

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

In the matter of an Application for Writ of
Certiorari.

Captain R.D. Sunil Pathirana
Hanhamunawa, Maspotha.
Kurunegala.

PETITIONER

C.A. (Writ) Application No.614/2011

Vs

1. Lt. General Jagath Jayasuriya
Commander
Sri Lanka Army,
Army Headquarters
Colombo 02.
2. Colonel K.J. Jayaweera
Center Commandant
Regimental Center
Sri Lanka Light Infantry
Panagoda.
3. Major T.K.M. Chandrasekera
Regimental Center
Sri Lanka Light Infantry
Panagoda.
4. Hon. Gotabhaya Rajapakse
Secretary, Ministry of Defence,

Ministry of Defence
Public Security Law
And Order, No. 15/5,
Baladaksha Mawatha
Colombo 05.

RESPONDENTS

BEFORE

: Deepali Wijesundera J.

COUNSEL

: Chamantha Weerakoon

Unamboowa with Kumuduni

Keerawela for the Petitioner.

Milinda Gunathilake for the

Respondents.

ARGUED ON

: 01st July, 2014.

DECIDED ON

: 06th July, 2015.

Deepali Wijesundera J.

The petitioner who was a Captain in the Sri Lanka Army was informed while he was participating in a course conducted by the Army that a decision has been taken to retire him compulsorily from service with effect from 31st October 2011 by letter dated 27th July 2011. This letter has been marked and produced as P7. The instant application has been filed seeking a writ of Certiorari to quash the said letter.

The learned counsel for the petitioner submitted that while serving in the Army in September 2000 he has gone home and had not reported back till April 2002. After he returned he had been charge sheeted under *Sec. 129 (1) and 106 (2) of the Army Act* for being absent from service without taking leave. The petitioner has pleaded guilty and as punishment he had to forfeit his seniority in 130 numbers. All this is stated in document marked **P1**. After reporting back for work subsequently he was promoted to the ranks of Lieutenant, temporary Captain and in May 2009 to the rank of Captain. (Document **P2a, P3k, P4a, P4d**). The petitioner has appealed under *Sec. 32 of the Army Act* against the decision in **P7** to the first respondent and to the Colonel of the Regiment (**P8 and P9**). Both these appeals were forwarded through the petitioner's Commanding Officer with his recommendation.

The learned counsel for the petitioner submitted that the petitioner was 37 years of age at the time of retirement and that he could have served in the Army until he reached the retirement age of 55 years therefore the petitioner had a legitimate expectation of serving in the Army until he was 55 years. The petitioner states that he was not given any reasons for his compulsory retirement.

The respondents counsel has argued that under *Sec. 9 (1) of the Army Act* all officers are appointed by the President and under *Sec. 10* all officers held office during the President's pleasure and the President has decided to retire the petitioner on the recommendation of the first respondent (**R1**). The decision to retire the petitioner has been conveyed to the first respondent by the fourth respondent by **R2** which decision was taken under *Sec. 31 (1) of the Army Act*. The position of the respondents was that the decision to compulsorily retire the petitioner is a decision of the President and since all officers hold their appointments during the President's pleasure the said decision can not be challenged. The respondents stated that by the time the petitioner filed the instant application the decision to compulsorily retire the petitioner had already been taken by the President therefore the grant of a prerogative writ would be futile and cited the judgment in **P.S. Bus Company Vs C.T.B. 61 NLR 497**.

The respondents submitted that the said decision was taken after considering the petitioner's service record of having deserted the Army for a period of more than one and a half years and also the fact that he was refused promotions. The respondents referred to documents marked as **R1, R2, R3 and R4**.

This court has to decide whether the decision to compulsorily retire the petitioner a decision which can be questioned since the officers of the Army hold their appointments at the pleasure of the President. Is it a decision of the respondents which was approved by the President as a mere formality as stated by the petitioner.

The learned counsel for the petitioner argued **P7** was issued on the request of the respondents and it is not a decision of the President. But on perusal of **R4** and **R5** which leads to **R1** it is evident the conduct of the petitioner has been the reason for the decision. **R2** clearly states that the President has approved the compulsory retirement of the petitioner. The argument of the petitioner that the decision was taken by the President on the request of the respondents and it is only a mere formality is a futile argument. The President as the Chief of Armed Forces has to be briefed by the respondents.

Sec. 10 of the Army Act No. 17 of 1949 (amended) states thus;

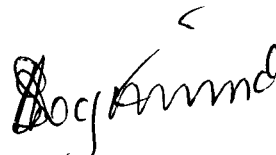
“Every officer shall hold his appointment during the President’s pleasure”.

In the case of **Air Vice Marshal Elmo Perera Vs Liyanage 2003 SLR 331**, it was held,

"..... it was open to the President to terminate the services of the petitioner on the basis that the petitioner holds office at the pleasure of the President".

In the instant case neither the first respondent nor the Regimental Council had the power to send the petitioner on compulsory retirement. The decision was taken by the President in terms of *Sec. 10 of the Army Act* and conveyed by **R1** to the first respondent. Therefore the petitioner's claim that **P7** contained a decision is misconceived in law and in fact.

For the afore stated reasons I decide that there is no merit in the petitioner's application. I dismiss the petitioner's application without costs.



JUDGE OF THE COURT OF APPEAL