

KUMARA
v
MAJOR GENERAL LIONEL BALAGALLA AND OTHERS

COURT OF APPEAL
AMARATUNGA, J., AND
SRIPAVAN, J.
C.A. 1841/2000
JUNE 7, 2002

Army Act – Section 20 of the Act – Commander of the Army recommending that the services of soldiers who have completed the original period of 12 years be retained in service – Approval by Her Excellency given not on case by case basis – Period of extension not stipulated validly.

The Commander of the Army has sought an order from H.E the President to extend the services of soldiers who have not expressed their willingness to serve for a further period after the expiry of the initial period of twelve years for a period of three months commencing 1.5.1995. However, the Minute of the Secretary of Defence addressed to H.E. the President did not refer to the three month period. It says that the Commander had recommended that the service in terms of section 20 of the Army Act. The petitioner also fell into the category.

Held:

- (i) The President had not specified the period for which services may be extended. This is contrary to section 20 of the Army Act which says that the President must decide the period to which such prolongation can be made.
- (ii) For a proper or lawful exercise of statutory powers, there should not only be compliance with the substantive formal and procedural requirements laid down but also the fair and reasonable exercise of discretion by the Authority vested with such power.

Per Sripavan, J.

"Where an act or thing required by a section of a statute is a condition precedent, it would not be competent to a court to dispense with what the legislature has made the indispensable foundation of its jurisdiction. The duty of

court is to interpret the words in accordance, with the language used by the legislature and not to travel outside on a voyage of discovery.”

- (iii) When a power is exceeded or abused without authority the purported exercise is a nullity and cannot be allowed to stand. The power is in effect regarded as not having been exercised by the proper authority.

APPLICATION for a mandate in the nature of a writ of certiorari / writ of mandamus

J.C. Weliamuna with *Lavangie Weerapana* for petitioner.

A. Gnanathan. Deputy Solicitor General for respondents in CA 1841/01 & 1842/01

Rajiv Gunatilake, State Counsel for respondents in CA 1843/01

Cur.ad. vult.

July 24, 2002

K. SRIPAVAN, J.

At the commencement of the hearing all Counsel agreed that C.A.Applications 1824/2001 and 1843/2001 are identical to C.A. Application 1841/2001 and that the judgment in C.A. Application 1841/2001 would bind the parties in C.A. Applications 1842/2001 and 1843/2001 as well.

The petitioner having joined the Sri Lanka Army on 24th May 1988 as a soldier served as a Nursing Assistant till 1992. Thereafter he followed a Nursing Course for a period of 3 years at the Nursing Training School Anuradhapura offered by the Department of Health and promoted to the rank of Temporary Sergeant with effect from February 1997. Prior to following the Nursing Course the petitioner was required to sign a bond with the Sri Lanka Army agreeing to serve the Army for a period of five years on successful completion of the said course. The petitioner signed the said bond and completed the said bond and completed the said nursing course on 15th October 1995.

In terms of clause 2 of the Soldiers Service Regulations No 1 of 1994 (P3) the period of original enlistment of a soldier is 12 years of which he shall serve the first five years in the Regular Force and the remaining seven years in the Reserve unless otherwise ordered by the Commander of the Army. However clause 3 of the said Regulation provides for a re-engagement of a soldier for a further period of military service in the Regular Force, not exceeding 12 years subject to the proviso referred to in the said clause.

The petitioner's original enlistment period as referred to in clause 2 of P3 lapsed on 23rd May 2000 and he was informed by letter dated 8th September 2000 that the original period of enlistment has been extended by one year till 9th September 2001. Since the petitioner was legally bound to serve the Sri Lanka Army for a period of 5 years on successful completion of the Nursing Course, the petitioner appealed for a resignation in November 2000 as evidenced by P5 after the completion of the said five years. However the petitioner was informed by the 2nd respondent that the period of original enlistment has been further extended till 1st December 2001 (P6). The petitioner alleges that by P7 dated 12th December 2000 his lawyer informed the first respondent of his grievance. Subsequently on 5th March 2001 a reminder was sent to the first respondent as evidenced by P8. The petitioner alleges that he did not receive any replies to P7 and P8 and as such forwarded another letter dated 21st September 2001 (P9) to the first respondent through his lawyer requesting for his release from the service of the Sri Lanka Army. No reply was received to P9 as well. On 24th December 2001 a further letter was sent to the first respondent by the petitioner's lawyer. To the petitioner's surprise, he received a letter dated 30th October 2001 (P11) extending the period of original enlistment referred to in P6 till 1st January 2003.

The petitioner seeks, inter alia,

- (a) a Writ of Certiorari to quash the decisions contained in the letters marked P4, P6 and P 11; and
- (b) a Writ of Mandamus compelling the 1st to 3rd respondents to release the petitioner and/or accept the resignation of the petitioner.

Learned Deputy Solicitor General appearing for the respondents strenuously contended that Her Excellency the President acting under section 20 of the Army Act granted the approval for prolongation of the service of the petitioner on completion of the 12 years period of his original enlistment and relied on the letter marked 1R1 dated 26th May 1995. The learned Deputy Solicitor General re-iterated the position taken up by the first respondent in paragraphs 7, 10 and 11 of his affidavit dated 26th May 2002 and submitted that the petitioner's service after the lapse of the original enlistment was not a re-engagement in terms of clause 3 of P3 but a prolongation of service.

I am unable to agree with the submissions made by the learned Deputy Solicitor General. Section 20 of the Army reads as follows:

“Where the time at which a soldier is entitled to be discharged from the army occurs during the period when the whole or any part of the army is on active service, the President may by order prolong the service of that soldier in the army for such period.”

The question to be asked is whether the aforesaid provision provides a blanket prolongation of the services of the soldiers in the army by the letter marked 1R1 as submitted by the learned Deputy Solicitor General? There is much significance in the use of the words“..... prolong the service of that soldier in the army for such period” in Section 20.

In order to exercise the power given in Section 20 of the Army Act, it is my view that the following pre conditions must be satisfied:

- (i) the whole or any part of the army must be on active service;
- (ii) A decision has to be taken by her Excellency the President whether the prolongation of the service of that soldier is required; and
- (iii) If so, Her Excellency the President must decide the duration of the period to which such prolongation can be made.

Where an act or thing required by a section of a statute is a condition precedent, it would not be competent to a court to dis-

pense with what the legislature has made the indispensable foundation of its jurisdiction. The duty of the Court is to interpret the words in accordance with the language used by the legislature and not to travel outside on a voyage of discovery. Thus, it appears that Her Excellency the President has to consider the prolongation of service of each and every soldier on a case by case basis.

At the hearing on 17.06.2002, the Court directed the learned Deputy Solicitor General to produce for the perusal of Court the following documents:

- (i) the Army Commander's letter of 25.04.95 referred to in the document marked 1R1: and
- (ii) the orders made by Her Excellency the President in terms of section 20 of the Army Act in respect of the petitioners in this application and in application Nos 1842/2001 and 1843/2001 as well.

The learned Deputy Solicitor General produced the Army Commander's letter dated 25.04.95 and not the orders made by Her Excellency the President in terms of Section 20 of the Army Act in respect of each of the petitioners. All that the Court can do is to see whether the power which the learned Deputy Solicitor General claimed under Section 20 of the Army Act has in fact been exercised by Her Excellency the President.

By letter dated 25.4.1995 the Commander of the Army has sought an order from Her Excellency the President to extend the services of soldiers who have not expressed their willingness to serve for a further period after the expiry of the initial period of 12 years, for a period of 3 months from 01.05.1995. However the minute of Secretary Defence addressed to Her Excellency the President does not refer to the period of 3 months set out in the Commander's letter of 25.4.95. It says that the Commander has recommended that the services of soldiers who have completed their original enlistment period of 12 years be retained in service in terms of Section 20 of the Army Act.

Her Excellency the President has approved this. This is an approval given without considering the case of each soldier on a case by case basis. The President has not specified the period for which services may be extended and according to the letter of

Additional Secretary, Defence dated 21.6.1995 addressed to the Commander of the Army, services may be extended up to any period. This is contrary to Section 20 of the Army Act which says that the President must decide the period to which such prolongation can be made.

For the proper or lawful exercise of a statutory power, there should not only be compliance with the substantive formal and procedural requirements laid down, but also the fair and reasonable exercise of discretion by the Authority vested with such power. In the absence of any order made by Her Excellency the President in terms of Section 20 of the Army Act, prolonging the petitioner's service after the lapse of the period of original enlistment, this Court cannot arrive at a finding that the documents P4, P6 and P11 were in fact communications made after an order made by Her Excellency the President.

When a power is exceeded or abused without authority, the purported exercise is a nullity and cannot be allowed to stand. The power is in effect regarded as not having been exercised by the proper Authority.

In view of the foregoing, a Writ of Certiorari is issued to quash the decisions contained in the documents marked P4, P6 and P11 in so far as it relates to the petitioner. Since the petitioner's period of original enlistment has expired, he cannot be re-engaged for a further period of military service in the Regular Force. Hence, a Writ of Mandamus is issued directing the first and second respondents to release the petitioner from the service of the Sri Lanka Army.

As agreed by all counsel, this order would bind the respective parties in CA Applications 1842/2001 and 1843/2001. I make no order as to costs.

AMARATUNGA , J. - I agree.

Application allowed.