva.
Member – Interview Board 02
Chief of Staff.
6. Maj.Gen. L. F. Kasthuriarachchi.
Member – Interview Board 02
Deputy Commandant – SLAVF.
7. Maj.Gen. B. H. M. A. Wijesinghe (Rtd).
Member – Interview Board 02
Military Secretary
8. Brig. D. B. S. N. Bothota.
Member – Interview Board 02
Assistant Military Secretary
9. Maj.Gen. A. Kariyakarawana (Rtd).
Member – Interview Board 02
Former Deputy Chief of Staff
10. Maj. Gen. G. D. I. Karunaratne (Rtd).
Member – Interview Board 02
Director General – General Staff

11. Maj. Gen. B. S. Vidanage (Rtd).
Member – Interview Board 02
Quarter Master General.

The 4th to 11th Respondents Above,
ALL C/o:
Army Head Quarters,
Colombo 03.

RESPONDENTS

BEFORE : **M. SAMPATH K. B. WIJERATNE, J**
WICKUM A. KALUARACHCHI, J

COUNSEL : Wardani Karunaratne with Sithija Jayamanna for
the Petitioner instructed by Alanka Dias.
V. De Abrew, ASG, PC, with R. Aluwihare, SC, for the
Respondents.

ARGUED ON : 26.07.2023

DECIDED ON : 20.09.2023

WICKUM A. KALUARACHCHI, J.

The petitioner has filed this writ application seeking inter alia following reliefs:

1. A writ of certiorari quashing the determination and/or decision of the 1st to 11th Respondents and/or those acting under or on their behalf to:
 - i. Placing the petitioner under retirement and/or mandatory retirement as reflected in communication dated 10th September 2018 marked “P-11”

- ii. Restraining the petitioner from his due promotion to the rank of Lieutenant Colonel with effect from 27/09/2012 as contemplated in communication dated 10th September 2018 marked “P-11”
2. A writ of certiorari quashing the proceedings and/or purported findings of the interview Board 02 conducted by the 4th to 11th Respondents in respect of petitioner’s promotion as reflected in communication marked “P-11” referred above.
3. A writ of mandamus compelling the 1st to 11th Respondents and/or those officers acting under their authority to grant the petitioner his due promotion to the rank of Lieutenant Colonel with effect from 27/09/2012 together with such back-wages and his consequential allowances, privileges and emoluments rightfully due to him.
4. Writ of prohibition restraining the 1st to 11th respondents and/or any one or more of them and/or those officers acting under their authority from giving effect to the impugned decision reflected in the communication marked P-11 retiring, discharging or removing the petitioner from Sri Lanka Army without promoting to the rank of Lieutenant Colonel with effect from 27/09/2012.

Briefly, the facts relating to this application are as follows:

Petitioner first enlisted in the Sri Lanka Army Volunteer Force (hereinafter sometimes referred to as SLAVF) as an Officer Cadet and was commissioned as a Second lieutenant in December 1992. Thereafter, he received promotion as a Lieutenant on 19th December 1995, as a Captain on 19th December 1998, as a Major on 23rd May 2005, as a Commanding Officer in 29th July 2010 and as a Selected

Major on 23rd June 2015. The petitioner is currently serving in the aforesaid rank of "Selected Major".

The petitioner has detailed in his petition a number of achievements and appreciations he had received, including the "Ranashura Medal" for his exceptional performance and conduct in the service. Accordingly, the petitioner states that he is entitled to a clean track record during the period of 26 years of his service, except on four occasions where he had been punished with admonition/reprimand/severe reprimand as far back as 1995, 2001, and 2003 for obtaining leave without approval.

The petitioner has stated that, as a Selected Major, he had been facing interview boards in 2016 and 2017, expecting due promotion to the rank of Lieutenant Colonel, but he was not promoted. According to the petitioner, after making several requests in 2018, upon succeeding the preliminary interview, the petitioner was called for an interview on 24th of July 2018 by the Interview Board No. 2 of SLAVF for an appointment to the rank of Lieutenant Colonel. The petitioner complains that instead of considering his suitability and eligibility to be appointed to the rank of Lieutenant Colonel as per Sections 16 and 17 of the Sri Lanka Army Act and the Voluntary Force Regulation 1985 published in Gazette Notification No.476/26 dated 20/10/1987, after the interview, it has been ordered to send him on compulsory retirement after a period of one year with effect from 8th August 2018. He was communicated of the said recommendation/decision by the letter dated 10.09.2018, marked "P-11". It is against the said P-11 that writs of certiorari, writ of mandamus and writ of prohibition have been sought in prayers (b) i & ii, (c), (d) and (e).

The Statement of Objections asserts that the petitioner has no clean record, that he was absent without leave on two occasions, and that warning letters were issued to him on both instances. Furthermore, it is claimed on behalf of the respondents that officers in the Sri Lanka

Army are not entitled to be promoted as of right. It is also specified that officers who have been absent without leave being approved would not be considered for promotion to the Rank of Lieutenant Colonel.

At the hearing of this application, the Learned Counsel for the Petitioner and the Learned Additional Solicitor General for the Respondents made oral submissions. After the hearing, parties were allowed to file written submissions along with the relevant judicial authorities but none of the parties filed written submissions or any judicial authority. The Learned Additional Solicitor General confined his arguments to the issue of maintainability of this application and contended that the reliefs prayed for by the petitioner are futile and thus this application could not be maintained.

Before going into the merits of this application, the objection regarding the maintainability of the application must be addressed, because if the application cannot be maintained, going into the merits of the case is purposeless.

The main contention of the Learned Additional Solicitor General was that, according to the journal entry dated 01.04.2021, the Learned Counsel for the Petitioner had moved to fix the matter for support only with regard to the relief mentioned in prayer (d) of the petition. The Learned Additional Solicitor General also contended that according to Section 10 of the Army Act, His Excellency the President of the Republic of Sri Lanka has the authority to grant promotions to commissioned officers of the Sri Lanka Army, and in terms of Article 35(1) of the Constitution, His Excellency the President has immunity from suit in any court or tribunal in the country.

The Learned Counsel for the Petitioner contended that after the 1st of April 2021, on the 24th of January 2022, the Court allowed the petitioner to confine this matter only to the prayers "(a)", "(b) ii", "(c)"

and "(d)" of the petition dated 07.06.2019. The Learned Counsel contended further that on the said day, the Learned Additional Solicitor General appeared for the respondents and he had not raised any objection. She contended further that; therefore, the petitioner is entitled to maintain this application for the reliefs "(a)", "(b) ii", "(c)" and "(d)" prayed for in the petition.

It is reflected from the journal entry dated 18.07.2019 that an undertaking was given to the court on behalf of the respondents that “no action would be taken to enforce the decision contained in P-11 and that no step connected with or ancillary to P-11 will be taken by the Sri Lanka Army and that the current status qua pertaining to the employment of the petitioner in the Sri Lanka Army will be maintained till the date on which this matter is in fact supported by the counsel for the petitioner.”

The Learned Counsel for the Petitioner contended that the matter was supported on 14.03.2022 but before the said date, the respondents issued the decision R-3 on 22.05.2020 violating the undertaking given to the court.

Among the decisions contained in R-3, the decision pertaining to the petitioner is that the board recommended the petitioner and nine other officers in the Rank of Major to be retired upon reaching the age of 55 years, and the board did not recommend those ten officers be promoted to the Rank of Temporary Lieutenant Colonel. The reason for not recommending the petitioner for the promotion has been stated as "absent without leave and past poor discipline".

In considering the recommendations stated in R-3 in respect of the petitioner, it appears that there is no violation of the undertaking given by the respondents to the Court for the following reasons:

On 18.07.2019, the undertaking to the Court was that no steps would be taken on P-11. The letter P-11 reads as follows:

The Army Bd No 02 assembled on 24 July 2018 had examined the SLAVF Bd proceedings and stipulated criteria with regard to the Promotion to the rank of T/Lt Col and determining their career progression. The Bd having perused your records, had recommended you to be retired from the SLAVF after a period of 01 year with effect from 08 August 2018.

It is brought to your information that the Commander of the Army has approved the above recommendation made by the Army Bd No 02.

If the petitioner was not allowed to serve in the army after 08th of August 2018, that would be a violation of the undertaking given to the Courts on 18.07.2019. However, the said decision was not carried out, instead, the petitioner was allowed to serve until the 29th of November 2027 by issuing letter R-3. It is very clear from the journal entry dated 01.04.2021, that the Learned Additional Solicitor General informed the Court on that day that the Sri Lanka Army would not proceed with the letter marked P-11. The recommendation contained in letter P-11 is for the petitioner to be retired from the SLAVF after a period of one year with effect from 08 August 2018. So, the said recommendation was not carried out as per the undertaking given to the Courts.

In addition, it transpires from the same journal entry that the petitioner not only accepted the said proposal, but also moved to proceed only with the relief prayed for in prayer (d) in his petition. It is precisely clear that the Learned Counsel for the Petitioner decided to proceed only with the relief prayed for in the prayer (d) accepting the position that the respondents had not acted on P-11 as per the undertaking given to the Court.

The contention of the Learned Additional Solicitor General was also that they withdrew P-11 and now only R-3 is in force. He contended further that in the said circumstances, the petitioner cannot maintain the reliefs sought in the petition based on P-11. The reply of the Learned Counsel for the Petitioner was that P-11 contains not only the date of retirement, but also the matters regarding the promotion.

It is correct that in P-11, it is stated that the Army Board No. 2 assembled to examine the promotion to the Rank of Lieutenant Colonel, but the Board had only made the recommendation that the petitioner be retired from 08th August 2018 and it is also stated that the Commander of Army has approved the said recommendation. However, reasons for not giving the promotion or any other matter relating to the promotion has not been mentioned in P-11. So, the *status quo* pertaining to the employment of the petitioner had been maintained till the date on which the matter was supported as per the undertaking given to the Court by the respondents on 18.07.2019. In addition, the *status quo* pertaining to the employment of the petitioner was not changed by R-3. As per the undertaking given to the Court, the recommendation contained in P-11 was not enforced, and as a result, the petitioner did not have to get retired on 8th August 2018 as it was mentioned in P-11.

Anyhow, the Learned Counsel for the Petitioner informed the Court on 24.01.2022 that she would confine the matter to the prayers "(a)", "(b)ii", "(c)" and "(d)" of the petition. The learned Additional Solicitor General for the respondents invited this Court to observe the conduct of the petitioner, pointing out the fact that the petitioner moved only to proceed with the prayer (d) on 01.04.2021 and then moved to proceed with the prayers "(a)", "(b)ii", "(c)" and "(d)" on 24.01.2022.

Anyhow, since the Learned Counsel for the Petitioner informed the Court subsequently that she would confine the matter only to the prayers “(a)”, “(b)ii”, “(c)” and “(d)” and this Court allowed the said application in the absence of any objection from the respondents, I hold that this application could be maintained for the reliefs prayed for in the prayers “(a)”, “(b) ii”, “(c)” and “(d)”.

Now, I proceed to consider the above reliefs prayed for by the petitioner. Consideration of prayer (a) is not required now, because that is regarding the issuing of notice to the respondents. Prayer (b)ii is based on P-11, and the relief prayed for is a writ of certiorari quashing the determination and/or decision of the 1st to 11th Respondents and/or those acting under or on their behalf restraining the petitioner from his due promotion to the rank of Lieutenant Colonel with effect from 27/09/2012 as contemplated in communication dated 10th September 2018 marked "P-11".

According to prayer b(ii), it indicates that P-11 contemplates a determination or decision restraining the petitioner from his due promotion to the Rank of Lieutenant Colonel with effect from 27.09.2012. It is apparent from P-11 that there is no such decision, determination, or even a recommendation that restrains the petitioner’s promotion with effect from 27.09.2012.

P-11 states that the Board examined SLAVF Board proceedings and stipulated criteria with regard to the promotion. Then it was recommended that the petitioner be retired from the SLAVF after a period of one year, with effect from 08th August 2018. That indicates that the Board was not inclined to give the promotion, although it is not stated specifically in P-11 about the promotion. However, it is precisely clear that there is no decision or determination contained in P-11 to the effect that the petitioner is being denied from promoting with effect from 27.09.2012. As there is no such decision or determination in prayer

(b)ii, the application cannot be maintained for the relief prayed for in prayer (b)ii of the petition.

The prayer (c) to the petition reads as follows:

A writ of certiorari quashing the proceedings and/or purported findings of the Interview Board 02 conducted by the 4th to 11th Respondents in respect of petitioner's promotion as reflected in communication marked "P-11" referred above.

The Learned Additional Solicitor General for the Respondents submitted that the respondents have withdrawn P-11. It is apparent from the conduct of the respondents also that they have withdrawn P-11 because the petitioner did not have to retire from 08.08.2018, instead the petitioner was allowed to serve until 29.11.2027 as stated in R-3. The said decision was informed to the Court on 01.04.2021 and the petitioner accepted the said extension of service and reserved his rights only to pursue with the relief prayed for in prayer (d) in respect of his promotion. In the aforesaid circumstances, asking to quash P-11 is now a futile exercise. Therefore, I hold that the petitioner cannot maintain this application for the relief prayed for in prayer (c) of the petition as well.

The only other prayer that the learned Counsel for the Petitioner moved to proceed with is prayer (d) of the petition. The prayer (d) of the petition reads as follows:

A Writ of Mandamus compelling the 1st to 11th Respondents and/or those officers acting under their authority to grant the Petitioner in his due promotion to the rank of Lieutenant Colonel effect from 27/09/2012 together with such back-wages together with his consequential allowances, privileges and emoluments rightfully due to him.

The contention of the Learned Additional Solicitor General was that because of the immunity of the President, the petitioner cannot canvass this promotion by way of a writ application. The reply of the Learned Counsel for the Petitioner was that the President is not the sole authority of granting the promotion, and all recommendations are made by the relevant army officials.

It is correct that the evaluation of the past records of the petitioner and making recommendations are done by the relevant army officials, but Section 9 of the Army Act specifically states that the officers shall be appointed by the President of the country. Section 9 and Section 10 of the Army Act read as follows:

- 9 (1). The officers shall be appointed by commissions under the hand of the President.
 - (2). Every officer shall upon appointment take and subscribe the prescribed oath, or make and subscribe the prescribed affirmation, before a prescribed officer.
 - (3). No commission issued by the President under subsection (1) of this section shall become invalid by reason of his death or vacation of office.
10. Every officer shall hold his appointment during the President's pleasure.

It is clear from the above sections that the officers in the Army are appointed by the President, and such officers can hold the office at the President's pleasure. Hence, other than the President, no other person can make the appointments of the officers. In the instant application also, it is apparent that the appointment of Lieutenant Colonel could only be given by the President.

What has been prayed for in prayer (d) is a Writ of Mandamus compelling the 1st to 11th respondents and/or those officers acting under their authority to grant the petitioner his due promotion to the Rank of Lieutenant Colonel with effect from 27.09.2012.

As the appointment of Lieutenant Colonel could only be given by the President and the 1st to 11th respondents do not have authority to appoint the petitioner or to give him a promotion to the rank of Lieutenant Colonel as explained above, the petitioner cannot maintain the application for writ of mandamus compelling the 1st to 11th respondents to appoint the petitioner to the Rank of Lieutenant Colonel. Therefore, the relief prayed for in prayer (d) of the petition also cannot be maintained.

For the reasons stated above, I hold that the application for writs prayed for in prayers (b)ii, (c), and (d) could not be maintained.

Accordingly, the application for writs prayed for by the petitioner is dismissed without costs.

JUDGE OF THE COURT OF APPEAL

M. Sampath K. B. Wijeratne J.

I agree.

JUDGE OF THE COURT OF APPEAL