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

In the matter of an application for a mandate in the nature of Writ of certiorari made in time of Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Captain M.B.A Dissanayake

No. 126/5A, Old Puttlam Road,

Tissa Weva, Anuradhapura.

Petitioner

Case No: CA(Writ) 299/2013

Vs.

1. General Jagath Jayasuriya RWP
   VSPVSV NDU psc
   Chief of Defence Staff,
   Block 5, BMICH,
   Colombo 07.
2. Lieutenant General A.W.J.C De Silva
   RWP USP NDU psc
   Commander of the Sri Lankan Army,
   Army Headquarters,
   Colombo 03.
3. Brigadier D.D.U.K Hettiarachchi RSP
   USP psc
   Army Headquarters,
   Colombo 03.

4. Colonel S.S Waduge psc
   Army Headquarters,
   Colombo 03.
5. Colonel H.G.P.M Kariyawasam RSP
   psc IP
   Office of Chief of Defence Staff,
   Block 5, BMICH,
   Colombo 07.

Respondents

Before: Janak De Silva J.

Counsel:

Faiz Musthapha P.C. with Didula Rajapakse for the Petitioner

Chaya Sri Nammuni SSC for the Respondents

Written Submissions tendered on:

Petitioner on 20.07.2018

Respondent on 21.01.2019

Argued on: 18.01.2019

Decided on: 25.03.2019

Janak De Silva J.

At all material times to this application the Petitioner was a Lieutenant of the Sri Lanka Army. A Court of Inquiry found the Petitioner to have received a quantity of gold jewelry out of a larger quantity of gold jewelry found near a safe in Puthukudiirruppu during the last phase of the humanitarian operations. A few other officers and soldiers were also found to be involved in

appropriating the gold jewelry. Based on the Court of Inquiry report the 1st Respondent concluded that the Petitioner's commission be withdrawn.

The Petitioner has sought the following relief from Court:

(a) A mandate in the nature of a writ of certiorari quashing the decision of the 1st Respondent contained in the document marked P3 to discharge the Petitioner from Sri Lanka Army,

(b) An interim order preventing the 2nd Respondent from taking action to discharge the Petitioner from Sri Lanka Army after having his commission been withdrawn based on the document marked P3 until the final determination of this application

The main arguments of the Petitioner are that P3 is liable to be quashed for any one or more of the following reasons:

(i) Orders could not have issued on the basis of the purported findings made by the Court of Inquiry

(ii) The commission of the Petitioner could have been withdrawn only as a punishment after a court martial

(iii) Non-compliance with Regulation 15(1) of Army Courts of Inquiry Regulations of 1952

(iv) Non-compliance with the Rules of Natural Justice

The learned President's Counsel for the Petitioner submitted that a Court of Inquiry is a fact-finding mechanism and that no punishments can be imposed by a court of inquiry.

Admittedly a Court of Inquiry is a fact-finding mechanism. In the instant case the Court of Inquiry report does not make a finding of guilt against the petitioner. The finding is made that the Petitioner is involved in the act of fraud.

Thereafter, although the 1st Respondent has in P3 dated 13.08.2012 directed that the commission of the Petitioner be withdrawn no further action has been taken thereon. Hence the question of quashing P3 by way of a writ of certiorari does not arise.

The learned President's Counsel for the Petitioner further submitted that the Court of Inquiry was held in violation of Regulation 15(1) of the Army Courts of Inquiry Regulation of 1952 since the Petitioner was not allowed to cross-examine two witnesses who had implicated the Petitioner. However, the Petitioner has not sought a writ of certiorari quashing the entirety of proceedings of the Court of Inquiry which was a relief sought and granted in *Amerasinghe vs. Daluwatta and other* [(2001) 3 Sri.L.R. 258]. In *Dayananda vs. Thalwatte* [(2001) 2 Sri.L.R. 73] this Court held that no writ can be granted unless it is specifically prayed for in the petition. In any event, upon an examination of the proceedings before the Court of Inquiry it appears that only Lance Corporal Jayasinghe B.G.I.K. testified to giving some of the gold jewelry to the Petitioner and the Petitioner was given the opportunity to cross-examine him.

The 2nd Respondent has by R14 dated October 2013 brought the findings of the Court of Inquiry to the attention of H.E., the President as the Commander-in-chief and sought his views on the retention of the Petitioner in view of section 10 of the Army Act No. 17 of 1949 as amended (Army Act). Petitioner has not sought any relief against R14. In any event, R14 is only a recommendation which is not subject to a writ of certiorari. The final decision as to whether the commission should be withdrawn was with H.E., the President.

In *A.D.R.N. Pereira vs. Hon. Chief Justice S.N. Silva and two Others* [C.A. Application No. 953/2008; C.A. Minutes 11.2.2009] this held [at page 4] that "The Judicial Service Commission does not have legal authority to make binding decisions in relation to the removal of the High Court Judges therefore a writ of certiorari would not lie to quash the recommendation of the Judicial Service Commission".

The "pleasure principle" has been recognized in relation to public officers and given effect to in Sri Lanka in a long of decisions such as *Vallipuram vs. Postmaster-General* (50 N.L.R. 214), *Silva v Attorney-General* (60 N.L.R. 14) and *Kodeswaran vs. Attorney-General* (70 NLR 121) (SC), (72 N.L.R. 337) (PC). The first constitutional appearance of this rule was in 1946. Although this rule was dismantled in relation to public officers by the 17th Amendment to the Constitution, it still applies with full vigor in relation to the armed forces. One instance is section 10 of the Army Act which states that every officer shall hold his appointment during the President's pleasure.

H.E. the President has approved the withdrawal of the commission of the Petitioner (R15) in the exercise of such pleasure principle. This approval is not challenged in these proceedings and in any case could not have been due to the constitutional immunity.

Therefore, the relief sought by the Petitioner is in any event futile. It is an established principle that administrative law remedies will be refused if it is futile [*Peiris v. Gunasekera* (66 NLR 498); *Shamsudeen v. The Minister of Defence and External Affairs* (63 NLR 430)]. In *Air Vice Marshall Elmo Perera vs. Liyanage and others* [(2003) 1 Sri.L.R. 331] it was held that writ would not lie if the final relief sought is a futile remedy. Similarly, in *Flying Officer Ratnayake vs. Commander of Air Force and Others* [(2008) 2 Sri.L.R. 162] this Court refused to issue a writ of mandamus directing the holding of a court martial as H.E. the President had already approved the withdrawal of the commission. Accordingly, the relief the Petitioner claims in the form of a writ of certiorari to quash P3 is futile.

The Petitioner submits that the Commander of the Army does not have power to recommend the withdrawal of the commission of the Petitioner. It is submitted that dismissal from the Army can be done only after holding a disciplinary inquiry contemplated in the Army Act and not on a Court of Inquiry finding which is essentially a fact-finding exercise. Reliance was placed upon *Lokuhennadige vs. Lt. General Sarath Fonseka and Others* [(2010) 2 Sri.L.R. 85], *Col. M.H.S. Boniface Perera* vs. *Lt. General Sarath Fonseka and Others* [C.A. Writ 705/2007; C.A.M. 10.09.2009] and Weerasinghe vs. *Lt. General Sarath Fonseka and Others* [C.A. 2148/2005; C.A.M. 23.07.2007].

In *Lokuhennadige vs. Lt. General Sarath Fonseka and Others* (supra) Sriskandarajah J. held that the decision to withdraw the commission and to dismiss the petitioner tantamount to punitive action and that dismissal from the Army is in the scale of punishment of the Court Marshal and therefore without holding a disciplinary inquiry no punishment can be imposed. He further held that without finding the petitioner guilty to the charges the 1st respondent cannot direct to take steps to withdraw the commission and to dismiss him from the Army on the basis that he was found responsible for the fraud from military police investigations and the Court of Inquiry. This

reasoning was adopted in *Col. M.H.S. Boniface Perera* vs. *Lt. General Sarath Fonseka and Others* (supra).

However, in *Major K.D.S. Weerasinghe vs. Colonel G.K.B. Dissanayake and others* [S.C.F.R. 444/2009; S.C.M. 31.10.2017] after a court of inquiry, the Army Commander sought a direction from H.E., the President regarding the further retention of the petitioner in that case which was approved. The Supreme Court held that Regulation 2 of the Army Disciplinary Regulations 1950 allowed the Commander to adopt such a procedure.

In the aforesaid circumstances, in any event R14 is not ultra vires.

For the foregoing reasons the application is dismissed with costs.

Judge of the Court of Appeal