

**IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA**

In the matter of an application under Article 126  
of the constitution of the Democratic Socialist  
Republic of Sri Lanka

Major K.D.S. Weerasinghe,

No. 100/2, Wewatenna Road,

Ampitiya, Kandy

**Petitioner****SC /FR/ Application No 444/2009**

Vs,

1. Colonel G.K.B. Dissanayake,  
Colonel Coordinator (Volunteer)  
Volunteer Force Headquarters,  
Shalawa,  
Kosgama.
2. Major General Sumith Balasooriya,  
Commander of the Sri Lanka Army,  
Volunteer Force Headquarters,  
Akuregoda,  
Pelawatte,
- 2A. Major General H.C.P. Gunathilake,  
Commander of the Sri Lanka Army,  
Volunteer Force Headquarters,  
Akuregoda,  
Pelawatte,
3. Brigadier Padumadasa,  
Military Secretary,  
Army Headquarters,  
Colombo 02.
- 3A. Major General M.U.M.M.W. Senanayake,  
Military Secretary,  
Army Headquarters,  
Colombo 02.

4. General Sarath Fonseka,  
Commander of the Ari Lanka Army,  
Army Headquarters,  
Colombo 02.
- 4A. Lt. General Jagath Jayasuriya,  
Commander of the Ari Lanka Army,  
Army Headquarters,  
Colombo 02.
- 4B. Lt. General A.W.J.C. de Silva,  
Commander of the Ari Lanka Army,  
Army Headquarters,  
Colombo 02.
5. Gotabhaya Rajapaksha,  
Secretary of the Ministry of Defence,  
Colombo 03.
- 5A. B.M.U.D Basnayake,  
Secretary of the Ministry of Defence,  
Colombo 03.
- 5B. Karunasena Hettiarachchi,  
Secretary of the Ministry of Defence,  
Colombo 03.
6. Hon. Attorney General,  
Attorney General's Department,  
Colombo 12

### **Respondents**

**Before:** Eva Wanasundera PC J  
B.P. Aluwihare PC J  
Vijith K. Malalgoda PC J

**Counsel:** Saliya Peiris PC with Thanuka Nandasiri for the Petitioner  
Suren Gnanaraj State Counsel for the Respondents

Argued on: 17.07.2017

**Judgment on:** 31.10.2017

**Vijith K. Malalgoda PC J**

Petitioner to the present application Keerthi Dilruk Somasiri Weerasinghe had filed this application alleging that his Fundamental Rights guaranteed under Articles 12 (1), 13 (3) and 13 (5) had been violated by the Acts committed by the 1<sup>st</sup> to the 5<sup>th</sup> Respondents. When this matter was supported, having heard the submissions made on behalf of the Petitioner, this court had granted leave to proceed for the alleged infringement of Articles 12 (1) and 13 (3) of the Constitution.

The Petitioner who had joined the Sri Lanka Volunteer Force as a “Cadet Officer” on 14.02.1986 was commissioned in the rank of ‘Second Lieutenant’ with effect from 27.06.1986. Thereafter he was promoted to the ranks Lieutenant, Captain and Major on 27.06.1989, 01.12.1992 and 12.01.1995 respectively.

At all times material to the present application the Petitioner was an officer in the rank of Major of the Sri Lanka Volunteer Force.

According to the Petitioner, he had faced a ‘Summary Trial’ on 30.08.2006 held against him on three charges punishable under sections 102 (1), 129 (1) and 115 (a) of the Army Act No 17 of 1949. The Petitioner had pleaded guilty to all three charges leveled against him and was punished with a reprimand and a forfeiture of pay. However, apart from the said punishment imposed on the Petitioner, the then Commander of the Army ordered the discharge of the Petitioner from service by a directive dated 29.08.2006. The Petitioner had gone before the Court of Appeal and a Writ Application was filed against the said decision of the then Commander of the Army seeking inter alia, a Writ of *Certiorari* quashing the said decision.

When the said application was taken up for argument on 21.01.2008 the court made the following order;

“Ms. Anusha Samaranayake Senior State Counsel appearing for the Respondents informs that the 1<sup>st</sup> Respondent is withdrawing the impugned document marked P-3 without prejudice to the rights of the 1<sup>st</sup> Respondent to take action, if any, under the provisions of Act No 17 of 1949 and the

regulations framed there under. Therefore, there is no purpose in proceeding with this application. The proceedings are terminated.”

As further submitted by the Petitioner, he was summoned before a Court of Inquiry presided over by the 1<sup>st</sup> Respondent somewhere in October 2008 in order to record a statement. During the said Court of Inquiry a statement was recorded from the Petitioner with regard to five payments made by way of cheques signed by him and one payment made in cash during the period from 06.01.2002 to 30.04.2005 as the Officiating Commanding Officer of the 2<sup>nd</sup> Battalion Sri Lanka National Guard.

In this regard the Petitioner had further taken up the position that he was never treated as a suspect during the said Court of Inquiry and permitted him to cross examine the witnesses who testified at the said inquiry. However the Petitioner had further taken up the position that, at one stage the 1<sup>st</sup> Respondent summoned three witnesses before him and told the Petitioner to cross examine them but, the Petitioner could not cross examined any of the witnesses without knowing the nature of their evidence.

The Petitioner’s complaint before this court is based on P-9 which is the decision of the 4<sup>th</sup> Respondent based on the findings of the Court of Inquiry referred to above. As referred to in P-9 the 4<sup>th</sup> Respondent had decided to take stern disciplinary action by forwarding charges and taking steps to recover the monies and to dismiss the Petitioner from the Sri Lanka Volunteer Force.

The present application is filed before the Supreme Court by the Petitioner Challenging the said decision of the 4<sup>th</sup> Respondent to dismiss him from the Sri Lanka Volunteer Force. As submitted by the Petitioner, steps had been taken to dismiss him from the Sri Lanka Volunteer Force and in support of his contention the Petitioner had produced marked P-13 a communication sent in order to obtain the name of a suitable replacement for the position held by the Petitioner.

As revealed before us, when the then Commander took a decision with regard to the findings of the summary trial, to discharge the Petitioner from the Sri Lanka Volunteer Force, the proceedings of the writ application filed against the said decision was abetted on the undertaking that “without prejudice to the rights of the 1<sup>st</sup> Respondent to take action, if any under the provisions of the Army Act No 17 of 1949 and the regulations framed there under.” Thereafter a statement had been recorded from the Petitioner with regard to certain payments at the 2<sup>nd</sup> Battalion Sri Lanka

National Guard but no proper Court of Inquiry was held against the Petitioner under the provisions of the Court of Inquiry Regulations. However based on the findings of the said Court of Inquiry, steps are being taken to dismiss the Petitioner from the Sri Lanka Volunteer Force without following the proper disciplinary procedure.

In response to the above position taken by the Petitioner before us, the Respondents whilst denying that the Respondents have taken steps to dismiss the Petitioner without following proper disciplinary procedure with regard to the payments made at the 2<sup>nd</sup> Battalion, had further submitted before us, that,

- a) The then Commander of the Sri Lanka Army acting under Regulations 2 of the Army Disciplinary Regulations 1950 submitted a letter to the secretary to the Ministry of Defence, Public Security, Law and Order on 27.12.2008 seeking a direction pertaining to the further retention of the Commission of the Petitioner. (4R3)
- b) In the said letter the then Commander had explained the past disciplinary record of the Petitioner, including the action taken against him and the outcome of the Writ Application which was pending before the Court of Appeal filed by the Petitioner.
- c) There were several communications between the Army Head Quarters and the Ministry of Defence prior to any decision was taken against the Petitioner.
- d) By letter dated 29.04.2009 the Secretary to the Ministry of Defence, Public Security, Law and Order had informed the then Commander of the Army, that His Excellency the President has approved the withdrawal of the Commission of the Petitioner with effect from 31.03.2009. (4R4)
- e) Findings of the Court of Inquiry with regard to Financial Transactions at the 2<sup>nd</sup> Battalion referred to by the Petitioner in the present application, does not have any bearing with the withdrawal of the Commission of the Petitioner.

It was further revealed during the arguments before us, that the 4<sup>th</sup> Respondent who is the Commander of the Army does not have any power or authority to withdraw the Commission of an Officer and it is only His Excellency the President is vested with power to approve the withdrawal of the Commission of an Officer of the Sri Lanka Army under section 10 of Army Act No 17 of 1949.

Regulation 2 of the Army Disciplinary Regulations 1950 provides that “the Commander of the Army shall be vested with the general responsibility for discipline in the Army” and in the case in hand

the Commander acting under the above provision had sought a direction from his Excellency the President regarding the further retention of Petitioner.

As revealed before us, the above conduct of the Commander of the Army when seeking a directive from his Excellency the President was an independent act and was done for the best interest of the Army, in order to maintain the discipline of the Army.

In the said circumstances it is clear that the decision to withdraw the Commission and to dismiss the Petitioner from the Sri Lanka Volunteer Force was taken by the then Commander of the Army by following the provision of the Army Act No 17 of 1949 and the Regulations framed there under and the said decision was not reached, as alleged by the Petitioner in violation of the provisions of the Army Act No 17 of 1949 and the Court of Inquiry Regulations promulgated under the said Act.

When considering the matters referred to above, I am reluctant to agree with the submissions placed on behalf of the Petitioner in support of his case. I see no reason to hold that the Fundamental Right of the Petitioner guaranteed under Article 12 (1) and 13 (3) had been infringed by the 1<sup>st</sup> to 5<sup>th</sup> Respondents or any one or more of them. I therefore make order dismissing this application but make no order with regard to costs.

**Judge of the Supreme Court**

**Eva Wanasundera PC J**

**I agree,**

**Judge of the Supreme Court**

**B.P. Aluwihare PC J**

**I agree,**

**Judge of the Supreme Court**