UDAYAKUMAR
v.
MAJOR GENERAL NALIN SENEVIRATNE

COURT OF APPEAL.
SIVA SELLIAH, J. AND ABEYWIRA, J.
C.A. 477/85.
NOVEMBER 25 AND 28, 1986.

Certiorari and Mandamus–Misappropriation of Army property–Army Court of Inquiry–Army Act–Ss. 24, 29, 120–Regulations under Army Act (Article 18)–Confession–Admissibility in proceedings before Army Court of Inquiry–Entitlement to pension–Minutes on Pensions.

The petitioner was a sergeant in the Sri Lanka Army recruited in July 1952 and due for retirement on 21.7.74 by which date he would have qualified to receive a pension. But on 17.6.74 he was arrested on a charge of misappropriation of army goods and prosecuted in the Magistrate's Court of Homagama where however he was acquitted. In the meantime there were two Army Courts of Inquiry where the petitioner was tried, found guilty and discharged in 1977 without a pension. The second Court of Inquiry was held without notice to the petitioner and no reliance was being placed on its findings. But at the first Court of Inquiry the petitioner was duly tried but these proceedings were attacked on the ground that a confession was improperly admitted.

Held–

(1) An Army Court of Inquiry is not debarred by Article 18 of the Regulations made under the Act from receiving a confession (provided adequate safeguards and cautions enjoined by the law have been observed). Article 18 only debars the use of the confession made before the Army Court of Inquiry in other proceedings against him.

(2) There is no legally enforceable right to a pension. Awarding a pension remains a matter of discretion.

Cases referred to:

(1) *Attorney-General v. Abeysinghe – 78 NLR 361, 364.*

(2) *Gunawardena v. Attorney-General – 49 NLR 359.*

(3) *Nixon v. Attorney-General – [1930] Chancery 387.*

APPLICATION for writs of Certiorari and Mandamus.

C. L. Wickramanayake for petitioner.

Shibly Aziz, D.S.G. with *P. Ratnayake, S.C.* for respondent.

Cur. adv. vult.

January 30, 1987.

SIVA SELLIAH, J.

The petitioner in this case was a sergeant in the Sri Lanka Army having been recruited in July 1952. He was due for retirement on 21.7.74 on which date he would have completed 22 years of service and would reasonably have had the expectation of receiving a pension from the Government. Before that date however he was arrested on 13.6.74 by the Military Police for misappropriation of army goods and on 17.6.74 a case was instituted on that charge against him in the Magistrate's Court, Homagama, Case No. 23236. He was however acquitted after trial in that case in 1978 for want of evidence. Although the petitioner has stated in paras 8 and 9 of his petition that there were two Courts of Inquiry held by the Army in respect of the same charge and other charges and that the first Court of Inquiry was concluded without any blame being attached to the petitioner while the second Court of Inquiry was ended abruptly it is manifest that these assertions are incorrect in fact and that he was found guilty by both Courts of Inquiry for misappropriation of Army property (vide para 7 of the statement of objection and P1A filed by the petitioner where the Deputy Minister of Defence has stated in Parliament that an Army Court of Inquiry has found the petitioner responsible for the losses arising from fraud and that as his conduct had deteriorated it is not intended to take him back to the service). A petitioner who seeks a remedy by way of Certiorari owes it to this court that statements of primary facts are correctly made and that the assistance of this court is not sought on flippant and irresponsible material. The learned Deputy Solicitor-General had rightly conceded that the second Court

of Inquiry has been held without notice to the petitioner and accordingly he was not relying on its conclusions; but the Deputy Solicitor-General contended that as far as this application by the petitioner is concerned, the conclusions arrived at by the first Court of Inquiry referred to of misappropriation of army goods by the petitioner are sufficient to disentitle the petitioner from the remedy sought. Although learned counsel for petitioner first contended that Courts of Inquiry could not be held under the Army Act but only Courts Martial as provided therein, he later conceded that Courts of Inquiry could be validly held under Regulations framed under the Army Act; he however stated that the counter affidavit filed on behalf of the 1st respondent shows that a confession had been made use of (A) and that this was obnoxious to Article 18 of the Regulations framed (vide Gazette No. 10,468 of 7.11.52) which states as follows:

> "Except upon the trial of any officer or soldier under section 120 of the Act for wilfully giving false evidence before the court, or for committing the civil offence of making a false statement on oath or giving false evidence in the court, the proceedings of a Court of Inquiry, or any confession, statement or answer to a question made or given at such Court shall not be admissible in evidence against an officer or soldier nor shall any evidence concerning the proceedings of the court be given against any officer or soldier."

I am of the view that this provision does not debar the Court of Inquiry from receiving a confession (provided the adequate safeguards and cautions enjoined by the law have been observed) as contended by counsel for petitioner but only debars the use of such confession made before the Army Court of Inquiry in other proceedings against him.

On the petitioner's own averments in the petition he was arrested on 13.6.74. He was never restored to duty and thus never completed his services on the scheduled date of retirement on 21.7.74. Even though he stated he was never discharged from service X1 and X2 establish that he was duly informed of his discharge from service.

The question then poses itself whether he is entitled to a pension in the circumstances and whether he is entitled to a pension as of right. While no doubt he has been acquitted of the charge of misappropriation in the Magistrate's Court, Homagama on 26.7.78 (vide proceedings marked A), the First Army Court of Inquiry had already heard evidence and found him guilty four years earlier in 1974

(vide para 7 (*a*) of the respondent's statement of objection) and he had been informed of his discharge by X1 and X2 on 28.4.77 and 2.5.77 (vide affidavit filed by Major General Seneviratne on 9.5.86).

The substantial question that has arisen in this case is whether the petitioner has earned his right to a pension and whether the army is under a duty to pay him a pension as urged in para 18 of the petition and whether the petitioner has been denied his pension in contravention of the Army Act.

In this connection it is necessary to scrutinize sections 24 and 29 of the Army Act (Chapter 357 of the Legislative Enactments).

Section 24 stipulates:

> "Every member of the Regular Force and every officer or soldier not belonging to the Regular Force who is on active service shall be entitled to such pay and allowance, and to be quartered in such manner as may be prescribed."

Section 29 stipulates:

> "Any officer or soldier, or the widow or any child or other dependent of any officer or soldier, may be paid a pension or gratuity in such circumstances and at such rates as may be prescribed.".

A scrutiny of these two sections shows that "while a soldier is entitled to his pay, *he may be paid a pension*". The distinction in the use of language is significant and does not lend itself to the construction that a pension is a matter of right. It is not a right which is legally enforceable but remains a matter of discretion. Indeed the first section of the Minutes on Pension reads as follows:

> "Public Servants have no absolute right to any pension or allowance under that rule and the Crown retains the power to dismiss a public servant without compensation."

Section 2 of the Minutes on Pension provides that "a public servant *may* be awarded a pension and section 15 provides that the Secretary to the Treasury *may*, in *his discretion*, grant a pension, gratuity or other allowance". Tennekoon, C.J. in *Attorney-General v. Abeysinghe* (1) stated:

> "The expression 'no absolute right' to my mind means 'no legal right'."

It is a signal hoisted by the draftsman to indicate both to the beneficiaries under the Minutes on Pension and to the court that the Minutes are not to be taken as creating rights enforceable in the courts. The "no legal right" concept contained in section 1 of the Minutes is then reinforced by the text of rules 2 and 15 which contain the expression "may be awarded" and "may in his discretion grant". Tennekoon, C.J. quoted with approval the decision by Gratiaen, J. in *Gunawardane v. Attorney General* (2) that the Minutes on Pension merely regulates the administration of pension by those in whose hands that duty is placed and does not confer upon retired Government Servants any legal right in respect thereof. Vide also *Nixon v. Attorney-General* (3) where the House of Lords held that:

> "The word is so used so that an eject in any form may be negative. The action destroys the possibility of a claim of legal right."

Towards the conclusion of his submission and reply the counsel for the petitioner conceded in view of the above decisions quoted by the learned Deputy Solicitor-General that pension is not a matter of right but contended that it should not be arbitrarily denied. In the instant case, the petitioner was charged before the First Army Court of Inquiry held in 1974 and found guilty of misappropriation; rigid rules of discipline, conduct and integrity must necessarily be enforced amongst army personnel; his pension has in the circumstances been refused to him. This court sees no reason to quash the decision not to pay him a pension nor can it enforce payment by way of Mandamus. As stated by Tennekoon, C.J. in *Attorney General v. Abeysinghe (supra)* (1) quoted earlier:

> "To do so would be a mere brutum fulmen as the payment of pension is entirely discretionary and the decision of the Secretary to the Treasury in the context of section 1 of Minutes on Pension is taken in the exercise of a purely administrative discretion which the courts have no jurisdiction to control."

The application of the petitioner for Writs of Certiorari and Mandamus is accordingly dismissed with costs fixed at Rs. 210.

ABEYWIRA, J. – I agree.

Application for writs refused.