WICKRAMASINGHE
v.
EDMUND JAYASINGHE, SECRETARY, MINISTRY OF MEDIA, TOURISM AND AVIATION

SUPREME COURT
G. P. S. DE SILVA, C.J.
KULATUNGA, J.
RAMANATHAN, J.
OCTOBER 30, 1995.

Fundamental Rights – Articles 12(1), 12(2), 14(1)(a), 15(7) and 126(2) of the Constitution – Emergency (Restriction of Public and Transmission of Sensitive Military Information) Regulations No. 1 of 1995. – Public Security Ordinance (Cap 40) Section 5 – Pre-censorship.

The petitioner stated that in view of certain regulations made by the President under Section 5 of the Public Security Ordinance, he has been compelled to cease publication of news items, *inter alia,* relating to the conduct of military operations and related matters pertaining thereto in the "Janajaya" newspaper of which he is the Chief Editor and Publisher.

HELD:

(1) Section 5(1) of the Public Security Ordinance empowers the President to make regulations "as appear to him to be necessary or expedient". The power is thus very wide; and so long as the regulations are within the ambit of the section, the court will not strike down the regulations, unless there are good reasons for doing so.

(2) The fact that some newspapers or other media are said to have been permitted to exercise self regulations would not *per se* constitute discrimination. The Competent Authority has not (and cannot) abdicate his power to act under the regulations even against such media, if it becomes necessary to do so.

In the case of the petitioner, it would appear that he is uncompromising and wishes to publish news of his choice relating to military operations, without censorship under the impugned regulations which he alleges are unguided and violative of his fundamental rights.

(3) The impugned censorship has been imposed at a time of national crisis and in the context of an on going civil war. Its validity has to be considered having regard to the reality of the current situation.

(4) The Court will no doubt consider whether the regulations are bad for overbreadth and impringe upon fundamental rights. In an appropriate case, the court may also hold that there has been an infringement of rights under Articles 12(1) and 12(2) in the implementation of regulations.

Cases referred to:

1. *Hettiarachchi v. Seneviratne et al* S.C. App 127/94 S.C.M. 4.7.1994.
2. *Joseph Perera v. The Attorney General* [1992] 1 Sri L.R. 199.
3. *New York Times v. US* [1971] 403 US 713.
4. *Banton Books v. Sullivan* (372 US 58-70).
5. *Organisation for a Better Austin v. Kiefe* (1971) 402 US 415.
6. The Zamora [1916] AC 77.

APPLICATION for infringement of fundamental rights.

L. C. Seneviratne, P.C. with *Nigel Hatch* for the petitioner.

Cur adv vult.

November 7, 1995.
KULATUNGA, J.

The petitioner states that he is the Chief Editor and Publisher of a weekly Sinhala Newspaper "Janajaya" registered under the Newspapers Ordinance. He states that he had been a Member of Parliament from 1984 – 1994 and a Cabinet Minister. He complains that his rights (qua Editor and Publisher of the said newspaper) guaranteed by Articles 12(1), 12(2) and 14(1) (a) of the Constitution have been infringed by executive or administrative action by the application of Emergency (Restriction of Publication and Transmission of Sensitive Military Information) Regulations No. 1 of 1995 published in Gazette (Extraordinary) No. 889/16 dated 21.09.95 as amended by a notification published in Gazette (Extraordinary) No. 891/3 dated 02.10.95.

The said regulations made by the President under S. 5 of the Public Security Ordinance (Cap. 40) prohibit *inter alia*, the Editor or Publisher of a Newspaper, whether in or outside Sri Lanka, to publish, distribute ..... or cause to be so done any material containing any matter which pertains to any –

(a) operations carried out, or proposed to be carried out by the Armed Forces or the Police Force (including the Special Task Force);

(b) procurement of proposed procurement of arms or supplies by any such Forces;

(c) deployment of troops or personnel, or the deployment or use of equipment, including aircraft or naval vessels, by any such Forces;

(d) any statement pertaining to the official conduct or the performance of the Head or any member of any of the Armed Forces or the Police Force.

The petitioner complains that by virtue of the said regulations, the State has imposed a "blanket censorship"; that the said regulations are unwarranted as they stifle legitimate criticism of Government policy in relation to military operations; hence the regulations are *ultra vires* and infringe his rights under Article 14(1) (a). Further, the 1st respondent who is the Competent Authority appointed under the regulations is reported to have relaxed the application of the prohibitions prescribed by the regulations in respect of the State controlled newspapers, the electronic media and foreign media, by permitting them to exercise self regulation censorship, without reference to the Competent Authority. The petitioner complains that such favoured treatment to a part of the media infringes his rights under Articles 12(1) and 12(2).

The petitioner states that in view of the said regulations, he has been compelled to cease publication of news items *inter alia*, relating to the conduct of military operations and related matters pertaining thereto in the "Janajaya" newspaper.

The petitioner has produced marked P2A – P2E copies of certain news items published in the "Janajaya" prior to the imposition of censorship. Some of the criticisms levelled against the government in the said news items are as follows:

(1) Acts of the government such as the shifting of the Pooneryn Army Camp and the supply of prohibited items to the North have strengthened the LTTE and demoralised the Army.

(2) The Army Commander is not ready for war and the Deputy Minister of Defence has no knowledge of war measures.

(3) The Army Commander's period of service has been extended for extraneous reasons.

(4) Major General Daluwatte who is in charge of the Eastern Province is an officer having a poor record of service. He is a timid officer who would order his men to surrender to the enemy.

(5) The Navy Commander should resign; The Army Commander should be retired; Algama or Seneviratne should be appointed as Army Commander.

(6) Rohan Daluwatte should not be given any responsibilities.

(7) The ability of the Forces both as regards attack and counter attack is unsatisfactory. There is no co-ordination among the Forces. Consequently, the LTTE was able to launch a successful attack on the Government Forces at Mandativu.

(8) The LTTE bomb attacks in Colombo have been planned in Wellawatte. But the Wellawatte Police is inactive; in fact according to some reports, officers attached to that Police Station are in collusion with the "tigers".

The above news items indicate the kind of criticism the petitioner desires to engage in through the newspaper media and which he considers to be in the public interest in the prosecution of the present war. It is also clear from his petition that he is not prepared to subject himself to the censorship imposed by the impugned regulations.

Admittedly, several newspapers some of which appear to be critical of the Government are presently publishing news relating to military operations in the North, subject to censorship.

S. 5(1) of the Public Security Ordinance empowers the President to make emergency regulations as appear to him to be necessary or

expedient in the interest of public security and the preservation of public order and the suppression of mutiny, riot or civil commotion etc. This power is couched in subjective language. The section empowers the President to make regulations "as appear to him to be necessary to expedient". The power is thus very wide; and so long as the regulations are within the ambit of the section, the Court will not strike down the regulations, unless there are good grounds for doing so.

The Court will no doubt consider whether the regulations are bad for over-breadth and impinge upon fundamental rights. In an appropriate case, the Court may also hold that there has been an infringement of rights under Articles 12(1) and 12(2) in the implementation of regulations. If any regulation is inherently discriminatory, any person affected by such a regulation may petition this Court for relief under Article 126 on the ground that the regulation is violative of rights under Article 12(1), in which event relief can be granted *in limine*, even before it is implemented.

The question before this Court is whether on the material placed before it, the petitioner has made out a *prima facie* case for the grant of leave to proceed. Article 126(2) provides *inter alia*, that an application for relief may be proceeded with only with leave to proceed first had and obtained from the Supreme Court, which leave may be granted or refused as the case may be. In *Hettiarachchi v. Seneviratne et al* [1] this Court observed:

> "It must not be supposed, or suggested, that the need to obtain leave to proceed under Article 126(2) is a mere formality. The onus is on the petitioner seeking relief to establish a *prima facie* case. Even if an important question of law, or jurisdiction, does appear to be involved, it must not be assumed, as some do, that this must necessarily be deferred for consideration at the final hearing. If it is relevant as a threshold consideration, that threshold must be crossed by obtaining leave to proceed, before seeking to proceed further".

It may appear that the Regulation 3 imposes an almost absolute prohibition on the publication of matters relating to military operations. There is also a power vested in the Competent Authority

to stop the publication of a newspaper which contravenes the regulations; contravention of the regulations is also an offence. However, the exercise of the power of the Competent Authority is discretionary and not automatic. He may exercise the power only "after issuing such directions as he considers necessary to effect compliance with the regulations". Apparently such directions are given whenever the Competent Authority subjects any news report to censorship. The resulting position is that there is no total bar against publication of matters relating to military operations.

However, the petitioner has on his own ceased to publish any news relating to military operations. He has not been stopped from publishing his newspaper; nor has he been prosecuted for any offence. Some of the matters he desires to discuss in the media may appropriately be raised elsewhere e.g., the Parliament, the Security Council or within the Establishment – whether by the members composing such bodies or on the basis of representations received from citizens. But, I cannot agree that in a war situation of the dimensions which is presently raging, the petitioner can claim the freedom to publish all such news items as appear in P2A – P2E, without restriction.

The fact that some newspapers or other media are said to have been permitted exercise self regulation would not *per se* constitute discrimination. The Competent Authority has not (and cannot) abdicate his power to act under the regulations even against such media, if it becomes necessary to do so. In the case of the petitioner, it would appear that he is uncompromising and wishes to publish news of his choice relating to military operations, without censorship under the impugned regulations which he alleges are unguided and violative of his fundamental rights.

Article 15(7) of the Constitution permits restrictions on rights *inter alia*, under Articles 12 and 14, as may be prescribed by "Law" (which expression includes regulations made under the Public Security Ordinance) in the interest of national security, public order etc. Learned President's Counsel for the petitioner rightly submitted that any such restrictions imposed by emergency regulations may be reviewed by Court. In support, he cited *Joseph Perera v. The*

Attorney-General [2] where it was held that it is competent for the Court to question the necessity of the emergency regulation and whether there is a proximate or rational nexus between the restriction imposed on a citizens' fundamental rights by emergency regulation and the object sought to be achieved by the regulation. On the basis of the same decision, Counsel also submitted that the impugned regulations do not provide adequate guidelines for the exercise of the powers of the Competent Authority; that the guidelines, if any, are vague; hence the regulations are inherently violative of rights under Article 12(1).

In *Joseph Perera's* case (*Supra*) the Court had to consider the validity of the arrest and detention of the petitioner for publishing a leaflet issued by the "Revolutionary Communist League", a Political Party of which the petitioner was a member. It was alleged that the said leaflet which was issued on the occasion of a proposed meeting and a lecture on the rights of students brought the Government into hatred and ridicule and constituted "subversive literature" in breach of Emergency Regulations 26 and 33, respectively. It was also alleged that the distribution of the said leaflet violated Emergency Regulation 28 (1) which prohibited the publication *inter alia,* of any leaflet without the permission of the Inspector General of Police. Wanasundera, J. said (p.235) –

> "The Petitioners were in possession of literature, which on a cursory glance could have appeared to be subversive. Document XI appeared to contain if not seditious statements at least statements that can be regarded as tendentious".

Accordingly, the Court held that there was no illegal arrest. But, on a closer scrutiny of the leaflet, it could not be said to justify a charge under Regulation 26 or be described as "subversive literature" under Regulation 33; hence the prolonged detention of the petitioner was illegal.

As regards the prohibition in Regulation 28(1), the Court held that the regulation was invalid for lack of objective guidelines, Sharvanada, C. J. said (p.229) –

> "Pre-censorship is under our law not necessarily unconstitutional and can be justified if brought within the ambit of Article 15. However, any system of pre-censorship which confers unguided and unfettered discretion upon executive authority without narrow objective and definite standards to guide the official is unconstitutional".

Counsel for the petitioner also relies on the following passages in the judgment at p. 229 –

> The general rule is that any form of previous restraint is regarded on the face of it as an abridgement of the freedom of expression and offends Article 14(1) (a) of the Constitution.
>
> It was said in *New York Times v. US* [3] that any system of prior restraints of expression comes to this Court, bearing a heavy presumption against its constitutional validity. *Banton Books v. Sullivan.*[4] The Government thus carries a heavy burden of showing justification for the enforcement of such restraint. *Organisation for a Better Austin v. Kiefe.*[5].

On the basis of these authorities, Counsel submits that the petitioner has made out a *prima facie* case for the grant of leave to proceed.

Of the decisions cited by Sharvananda, C. J., only one case i.e., *New York Times* case involved a restraint on newspapers against a publication which appears to relate to a war situation. The Government sought to enjoin newspapers from publishing contents of classified study on the "History of U.S. Decision – making Process on the Vietnam Policy". It was held that the Government failed to meet its burden of showing justification for imposition of the restraint. That case is clearly distinguishable for the reason that the policy under discussion there was the involvement of the United States of America in the affairs of a foreign State.

In the instant case, it cannot be said that the occasion and the manner of pre-censorship is arbitrary. The Government is faced with a serious civil war. The matters in respect of which censorship is

imposed are specified. The restriction is against the publication of matters which could be classified as "sensitive information". All such matters relate to the prosecution of the war. Hence, the impugned censorship cannot be described as a "blanket censorship"; clearer guidelines may not be demanded in the present circumstances. In this connection, a reference may be made to the decision of the Privy Council in *The Zamora* [6] even though the dicta appearing therein may require modification in the light of constitutional provisions which secure fundamental rights and freedoms of the citizen. The Privy Council observed thus (p. 107):

> "Those who are responsible for national security must be the sole judges of what the national security requires. It would be obviously undesirable that such matters should be made the object of evidence in a Court of law or otherwise discussed in public"

"The Zamora was decided during the first world war, in relation to acts of the Crown, in defence of the realm. I have referred to it not because it is exactly in point nor because I have formed any opinion that such dicta can be applied in our legal system, without qualification but because it is of some assistance in viewing the case before us, in its correct perspective.

The impugned censorship has been imposed at a time of national crisis and in the context of an ongoing civil war. Its validity has to be considered having regard to the reality of the current situation. Viewed from this stand point Joseph Perera's case (*Supra*) is of no assistance. The facts of that case are significantly different. I am of the opinion that no *prima facie* case has been made out that the impugned regulations are *ultra vires* or violative of the petitioner's fundamental rights. Leave to proceed is accordingly refused.

G. P. S. DE SILVA, C.J. – I agree

RAMANATHAN J. – I agree

Leave to proceed refused.