

BRIGADIER LIYANAGE
v.
CHANDRANANDA DE SILVA
SECRETARY,
MINISTRY OF DEFENCE AND OTHERS

SUPREME COURT
AMERASINGHE, J.
WIJETUNGA J. AND
BANDARANAYAKE, J.
S. C. APPLICATION 506/99 (F. R.)
2nd NOVEMBER, 1999

Fundamental rights - Failure to promote the petitioner as a Major General - Article 12(1) of the Constitution.

The petitioner was suspended from duties until the hearing and determination of the "Embilipitiya disappearance case" and he was not considered for promotion pending the court case. Consequently, he was superseded by two other officers. After trial, he was acquitted. Thereafter, the Commander of the Army made a written recommendation to the Secretary, Ministry of Defence (the 1st respondent) that the petitioner be, inter alia, promoted to the rank of Major General with effect from 4th December, 1997 on a supernumerary vacancy on which date the two officers who had superseded the petitioner were promoted to the rank of Major General and thereafter be absorbed into the permanent cadre with effect from 10th February, 1999 on which date the High Court judgement was delivered. However, the petitioner was not promoted to the post of Major General on the ground that the promotion was not in the best interest of the Army since the petitioner failed to exercise due control over persons who were convicted by court.

The petitioner did occupy a place of authority in the chain of command. But so were others above and below him who were nevertheless promoted. There was also no explanation why a captain Chamarasinghe who had been indicted in the court was promoted with effect from 2nd June 1995 to the rank of temporary major.

Held :

The failure to promote the petitioner to the post of Major General as recommended by the Commander was unreasonable, irrational, arbitrary and in the circumstances violative of the petitioner's fundamental rights guaranteed by Article 12(1) of the Constitution.

Per Amerasinghe, J.

"The petitioner, as we have seen, was acquitted and in the eyes of the law is in no worse position than those other persons who were in the chain of command."

APPLICATION for relief for infringement of fundamental rights.

Romesh de Silva, P. C. with Palitha Kumarasinghe and Hiran de Alwis for the petitioner.

Shavindra Fernando, S.S.C. with Sanjay Rajaratnam S.S.C. and N. Pulle S. C. for respondents.

Cur. adv. vult.

November 25, 1999

AMERASINGHE, J.

The petitioner joined the Ceylon Army as a Cadet Officer in 1968. He was promoted to the rank of 2nd Lieutenant in August 1969 and through various ranks he was made a Brigadier in 1995. He has been the recipient of the following awards for exceptional services :

1. Ranawickrama Padakkama
2. Ranasura Padakkama
3. Uttama Seva Padakkama
4. North East operational Medal and Clasp V Rivi Resa Medal and Clasp.

In the annual appraisals by superior officers between 1962 and 1996 he received "above average" gradings. He has been described as an "asset to the Army" (1992 Major General

Daluwatte), "outstanding Officer" (Major General Namuni); it has been observed that he had "always brought good results" (1996 Major General Seneviratne). Additionally, in a letter dated 5th September 1999 marked as document A15, General Hamilton Wanasinghe, after describing the achievements of the petitioner, concludes that "with this record Brigadier Liyanage could easily be termed as an asset not only to the Army but the country as a whole".

However the petitioner was not promoted to the rank of Major General to the supernumerary vacancy in 1997 and as a Major General in the permanent cadre with effect from 10th February 1999. He states that the failure to promote him is "unreasonable", arbitrary and capricious and constitutes a violation of his fundamental rights guaranteed by Article 12(1) of the Constitution.

The respondents do not dispute the fact that the petitioner had an outstanding career in the Army. However, they maintain that in terms of Regulation 12 of the Army Officers' Service Regulations (Regular Force) 1992, the respondents were obliged to deny the petitioner his promotions.

Regulation 12 provides as follows :

(1) Promotion to the rank of Colonel and above shall be by selection. In the case of promotion to the rank of Colonel such promotion shall be given only to such substantive Lieutenant Colonel as is considered best qualified for such rank and appointment. In the case of promotion to the rank of Brigadier, such promotion shall be given only to such substantive Colonel as is considered best qualified for such rank and appointment.

(2) In the case of every such selection -

(1) the officer's past record of service; and

(2) the question whether his promotion is clearly in the best interest of the Army shall be considered.

The respondents maintained that the petitioner's promotion was denied him because it was in the best interest of the Sri Lanka Army to do so. They arrived at this conclusion on the basis that the petitioner had exercised insufficient control over his subordinates when he was serving in the Army as the Co-ordinating Officer of Ratnapura in 1989. Specifically, the matter of concern related to charges against the petitioner in the "Embilipitiya disappearances case". The petitioner was acquitted of all charges against him. Although the Attorney-General filed appeals in respect of certain persons, no appeal against the petitioner's acquittal was filed by the Attorney-General.

Although the petitioner was suspended from duties until the hearing and determination of the case referred to above, after his acquittal the Commander of the Army wrote to the Secretary, Ministry of Defense as follows:-

2. Since he has been acquitted by the High Court I have the honour to recommend his reinstatement in the Army and the appointment as the Quarter Master General with effect from 10 February 1999.

3. He was not considered for promotion pending the above Court Case and as a result was superseded by two officers namely Major General L. C. R. Goonawardena RSP USP ndc IG and Major General G. W. W. Perera RWP RSP psc. I therefore recommend that Brigadier R. P. Liyanage RWP RSP USP be promoted to the rank of Major General with effect from 04 December 1997 on a supernumerary vacancy on which date the above two officers were promoted to the rank of Major General and thereafter be absorbed into the permanent cadre with effect from 10 february 1999 on which date the High Court judgment was delivered."

The petitioner has pointed out that with effect from 11th February 1999, the petitioner functioned as Quarter Master General, a position normally held by an officer in the rank of

Major General. However, notwithstanding the recommendation of the Army Commander, (the 2nd respondent), the petitioner has not been promoted to the post of Major General. Learned Counsel for the respondents submitted that the promotion was not in the best interest of the Army since the petitioner had failed to exercise due control over persons who were convicted in the abovementioned court case. It was not in dispute that the petitioner was not in any way directly involved in the commission of the offences dealt with in the above case. The petitioner did occupy a place of authority in the chain of command. But so were others above and below him who were nevertheless promoted. For instance, Brigadier Vajira Wijeratne, the Provincial Commander who was his immediate superior was promoted to the rank of Major General in 1996. Two Battery Commanders who stood immediately below him namely, Major D. J. R. Rupasinghe and Major R. M. Piyatilake were also promoted. Major D. J. R. Rupasinghe was promoted with effect from 15th January 1996 and Major Piyatilake was promoted with effect from 6th June 1997 as temporary Lieutenant Colonels. Learned Counsel for the respondents sought to distinguish the cases of the Provincial Commander and the Battery Commanders on the basis that they were not indicted in the case referred to above. There is no explanation why Capt. K. V. V. Chamarasinghe, Detachment Commander who was an officer in charge of the Sevana Detachment and indicted in the court case was promoted with effect from 2nd June 1995 to the rank of temporary Major. This makes the failure of the respondents to treat the petitioner in an even handed manner arbitrary and capricious. The petitioner, as we have seen, was acquitted and in the eyes of the law is in no worse position than those other persons who were in the chain of command. Learned Counsel for the respondents submitted that the "disappearance case" had attracted international as well as local concern and that the miscreants must be seen to be suitably dealt with. There is no rational reason why the petitioner should be singled out from those who might be held accountable because of their

positions in the chain of command. Moreover one would have expected officers closer in rank to those found guilty in the case referred to above such as Battery and Detachment Commanders if the occupation of a place in the chain of command was a matter that called for punitive action.

Much reliance was placed by Learned Counsel for the respondents on the reports submitted by the Magistrate in connection with certain Habeas Corpus applications. Having examined the observations made by the Magistrate it is clear that the petitioner was not in any way directly implicated. Had the first respondent perused the reports of the Magistrate with caution and deliberation it should have been evident to him that the petitioner's blameworthiness was neither more nor less than that which was attributable to all those in the chain of command.

For the reasons set out above I am of the view that the failure to promote the petitioner to the post of Major General with effect from 4th December 1997 on a supernumerary vacancy and as Major General in the permanent cadre with effect from 10th February 1999 was unreasonable, irrational, arbitrary and capricious and in the circumstances was violative of the petitioner's fundamental rights guaranteed by Article 12(1) of the Constitution. I make order that the recommendations of the Commander of the Army dated 8th March 1999 addressed to the Secretary Defence (letter No. MSB/A. 6/1 dated 8th March 1999) be implemented. I further make order that the State shall pay the petitioner a sum of Rs. 50,000 as compensation and a sum of Rs. 5000 as costs.

WIJETUNGA, J. - I agree.

BANDARANAYAKA, J. - I agree.

Relief granted.