IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

In the matter of an application for writs in the nature of Certiorari, Mandamus and Prohibition under Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

L. t. Col. Y. P. P. Kumara

No. 161, Duhena Watta.

Dodampahala (Central),

Dickwella.

PETITIONER

CA. Writ App. No. 381/2022

Vs.

1. Lt. Gen. H. L. V. M. Liyanage
   Commander of the Sri Lanka Army, Army Headquarters, Colombo 03.

2. Maj. Gen. D. B. S. N. Bothota
   Military Secretary, Army Headquarters, Colombo 03.

3. Brig. H. T. W. Vidyaananda
   Centre Commandant,
   Gajaba Regiment,
   Saliyapura, Anuradhapura.

4. Gen. G. D. H. Kamal Gunarathne (Retd)
   Secretary, Ministry of Defence, No. 15/5, Baladaksha Mawatha, Colombo 03.

5. Maj. Gen. T. J. Kodithuwakku

6. Maj. Gen. C. D. Weerasuriya

7. Maj. Gen. S. U. M. N. Manage

8. Maj. Gen. R. A. D. P. Ranawaka

9. Maj. Gen. D. M. K. D. B. Pusella

10. Maj. Gen. D. B. S. N. Bothota

11. Maj. Gen. A. C. Lamahewa

12. Maj. Gen. W. B. S. M. Abeysekara

13. Maj. Gen. M. A. W. W. W. M. C. B. Wickramasinghe

14. Brig. K. D. M. L. Samaradiwakara

    5th to 14th Respondents all of Sri Lanka Army, Sri Lanka Army Head Quarters, Battaramulla.

15. Brig. A. M. G. P. S. K. Abeysinghe
    Director Army Pay and Records;
    Army Cantonment,
    Panagoda,
    Homagama.

16. Major R. M. L. U. A. Rathnayaka
    Commanding Officer
    Headquarters Battalion,
    Gajaba Regiment,
    Saliyapura, Anuradhapura.

RESPONDENTS

Before : Sobhitha Rajakaruna, J.

Dhammika Ganepola, J.

Counsel	:	Shantha Jayawardena for the Petitioner. Sehan Zoysa S.C. for the Respondents.
Argued On	:	12.07.2022
Written Submission tendered On	:	Petitioner : 31.08.2023 1st to 6th Respondents : 14.08.2023
Decided On	:	24.10.2023

Dhammika Ganepola, J.

The Petitioner serves at the Regimental Headquarters of the Gajaba Regiment as a Lieutenant Colonel of the Sri Lanka Army. He had been confirmed in the rank of Lieutenant Colonel on 30.12.2010. The Petitioner states that he has been consistently categorised as "above average" in his annual confidential reports. However, it is claimed that the Petitioner had not been considered for his promotion to the rank of Colonel on three consecutive occasions. Consequently, the Petitioner had submitted the Redress of Grievance (ROG) dated 14.07.2020 (P22) whereby the Petitioner has requested that the entry-maintained pertaining to the relevant incidents against his personal records at the Military Secretary Branch be cleared since it could be an impediment to his future career progression. Accordingly, after considering the said ROG submitted by the Petitioner and giving a hearing to the Petitioner the Army Advisory Board by P30 has recommended that the Petitioner could not be promoted to the rank of Colonel as the Respondents state the service record of the Petitioner was tainted with six disciplinary breaches. Thereafter upon receiving the letter marked P39 on 08.04.2022, the Petitioner had been informed that the Commander of Sri Lanka Army has recommended his retirement following the conclusion of his service extension. The Petitioner states that;

a. The Petitioner had not been guilty of any offence.
b. It is only the President who can persuade an officer to retire, and no other officer has such authority.
c. The aforesaid decision does not fall under the purview of Section(1)(b) of the Army Pensions and Gratuities Code of 1981.

d. The impugned decisions are arbitrary, unfair and has no basis whatsoever and, in any event, tainted with malice.
e. The army granting him service extension on the premise that his services were required for the best interest of the Army cannot deprive him the promotion to the rank of temporary Colonel.
f. No fair hearing has been given to the Petitioner prior to arriving at the impugned decisions.

Accordingly, the Petitioner seeks,

a. *Writs of Certiorari* quashing the decisions reflected in documents marked P30, P39, and P41, and decisions of Army Selection Board No. 1 and Army Advisory Board to not promote the Petitioner to the rank of Temporary Colonel,
b. *Writs of Mandamus* compelling the Respondents to confirm the Petitioner to the rank of Temporary Colonel with effect from 29.09.2020 and confirm the Petitioner in the rank of Colonel with effect from 12.11.2018,
c. *Writs of Prohibition* prohibiting the Respondents from sending the Petitioner on retirement from Sri Lanka Army without being promoted to the rank of Temporary Colonel with effect from 29.09.2020 and prohibiting Respondents from sending the Petitioner on retirement from Sri Lanka Army without being promoted to the rank of Colonel with effect from 12.11.2020.

The Respondents contend that in view of the number of vacancies and the fierce competition for high-ranking positions in the Army, the Petitioner's past record of service will be compared with other eligible officers in the same seniority in considering him for the promotions. As the disciplinary record of the Petitioner was poor and was not up to the expected standard, the Petitioner had not been recommended to the rank of Colonel by three consecutive Army Promotion Boards convened on 29.09.2020, 27.01.2021 and 10.05.2021. The last Promotion Board convened on 10.05.2021 recommended the Petitioner's retirement due to exceeding the number of maximum permissible service extensions in the Sri Lanka Army.

The selection criteria for the rank of Colonel are stipulated in Regulation No.12 of the Army Officers Service Regulations 1992 (R15). Said Regulation No. 12 reads 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 an appointment. In the case of promotion to the rank of Brigadier such promotion Shal be given only to such substantive Colonel as is considered best qualified for such rank and appointment.
(2) In the case of every search selection-

(a) The officer's past record of service; and

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

Therefore, it is apparent that the appointment to the rank of Colonel or Brigadier is not as of right but is at the discretion of the Army Promotion Board appointed for such purpose and the Commander of the Army. During his career, the Petitioner has been awarded Poorna Boomi, North and East Operational Medal, Desha Puthra and Reviresa Medals for his services rendered and he has completed several other military training courses. Said career progression of the Petitioner has not been challenged by the Respondents. Several service extensions have also been granted to the Petitioner by the Commander of the Sri Lanka Army. It may be a legitimate argument for one to raise that such service extensions would not have been granted to the Petitioner unless the Commander of the Sri Lanka Army was satisfied that the granting of such extensions was in the best interest of the Army.

The principal submission of the Respondents is that the Petitioner's poor disciplinary record, based on which all three Army Promotion Boards decided not to recommend him for a higher rank is far away from the standards required. The Respondents contended that the Petitioner has been punished and was warned for the breach of discipline on six occasions. It is the position of the Petitioner that even though the Petitioner was subjected to a one-year probation period and several warnings, such a probation and/or warnings would not amount to a bad disciplinary record as it is factually incorrect and could not affect his promotion to the rank of Colonel. Therefore, it is appropriate to examine the Petitioner's alleged bad disciplinary record. Anyhow I am mindful of the importance of discipline in the Army and the duties and responsibilities left with the Commander of the Army in controlling such. In this regard, I am inspired by the words of Justice Sripavan (as he was then) mentioned in the *Wikramarathne Vs. Commander of the Army and others CA (Writ) Application No.800/2006 CA Minutes of 07th January 2008*.

> *"In service matters, the first respondent should be left with a free hand to make decisions with regard to the internal administration of the army in the interest of efficiency, discipline, exigencies of service etc. The court cannot interfere with the appointment of promotion unless the first respondent has acted unlawfully, arbitrarily or guided by ulterior considerations which discriminatory or unfair."*

Also, I would like to draw attention to the following passage of *His Lordship Justice Mahinda Samayawardhena in Jagath Kumara Imaduwa Vithane Vs. Commander, Sri Lanka Army, CA/WRIT/354/2015* decided on 25.03 2019 [also reported in 2019 (2) Sri LR 391].

> *"The discipline of the army is paramount importance and shall be best left to the commander and not to the court to deal with. If there is no discipline, there is no army. The court in the exercise of writ jurisdiction will not interfere with the internal administration of the Army, which includes taking disciplinary decisions unless there are compelling cogent reasons such as decisions are ex facie ultra vires, unlawful and arbitrary to do so."*

Therefore, in the light of the above decisions and circumstances of this case Court shall not interfere with the findings of the Army Promotion Board unless this Court is satisfied that the discretion vested with such Board and the Commander of the Army has been exercised unreasonably and/or wrongfully and /or that there has not been a proper consideration of the materials relating the Petitioner.

Alleged Disciplinary Breach No. 01- Affair with a female soldier- P11/R4

It is stated that the Petitioner was having an inappropriate affair with a female soldier while he was serving at Valaichchena Camp in 2001. Based on such an allegation there had been a summary trial against the Petitioner and finally, the Petitioner had been discharged from all the charges pertaining to the charges as contained in P11/R4 due to insufficient evidence. As the Petitioner was discharged from the charges therein it would not be reasonable to hold such incident against the Petitioner after 20 years from the incident.

However, the Respondents contend that although the Petitioner was discharged from the said charges as contained in P11/R4, he was subjected to a probation period of one year from 23.04.2005 for having an alleged unnecessary friendship with a female soldier on the same proceedings. Upon perusal of the documents P11/R4, it appears that such a probation period had been imposed on the Petitioner without any charge sheet being issued, without giving a fair hearing to the Petitioner or without pursuant to a summary trial. Such period of probation, in any event, lapsed on 22.04.2006. It is also observed that despite such an alleged breach of the disciplinary code, the Petitioner was confirmed in the rank of Major on 30.06.2007 and in the rank of Lieutenant Colonel on 30.12.2010. It is observed that irrespective of imposing a such probation period on the Petitioner, document P11 specifically provides that the Petitioner has been discharged from the charges levelled against him as there had been no evidence to prove such charges. Therefore, in view of P11, the Petitioner has not committed any breach of discipline.

Irrespective of the same, the Army Advisory Board concluded that the Petitioner 'committed an offence' by having an extramarital affair with a female soldier (R10 and P30). Said Board decision stipulated in documents R10 and P30 as follows,

> "*The Board is of the considered opinion that as per the prima facia evidence of the Court of Inquiry, the senior officer has committed an offence for having an extramarital affair with a female soldier. Therefore, the Board does not recommend to clear him from the said allegation levelled against him.*"

Further, it is observed that the Board has decided that the Petitioner had committed an offence based on the evidence of the Court of Inquiry. The Court of Inquiry is a fact-finding inquiry. The decision to determine the committing of an offence merely based on the evidence placed before a Court of Inquiry, which has no jurisdiction to impose a punishment, would be illegal and ultra vires and aspect will be elaborated below. In the above premise, it is apparent that the Army Advisory Board had been misguided by facts

and law by concluding and recommending that the Petitioner has committed an offence of having an extramarital affair with a female soldier. Therefore, I am of the view that the decision of the Army Advisory Board not to recommend the Petitioner for his promotion is based on the misconception that the Petitioner committed an offence.

Alleged Disciplinary Breach No. 2- Assault of a Soldier- P12/R6

The Petitioner was alleged to have assaulted a soldier on 20.10.2001 during a night guard inspection and accordingly, he had been summarily tried. At the trial, the Petitioner has pleaded guilty(P12/R6) and accordingly, the Petitioner has been warned. However, by Order P21 issued on 05.01.2018, the Commander of the Army has approved the recommendation of the Advisory Board to consider the career progression of certain officers who were penalized for assault-related offences. It is observed that the Petitioner's name is also included in said Order P21 with the number of other high-ranking officers. Said Order P21 has been admitted by the Respondents in their limited Statement of Objections. Hence, I am of the view that in view of Order marked P21, the warning issued on the Petitioner in respect of the impugned incident cannot stand as an impediment in considering the eligibility of the Petitioner for his promotion.

Alleged Disciplinary Breach No.3 - Assault of a Civil Officer- R5

It has also been stated that the Petitioner was accused of assaulting a civilian staff on 20.10.2004. However, as per the document R5 submitted by the Respondents, it is evident that the Petitioner has not committed any offence which would amount to framing charges against and trying the Petitioner. It even appears that no warning was issued against the Petitioner on such an allegation. Therefore, it is unfair for the Army Advisory Board to consider such an incident as a disciplinary breach.

Alleged Disciplinary Breach No. 4 – Lack of supervision - P13/R7

As per the decision contained in document R7/P13, it has been directed to produce the Petitioner and another Major before the Commander of the Sri Lanka Army and warn about their lack of supervision on the matters pertaining to the commitment of fraud by a subordinate officer. Said warning has been issued on the Petitioner based on a report of a Court of Inquiry which was held against one Corporal Nishantha Kumara in respect of cheating and shortage of money in the Non-Commissioned Officers' mess at the Army Training School Madura Oya in 2010. There had been no summary trial or Court Martial held against the Petitioner in respect of the alleged misconduct. Said decision to warn the Petitioner has been arrived at merely based on a report of a Court of Inquiry held against some other officer. However, the Petitioner submits that an officer in the Army cannot be

punished by a Court of Inquiry, or based on an Order made upon the report of the Court of Inquiry as such Court of Inquiry is only a fact-finding forum.

Nevertheless, by the time the said decision R7/P13 was issued, the Petitioner was serving as the Administrative Officer of the said unit holding the rank of Major and the said warning against the Petitioner had been issued without issuing a charge sheet. As per Clause 8 of the P19 when an officer is to be warned without issuing a charge sheet based upon a Court of Inquiry report it must be specifically stated. Nevertheless, nowhere in the document R7/P13 it is stated as such. As per Clause 5 of the Instructions on the Imposition of Punishments to Army Officers marked P19, a warning issued without issuing a charge sheet to an officer in the rank of Major or below would not be considered as a punishment. Therefore, based on the circumstances of this case, I am of the view that the warning reflected in the R7/P13 which has been issued pursuant to the Court of Inquiry Report cannot be considered as a disciplinary breach that would stand in the way of granting the relevant promotion to the Petitioner.

Alleged Disciplinary Breach No. 5 – Irresponsible and careless conduct as a Chairmen of the Technical Evaluation Committee - R8

The Petitioner was warned based on a report of a Court of Inquiry for the irresponsible and careless conduct of the Petitioner as the Chairman of the Technical Evaluation Committee appointed to purchase forty dishwashing machines in 2016. As per the decision contained in R8, it has been directed to produce the Petitioner before the Commander of the regiment and to be strictly warned.

There was no summary trial or Court Marshal held against the Petitioner in respect of such allegations and no charge sheet had been issued against the Petitioner. As per Clause 8 of the P19 when an officer is to be warned without raising a charge sheet based upon a Court of Inquiry report it must be specifically stated. Nowhere in R8, it has been mentioned as such.

In both the above instances (*Alleged disciplinary breach No.* 4 and 5), the Petitioner had been warned based on the findings of the Courts of Inquiry. The Petitioner submits that an officer in the Sri Lanka Army cannot be punished by a Court of Inquiry or based upon a report of a Court of Inquiry without affording a Summary Trial or Court Martial as the Court of Inquiry is only a fact-finding mission having no authority to convict and sentence an officer.

It is observed that there is a distinction between a Court of Inquiry and a Summary Trial/Court Marshal. The Court of Inquiry is a fact-finding inquiry and it is defined in Regulation 2 of The Army Courts of Inquiry Regulations 1952 as follows:

> *"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 thing which may be referred to them for inquiry under these regulations."

Regulation 162 of the said regulations further reads 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 or matters into which it has assembled to inquire as required by the convening authority."

The effect of the findings of a Court of Inquiry was discussed in the case of ***Boniface Perera V. Lt, General Sarath Fonseka and others CA Writ Application 705/2007 (CA minutes dated 10.09.2009)*** by ***Anil Goonarathne J.*** as follows,

"This court having considered the case of either party is of the view that proceedings before a Court of Inquiry in terms of the Army Act is a preliminary step prior to a proper trial, which is more or less a fact-finding inquiry to collect and record evidence and to submit a report. On receipt of such Court of Inquiry proceedings or report, the Commander of the Army could decide whether to initiate formal disciplinary proceedings by a Court Material or Summary Trial in terms of provisions of the Army Act. Court of Inquiry proceedings on the basis of terms of reference issued regarding the allegation against the officer concerned. There are no formal charges framed. Therefore, based on the Court of Inquiry proceedings it would not be within the purview of the 1st Respondent to impose any punishment as in the case in hand.

It is essential that a person concerned should be tried on formal charges and no punishment could be imposed prior to framing formal charges at a legally constituted Court Material or Summary Trial. As such any decision to punish based on the Court of Inquiry proceedings would be illegal and ultra vires the provisions of Army Act."

In the case of ***K. S. Fernando V. Sarath Fonseka and four others CA Writ 1826/2006 (CA minutes dated 10.09.2008)*** the effect of a finding of a Court of Inquiry and the provisions of Section 133 of the Army Act were discussed by W. L. R. Silva J. as follows:

"The Court of Inquiry appointed by the Commander of Armed Forces was to collect and record evidence in respect of a complaint made by the complainant against the accused-Petitioner. The Court of Inquiry Regulations have been marked as lR3. It is to be noted that section 133 of the Army Act, prescribes how punishment could be imposed on an accused. According to that section, punishments could be imposed only upon the decision of a court-martial ....

When considering the matters referred to above it is clear that the decision referred to in P8 and P9 based on the finding of the 1st Respondent in P3 was reached without following the relevant legal provisions of the Army Act and therefore the said decisions have been made ultra vires."

The nature of the Court of Inquiry has been discussed by ***Sri Skandarajah J***. in. ***Harishchandra Vs. commander of the Army and Others 2012 (1) SLR 416*** as follows:

"A Court of Inquiry is different from a 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 a Court of Inquiry, there is no accused or 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 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."

In the light of the above, I am of the view that the warnings given to the Petitioner based on decisions or findings of a Court of Inquiry on said occasions cannot be considered based on the circumstances of this case, as disciplinary breaches and therefore the same should not stand in the way of considering the grant of the relevant promotions to the Petitioner.

Alleged Disciplinary Breach No. 6 - Adverse Confidential Report - R9

An adverse confidential report was submitted by the Commander of Security Headquarters (Wanni) whereby the Petitioner was strictly warned in respect of his irresponsible conduct, bad attitude towards responsibilities he was entrusted with, misusing of military vehicles, violation of instructions and misbehaviour as the Staff Officer Administration. As per the said adverse report R9 dated 13.02.2014 the Petitioner has been placed on report for one year with effect from 13.02.2013 in which any careless mistake or any repetition of a similar act would be dealt severely. It has also been stated that during the said period the Petitioner will not be considered for any confirmation of rank, recommendation of promotions or any other privileges. It is observed that the period of one year during which the Petitioner was placed on the report as per the R9 has lapsed. Therefore, the said adverse confidential report should not stand as a barrier in considering the Petitioner for the impugned confirmation or promotion now.

The Petitioner contends that the Respondents have failed to exercise due discretion when the Respondents considered the grant of the impugned promotion to the Petitioner as they have failed to take into account the applicable laws and regulations. Therefore, the Petitioner claims that it was unreasonable for the Respondents to deny the Petitioner of his promotion. The Petitioner is relying on the judgement of ***Colonel U.R. Abeyratne Vs. Gen.N.U.M.MW. Senanayake, Commander of the Sri Lanka Army and Others CA(Writ) Application No.239/2017, C.A. Minutes 07.02.2020,*** where it states,

"*The failure to consider relevant material spreads its tentacles across all grounds of judicial review. Where statutes or subsidiary legislation contain, in clear and unambiguous terms what should be considered relevant, a decision which falls outside those "four corners of the law" may be caught under the more straightforward grounds of illegality or procedural impropriety. However, statutes do not really have "corners" in the neat way postulated by theory[1] and the decision maker would be required to take into account a range of relevant material which is not expressly specified.*

[1] P.P. Craig, Administrative Law [5th Edition, 2003] Sweet and Maxwell, page 633.

In such instances, Court may be more inclined to assess such decisions on the grounds of rationality or proportionately, Mumbai courts can still intervene even where the decision is within the purported " four corners of the law but do not satisfy the threshold of reasonableness due to a failure to consider relevant material.

If a decision has been influenced by considerations which either expressly or implicitly cannot lawfully be taken into account, a Court may hold that such discretionary power has not been exercised validly"

When this Court considers all the facts mentioned above and the circumstances involved in this case, it is clear that no proper consideration has been given to the relevant materials by the Army Advisory Boards when said Boards arrived at the relevant recommendations. Finally, I need to draw attention to the passage in ***Colonel U.R. Abeyratne case [Supra]*** where it is opined as follows:

> "it is, therefore, the view of this Court that a decision reached in such circumstances is not only a decision which no sensible authority acting with due appreciation of its responsibilities would have decided to adopt but is also a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at."However, the Army Promotion Board assembled on 29.09.2020,27.01.2021 and 10.05.2021 has decided (R16, R17 and R18) not to recommend the Petitioner to be promoted to the rank of Colonel following the recommendations of the respective Army Advisory Board. It is evident from the said decisions marked R16, R17 and R18 of the Army Promotion Board that the Army Promotion Board has based its decision on the said erroneous recommendations of the respective Army Advisory Boards that the service record of the Petitioner was tainted with six disciplinary breaches. The Redress of Grievance (ROG) submitted by the Petitioner by P22 to clear the erroneous references made by the Army Advisory Board has also been rejected on the very same basis and the recommendation of the Advisory Board has been approved by the Commander of the Army by letter P30.

Thereafter the Petitioner has been informed that the Commander of the Army has recommended to retire the Petitioner from Sri Lanka Army by the letters P39 and P41. As the Petitioner was not recommended for his next promotion and he has been permitted to serve the maximum permissible period in his present rank of Lieutenant Colonel, the Commander of the Army has recommended sending the Petitioner on retirement. The above decisions reflected in P39 and P41 are solely based on illegal and irrational recommendations made by the Army Advisory Boards which cannot stand in law. Therefore, the said decisions reflected in the P30, P39 and P41 are liable to be quashed.

This Court considered the decision-making process involved in the instant application. Therefore, this Court is not inclined to make any order to promote the Petitioner to the rank of Colonel. It is up to the Respondents to consider the promotion based on the relevant material pertaining to the Petitioner according to the laws and regulations

applicable. Based on the circumstances and the reasons given I am inclined to issue a writ of certiorari quashing the decisions reflected in the P39, p41 and P30. The 1st Respondent shall direct the relevant Army Promotion Board to consider the promotion of the Petitioner to the rank of Colonel in accordance with the applicable laws and regulations and arrive at a decision taking into consideration all material relating to the Petitioner. I am of the view that such cause of action should be carried out by the relevant authorities at their earliest without causing any prejudice to the Petitioner considering his date of retirement. This Court order no cost.

Application is partly allowed.

Judge of the Court of Appeal

Sobhitha Rajakaruna J.

I agree.

Judge of the Court of Appeal