

**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 recording 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 කබා ගත නොහැකි බැවින් නිලධාරීන් දෙදෙනාම යුද්ධ හමුදා අධිකාරියෙන් ඉවත් කොට යුද්ධ හමුදා සේවයෙන් අස් කිරීමට අවශ්‍ය ඉදිරි කටයුතු සිදු කිරීමටද සෙනිව 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.