PERERA

v.

ATTORNEY-GENERAL

COURT OF APPEAL.
G. P. S. DE SILVA, J. AND JAMEEL, J.
C.A. 415/76 (F) ; D.C COLOMBO A/84/Z.
JANUARY 24, 1985.

Army Act, Section 10 – Withdrawal of Commission as Lieutenant in Sri Lanka Army Volunteer Force – Regulations 72 and 73 of the Sri Lanka Volunteer Force Regulations – Holding office during pleasure – Application of principles of natural justice in cases of dismissal from office held during pleasure.

The plaintiff, a commissioned Lieutenant in the Sri Lanka Volunteer Force was placed on compulsory leave and later his commission was withdrawn in terms of Regulation 73 of the Sri Lanka Volunteer Force. He was given no opportunity to show cause.

Held –

The plaintiff held office during pleasure and hence his contract of service with the State was terminable at will without any right to a prior hearing. There is no enforceable contract between the officers in the Army and the State. Nor can an action in delict lie because plaintiff must show infringement of a legal right. But here he has no such right. Hence he has no right of action.

Cases referred to :

(1) *Ridge v. Baldwin [1963] 2 All ER 66.*
(2) *Mitchell v. The Queen (1890) [1896] 1QB 121.*
(3) *Leaman v. The King [1920] 3 KB 663.*
(4) *The Attorney-General v. Chanmugam (1967) 71 NLR 78, 82.*
(5) *Kodeeswaran v. Attorney-General (1969) 72 NLR 337, 345.*

APPEAL from the District Court of Colombo.

D. R. P. Goonetilleke for appellant.
Sarath Silva, D. S. G. for respondent.

Cur. adv. vult.

March 8, 1985.

G. P. S. DE SILVA, J.

The plaintiff was commissioned as Lieutenant in the Sri Lanka Army Volunteer Force on 6th May 1971. On 24.10.72 he was placed on compulsory leave without pay. Thereafter his Commission was withdrawn with effect from 13th March 1973 by gazette No. 53 of 30th March 1973. The Commander of the army by letter dated 29.5.73 informed him that his Commission was withdrawn in terms of regulation 73 of the Sri Lanka Volunteer Force Regulations. On 12th December 1974 he instituted this action against the Attorney-General complaining that the withdrawal of the Commission was contrary to the principles of natural justice ; that it was wrongful, without reasonable grounds, mala fide and for extraneous reasons ; that he suffered damages which he estimates at Rs. 50,000. He sought a declaration (*a*) that the withdrawal of his Commission was illegal and wrongful ; (*b*) that he is entitled to the restoration of the Commission with effect from 13.3.73 ; (c) that he is entitled to his salary from 24.10.72 and to damages in a sum of Rs. 50,000.

At the trial the District Judge tried issue Nos. 17, 18, 19, 20, 21, 22 and 23 as preliminary issues of law :

(17) Was the dismissal from office by gazette notification referred to in issue No. 5 ? (i.e. gazette No. 53 of 30.3.73).

(18) Did the plaintiff hold office at the pleasure of the President of Sri Lanka ?

(19) Can the plaintiff institute an action to recover salary and other allowances ?

(20) If issues 17 and/or 18 and/or 19 are answered in favour of the defendant :

(*a*) can the plaintiff maintain this action ?

(*b*) is the plaintiff entitled to the relief prayed for in the plaint ?

(21) Is the dismissal by the President a matter justiciable in this court ?

(22) Is the placing of the plaintiff on compulsory leave without salary a matter justiciable in this Court ?

(23) If the answer to issues 21 and/or 22 is in the negative has the Court jurisdiction to hear and determine this action ?

The District Judge having heard the submissions of counsel answered the issues in favour of the defendant and dismissed the plaintiff's action. The plaintiff has now preferred an appeal.

Mr. D. R. P. Goonetilleke, counsel for the plaintiff-appellant referred us to regulation 72 and 73 of the Sri Lanka Volunteer Force Regulations. Regulation 73 was relied on by the Army Commander in his letter of 29.5.73 to the plaintiff. The regulations read thus :

"72. For any reason other than misconduct, an officer may at any time be called upon to resign his commission, should the circumstances of the case in the opinion of the Governor General require it.

73. An officer may at any time be called upon to resign his commission or be removed from the Volunteer Force for misconduct".

It was counsel's submission that there was no charge of misconduct against the plaintiff nor was an inquiry held into any alleged misconduct. Counsel further urged that in these circumstances the officer must be called upon to resign before the commission is withdrawn. The plaintiff, however, was not called upon to resign before his commission was withdrawn. Mr. Goonetilleke maintained that an imperative requirement as to procedure was not complied with and hence the withdrawal of the Commission was wrongful.

Relying on the decision of the House of Lords in *Ridge v. Baldwin,* (1) Mr. Goonetilleke further contended that the withdrawal of the Commission by the President had no legal effect whatsoever since the plaintiff was denied an opportunity of showing cause against the withdrawal of his Commission. In short, the submission was that there was a clear violation of the audi alteram partem rule.

On a consideration of the averments in the plaint read as a whole, it seems to me that Mr. Sarath Silva, Deputy Solicitor-General, is right in his submission that the action is framed on the basis of a breach of the contract of employment and that the damages claimed is for the wrongful withdrawal of the Commission – vide in particular paragraphs 10 and 11 of the plaint. The preliminary issues raised on behalf of the defendant related to two objections. The first was that no cause of action has accrued to the plaintiff to sue the defendant and the second was that the court had no jurisdiction to hear and determine the action.

On the first point it is very relevant to note that the plaintiff held his appointment "at pleasure". Section 10 of the Army Act (Chap. 357) enacts that "Every officer shall hold his appointment during the Governor-General's pleasure". Section 107 (1) of the Constitution of 1972 (which was in operation on the date of the withdrawal of the Commission and at the time of the institution of the action) provides that "save as otherwise expressly provided by the Constitution, every state officer shall hold office during the pleasure of the President". It was not contended that the plaintiff was not a "State officer". His contract of service with the State was terminable at will without assigning reasons. The principle is that the public interest requires that the State should be in a position to terminate the services of its

employees at any moment. The D.S.G. relied on the well known case of *Mitchell v. The Queen* (2) wherein Lord Esher in the opening sentence of his judgment states :

"I agree with Matthew, J. that the law is as clear as it can be, and that it has been laid down over and over again as the rule on this subject that all engagements between those in the military service of the Crown and the Crown are voluntary only on the part of the Crown and give no occasion for an action in respect of any alleged contract".

And Lord Esher concludes his judgment with these words :

"It has been decided over and over again that, whatever means of redress an officer may have in respect of a supposed grievance, he cannot as between himself and the Crown take proceedings in the Court of Law in respect of anything which has happened between him and the Crown in consequence of his being a soldier. The Courts of law have nothing whatever to do with such a matter".

A similar view was expressed in *Leaman v. The King* (3). Both these cases were cited with approval by Sirimane, J. in *The Attorney-General v. Chanmugam* (4). It may not be irrelevant to note that Lord Diplock in *Kodeeswaran v. Attorney-General* (5) observed :

"As already pointed out the current of authority for a hundred years before 1926, though sparse, was to the effect that arrears of salary of a civil servant of the Crown, *as distinguished from a member of the armed services,* constituted a debt recoverable by Petiton of Right". (The emphasis is mine)

The fact that there is no enforceable contract between officers in the Army and the State is discussed by Wade in his "Administrative Law", 5th Edition, page 65 :

"In the armed services the lack of any legal remedy for wrongful dismissal has been made clear in a parallel line of decisions which are, if anything, more categorical than those dealing with civil servants. It was in fact the decisions about military service which provided persuasive precedents for the decisions about civil service . . . . . The military cases tend more to the conclusion that this type of Crown service is not contractual at all. This was flatly stated by Lord Esher, M. R. in 1890 . . . . . ".

Having regard to the principles set out in these decisions and the "pleasure priniciple" enacted in the Army Act and in the Constitution, I am of the view that Mr. Goonetilleke's submission based on regulations 72 and 73 cannot succeed.

I turn next to the question of the denial of the principles of natural justice. Admittedly the plaintiff was not heard before his Commission was withdrawn. Does this fact give rise to a cause of action ? The answer is emphatically in the negative. Lord Reid in *Ridge v. Baldwin (supra)* in considering the application of the principles of natural justice to cases of dismissal stated :

> "These appear to fall into three classes, dismissal of a servant by his master, dismissal from an office held during pleasure, and dismissal from an office where there must be something against a man to warrant his dismissal . . . . . there are many cases where a man holds office at pleasure. Apart from judges and others whose tenure of office is governed by statute, all servants and officers of the Crown hold office at pleasure . . . . . It has always been held, I think rightly, that such an officer has no right to be heard before he is dismissed and the reason is clear. As the person having the power of dismissal need not have anything against the officer, he need not give any reason . . . . . I fully accept that where an office is simply held at pleasure the person having power of dismissal cannot be bound to disclose his reasons. No doubt he would in many cases tell the officer and hear his explanation before deciding to dismiss him. But if he is not bound to disclose his reason and does not do so, then, if the court cannot require him to do so, it cannot determine whether it would be fair to hear the officer's case before taking action".

Finally, it was contended on behalf of the plaintiff that the action is based on delictual liability. As stated earlier, the averments in the plaint do not support such a contention and the claim for Rs. 50,000 as damages appears to be for wrongful dismissal. In an action in delict the act complained of should be legally wrongful as regards the plaintiff and the plaintiff must show that a legal right of his has been infringed. Plainly, the withdrawal of the Commission by the President does not constitute an infringment of a right of the plaintiff. In any event, the breach of a contract by one of the parties to it is not a delict – Principles of South African Law by Wille, 5th Edition, page 501.

On a consideration of the matters set out above, it seems clear that the plaint does not disclose a cause of action. In this view of the matter, it is unnecessary to consider the jurisdictional issue based on the immunity of the President in respect of civil proceedings – section 23 (1) and the ouster clause embodied in section 106 (5) of the 1972 Constitution. In the result, the appeal fails and must be dismissed However, in all the circumstances of the case, I make no order as to costs of appeal.

JAMEEL, J. – I agree.

Appeal dismissed.