FLYING OFFICER RATNAYAKE
v
COMMANDER OF THE AIR FORCE AND OTHERS

COURT OF APPEAL
SRIPAVAN, J.
SISIRA DE ABREW, J.
CA 104/2005
JANUARY 11, 2007

Air Force Act – Section 133(1)e – Misappropriation of Funds – Court of Inquiry – Charge sheet – Summary trial – Dismissed from service – Can an officer be dismissed without being convicted by a Court Martial? Commission withdrawn – Futility of the application? Error on the face of the record – Natural Justice.

The petitioner a flying officer attached to the Air Force sought writs of *certiorari/mandamus* to quash the decision of the 1st respondent recommending the withdrawal of the commission and to direct the respondents to hold a Court Martial.

The petitioner contended that, he was summoned before a Court of Inquiry to record a statement regarding alleged malpractices in the Service Institute Fund and thereafter was served with a charge sheet and a summary trial was held and at the summary trial the petitioner requested a Court Martial. The petitioner contended that, he was informed by the respondents that Her Excellency the President had approved the withdrawal of his commission. The petitioner's contention was that in terms of Section 133(1) 3 of the Air Force Act, an officer can be dismissed from service only upon a conviction by a Court Martial and that he was dismissed without being convicted by a Court Martial.

Held:

(1) The petitioner is an officer of the Air Force. In terms of Section 133(1) of the Act the dismissal of an officer from the Air Force can be done only upon a conviction by a Court Martial. The decision of the 1st respondent recommending the withdrawal of the commission has been made without following the procedure laid down in the law. If the statute which confers the power lays down how the power is to be exercised, the Court strikes down the action if the procedural requirement is disregarded. The decision of the 1st respondent regarding the withdrawal of the commission should be quashed.

Held further

(2) The 1st respondent in his resolution to withdraw the commission had stated that the Court of Inquiry had established that the petitioner had misappropriated funds, but according to the appeal of the 2nd respondent, the Court of Inquiry had only recommended to take disciplinary action – therefore it is safe to conclude that on the document recording withdrawal there is an error on the face of the record which led to violate the rights of the petitioner to continue his services in the Air Force.

Per Sisira de Abrew, J.

"Since Her Excellency the President has approved the withdrawal of the commission, it is futile to issue a writ of *mandamus* directing the respondents to hold a Court Martial afresh. This order does not prevent Her Excellency the President from reconsidering the withdrawal of the petitioner's commission, which was based on the reconsideration of the 1st respondent.

APPLICATION for writs in the nature of *certiorari* and *mandamus*.

Cases referred to:-

1. *Bardbury and others* v *Enfield London Borough Council* 1967 1 WLR 1311 at 1325.
2.. *Associated Provincial Picture House Ltd.* v *Wednesbury Corporation* 1948 1 KB 233 at 225

Shantha Jayawardane for petitioner.

Anusha Navaratne DSG with *Ganga Wakistaarachchi* SC for respondents.

Cur.adv. vult.

August 28, 2007

SISIRA DE ABREW, J.

This is an application for writs of *certiorari* and *mandamus* to quash the decision of the 1st respondent recommending the withdrawal of the Commission of the petitioner and to direct the respondents to hold a Court Martial in respect of the charges against the petitioner respectively.

The petitioner joined the Sri Lanka Air Force on 1.8.97 as an officer in the rank of cadet officer. On 12.6.2001 the petitioner was promoted to the rank of "Flying Officer." On 25.4.2004, the petitioner was informed by the Scott Officer that a Court of Inquiry had been appointed to investigate into the malpractices in Service Institute Fund of the Katunayake Air Base. The petitioner was summoned before the said Court of Inquiry in order to record his statement. He appeared before the said Court of Inquiry on 27.4.2004 and 28.4.2004 and made his statement. After recording of the said statement, the petitioner was placed under 'close arrest' and thereafter under 'open arrest'. On 12.8.2004 the petitioner was served with a charge sheet containing nine charges. On 13.8.2004 a summary trial was held against the petitioner and the petitioner pleaded not guilty to all nine charges. At the summary trial the petitioner requested for a Court Martial.

On 9.9.2004 the petitioner was served with a letter (P19) dated 2.9.2004 signed by the 2nd respondent. The said letter *inter alia* stated the following things:

(a) The Court of Inquiry convened to investigate into the misappropriation of Service Institute Funds has established that the petitioner had misappropriated the said funds to the total of Rs. 428,841/-;

(b) As the petitioner opted to be tried by a Court Martial, action is taken to proceed with the same on meeting the legal requirements of recording summary of evidence;

(c) That the petitioner was required to show cause on or before 15.9.2004 as to why disciplinary action even culminating with termination should not be initiated against the petitioner;

The petitioner submitted his reply to the letter marked P19 denying the allegation of misappropriation. On 22.12.2004 the petitioner received a letter from the 2nd respondent stating that his reply had been disregarded by the Headquarters. The 2nd respondent, by his letter dated 23.12.2004 (P25), informed the petitioner that Her Excellency the President had approved the withdrawal of the commission of the petitioner with effect from 1.12.2004. The petitioner states that the withdrawal of the said commission of the petitioner was based on the recommendation of the 1st respondent. He therefore seeks a writ of *certiorari* to quash the decision of the 1st respondent recommending the withdrawal of the said commission. This decision of the 1st respondent has been produced by the respondents along with their objections marked 2R8(a).

The main contention of learned Counsel for the petitioner was that in terms of Section 133(1)(e) of the Air Force Act (hereinafter referred to as the Act), an officer can be dismissed from service only upon a conviction by a Court Martial and the petitioner had been dismissed from service without being convicted by a Court Martial. Learned Counsel contended that the respondents had failed to appoint a Court Martial. The learned DSG for the respondents on the other hand argued that the application filed by the petitioner was futile as the petitioner's commission had already been withdrawn. Learned Counsel for the petitioner in reply to the said contention submitted that he would abandon paragraph (b) of the prayer to the petition and that he would confine himself to the reliefs sought in paragraphs (c) and (d) of the prayer to the petition. In view of this submission by the learned Counsel for the petitioner, the contention with regard to futility need not be considered.

It is an undisputed fact that a Court Martial was not held in this case against the petitioner in respect of the nine charges leveled against him. The 2nd respondent, in paragraph 21 of his affidavit, admits that the petitioner at the conclusion of the Summary Trial requested that he be tried by a Court Martial. Further the 2nd respondent, in his letter P19, too admitted that action would be taken to appoint a Court Martial. But no evidence was placed before this Court to establish that a Court Martial was appointed.

Section 133(1) of the Act reads as follows:

Subject to the provisions of Section 134, the following shall be the scale of punishments, in descending order of severity, which may be inflicted on officers convicted of offences by Courts Martial:

(a) death;

(b) rigorous imprisonment;

(c) simple imprisonment;

(d) cashiering;

(e) dismissal from the Air Force;

(f) forfeiture, in the prescribed manner of seniority of rank, either in the Air Force or in the corps to which the offender belongs, or in both; or in the case of an officer whose promotion depends upon length of service, forfeiture of all or any part of his service for the purpose of promotion;

(g) severe reprimand or reprimand;

(h) such penal deductions from pay as are authorized by the Act;

The petitioner is an officer of the Air Force. No Court Martial was appointed even though the petitioner made such a request. The petitioner has not been convicted by a Court Martial. Under Section 133(1) of the Act, dismissal of an officer from the Air Force can be done only upon a conviction by a Court Martial. The petitioner in this case has been dismissed without the said requirement being complied with. The decision of the 1st respondent recommending the withdrawal of the commission of the petitioner contained in 2R8a has been made without following the procedure laid down in law. If the statute which confers the power lays down how the power is to be exercised, the Court would strike down the action if the procedural requirement is disregarded. In this connection, I would like to cite the following passage from the judgment of Danckwerts LJ reported in *Bradbury and Others* v *Enfield London Borough Council*[1] at 1325. "It is imperative that the procedure laid down in the relevant statute should be properly observed. The provisions of the statute in this respect are supposed to provide safeguards for Her Majesty's subjects. Public Bodies and Ministers must be compelled to observe the law; and it is essential that

bureaucracy should be kept in its place." Lord Denning MR in the above case observed thus; "If a local authority does not fulfill the requirements of the law this court will see that it does fulfill them. It will not listen readily to suggestions of 'chaos.' " Applying the principles laid down in the above judicial decision, I hold the view that the said decision of the 1st respondent recommending the withdrawal of the commission of the petitioner should be quashed.

Learned Counsel for the petitioner urged that the petitioner was not afforded an opportunity to state his defence before the 1st respondent proceeded to recommend the withdrawal of the commission of the petitioner. Having considered the pleadings of both parties I have to conclude that no Court Martial was held against the petitioner. The petitioner was not given an opportunity to state his case. In my view, the 1st respondent has made the recommendation to withdraw the commission of the petitioner without following the procedure laid down in law and the rules of Natural Justice. When a Public Officer takes decisions affecting the rights of an individual without following the procedure laid down in law and/or rules of Natural Justice such decisions could be termed as unreasonable decisions.

Lord Greene M R in the case of *Associated Provincial Picture House Ltd.* v *Wednesbury Corporation*[2] at 229 stated thus: "It is true that discretion must be exercised reasonably. Now what does that mean? Lawyers familiar with the phraseology used in relation to exercise of statutory discretions often use the word 'unreasonable' in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that must not be done. Foe instance, a person entrusted with discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting unreasonably."

In the present case the 1st respondent proceeded to recommend the withdrawal of the Commission of the petitioner without following the procedure so laid down in law and the rules of Natural Justice. I therefore hold that the decision of the 1st

respondent contained in 2R8(a) is unreasonable. The decision of the 1st respondent should be quashed on the ground of unreasonableness too.

The 1st respondent, in his recommendation to withdraw the Commission of the petitioner [2R8(a)] stated that the Court of Inquiry, appointed to investigate into the allegation levelled against the petitioner, had **established** that the petitioner had mis-appropriated service Institute Funds to the total of Rs. 428,841/-. But according to the affidavit of the 2nd respondent filed before us, the Court of Inquiry had only **recommended** to take disciplinary action against the petitioner since there was a *prima facie* case against him. (Vide paragraph 19 j of affidavit of the 2nd respondent). Then the above recommendation of the 1st respondent does not appear to be correct. Thus it is safe to conclude that on the document marked 2R8(a) there is an error on the face of the record which led to violate the rights of the petitioner to continue his services in the Air Force. A writ of *Certiorari* quashing the recommendation of the 1st respondent should be issued on this ground as well.

For the reasons set out in my judgment, I issuing a writ of *certiorari*, quash the decision of the 1st respondent contained in 2R8(a) recommending the withdrawal of the Commission of the petitioner. Since Her Excellency the President has approved the withdrawal of the petitioner's Commission, it is a futile exercise to issue a writ of *mandamus* directing the respondents to hold a Court Martial afresh. The writ of *mandamus* sought in terms of paragraph (c) of the prayer to the petition is therefore refused. This order does not prevent His Excellency the President from reconsidering the withdrawal of the petitioner's Commission, which was based on the recommendation of the 1st respondent.

SRIPAVAN, J. -I agree.

Application for writ of certiorari allowed.