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DIGEST

LOKUHENNADIGE VS. LT. GENERAL SARATH FONSEKA AND OTHERS

COURT OF APPEAL
SRISKANDARAJAH, J.
CA 1274/2006
MARCH 12, 2009

Army Act – Section 27 (d) – Court of Inquiry – Disqualification to be a member of the Court of Inquiry – Power to deduct sum ordered from pay or allowance – Validity – Judicial Review – appeals – Difference – Withdrawing of commission – Dismissed from Army – Can punishment be imposed without holding inquiry? Punishment – Surcharge is it a punishment?

On an investigation by Military Police into an "air ticket fraud" the petitioner a Captain in the Army was taken into custody, a Court of Inquiry inquired into the incident and recommended that the respondent should recover from the petitioner and two others, the said sum, to take disciplinary action against those who were found responsible, and to take steps to withdraw the commission and to dismiss the 3 officers. It was contended that, the 3rd respondent was disqualified to sit as a member of the Court of Inquiry – as he was a beneficiary of a ticket obtained from the Directorate as he is witness to the transactions and that the 6th respondent did not participate on all days of the inquiry, that there was no evidence to prove that the petitioner misappropriated the alleged sum by issuing air tickets to third parties.

Held

(1) As there is no allegation against the 3rd respondent that he had any interest or involvement in the said fraud or misappropriation – he is not disqualified.

(2) Absence of the 6th respondent on some dates of the inquiry would not have caused any impact on the outcome of the findings.

(3) Function of the Court of Inquiry is to record evidence and finally to record its findings.

(4) The 1st respondent has the power to deduct the said sum from the pay or allowance due to the officer. When an authority is empowered by law to arrive at a decision after consideration of the material before it this Court cannot in those proceedings interfere with the decision. Judicial Review – Court is concerned with its legality.

(5) The recovery or deduction of the said sum from the salary of the petitioner is not a punishment but to make good the loss incurred by the Army – it is only a surcharge.

(6) The 1st respondent has the authority to direct a disciplinary inquiry, any punishment on the petitioner can only be imposed after such disciplinary inquiry.

Held further

(7) The decision to withdraw the commission and to dismiss the petitioner tantamount to punitive action. Dismissal from the Army is in the scale of punishment of the Court Marshal, therefore without holding a disciplinary inquiry no punishment can be imposed. 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.

APPLICATION from a Writ of Certiorari.

Case referred to:-

Best Footwear (Pvt.) Ltd and *two others vs. Aboosally, former Minister of Labour and Vocational Training and others* – 1997 – 2 Sri LR 137

Ransiri Fernando with *Senaka Amarajith* for petitioner

Farzana Jameel DSG with *Deepthi Tilakawardene SC* for respondents

July 09th 2009

SRISKANDARAJAH. J

The Petitioner submitted that he was enlisted to the Sri Lanka Army on 03.11.1990 and at all time material to this

application he served as a Caption of the regular force of the Sri Lanka Army. He was attached to the Directorate of Movement of the Sri Lanka Army with effect from 23.09.1998 as an additional staff officer III. He submitted that during the time material to this application, his superior officer was one Major Hettiarachchi and the clerk in charge of the subject of overseas travel was one Corporal Dahanayake. The Respondents submitted that Major Hettiarachchi had served in the said Directorate from 26.02.1996 to 04.01.1999. From 04.01.1999 to 07.07.2000 the Petitioner had served as a staff officer in charge of the station of overseas courses and overseas travel of the said Directorate.

On an investigation initiated by the military police into an air ticket fraud which had taken place in the Directorate of Movement of the Sri Lanka Army the Petitioner and one Corporal Dahanayake DTG who was the subject clerk of that section were taken into military custody on 28.04.2000. It is common ground that after the conclusion of the military police investigation in relation to the said incident a Court of Inquiry consisting of four commissioned officers was appointed on 02.05.2001 to inquire into the said incident. The Court of Inquiry commenced its proceedings on 26.05.2001 and continued until 28.12.2001 and during the course of the inquiry it was revealed that the value of the fraud committed in the said incident is in excess of Rs. 500,000/-. Therefore action was taken to cancel the said Court of Inquiry and a fresh Court of Inquiry was convened as provided under paragraph 4(a) of the special rules made under Note 2 of the Financial Regulation No 102 Relating to Losses of Three Armed Forces. The Court of Inquiry convened (The 2nd Court of Inquiry) as provided by the said rule was comprised of three commissioned officers and a civilian officer nominated by the

secretary to the Ministry of defence. The 2nd Court of Inquiry commenced the inquiry on 16.08.2004 and concluded on 08.12.2005. In this Court of Inquiry sixteen witnesses along with the Petitioner gave evidence.

The Petitioner challenged the constitution of the 2nd Court of Inquiry on the basis that the 3rd Respondent is disqualified to be a member of the said Court of Inquiry. The Petitioner contended that the inquiry is in relation to the misappropriation of funds in relation to the issue of tickets for overseas courses and overseas travel at the Directorate of Movement of the Sri Lanka Army and whereas the 3rd Respondent was a beneficiary of a ticket obtained from the said Directorate. The 3rd Respondent is a witness to the said transaction and hence he is disqualified to be a member of the Court of Inquiry. The fact that every person who has obtained a ticket from the Directorate is not disqualified to sit as a member of an inquiry panel that is constituted to inquire into a fraud or misappropriation of funds of the Directorate unless it is shown that he has an interest or involvement in the said fraud or misappropriation. As there is no allegation levelled against the 3rd Respondent that he had any interest or involvement in the said fraud or misappropriation the Petitioners objection that the constitution of the said Court of Inquiry is invalid has no basis.

The second objection raised by the Petitioner is that one of the inquirers; the 6th Respondent (the civilian officer) who was particularly included in view of the high value of the loss under the above mentioned rules was not present on all the days of the inquiry. Hence the petitioner submitted that the findings of the Court of Inquiry are invalid. The Respondents contended that the 6th Respondent was present at the inquiry at all relevant time and his absence on few occasions will

not have any adverse impact on the findings of the Court of Inquiry as the findings of the Court of Inquiry was by all members after considering all the evidence led in the said Court of Inquiry.

The Court of Inquiry is a fact finding inquiry, the Court of Inquiry is defined in Regulation 2 of The Army Courts of Inquiry Regulations 1952 it states:

> *2. Court of Inquiry means an assembly of officers, or, of one or more officers together with one or more warrant or non-commissioned officers, directed to collect and record evidence and, if so required, to report or make a decision with regard to any matter or think which may be referred to them for inquiry under this regulation.*

Regulation 162 of The Army Courts of Inquiry Regulations provides that "Every Court of Inquiry shall record the evidence given before it, and at the end of the proceedings it shall record its findings in respect of the matter of matters into which it was assembled to inquire as required by the convening authority. The function of the Court of Inquiry is to record evidence and finally to record its findings. At the stage of recording evidence the absence of an inquirer on few sittings would not vitiate the proceedings of recoding evidence as no prejudice is caused to any one. But at the time of recording its finding all the members must give their mind to the evidence led and arrive at their finding. In the aforesaid inquiry the 6th Respondent was absent only on few occasions at the stage of recording evidence due to the pressure of work as he was a civil officer but he has participated in the process of recording the findings of the inquiry. In these circumstances the absence of the 6th Respondent on some dates of the inquiry would not have caused any impact on the outcome of

the findings of the Court of Inquiry and hence the Petitioner's submission that the findings of the inquiry are invalid has no merit. The Petitioner in the above circumstances cannot seek a writ of certiorari to quash the proceedings or the opinion or the observation of the Court of Inquiry marked X5.

The Petitioner in this application has also sought to quash the decision of the 1st Respondent marked X6. The Petitioner submitted that based on the opinion and the observation of the Court of Inquiry the 1st Respondent has decided that:

(i) The total amount that is alleged to have been misappropriated should be recovered on the following basis: Petitioner – Rs. 413,140.00, Maj L P T I Hettiarachchi – Rs. 874,823.40 and Corporal Dahanayake – Rs. 1,036,858.00

(ii) To take disciplinary action against those who were found responsible for the said fraud and

(iii) To take steps to withdraw the commission and to dismiss the two army officers and the other officer.

The Petitioner challenged the aforesaid decision on the basis that the evidence led before the Court of inquiry did not prove that the Petitioner has misappropriated a sum of Rs. 413,140/- as alleged by issuing Air Tickets of the Sri Lanka Army to third parties.

The Special Rules made under Note 2 of Financial Regulation No. 102 Relating to Losses of Three Armed Forces, in Rule 3 provides:

3. Responsibility for loss:

(a) Members of the Service shall be held personally responsible for any loss caused to the service/

Government by their own delay, negligence, fault or fraud and shall make good such loss. A member of the service will similarly be responsible if he/she allows or directs any action to be performed:-

(1) Without proper authority or

(2) Without complying with the relevant service regulations, orders or other appropriate instructions or

(3) Without exercising reasonable care, or

(4) Fraudulently

(b) Every member shall at all times be responsible for the safe custody, proper use and due disposal of any property issued to him/her or placed in his/her temporary or permanent custody. In case of loss or damage to them, or in case of failure to account for them, whenever called upon to do so such member shall be surcharged.

Disciplinary action shall in addition be taken against him/her for any carelessness, negligence or non-compliance with any regulations, rules or instructions.

Rule 4 provides for Inquiry and fixing Responsibility:

4(a) provides that as soon as a loss occurs, Inquiries should be instituted as laid down by the Board/Court of Inquiry regulations by the appropriate service authority to ascertain the extent and the cause of loss and to fix responsibility where necessary.

Rule 6; empowers the Service Commanders to determine the degree of responsibility for the loss, from any servicemen concerned and the amount to be recovered from each of them and to authorise the recovery of such amount.

In the instant case the Court of Inquiry was held to ascertain the cause of loss and to fix responsibility. The 1st Respondent after the receipt of the findings of the Court of Inquiry has decided that a total sum of Rs. 2,324,821.40 which was misappropriated should be recovered from the Petitioner, Maj L.P.T.I. Hettiarachchi and Corporal Dahanayake. This amount is apportioned to Petitioner – Rs. 413,140.00, Maj. L.P.T.I. Hettiarachchi – Rs. 874,823.40 and Corporal Dahanayake – Rs. 1,036,858.00 in accordance with the degree of responsibility.

The 1st Respondent under Section 27(d) of the Army Act read with Rule 6 mentioned above has the power to deduct the said sum from the pay or allowance due to the officer. The burden of proof as to the recovery of this sum is stipulated in the said Section. It provides that after due investigation if it appears to the Commander of the Army that it had occurred by any wrongful act or negligence of the officer he could deduct the sum lost from the pay or allowance due to the officer. The Commander of the army had arrived at the aforesaid decision after considering the Court of Inquiry proceedings and findings. When an authority empowered by law to arrive at a decision after consideration of the material before it this court cannot in these proceedings interfere in that decision. It is settled law that the remedy by way of certiorari cannot be made use of to correct errors or to substitute a correct order for a wrong order. Judicial review is radically different from appeals. When hearing an appeal the Court is concerned with

the merits of the decision under appeal. In judicial review the court is concerned with its legality. On appeal the question is right or wrong, on review, the question is lawful or unlawful. Instead of substituting its own decision for that of some other body as it happens when an appeal is allowed, a court on review is concerned only with the question whether the act or order under attack should be allowed to stand or not; *Best Footwear (pvt) Ltd, and Two Others v. Aboosally, former Minister of Labour & Vocational Training and Others*[1]

In view of the above the decision to recover the said sum from the salary of the Petitioner cannot be challenged by a writ of certiorari. The said recovery or deduction of the said sum from the salary of the Petitioner is not a punishment imposed on the Petitioner but it is to make good the loss incurred by the Army; in other words it is only a surcharge. As provided by Rule 8 of Note 2 of Financial Regulation No. 102 Relating to Losses of Three Armed Forces the maximum recoverable value will be the actual loss involved. This indicates that the sum recovered under these rules is not a punishment.

In addition to the said deduction the 1st Respondent has directed to hold a disciplinary inquiry. The 1st Respondent has the authority to direct a disciplinary inquiry as it is provided by rule 07(j) of the said Note 2 of the Financial Regulation. Any punishment on the Petitioner can only be imposed after such disciplinary inquiry. In a disciplinary inquiry a charge sheet will be served and the person accused will have an opportunity to answer the charges and defend himself in contrast to a Court of Inquiry where there is no accused and no charge sheet all those who appear before the Court of Inquiry are witnesses as it is a fact finding inquiry. Only in instances where the inquiry affects the character

or military reputation of an officer or a soldier the officer or a soldier was afforded an opportunity of being present throughout the inquiry and allowed to cross-examine any witness, make statements and adduce evidence on his own behalf. But this opportunity given to an officer or soldier will not change the character of the Court of Inquiry into a disciplinary inquiry.

The decision contained in X6 to take steps to withdraw the Commission and to dismiss the Petitioner from the Sri Lanka Army tantamount to a punitive action. Dismissal from Army is in the scale of punishment of the Court Martial. Therefore without holding a disciplinary inquiry contemplated in the Army Act and the regulations framed thereunder no punishment can be imposed. Without finding the Petitioner guilty to the charges the 1st Respondent cannot direct to take steps to withdraw the Commission of the Petitioner and to dismiss him from the Army on the basis that he was found responsible for the said fraud from the military police investigation and the Court of Inquiry. Therefore this court issues a writ of certiorari to quash that part of the decision contained in the decision of the 1st Respondent in document marked X6 dated 14.01.2006 namely:

මෙවැනි මහා පරිමාණ වංචාවක් සිදුකල අයවළුන් තවදුරටත් යුද්ධ හමුදා සේවයේ තබා ගත නොහැකි බැවින් නිලධාරීන් දෙදෙනාම යුද්ධ හමුදා අධිකාරියෙන් ඉවත් කොට යුද්ධ හමුදා සේවයෙන් අස් කිරීමට අවශ්‍ය ඉදිරි කටයුතු සිදු කිරීමටද සෙනීව යුද්ධ හමුදා සේවයෙන් අස් කිරීමට ද කටයුතු කල යුතු බව විධානය කරමි.

The application for a writ of certiorari is allowed to the extent stated above in the judgement. The Court makes no order as to costs.

application allowed - partly.

TRUSTEES OF THE CEYLON SCHOOL FOR THE DEAF AND BLIND VS. COMMISSIONER OF LABOUR AND OTHERS

COURT OF APPEAL
SRISKANDARAJAH, J.
CA 971/2007
FEBRUARY 18, 2009
MARCH 20, 2009
APRIL 29, 2009
MAY 15, 2009

Writ of Certiorari - Payment of Gratuity Act 12 of 1983 - Section 6 (2), Section 7 - Retirement - Pensionable service? Entitlement to gratuity payments - salary paid by State - Changes made to the salary after service period of employee - liability to pay arrears? Trust Ordinance - Section 114.

The petitioner an approved charity employed the 4th respondent – a government teacher in January 1969 as a teacher – after 33 years the 4th respondent retired in April 2002. The respondent received a pension from the State. The respondent was promoted in April 1997 and his salary revised with arrears to be paid with effect from September 1999. This was communicated in December 2005. The Commissioner of Labour informed the petitioner to pay gratuity and the arrears of the salary. The petitioner contended that, they are not entitled in law to make any payment for gratuity to a teacher whose salary was paid by the State, and that, they are not responsible for changes made to the employees position/salary after the service period of the employee had ended.

Held

(1) In view of Section 7 as the 4th respondent was in the contributing pension scheme, he is not exempted by Section 7 of the Gratuity Act.

(2) Even though the notification to pay the enhanced salary was in 2005 – three years after retirement, the 4th respondent was promoted with effect from April 1997 – and the notification to pay

the arrears from September 1999 is in order. Even though the notification came after retirement the 4th respondent's monthly salary was revised and his salary was deemed to have been in effect from September 1999. The last salary has to be considered on the basis of the revised salary.

APPLICATION for a Writ of Certiorari.

Case referred to:-

Hindu Women's Society Ltd and others vs. Commissioner General of Labour and others – SC 188/2007 – SCM 1.10.2007

M. A. Sumanthiran with Buddhinee Herath for petitioner

Yuresha de Silva SC for 1- 3 respondents

Hemantha Situge with *M. K. P. Chandralal* for 4th respondent.

September 03 2009

SRISKANDARAJAH, J.

The Petitioner is an approved charity incorporated under Section 114 of the Trust Ordinance with the aim of providing both academic and vocational education for deaf and blind children. The 4th Respondent a government teacher was recruited on the 15th of January 1969 to the Petitioner's School. He worked in the capacity of a teacher for 33 years with the Petitioner and retired from service on the 21st of April 2002. It is admitted by all parties to this application that the 4th Respondent's salary was paid by the government and he is receiving a pension from the government. The Position of the Petitioner is that as the 4th Respondent was in a pensionable service and after retirement he is receiving a pension, he is not entitled to any gratuity payments as per the payment of Gratuity Act No. 12 of 1983 but the gratuity payment made by the Petitioner to the 4th Respondent is a voluntary payment. The Learned State Counsel who appeared for

the 1st and 2nd Respondents (the Commissioner and the Assistant Commissioner of Labour) brought to the notice of this court the Supreme Court case; *The Hindu Women's Society Limited and Another v. The Commissioner General of Labour and Nine others*(1) In this case the Commissioner General of Labour has given an undertaking that as the respondent is drawing a pension from the Government on the basis of an award made by the Director of Pension he would withdraw the notification marked P30, which is a notice issued under the Gratuity Act.

The Petitioner submitted that without prejudice to the above submissions the Petitioner made a payment of gratuity to the 4th Respondent amounting to Rs. 174,689.50 on 07.05.2003 on the basis of his last drawn salary Rs.11,077/-. The Ministry of Human Resources Development, Education and Cultural Affairs notified the Petitioner that the 4th Respondent had been promoted to Grade 1 in the teacher service with effect from 21st April 1997 and that his salary was revised accordingly and that the arrears were to be paid with effect from 1st September 1999. Accordingly the 4th Respondent's monthly salary was revised to Rs. 15,204/- and he is entitled to this salary from 1st September 1999. The 4th Respondent claimed that the gratuity payment to be made on the revised salary that he was entitled to at the time of retirement. As the Petitioner has not acceded to the request the 4th Respondent made a complaint to the Commissioner of Labour and the Commissioner of Labour after an inquiry by his letter dated 17th August 2007 informed the Petitioner that the Petitioner was unable to establish the fact that it duly paid the Gratuity payment payable to the 4th Respondent as per the Payment of Gratuity Act and requested the Petitioner to pay a sum of Rs. 134,216.78 as remaining amount payable to the 4th Respondent and surcharges.

The Petitioner's challenge to the aforesaid order in this application is two fold. One is on the basis that the Petitioner is not obliged in law to make any payments for gratuity to any teacher whose salary is paid by the Department of Education. The second is that the said order of the 1st and 2nd Respondents is vitiated by error of law on the face of the record in that the Petitioner cannot be lawfully held responsible for changes made to the employee's position and salary after the service period of the employee had ended since the Petitioner's responsibility towards the employee ends with the retirement of the employee.

The settlement arrived in the Supreme Court case referred to above; *The Hindu Women's Society Limited and Another v. The Commissioner General of Labour and Nine others (supra)* does not indicate whether the employee under consideration was under a contributory pension scheme or a non contributory pension scheme. In the present case the 4th Respondent was in the contributory pension scheme and it is evident by the salary particulars of the 4th Respondent. Section 7 of the Gratuity Act provides:

7. The provisions of section 5 shall not apply to or in relation to a workman –

(a) employed as a domestic servant or as a domestic servant or as a personal chauffeur in a private household; or

(b) entitled to a pension under any non-contributory pension scheme.

In view of the above provisions the 4th Respondent is not exempted by section 7 of the Gratuity Act. The Petitioner in his counter affidavit admitted that according to Payment of Gratuity Act No 12 of 1983 as amended, an employee who had

been contributing to a pension scheme is entitled to gratuity and it was on that basis of this statutory obligation the 4th Respondent was paid his gratuity at the time of his retirement. But the Petitioner's position was when the 4th Respondent's salary anomaly was corrected and he was put on the correct salary scale by the Ministry of Education, the Petitioner cannot be held responsible to award him enhanced gratuity on the basis of increased salary. The rate of payment of gratuity is provided is Section 6. Section 6(2) provides:

(2) A workmen referred to in subsection (1) of section 5 shall be entitled to receive as gratuity, a sum equivalent to –

(a) Half a month's, wage or salary for each year of completed service computed at the rate of wage or salary last drawn by the workman, in the case of a monthly rated workman, and

(b) In the case of any other workman, fourteen days' wage or salary for, each year of completed service computed at the rate of wage or salary last drawn by that workman:

The question that has to be determined is the last drawn salary in relation to the 4th Respondent. The 4th Respondent's salary at the time of retirement was paid without considering his promotion for Grade 1 for which he was entitled to from 21st April 1997. The Ministry of Human Resources Development, Education and Cultural Affairs notified the Petitioner by its letter dated 13th December 2005, three years after retirement of the 4th Respondent that the 4th Respondent had been promoted to Grade 1 in the teacher service with effect from 21st April 1997 and that his salary was revised accordingly and that the arrears were to be paid with effect from 1st September 1999. Even though this notification came after his

retirement the 4th Respondent's monthly salary was revised to Rs. 15,204/- and this salary was deemed to have been in effect from 1st September 1999. Therefore the 4th Respondent is entitled to this salary at the time of retirement. In fact the arrears of salary to the 4th Respondent were to be paid with effect from 1st September 1999. This fact indicates that he is not only entitled to Rs. 15,204/- as his last salary at the time of retirement but in fact his salary was rectified and paid. Therefore the Commissioner is not in error in coming to the conclusion that the last drawn salary has to be considered on the basis of the revised salary.

In view of the above the Petitioner has not established any ground to issue a writ of certiorari to quash the decision contained in document dated 17th August 2007 marked 17. The application of the Petitioner is dismissed without costs.

application dismissed.

COLONEL FERNANDO VS. LT. GENERAL FONSEKA

COURT OF APPEAL
SRISKANDARAJAH, J.
LECAMWASAM, J.
CA 611/2007

Army Act Section 42, Section 133 – Court of Inquiry – Warned and recommended for retirement – disciplinary action by way of summary trial – No Court Marshal – scale of punishment – Has the Commander of the Army Authority to direct retirement? When does Mandamus lie?

At a Court of Inquiry it was revealed that the petitioner a temporary Colonel had committed certain military offences. The 1st respondent Commander of the Army directed that, the petitioner should be warned and recommended retirement from service.

It was contended that, the witnesses before the Court of Inquiry did not sign their statements at the time, they were made but had signed subsequently in the absence of the petitioner. It was further contended that the discretion to warn the petitioner and the recommendation of retirement are both ultra vires the powers of the 1st respondent.

Held

Per Sriskandarajah. J.

> "A Court of Inquiry is different from a disciplinary inquiry, in a disciplinary inquiry a charge sheet will be served, and the person accused will have an opportunity to answer the charges and defend himself. In a Court of Inquiry there is no accused and no charge sheet, all those who appear before the Court of Inquiry are witnesses as it is a fact finding inquiry".

(1) The impugned decision of the Commander of the Army cannot be considered as punishment, and as they are not punishments the petitioner cannot complain of a fair hearing. The 1st respondent

has the power to warn the petitioner, in exercising his powers in maintaining discipline.

Held further

(2) The 1st respondent has no authority to direct to retire the petitioner from service – this direction is ultra vires the power of the 1st respondent.

Per Sriskandarajah, J.

"The petitioner is seeking a mandamus to confirm him in the rank of Colonel. The petitioner has not established that he has a legal right to claim that he should be confirmed in the said rank. The confirmation of an officer depends on his performance and other relevant facts and is granted only after the evaluation of his service record. Therefore there is no public duty".

Per Sriskandarajah, J.

"Petitioner has no right to request that he be retained in service under Clause 3(2) b of the Army Pension and Gratuities Code of 1981. The Court will not grant Mandamus to enforce a right not of a legal but of purely equitable nature however extreme the inconvenience."

APPLICATION for Writ of Certiorari/Mandamus.

Cases referred to:-

1. *Ratnayake and others vs. C. D. Perera and others* – 1982 2 Sri LR 451
2. *Credit Information Bureau of Sri Lanka vs. M/s Jaffergee & Jaffergee (Pvt.) Ltd* – 2005 – 1 Sri LR 89

Faiz Musthapha PC for petitioner.

Janak de Silva SSC for respondents.

August 27 2009

SRISKANDARAJAH, J

The Petitioner is an officer in the Rank of Temporary Colonel of the Regular Force of the Sri Lanka Army. The Petitioner submitted that on 05.01.2006 as the Commandant

of the Central Arms and Ammunition Depot, he conducted two summary trials against two soldiers (Drivers) attached to the Central Arms and Ammunition Depot, A.S.R. Bandara and J.A. Asanka who had absent themselves from service without leave. Consequent to the summary trial the said two soldiers were found guilty and the Petitioner imposed the punishment of "7 days confinement to barracks" to both the soldiers. On a complaint made by A.S.R. Bandara to the Commander of the Army over the telephone on 05.01.2006, instructions were given to the Central Arms and Ammunition Depot, Kosgama to send three soldiers namely Private Bandara A.S.R., Private Asanka JA and Private Karunaratna HRS to Army Head Quarters and instructions were also given to the Military Police to initiate an investigation into the allegations made by the said three soldiers against the Petitioner. In the Military Police investigation the following allegations against the Petitioner was revealed;

(i) Employment of Army personal as drivers and escorts as his personal staff exceeding the authorized number detailed for an officer in the rank of Colonel serving outside operational areas as set out in the Army Headquarters letter No. GSBR/A/26/P3(38) dated 23.02.2004.

(ii) Employment of Army personal for domestic work (washing clothes cooking etc) by the wife of the Petitioner resulting in misusing Army resources for personal use.

(iii) Permitting his wife to use insulting language on the Army personal detailed as his personal staff.

A Court of Inquiry was convened consisting of 2nd to 4th Respondents. The Court of Inquiry recorded statements of approximately 10 witnesses including the said three soldiers, members of the Petitioner's personal staff and the Petitioner. The Court of Inquiry concluded recording evidence in May 2006.

The 1st Respondent submitted that on the perusal of the evidence led in the Court of Inquiry and the report of the Court of Inquiry revealed that the Petitioner whilst he was serving as the Commandant of the Central Arms and Ammunition Depot of the Sri Lanka Army stationed at Kosgama committed the following military offences;

(i) Employment of Army personnel as drivers and escorts as his personal staff exceeding the authorised number detailed for an officer in the Rank of Colonel outside operational areas as set out in the Army Headquarters' letter No. GSBR/A/26/PS(38) dated 23.02.2004.

(ii) Ill treating soldiers.

(iii) Employment of Army personal for domestic work (washing clothes Cooking etc) by the wife of the Petitioner resulting in misusing Army resources for personal use.

(iv) Permitting his wife to use insulting language on the Army personal detailed as his personal staff.

(v) Parking his staff vehicle and official vehicle at his residence in the night contravening the relevant Army orders.

(vi) Using his official vehicle and another, vehicle hired by the Army in civil number plates contravening the relevant Army Orders.

The 1st Respondent submitted that after considering the above he directed that:

(i) The Petitioner should be warned by the Chief of Staff of the Army having marched before him for the offence committed by him abusing his powers as a senior commissioned officer in the Army.

(ii) The Petitioner should be recommended for retirement from the service on the 1st occasion and steps should be

taken accordingly since his further retention in the Army is not in the best interest of the Army.

The above opinion and direction of the Commander of the Army is in the document marked P17.

The Petitioner challenged the said Court of Inquiry proceedings and its finding on the basis that the witnesses did not sign their statements at the time they were made and they were signed at a later stage in the absence of the Petitioner. This position was denied by the 2nd to the 4th Respondents; the President and the members of the Court of Inquiry and they submitted that all the witnesses including the Petitioner signed their statements at the time they were made. They further said that in the said Court of Inquiry, the Petitioner was afforded the opportunity of being present throughout the inquiry. Further he was allowed to cross examine the witnesses whose evidence was likely to affect his character and military reputation, to make statements and to adduce evidence on his own behalf. In the above circumstances the procedure adopted in the Court of Inquiry is in accordance with law hence a writ of certiorari will not lie to quash the proceedings, conclusions and recommendations of the Court of Inquiry.

The Petitioner submitted that consequent to the Court of Inquiry no disciplinary action was taken against the Petitioner by way of Summary Trial or Court Martial. The Petitioner in this application has also sought a writ of certiorari to quash the decisions or directions of the 1st Respondent contained in P17.

The Court of Inquiry is a fact finding inquiry, it is defined in Regulation 2 of The Army Courts of Inquiry Regulations 1952, it states:

2. Court of Inquiry means as assembly of officers, or, of one or more officers together with one or more warrant or non-commissioned officers, directed to collect and record evidence and, if so required, to report or make a decision with regard to any matter or thing which may be referred to them for inquiry under this regulation.

Regulation 162 of The Army Courts of Inquiry Regulations provides that "Every Court of Inquiry shall record the evidence given before it, and at the end of the proceedings it shall record its findings in respect of the matter of matters into which it was assembled to inquire as required by the convening authority. The function of the Court of Inquiry is to record evidence and finally to record its findings.

A Court of Inquiry is different from a disciplinary inquiry. In a disciplinary inquiry a charge sheet will be served and the person accused will have an opportunity to answer the charges and defend himself. In a Court of Inquiry there is no accused and no charge sheet all those who appear before the Court of Inquiry are witnesses as it is a fact finding inquiry. Only in instances where the inquiry affects the character or military reputation of an officer or a soldier the officer or soldier was afforded an opportunity of being present throughout the inquiry and allowed to cross-examine any witness, make statements and adduce evidence on his own behalf. But this opportunity given to an officer or soldier will not change the character of the Court of Inquiry into a disciplinary inquiry.

The Petitioner challenged the decision contain in P17 namely:

(1) To warn the Petitioner,

(2) The Petitioner abused the powers of his rank,

(3) To retire the Petitioner from service on the 1st occasion.

The scale of punishment by Summary Trial under Section 42 or the scale of punishment under the Court Martial under Section 133 of the Army Act does not contain any one of the acts mentioned above. Therefore the above cannot be considered as punishment. As they are not punishments the Petitioner cannot complain of a fair hearing. In relation to (1) and (2) above the 1st respondent is entitled to come to a conclusion from the evidence recorded in the Court of Inquiry that the Petitioner has abused the power of his rank and therefore he should be warned. In terms of Regulation 2 of the Army Discipline Regulations, 1950 the general responsibility for discipline had been vested in the Commander of the Army. The 1st Respondent exercising his powers in maintaining discipline directed that the Petitioner be warned by the Chief of Staff of the Army having marched before him. This order has already been executed and the Petitioner has been warned. In these circumstances a writ of certiorari will not be available to quash the decision of the 1st Respondent that the Petitioner should be warned by the Chief of Staff of the Army for two reasons one is that the 1st Respondent has authority to discipline his officers and he has acted in the evidence available in the Court of Inquiry Proceedings. Secondly quashing this decision is futile as it has been already executed.

The second direction of the 1st Respondent contained in P17 namely: The Petitioner should be recommended for retirement from the service on the 1st occasion and steps should be taken accordingly since his further retention in the Army is not in the best interest of the Army. The Respondents submissions that in terms of regulation 2(1)(a) of the Army Officers Services Regulations (Regular Force) 1992, the authority has been vested in the Commander of the Army to submit recommendations interalia for removals and resignations of officers in the rank of Major and above to the

Secretary to the Ministry of Defence for the approval of His Excellency the President.

But the above regulation does not apply to retirements. The said regulation in regulation 37 states:

No authority other than the President shall require, persuade or induce an officer to retire or resign his commission, and

Regulations 39 states:

An officer may be called upon to retire or resign his commission for misconduct or in any circumstance which in the opinion of the President, require such action. An officer so called upon to retire or to resign his commission may request an interview with the secretary in order that he may be given an opportunity of stating his case.

From the Regulation 37 and 39 above it is evident that the 1st Respondent has no authority to direct to retire the Petitioner from service on the 1st occasion. Therefore the decision of the 1st Respondent to direct to retire the Petitioner from service on the 1st occasion is ultra vires the powers of the 1st Respondent. Therefore this court quashes that part of the direction contained in document marked P17.

The contention of the Respondents is that the recommendation in P20 is to retire the Petitioner with effect from 1st September 2007 as he has completed the maximum period of service in the rank of Lieutenant Colonel in terms of Clause 3(1) (b) of the Army Pensions and Gratuities Code 1981 which is framed under Regulation made under Section 29 and 155 of the Army Act. This is an administrative action taken in accordance with the said Code and it has no bearing in the out come of the Court of Inquiry proceedings or the finding of the 1st Respondent contained in P17.

The Said Code in Clause 3 states:

3(1)(a) Subject as hereinafter provided, all officers shall retire on reaching the age of fifty-five years.

(b) An officer, other than a Quarter master or a short Service Field Commissioned officer, shall retire on the expiry of such period in the substantive rank he holds as is specified below unless he is promoted to the next higher rank, within that period.

Substantive rank	Period-years
Lieutenant	06
Captain	11
Major	10
Lieutenant Colonel	08
Colonel	05
Brigadier	04

(c) ….

(d) …

2 (a) for the purpose of computations of service in the ranks referred to in paragraph (1) (b), the service of an officer in a temporary or acting rank shall be reckoned as service in the substantive rank of such officer during the period he holds such temporary or acting rank.

(b) Notwithstanding anything in this regulation, the Secretary in consultation with the commander of the Army, may retain the services of an officer, other than a short service Field Commissioned officer, in any rank beyond the period specified for that rank in paragraph (1)(b) or beyond the age specified in paragraph (1) (c), if in the opinion of the President, it is essential in the interest of the Army to do so.

The Petitioner submitted that he was due to be confirmed in the rank of Colonel with effect from 31.08.2004 and promoted to the rank of Brigadier with effect from 01.05.2006. He was not confirmed in the rank of Colonel as the Promotion Board which sat in June 2006, did not recommend same in view of the Court of Inquiry proceedings. He was promoted to the rank of Lieutenant Colonel on 31.08.1999. Thereafter on 01.07.2005 he was promoted to the rank Temporary Colonel (substantive rank being Lieutenant Colonel). Thus he would be completing the maximum service 8 years in the rank of Lieutenant Colonel on 31.08.2007. This fact was brought to the notice of the Petitioner by the Director Pay and Records on 26th February 2007 and invited the Petitioner to make an application to continue in service if he so wish. The Petitioner made an application that he be permitted to continue in service under Clause 3(2)(b) of the Army Pensions and Gratuities Code 1981 (which Code is referred to above). As he has not got a favourable reply he has submitted a Redress of Grievance to the 1st Respondent through the proper channels on 22nd May 2007. The findings of the 1st Respondent contained in document marked P17 is dated 30th of May 2007. Therefore it is clear that the findings of the Court of inquiry or the recommendation of the 1st Respondent based on the Court of Inquiry proceedings has no bearing on the retirement notice issued on the Petitioner or on the consequent direction to take action to retire the Petitioner contained in letter marked P20. Hence the decision or direction contained in P20 is in accordance with Clause 3(1)(b) of the Army Pensions and Gratuities Code 1981 and hence it cannot be quashed by a writ of certiorari.

In view of the above the Petitioner is not entitled to a writ of prohibition, prohibiting the 1st, 5th and 6th from retiring and/or recommending the Petitioner to be retired.

The Petitioner in this application has sought a writ of mandamus to take all necessary steps to confirm the Petitioner in the rank of Colonel with effect from 31.08.2004 and a writ of mandamus directing the 1st and 6th Respondents to take all necessary action to continue in service under Clause 3(2)(b) of the Army Pensions and Gratuities Code 1981.

The Petitioner is seeking a mandamus to confirm him in the rank of Colonel. The Petitioner in this application has not established that he has a legal right to claim that he should be confirmed in the rank of Colonel. The confirmation of an officer depends on his performance and other relevant factors and it is granted only after an evaluation of his service record. Therefore there is no public duty on the part of the 1st Respondent to confirm the Petitioner in the rank of Colonel.

The general rule of Mandamus is that its function is to compel a public authority to its duty. The essence of Mandamus is that it is a command issued by the Superior Court for the performance of public legal duty. Where officials have a public duty to perform and have refused to perform, Mandamus will lie to secure the performance of the public duty, in the performance of which the applicant has sufficient legal interest. It is only granted to compel the performance of duties of a public nature, and not merely of private character that is to say for the enforcement of a mere private right, stemming from a contract of the parties *Ratnayake and others v. C.D. Perera and others*(1).

The duty to be performed must be of a public nature. A Mandamus will not lie to order admission or restoration to an office essentially of a private character, nor in general, will it lie to secure the due performance of the obligations owed by a company towards its members, or to resolve any, other private dispute, such as a claim to reinstatement to membership of a trade union, nor will it issue to a private arbitral tribunal" de Smith Judical Review 4th Ed. page 540.

The Petitioner is also seeking a writ of mandamus directing the 1st and 6th Respondents to take all necessary action to allow the Petitioner to continue in service under Clause 3(2)(b) of the Army Pensions and Gratuities Code 1981. The said clause vests discretion on the Excellency the President to retain an army officer beyond the stipulated period of retirement if it is essential in the interest of the Army to do so. The said Clause reads as follows:

> The Secretary in consultation with the commander of the Army, may retain the services of an officer, other than a short service Field Commissioned officer, in any rank beyond the period specified for that rank in paragraph (1) (b) or beyond the age specified in paragraph (1) (c), if in the opinion of the President, it is essential in the interest of the Army to do so.

Therefore the Petitioner has no right to request that he be retained in service under Clause 3(2)(b) of the Army Pensions and Gratuities Code 1981. The court will not grant a Mandamus to enforce a right not of a legal but of a purely equitable nature however extreme the inconvenience to which the applicant might be put; *Credit Information Bureau of Sri Lanka v. Messrs Jafferjee & Jafferjee (pvt) Ltd* (2).

This court issue a writ of certiorari to quash the decision of the 1st Respondent namely: "to direct to retire the Petitioner from service on the 1st occasion" which is contained in P17 without prejudice to the authority of the 1st Respondent to take action against the Petitioner under Clause 3 (1) (a) or 3 (1) (b) of the Army Pensions and Gratuties Code 1981.

The Application for a writ of certiorari is allowed to the extent stated above. The Court makes no order with regard to costs.

LACAMWASAM, J. – I agree.

application allowed - Partly.