VISUVALINGAM AND OTHERS
v.
LIYANAGE AND OTHERS

SUPREME COURT
WANASUNDERA, J., RATWATTE, J., SOZA, J., RANASINGHE, J. AND RODRIGO, J.
S.C. APPLICATIONS NOS. 47/83. 53/83 And 61/83
24, 25, 26, 27, 28 AND 31 OCTOBER 1983 AND
1, 2, 3, 7, 8 AND 9 NOVEMBER 1983.

Fundamental Rights — Emergency Regulations (Miscellaneous Provisions and Powers) under Public Security Ordinance — Prohibition by Competent Authority to print, publish and distribute newspaper called Saturday Review — Closure of press — Violation of fundamental rights guaranteed under Articles 14(1) (a), (c) and (g) and 12(1) and (2) of the Constitution — Locus standi of a company.

New Era Publications Ltd., a company along with its shareholders and directors in case No. 47/83 complained of infringement of their fundamental right of freedom of speech and expression including publication set out in Article 14(1)(a) and to the right of freedom to engage by themselves or in association with others in any lawful occupation, profession, trade, business or enterprises set out in Article 14(1)(g). The 1st to 6 petitioners are citizens of Sri Lanka and are seeking to vindicate their own fundamental rights as citizens and have merely utilised the institution of a company (7th petitioner) to exercise their fundamental right of freedom of speech including publication (Article 14(1)(a) and the fundamental right of freedom to engage with one another in the newspapers business (Article 14(1)(g). In case No. 53/83 and 63/8 the same petitioners complain of the infringement of their fundamental rights guaranteed to them under Articles 14(1)(a), 14(1)(g) and 12(1) and 12(2) of the Constitution. Only citizens are endowed with fundamental rights under Articles 14(1) and 12(2) but Article 12(1) guarantees equality before the law and equal protection of the law to all persons.

The 1st respondent made order in terms of Regulation 14 of the Emergency Regulations that no person shall print, publish or distribute or in any way be concerned in the printing, publication or distribution of the newspaper ***Saturday Review*** and also that the printing press where the ***Saturday Review*** was printed be closed. The petitioners allege:

(i) that the orders were made *mala fide* and in abuse of the powers conferred by Regulation 14(3) and not for a legal purpose but for an ulterior purpose;

(ii) that they were made mechanically, perfunctorily, unreasonably and without addressing his mind to the relevant facts and circumstances;

(iii) the orders were made with the object of masking the true purpose which was to prevent the publication of news and views which may lead to criticism of aspect of government policy despite the fact that much criticism as had been published were made *bona fide* in respect of public affairs.

Held —

Although the freedom of speech and expression is an essential prerequisite for the purpose of successfully preserving democratic institutions and the freedom of the press embraces the freedom to propagate a diversity of views and ideas and the right of free and general discussions of all public matters including matters not palatable to the Government or to the majority of people in the country, the ***Saturday Review*** carried material that must necessarily attract the attention of the authorities at a time when there are unsettled conditions in the country as today. It highlights the atrocities and excesses of the police and the armed services. In general, editorial policy inclines towards the radical groups waging a struggle against the State and, if not explicitly at least implicitly eulogises the terrorists and praises the sacrifices they have made. In the present contexts it cannot be said that the competent authority (1st respondent) was so unreasonable or wrong when he said that the impugned orders were made as the editorial policy of the paper was extremely prejudicial to the security and safety of the country and its citizens.

The fundamental rights guaranteed by the Constitution cannot by their very nature be interpreted as being absolute rights. There are well recognised restrictions and exceptions to the exercise of these rights. Freedom of speech, press and assembly are dependent upon the powers of Constitutional government to survive. If it is to survive it must have the power to protect itself against unlawful conduct and under certain circumstances against incitements to commit unlawful acts.

Apart from a fatal prohibition and ban on certain topics offensive to society and orderly government, freedom of speech in other matters may be circumscribed by time, place and circumstances. What is permissible at one place and time may not be permissible at another place or time.

In dealing with an emergency situation, courts have always been prepared to give the executive sufficient leeway in making decisions affecting the safety of the people and the security of the country. These decisions have to be made rapidly and in the light of information then available and under the constraint of available resources. It is not for the Court to substitute its opinion for that of the competent authority where the court is satisfied that the material before him was reasonably capable of supporting the view and opinion formed by him.

(2) **Held further** (Wanasundera, J. and Ratwatte, J., dissenting)

The 7th petitioner-company is not merely an institutional device functioning as an agent or trustee for the shareholders. This is not a case where the shareholders' right of publication in association with others is directly affected. The party directly affected is the company. The company and its shareholders are in law and even in fact two distinct entities. The company must be treated like any other independent person with rights and liabilities approprite to itself

The impugned orders directly affect the right of speech and expression and publication of the 7th petitioner-company who is seeking compensation for the loss sustained by it only for itself. The impugned orders at most affect the 1st to 6th petitioners indirectly. Any rights of the 7th petitioner-company that may be affected are not fundamental rights recognised and enforceable under the provisions of our Constitution. Hence the applications complaining of infringement of the fundamental rights guaranted by Articles 14(1)(a), (e) and (g) and 12(2) are not maintainable for want of competence.

Cases referred to :

1. *Bennect Coleman & Co., Ltd., v. Union of India,* AIR 1973 SC 106.
2. *The Express Newspapers Ltd., v. Union of India* AIR 1958 SC 578.
3. *Sakal Papers Ltd., v. Union of India* AIR 1962 SC 305.
4. *R. C. Copper v. Union of India* (1970) 35 CR 530 AIR 1970 SC 564 *(Bank Nationalisation case).*
5. *Gedhra Electricity Co., v. State of Gujerat* AIR 1975 SC 32.
6. *State Trading Corporation of India Ltd., v. the Commercial Tax Officer and others* AIR 1963 SC 1811.
7. *Tata Engineering and Locomotive Co., Ltd., v. State of Bihar* (Telco Case) AIR 1965 SC 40.
8. *Termini ello v. Chicago* (1949) 93 US Lawyers Edn. 1151.
9. *American Communication Association v. Dodds* (1950) 339 US 312, Lawyer Edn. 927.
10. *State of Gujarat v. Shri Ambica Mills* AIR 1974 SC 1300.
11. *Colonial Bank v. Whinney* 11 AC 426.
12. *Tunstall v. Steigmann* 1962 All ER 417.
13. *Gramaphone & Typewriter Ltd., v. Stanley* 1908 2 KB 89, 98.
14. *R. v. Chief Immigration Officer, Heathrow Airport, Ex parte Bibi* 1976 I WLR 979.
15. *R. v. Secretary for the Home Department ex parte Fernandes* Times Law Report of November 20, 1980.

16. *Farima Neld v. European Communities Commission* (1974) 2 CMLR 338.

17. *Neville Fernando and others v. Liyanage and others* — Janatha Press Case S.C. Application No. 134/1982 (S.C. Minutes of 9.2.83.)

18. *Neville Fernando v. Liyanage* — S.C. Application No. 116/82 S.C. Minutes of 14.12.82.

19. *Saloman v. Saloman & Co., Ltd.,* 1897 AC 22

20. *Short v. Treasury Commissioner* 1948 1 KB 116.

21. *Padfield v. Minister of Agriculture, Fisheries and Food* 1968 AC 997.

22. *Associated Provincial Picture House Ltd., v. Wednesbury Corporation* 1948 1 KB 223.

23. *Secretary of State for Education and Science v. Tameside Metropolitan Borough Council* 1976 3 WLR 641.

24. *Hirdaramani v. Ratnavale* 75 NLR 67.

25. *Siriwardena and Others v. Liyanage and Others* (Aththa Case) — S.C. Application No. 120/82 — S.C. Minutes of 27.1.1985.

26. *In re W. (An Infant)* 1971 AC 682, 700.

27. *Secretary of State for Employment v. ASLEF* (No. 2) (1972) All ER 949 967 (1972) 1 WLR 1370.

28. *Liversidge v. Anderson* (1942) AC 206, 239.

29. *Gunasekera v. Ratnavel* 76 NLR 316.

30. *Ras Behari Lal v. King Emperor* (1933) 60 Indian Appeals 354, 361.

31. *Anisminic Ltd., v. Foreign Compensation Commission* — (1969) 1 All ER 208.

32. *I.R.C. v. Rossminster Ltd.* 1980 1 All ER 80.

33. *Nakkuda Ali v. Jayaratne* 1951 AC 66.

34. *A.G. of St. Christopher v. Reynolds* 1979 3 All ER 129 (P.C.)

35. *A.G. of Canada v. Hallet & Cary Ltd.* 1952 AC 427.

APPLICATIONS complaining of infringement of fundamental rights.

S. Nadesan, Q.C. with *S. Mahenthiran* and *S. H. M. Reeza* for petitioners.

M. S. Aziz Deputy Solicitor General with *Parakrama Karunaratne* State Counsel for respondents.

Cur. adv. vult

18 November, 1983.

WANASUNDERA, J.

The "Saturday Review" is a weekly newspaper in English and was originally published by a Company called Kalai Nilayam. This Company was formed in January 1982 and had the objects broadly described in the publication brochure P1 issued by the Company —

1. to establish a two-way communication between all persons and nationalities in this country;

2. to stand up against injustice, acts of discrimination and the violation of the rights of human rights and freedom.

Mr. Nadesan stated that the "Saturday Review" devoted itself to both political and cultural matters concentrating mostly on the developments and events in the Northern peninsula. A brief survey of its back numbers shows that its material which is varied and of a fairly high standard would have catered to the English speaking intelligentsia of this country.

In August 1982 the "Saturday Review" was bought by the Company called New Era Publications Ltd., the 7th petitioner. The shareholders, directors, and the New Era Company are, it is alleged, motivated by the same considerations set out in the brochure referred to, in the conduct of this newspaper. The New Era Publications Ltd., is a limited liability company without a share capital but with its liability limited by the guarantee of its members. It consists of seven shareholders, the 1st to 6th petitioners and one Mr. K. Kandasamy, who is at the moment abroad and not made a party to this application. These seven

members also constitute the sole directors of the Company. All of them are citizens of Sri Lanka.

The Company has its registered office at No. 118, Fourth Cross Street, Jaffna, but the printing of the paper has been entrusted, on a commercial basis, to the St. Joseph's Catholic Press, which functions at another address in Jaffna and has no other connection with New Era Publications Ltd.

As a general background to the facts of this case, it should be mentioned that on the 18th of May 1983 a state of Emergency was declared by the Government under the Public Security Ordinance. With the declaration of Emergency, there was brought into operation from the same date a set of Emergency Regulations valid for a period of one month, but which could be renewed after debate in Parliament from month to month.

The 1st respondent, who is the Secretary to the Ministry of State, has been appointed Competent Authority under the provisions of the Emergency Regulations (Miscellaneous Provisions and Powers) Regulation Nos. 1, 2 and 3 of 1983, for the purpose of the Regulations. The 2nd respondent is the Inspector General of Police and the 3rd respondent is the Attorney-General.

On the 1st of July 1983, the 1st respondent, acting in terms of Regulation 14 of the said Regulations, made order (P2) that—

(a) no person shall print, publish or distribute or in any way be concerned in the printing, publication or distribution of the newspaper " Saturday Review " for a period of one month from the date of the order.

(b) the printing press in which the said newspaper was printed shall, for a period of one month from the date of the order, not be used for any purpose whatsoever.

The Inspector General of Police, acting under and in pursuance of the authority granted by this order, thereupon sealed the

office of the " Saturday Review " where only the editorial and administrative work takes place. The printing press, namely the St. Joseph's Catholic Press, was however not sealed. Similar orders have been made every time with the renewal of the Emergency.

Mr. Nadesan mentioned two infirmities in connection with this order to show that it had not been duly made by the Competent Authority as he had not brought his mind to bear on the matter before him. First, as regards the period concerned. Since the Emergency operates from the 18th of one month to the 17th of the succeeding month, the Competent Authority erred when he made an order on 1st July 1983 to operate for a period of one month from that date. The second complaint is as regards the order for the closure of the printing press where the " Saturday Review " was printed. It does not appear that the Competent Authority was aware that the printing was being done on a commercial basis by another organisation at the St. Joseph's Catholic Press. This mistake was apparently discovered later and, as stated earlier, the St. Joseph's Catholic Press was not closed and it continued to attend to whatever other business it had. These mistakes however do not sufficiently establish that the Competent Authority did not give his mind to the need to ban the publication of this paper.

The petitioners claim that their fundamental rights guaranteed by Article 14(1) (a), (c) and (g) are violated by the above orders of the Competent Authority. The respondents however have denied that these orders and acts are illegal and have also taken up, by way of defence, two rulings of this Court to the effect that the petitioners lack *locus standi* and are precluded from coming into Court and obtaining relief. They are the judgments of Sharvananda J. in S.C. 116/82 (S.C. Minutes of 14.12.1982) and S.C. 134/82 (S.C. Minutes of 7.2.1983). Each of these judgments is a judgment of a bench of three judges. The very fact that the Chief Justice has referred this matter to this larger bench for decision, at the request of counsel, is precisely for the reason that the matter should be reconsidered. Although I myself was a member of the bench in S.C. 134/82, I found that the issue in that case had already been

decided in the earlier application which involved the same parties and the same subject-matter. I was therefore of the view that S.C. 134/82 could be decided on the ground of *res judicata* alone. In that view of the matter the legal question that is now before us was not considered by me. The present larger bench has specifically assembled to reconsider this matter and, because I had left the issue before us open for future decision, I am now at liberty to give my mind to this matter.

The petitioners allege that their fundamental rights under Article 14 have been violated. The relevant provisions, Article 14(a), (c) and (g) are worded as follows :—

" 14. (1) Every citizen is entitled to —

(a) the freedom of speech and expression including publication ;

(c) the freedom of association ;

(g) the freedom to engage by himself or in association with others in any lawful occupation, profession, trade, business or enterprise ; "

Mr. Nadesan drew our attention to certain significant differences between the above provisions and the corresponding provisions of the Indian Constitution, particularly to the words " in association with others " in Article 14(1) (g) and their absence in India, which makes our provisions much larger in content than the corresponding Indian provision. This item is of the greatest significance in this case.

Relying on the provisions of Article 14(1) (a), (c) and (g), Mr. Nadesan submits that every citizen in this country has freedom of association, namely to freely associate with one another and to organise themselves in such a way as to enable them to engage in any lawful business or enterprise. In this case this right is the carrying on in association with others the business or enterprise of a newspaper in furtherance of the fundamental right of freedom of speech and expression, including publication,

guaranteed by Article 14(1) (a). The petitioners in their capacity as citizens of this country are exercising their fundamental right through the institutional device of a company which they were entitled in law to bring into existence. This freedom, they say, has been eroded by the closure of the Saturday Review by executive or administrative action. Mr. Nadesan stressed particularly the right of a citizen to use an institutional device to enjoy or exercise the fundamental rights involved in this case. The Constitution, he says, permits the exercise of such rights in association with others. The position here is even stronger than the legal position obtaining in India.

In this case they have utilised the institution of a company, since it gave them certain advantages. For example, their liability is limited, they cannot be sued for the debts of the company, and they are not liable to pay taxes due from the company in respect of its profits. It cannot therefore be said that the petitioners, by resorting to this device, intended to forego their rights as citizens when on the other hand they have resorted to this device for the better exercise of their fundamental rights. By their acts they did not intend to transfer, nor have they transferred, their fundamental rights of freedom of speech to the company which is in law not entitled to enjoy such a right.

Mr. Nadesan further submitted that, since the Constitution enjoins all State organs to secure and advance these fundamental rights, the artificial and purely civil law concepts associated with company law, agency or partnership law which had taken shape due to the exigencies of trade, commerce and business should not be interposed to prevent the full operation and the realisation of a fundamental right guaranteed to a citizen by the Constitution. On the contrary, he submits that since "in fact" (in contradistinction to "in law") a company is only a fictitious person and its own rights and interests are in truth owned by and exercised for the benefit of actual human beings who are its shareholders, there should be no difficulty in the way of a court which wishes to give full effect to these fundamental rights from acting accordingly. Mr. Nadesan rightly stressed that we are here dealing with one of the most important of the fundamental rights, namely the right of free speech and

expression, including publication. It embraces not only a natural instinct involving the basic need of man to express himself but also equally important social and political interests, namely the exchange of information and ideas and free discussion between members of the community for the welfare of society. This would be especially necessary in a Parliamentary democracy. Bruce — " The American Commonwealth ", page 274 — observes in this connection :

> " The more completely popular sovereignty prevails in a country so much the more important is it that the organs of opinion should be adequate to its expression, prompt, full and unmistakable in their utterances . . . .The press, and particularly the newspaper press, stands by common consent first among the organs of opinion . . . . The conscience and commonsense of the nation as a whole keep down the evils which have crept into the working of the constitution and may in time extinguish them . . . . That which, carrying a once famous phrase we may call the genius of universal publicity, has some disagreeable results, but the wholesome ones are greater and more numerous. Selfishness, injustice, cruelty, tricks and jobs of all sorts, shun the light; to expose them is to defeat them. No serious evils, no rankling sore in the body politics, can remain long concealed, and when disclosed it is half destroyed. So long as the opinion of a nation is sound, the main lines of its policy cannot go far wrong."

The decisions of both the U.S. and Indian Supreme Courts are studded with quotations and statements expressing similar sentiments. It is unnecessary to refer to all those authorities. But Mr. Nadesan brought to our notice two documents — one, the Manifesto of the United National Party, and the other, a booklet published by our present President Mr. J. R. Jayewardena when he was the Leader of the Opposition and Leader in the National State Assembly of the United National Party. This booklet constitutes the written submissions which he and his lawyers submitted to the Constitutional Court on behalf of the party when the Sri Lanka Press Council Bill was being

considered by the Constitutional Court under the previous Constitution. This, Mr. Nadesan submitted, was a most illuminating and useful document, thoroughly researched, containing references to most of the leading cases including the *Bennet Coleman's* case (1), which is quoted with approval. Having regard to its accuracy and comprehensiveness, Mr. Nadesan said, it relieved him of the necessity of searching for or referring to other sources. This publication and the Manifesto provided the background for the drafting of the present constitutional provisions relating to fundamental rights.

Mr. Nadesan relied strongly on the first six paragraphs, namely paragraphs 1.1 to 1.6 set out below which he said contained as full a statement as one can make of the nature and width of the fundamental right of free speech and expression guaranteed by our Constitution :

" 1. *The Freedom of thought and expression and the freedom of the Press*

1.1 The freedom of the Press is the essence of liberty and this is the source of all other liberties. If this freedom is suppressed, restrained or controlled, then the foundation for autocracy is laid. Freedom of speech is the basis of freedom of thought. Speech is the institution by which man gives expresion to his right to think freely. If therefore the freedom of speech is affected, it would equally affect the freedom of thought. In such a context an examination of the structure of the Press would show that it is an institution created by a developed society to convey the thoughts of the people. It also provides the material for other people to think and form their own opinion. This is of fundamental importance. By the expression "Press" is meant every media such as newspapers, books, magazines and the radio by which the thoughts of the people and the factual data which forms the basis of human thinking is conveyed to the people.

1.2 It is submitted that there are two priorities involved in the concept of freedom of speech, namely—

(a) the source from which the communication issues, and

(b) perhaps the more important one, the recipient of the communication.

The freedom to express one's thoughts is confined to a few compared to the wider circle to which freedom of expression is extended in so far as the recipient is concerned, namely the community.

1.3 It is in the freedom of the recipient that public opinion has its birth. The Press provides the data by which such opinions find their fullest expression. Therefore it is man's right as the recipient of information to look to as many sources of information as he likes ; and it is equally the duty of the Press which provides the information to seek it from as many sources as possible. If, however, the sources of information become concentrated in one, or restricted to a few bodies, then the formation of ideas is limited. It is in such circumstances only proper that the sources of information available to the public should be enlarged rather than restricted; therefore there can be no justification for interference with the freedom of the Press.

1.4 Freedom of speech requires courage. If a person who gives information is timid or is reluctant to give facts then the formation of public opinion is restricted. The placing of any restrictions on the communication of data and opinion as hitherto communicated to the public is a matter which merits the closest attention of any tribunal.

1.5 It is submitted that in a system of government based on universal suffrage both the issues and recipient of information express themselves through the ballot. In such a system there is always a tendency on the part of those in power who wish to maintain their position of power to control the publication of data and opinion, because it might ultimately affect their tenure. Therefore, it is not uncommon to see those in power hedging themselves in with restrictions on the publication of data which would be the basis for the formation of public opinion.

1.6 It is submitted that in a free society the victory of persuasion over force could be ensured and achieved only by permitting public discussion. A Constitution that seeks to express the aspirations of the people and ensures certain

fundamental rights must therefore be interpreted not only against the background of the intentions of the framers of the Constitution but the mandate given by the people to such persons. It is submitted therefore that the fundamental rule of interpretation especially of constitutional documents is to examine the thoughts which guided the enactors of the fundamental law, the motives and reasons which prompted the draftsmen of the particular Constitutional instrument. A reference therefore to the United Front Manifesto which was claimed to be the basis upon which the Constituent Assembly received a mandate from the people to frame a Constitution. . . ."

An independent newspaper would, to a large extent, fulfil the sentiments and aspirations spelt out in the above passages. The role of such newspapers is to inform the public, to criticise persons and matters deserving criticism, and also to give an opportunity to the public for the free expression of public opinion. In the recent contempt case against the Editor of the Ceylon Daily News, the judgments of both the majority and the minority were to the effect that the freedom of speech is a most vital and valuable asset and that it does not admit of limitation, save in the most exceptional cases permitted by the law.

For a proper appreciation of this fundamental right, Mr. Nadesan said it would have to be examined in the context of the Preamble and Articles 3 and 4 of the Constitution. He showed us that the fundamental rights are part and parcel of the rights of the People reserved by them to themselves. He drew our attention to the fact that those rights shall not be abridged, restricted or denied by any organ of Government, but on the contrary there is an injunction that they should be secured and advanced by them.—Article 4(d).

I am of the view that there is substance in Mr. Nadesan's submission that the conjoint effect of Article 14(1) (a), (c) and (g) is to enable the petitioners to act in association with others to carry on the business of publishing the Saturday Review in the exercise of their fundamental right of free speech, expression and publication. Unlike under the Indian Constitution, they can continue to act in association, notwithstanding the formation of the Company. Although the Company is, in the eye of the law a

separate juristic person (with whom they have the closest contact, being not so much associated but actually integrated), if we have to give effect to the fundamental right, then we must necessarily regard that company as the medium or vehicle through which they are exercising their fundamental rights.

This is adequate to dispose also of the argument that if we were to allow shareholders of a company to claim relief to which the company itself is disentitled since it is not a citizen, would we not be allowing something to be done indirectly which the law has prohibited from being done directly? That argument would be valid in a case where the shareholders are allowed to make a claim on behalf of the company. In such a case the shareholders can only succeed if the court is prepared to " lift the veil " and look behind the corporate structure. The present case is different and is based on the distinction drawn in the Indian cases between shareholders who claim relief on behalf of the company which is impermissible and shareholders who claim in their capacity as citizens by virtue of a fundamental right vested in them in their own right. There is no reason why shareholders claiming in their own right should be denied relief if the guarantee of freedom of expression is to be protected and advanced.

An examination of the Indian cases would be helpful at this stage. In *Bennett Coleman & Co. Ltd. v. Union of India* (1), a number of corporations plus the shareholders, the editors and publishers challenged the Import Policy for Newsprint for 1972-73, declared by the Union Government as being violative of Article 19(1) (a) — freedom of speech and expression — and Article 14 dealing with the equal protection clause. The Additional Solicitor-General appearing for this Union pleaded *Inter alia* that " the petitioners were companies and therefore they could not invoke fundamental rights "

The Indian Supreme Court, after referring to two previous decisions, — *The Express Newspapers Ltd. v. Union of India* (2), and *Sakal Papers Ltd. v. Union of India* (3), said that in those cases relief had been granted to petitioners as shareholders or

editors of newspaper companies. The court then proceeded to state as follows :—

" In the present case, the petitioners in each case are in addition to the company the shareholders, the editors and the publishers. In the *Bennett Coleman* group of cases one shareholder, a reader of the publication and three editors of the three dailies published by the Bennett Coleman Group are the petitioners. In the *Hindustan Times* case a shareholder who happens to be a Deputy Director, a shareholder, a Deputy Editor of one of the publications, the printer and the publisher of the publications and a reader are the petitioners. In the *Express Newspapers case* the company and the Chief Editor of the dailies are the petitioners. In the *Hindu* case a shareholder, the Managing Editor, the publisher of the company are the petitioners. One of the important questions in these petitions is whether the shareholder, the editor, the printer, the Deputy Director who are all citizens and have the right to freedom under Article 19(2) can invoke those rights for freedom of speech and expression, claimed by them for freedom of the press in their daily publication. The petitioners contend that as a result of the Newsprint Control Policy of 1972-73 their freedom of speech and expression exercised through their editorial staff and through the medium of the publication is infringed. The petitioners also challenge the fixation of 10 page ceiling and the restriction on circulation and growth on their publications to be not only violative of but also to abridge and take away the freedom of speech and expression of the shareholders and the editors. The shareholders, individually and in association with one another represent the medium of newspapers through which they disseminate and circulate their views and news. The newsprint policy exposes them to heavy financial loss and impairs their right to carry on the business of printing and publishing of the dailies through the medium of the companies.

" In *R. C. Cooper v. Union of India* (4), which is referred to as the *Bank Nationalisation case* Shah, J. speaking for the majority dealt with the contention raised about the maintainability of the petition. The petitioner there was a shareholder, a Director and holder of deposit of current accounts in the Bank. The locus

standi of the petitioner was challenged on the ground that no fundamental right of the petitioner there was directly impaired by the enactment of the Ordinance and the Act or any action taken thereunder. The petitioner in the *Bank Nationalisation case,* (supra) claimed that the rights guaranteed to him under Articles 14, 19 and 31 of the Constitution were impaired. The petitioner's grievances were these. The Act and the Ordinance were without legislative competence. The Act and the Ordinance intefered with the guarantee of freedom of trade. They were not made in the public interest. The President had no power to promulgate the Ordinance. In consequence of hostile discrimination practised by the State the value of the petitioner's investment in the shares is reduced. His right to receive dividends ceased. He suffered financial loss. He was deprived of the right as a shareholder to carry on business through the agency of the company ".

" The ruling of this court in *Bank Nationalisation case* (4), was this:

> 'A measure executive or legislative may impair the rights of the company alone and not of its shareholders. It may impair the rights of the shareholders and not of the Company; it may impair the rights of the shareholders as well as of the company. Jurisdiction of the Court to grant relief cannot be denied, when by State action the rights of the individual shareholder are impaired, if that action, impairs the rights of the Company as well. The test in determining whether the shareholder's right is impaired is not formal; it is essentially qualitative; if the State action impairs the right of the shareholders as well as of the Company, the Court will not, concentrating merely upon the technical operation of the action, deny itself jurisdiction to grant relief'.

> " In the *Bank Nationalisation case,* (supra) this Court held the statute to be void for infringing the rights under Article 19(1) (f) and 19(1) (g) of the Constitution. In the *Bank Nationalisation case* (supra) the petitioner was a shareholder and a director of the company which was acquired under the statute. As a result of the *Bank*

Nationalisation case (supra) it follows that the Court finds out whether the legislative measure directly touches the company of which the petitioner is a shareholder. A shareholder is entitled to protection of Article 19. That individual right is not lost by reason of the fact that he is a shareholder of the company. The *Bank Nationalisation case* (supra) has established the view that the fundamental rights of shareholders as citizens are not lost when they associate to form a company. When their fundamental rights as shareholders are impaired by State action their rights as shareholders are protected. The reason is that the shareholders' rights are equally and necessarily affected if the rights of the company are affected. The rights of shareholders with regard to Article 19(1) (a) are projected and manifested by the newspapers owned and controlled by the shareholders through the medium of the corporation. In the present case, the individual rights of freedom of speech and expresion of editors, Directors and shareholders are all exercised through their newspapers through which they speak. The press reaches the public through the newspapers. The shareholders speak through their editors. The fact that the companies are the petitioners does not prevent this Court from giving relief to the shareholders, editors, printers who have asked for protection of their fundamental rights by reason of the effect of the law and of the action upon their rights. The locus standi of the shareholder petitioners is beyond challenge after the ruling of this Court in the *Bank Nationalisation case* (supra). The presence of the company is on the same ruling not a bar to the grant of relief ".

It would be observed that the Supreme Court relied to a great extent on an expression of opinion on this precise matter in *R. C. Cooper v. Union of India* (4), popularly called the *Bank Nationalisation case. Seervai* in his *Constitutional Law of India (2nd Edn) criticises that decision. At page 670 Mr. Seervai states:*

" It is clear that the rights of the banks were decided in their absence and without their being heard. The petitioner

> came to court expressly stating that he did not challenge the Act as violating the Banks' fundamental rights but as violating his aim and the court ended up by deciding that the Act violated the Bank's fundamental rights under Articles 14, 19 and 31 ".

Probably Mr. Seervai overlooks the express statement contained in paragraph 14 of that case where it is stated that an executive or legislative measure " may impair the rights of the shareholders as well as of the company " and on that ruling it was perfectly legitimate for the Indian Supreme Court to arrive at the conclusion it did.

Furthermore the bench in the *Bennett Coleman* case, which sought to explain the judgment of the *Bank Nationalisation* case on this issue, included three of the judges who sat on the previous bench and two of the judges had actually participated in the earlier judgment. They are probably in a better position than Mr. Seervai to interpret their own judgment.

The rulings on this point, both in the *Bank Nationalisation* case and the *Bennett Coleman* case were again referred to and followed in *Godhra Electricity Co. v. State of Gujarat* (5). This was decided by Ray C. J. and Mathew J. Ray J. had not expressed an opinion on this matter in the *Bank Nationalisation* case (4) though he wrote the leading judgment in the *Bennett Coleman* case (1). Similarly, Mathew J., who did not express an opinion on this question in the *Bennett Coleman* (1) case, now quoted both the above cases with approval in his judgment. So that we find that in India there is a consistent line of authority in support of the principle contended for by Mr. Nadesan.

In *Godhra* case the 1st appellant was a company. The 2nd appellant was a shareholder and its Managing Director. The appellants challenged the validity of a notice issued by the Gujarat Electricity Board whereby it purported to exercise the option of purchasing the electrical undertaking of the 1st appellant under section 6 of the Indian Electricity Act. The appellants sought a declaration that the provisions of sections 6, 7 and 71 of the Act violated the fundamental rights contained

in Articles 14, 19(1) (f) and 19(1) (g) and 31 of the Indian Constitution.

Mathew, J., delivering the order of the court said—

> " The undertaking, no doubt, belonged to the 1st appellant, a corporation. Not being a citizen, it has no fundamental right under Article 19. The 2nd appellant is a shareholder and the Managing Director of the Company. If his right to carry on the business through the agency of the Company is taken away or abridged, or, his right to a divisible share in future of the property of the company is diminished or abridged in taking delivery of the undertaking without payment of the purchase price, there is no reason why he should be disabled from challenging the validity of the sub-section ".

He concluded by stating :

> " We think the second appellant is entitled to challenge the validity of the sub-section on the ground that it abridged his fundamental right under Arts. 19(1) (g) and 19(1) (f) ".

In S.C. 116/82, my brother Sharvananda, J., has chosen to take a different view of this matter. After holding that a company cannot take advantage of the provisions of Article 14, he addressed himself to the question as to whether the shareholders of a company can come forward and ask for relief when the Competent Authority had sealed the printing press and prevented the company from carrying on business. The answer to this question my brother said depends on a proper appreciation of the relationship in law of shareholders to the company. His conclusion was in the following words :—

> " I cannot subscribe to the concept that the shareholders carry on business through the agency of the company ".

This conclusion, as stated earlier, overlooks the vital distinction referred to earlier appearing in the law in the *Bank Nationalisation* and the *Bennett Coleman* cases as against the situation in the *State Trading Corporation* case (6) and the *Tata*

Engineering & Locomotive Co. (7) case where the shareholders claimed only on behalf of the company. My brother proceeded as follows :—

> " I agree with Mr. H. M. Seervai that the decision in the *Bennett Coleman* case with respect to shareholders' rights *vis-a-vis* the act against the company is erroneous (vide Constitutional Law of India (2nd Edn.) Vol. 1 at page 685) "

I have already dealt with the criticism of Mr. Seervai and shown that it arises from a misunderstanding of a distinction the Indian Supreme Court has drawn between the case of a shareholder coming forward on behalf of the company and seeking relief for and on behalf of the company and one where a shareholder petitions court in his own right as a citizen for a violation of his own fundamental right. The failure to grasp this distinction has apparently led this eminent jurist to conclude that the *Bank Nationalisation* case and the *Bennett Coleman* case had purported to overrule the *State Trading Corporation* case and the *Tata Engineering & Locomotive Co.* case.

Mr. Nadesan, who had undertaken a searching analysis of those cases, demonstrated to us that the two later cases have in no way affected the two earlier cases. The learned Deputy Solicitor General himself confessed that he found it difficult to follow Mr. Seervai's reasoning on this matter although he agreed with Mr. Seervai's general conclusions. The Indian Supreme Court has in the two latter cases proceeded on the basis of the validity of the two earlier cases and quite rightly held that, because the *State Trading Corporation* case and the *Tata Engineering & Locomotive Co.* case dealt with a different aspect of this same matter, they had no controlling effect on the later cases. The *Bank Nationalisation* case and the *Bennett Coleman* case contain a refinement or further development of the principle laid down in the *State Trading Corporation* case and the *Tata Engineering & Locomotive Co.* case. The later cases proceed on a different legal and factual basis. The reference to property rights in the Indian cases is only incidental and has no

controlling effect on those decisions. They deal with more than one fundamental right and my brother Sharvananda J. erred when he made the existence of a property right in India the basis for distinguishing the Indian cases. In my opinion the rulings in S.C. Application No. 116/82 and S.C. Application No. 134/82 are erroneous and should be overruled.

Turning to the merits, Mr. Nadesan claimed that the articles published in the Saturday Review were innocuous and should not have drawn the intervention of the Competent Authority. The State however challenges this statement. In the affidavit by the Competent Authority, he states that the Saturday Review is a political newspaper advocating the cause of dividing the country and the establishment of a separate State to be called Eelam. Many of the articles and items that have been published suggested that the publishers had eschewed democratic processes based on non-violence as a means of resolving the problems facing the Tamil people and openly encouraged the adoption of force and terrorism. The newspaper had also given ample publicity to the acts of the terrorist movements operating in the North, particularly of the terrorist organisation called the Tamil Eelam Liberation Front, and often eulogised such conduct with a view to encouraging the growth of that movement and to countenance the use of force against the lawfully established Government of this country. Finally, the Competent Authority says that the Saturday Review is blatantly communalistic and constantly highlighted alleged grievances and injustices committed against the Tamil community which were capable of arousing communal feelings among this community and encouraged conduct prejudicial to the maintenance of public order and security. To Mr. Nadesan's statement that this paper also carried articles of cultural and artistic interest, the learned Deputy Solicitor-General submitted that interspersed among the political artices, articles of undoubted artistic and cultural value are sometimes found and this has been done advisedly as a " sugar coating ", to use his own words, or to disguise the highly tendentious material contained in the paper so as to give the newspaper the appearance of a paper that is balanced and

moderate in its views. Mr. Aziz also referred to the fact that this newspaper was directed to the intelligentsia, which included the student population who were in the forefront of this agitation. The newspaper appeared also to have large support from Tamil subscribers abroad. In fact, it has been suggested that the Saturday Review serves as a sort of medium of communication between the various well-organised expatriate groups of Tamils abroad, keeping them posted with the news and developments in this country and operating as their mouth-piece for disseminating radical views.

It would appear to me that, for the most part, the publishers have tried to live up to the objects, and ideals set out in the brochure P1. Making due allowance for the regional interest and approach of the publication, the publishers have tried to be as objective as possible and have sought to produce a weekly newspaper, which appears to be a cut above the average newspaper judged by journalistic standards.

I am in agreement with Mr. Nadesan when he says that the freedom of speech and expression is an essential prerequisite for the purpose of successfully preserving democratic institutions and the freedom of press embraces the freedom to propagate a diversity of views and ideas and the right of free and general discussions of all public matters. Barring the exceptions contained in Article 15(2) and (7), the object of freedom of speech and expression is " to foreclose public authority from assuming a guardianship of the public mind through regulating the Press and speech ; it rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public ".— *Termini ello v. Chicago* (8).

Some of the material in the Saturday Review may not be palatable to the Government or to the majority of people in this country, but that by itself is no reason for imposing a sanction on this paper if the fundamental freedom of free speech has any worthwhile meaning. Unfortunately there has also crept into this publication some material that must necessarily attract the

attention of the authorities at a time when there are unsettled conditions in the country as today. Mr. Nadesan himself admitted that one of the objects followed by the publishers was to highlight the grievances of the Tamil people by laying bare the atrocities and excesses of the police and the armed services. It is apparent that full rein has been given to this object. It cannot also be gainsaid that this publication, being intimately concerned with the aspirations of the Tamil community and under pressures from public opinion in the North, has in its general editorial policy, found that it could not but help incline towards the radical groups waging a struggle against the State. It has at times, if not explicitly, at least implicitly eulogised the terrorists and praised the sacrifices they have made.

Whether or not this material would pass muster in normal times need not concern us now. But in the present context I cannot say that the Competent Authority was so unreasonable or wrong when he was of the view that—

> " . . . this editorial policy, was, in the context of the circumstances prevailing in the country at the time the two impugned orders were made and to date, extremely prejudicial to the security and safety of the country and its citizens ".

The fundamental rights guaranteed by the Constitution cannot by its very nature be interpreted as being absolute rights. There are well-recognised restrictions and exceptions to the exercise of this right. One of the cases relied on by Mr. Nadesan —*American Communication Association v. Dodds,* (9) — brings this out clearly :—

> " Freedom of speech, press and assembly are dependent upon the powers of Constitutional Government to survive. If it is to survive, it must have power to protect itself against unlawful conduct and under certain circumstances against incitements to commit unlawful acts. Freedom of speech does not comprehend the right to speak on any subject at any time."

Apart from a total prohibition and ban on certain topics offensive to society and orderly government, freedom of speech in other matters may be circumscribed by time, place and circumstances. What is permissible at one place may not be appropriate at another. What is considered apposite to one time may not be so to a different time or period. A statement may be allowed in the context of a particular set of circumstances, but may be considered undesirable in different circumstances. This order was made by the Competent Authority under Regulation 14(3) of the Emergency (Miscellaneous Provisions and Powers) Regulations No. 5 of 1983. This provision enables the Competent Authority to make the order he has made, if he—

> " is of opinion that there is or has been or is likely to be in any newspaper, publication of matter which is, in his opinion, calculated to be prejudicial to the interests of national security or the preservation of public order or the maintenance of supplies and services essential to the life of the community or matter inciting or encouraging persons to mutiny, riot or civil commotion . . . "

The Deputy Solicitor-General also submitted that, while a state of Emergency had been declared as early as 18th May, no action was taken to restrict publication of news until 1st July 1983. Just prior to this date, the terrorist group, Tamil Eelam Liberation Front, had called a Hartal and this led to large-scale violence in the North resulting in serious loss and damage to property. We were also told that an order similar to this has been made against one other Tamil newspaper. A censorship however had been imposed on all other newspapers. Subsequent to the order made against the petitioners, in late July there had been an outbreak of communal violence, which is unprecedented in recent history and these subsequent events seem to confirm the wisdom of the timely action taken by the Competent Authority.

In dealing with an Emergency situation, courts have always been prepared to give the Executive sufficient leeway in making decisions affecting the safety of the people and the security of the country. The decisions have to be made rapidly and in the light of information then available and under the constraint of the

available resources. While some of the Emergency Regulations permit the authorities to apply a system of graduated pressure and restrictions on an errant newspaper, I am not in agreement with Mr. Nadesan when he says that these provisions preclude the Competent Authority from directly resorting to the provisions of Pegulation 14(3) in a fit case. In the result, I hold that the fundamental rights of the 1st to 6th petitioners have not been violated by any executive or administrative action.

I would therefore dismiss all three petitions without costs.

RATWATTE, J. I agree

SOZA, J.

New Era Publication Ltd., who is the 7th petitioner in application No. 47/83 filed on 22nd July, 1983, and in No. 53/83 filed on 25th August, 1983 and the 5th petitioner in application No. 61/83 filed on 13th October, 1983, is a duly registered private limited liability guarantee company without a share capital engaged in the publication in the English language of the newspaper " Saturday Review ". The 1st to 6th petitioners in cases Nos. 47/83 and 53/83 along with one Kandiah Kandasamy who was unable to join as a petitioner as he was away from Sri Lanka are the sole shareholders and sole directors of the 7th petitioner-company. Only the 1st, 3rd, and 5th and 6th petitioners in cases Nos. 47/83 and 53/83 were able to join as the 1st, 2nd, 3rd and 4th petitioners respectively in case No. 61/83 owing to the absence of the others from the Island. The 1st to 6th petitioners, among whom are the 1st to 4th petitioners in case No. 61/83, are citizens of Sri Lanka. They are persons of considerable wealth and men of high standing in public life. They are now engaged in social service and do not belong to any political party. The income and property of the company were applied solely towards the objects of the Company and no dividends, bonuses or profits were payable to its members.

The " Saturday Review " was first published in January, 1982, by a company called Kalai Nilayam Ltd. The objects of the paper

were to disseminate news and views and information on men and matters, to stand up for human rights and freedom, to provide a forum for free comment and expression of opinion by members of the public, to reflect the ethos and life of the people around Jaffna, to enlighten non-Tamils on Tamil culture and establish a two-way communication between all peoples and nationalities and break down the barriers of prejudice and emotional antipathies which had built up over the years, to foster the humanities and to serve as a link between Sri Lankans here and abroad. The paper was independent and non-partisan — see brochure P1.

On 9th August, 1983, the New Era Publications Ltd. whose objects accorded with those of Kalai Nilayam Ltd. became the owners of the " Saturday Review ", and from 2nd October 1982, were responsible for its continued publication. The new owners employed the necessary staff and continued with the earlier arrangement to have the paper printed at St. Joseph's Catholic Press, Jaffna, on a purely commercial basis. It may be noted that S. Sivanayagam who is the 2nd petitioner in Cases No. 47/83 and No. 53/82 is according to P4 the editor of the " Saturday Review " and in receipt of a monthly salary of Rs. 3,500/-.

Don John Francis Liyanage, Secretary to the Ministry of State appointed as Competent Authority under the Emergency Regulations, Rudra Rajasingham, Inspector-General of Police and the Attorney-General are the 1st, 2nd and 3rd respondents respectively in all three applications. All three applications raise similar questions of law and fact but there are differences of which notice would be required. It was agreed that all three applications could be dealt with in one judgment.

Application No. 47/83.

I will take Application No. 47/83 first. The grievance here is that on 1st July, 1983 the 1st respondent acting under the powers vested in him by Regulation 14 of the Emergency

(Miscellaneous Provisions and Powers) Regulations promulgated on 18th June, 1983, made order P2—

(a) that no person shall print, publish or distribute or in any way be concerned in the printing, publication or distribution of the " Saturday Review " for a period of one month from the date of the order, and

(b) that the printing press in which the said newspaper was printed shall for a period of one month from the date of the order not be used for any purpose whatsoever ;

(c) that the Inspector-General of Police is authorised to take such steps (including the taking possession of the printing press or of any part of such printing press or premises) as appear to him to be necesary for ensuring compliance with the order.

The second respondent Inspector-General of Police thereupon sealed the office of the " Saturday Review " where the editorial and other work in connection with the publication of this newspaper was being done and where the documents and papers including the books of accounts were kept. The 2nd respondent, however, took no steps to prevent the commercial printing press in which the " Saturday Review " was printed from being used for its commercial purposes.

On the expiry of the Emergency Regulations of June, 1983, Emergency Regulations were promulgated afresh on 18th July, 1983, and in pursuance of these Emergency Regulations a fresh order P3 dated 18th July, 1983, was made by the 1st respondent, the Competent Authority, in terms identical with the order P2. The 2nd respondent took action similar to what he did on the first occasion and the closure of the " Saturday Review " was thus continued. The basis on which the first respondent has acted is that he is of opinion that there has been published and is likely to be published in the " Saturday Review " matter calculated to be prejudicial to the interests of national security, the preservation of public order, the maintenance of supplies and services essential to the life of the community and matter inciting and encouraging persons to mutiny, riot and civil commotion.

The petitioners state that they are entitled to the fundamental rights embodied in Article 14(1) of the Constitution of Sri Lanka, more particularly to the fundamental right of freedom of speech and expression including publication set out in Article 14(1) (a) and to the right of freedom to engage by themselves or in association with others in any lawful occupation, profession, trade, business or enterprise set out in Article 14 (1) (g). The two orders P2 and P3 of 1st July, 1983, and 18th July, 1983, respectively and the acts of the second respondent and his subordinate police officers violate these fundamental rights of the petitioners. The two orders are unlawful and a nullity. They have been made by the 1st respondent—

(a) mala fide and in abuse of the powers conferred by Regulation 14(3) of the Emergency Regulations and not for a legal purpose but for an ulterior purpose ;

(b) mechanically, perfunctorily, unreasonably and without addressing his mind to the relevant facts and circumstances as will be seen from the following considerations :

(i) The impugned orders are a verbatim reproduction of Regulation 14 (3), the only changes being the substitution of the conjunctive "and" for every disjunctive "or" except one, appearing in the Regulation;

(ii) The commercial printing press at which the " Saturday Review " was printed was ordered to be closed for one month without any regard to the fact that the regulations then in force were to lapse on the 18th July and that this Press was engaged in other commercial printing not deemed to be obnoxious ;

(iii) At no time had there been any publication of any matter which constituted an offence even after the Emergency Regulations came into force nor was any matter calculated to be prejudicial to the interests of

national security or the preservation of public order or maintenance of supplies and services essential to the life of the community or inciting or encouraging persons to mutiny, riot or civil commotion ever published ;

(iv) Being on his own admission unaware of the constitution, objects and other relevant factors pertaining to the 7th petitioner-company and the standing of its members, and the fact that at no time had the editor or publisher of the paper been charged with the commission of any offence and that no complaint had been made against them to the Press Council barring one for which there was an adequate defence and not having had the time to verify them, the 1st respondent was not possessed of all the information material to a fair assessment of the exact situation concerning the paper to enable him to form the opinion he says he formed ;

(v) There was no material at all to justify making the orders ;

(vi) The Emergency was declared on 18th May, 1983, and there were Emergency Regulations in force from that date prescribing stringent punishments for contraventions, yet no charge was preferred or prosecution launched in respect of any alleged transgression by the " Saturday Review " nor even was the unlikelihood of the petitioners or the Press itself courting the risk of incurring the dire penalties and sanctions prescribed for contraventions, taken into account.

(c) with the object of masking the true purpose which was to prevent the publication of news and views which may lend to criticism of aspects of Government policy despite the fact that such criticism as had been published were made bone fide in respect of public affairs.

As a result of the closing down of the " Saturday Review " the petitioners have suffered financially — loss of revenue from advertisements and payments to staff. The petitioners seek a declaration that the said orders of the 1st respondent are null and void and/or contravene the Constitution and the issue of a direction to the 2nd respondent to hand back the office together with the equipment, papers, documents and books of account and an award of Rs. 23070/- per month as compensation from 1st July, 1983, in favour of the 7th petitioner.

Although every front page of the " Saturday Review " carries the legend, "The only regional newspaper in Sri Lanka " the circulation of the paper is not confined to the North of Sri Lanka. It is read in Colombo also and even in the deep South and beyond our shores. The paper, however, will appeal only to the English educated elite who constitute only a very small proportion of the people. Its object is to bring matters of public interest to the notice of the President and the authorities and to mould public opinion among a responsible readership not likely to resort to violence.

The 1st respondent admits he made the orders P2 and P3 but denies he made them mala fide or for an ulterior purpose or that he acted unreasonably or failed to give his mind to the facts and circumstances relating to the publication of the " Saturday Review " before making the orders in question. He denies too that his object was merely to stifle criticism of Government policy. He had on the other hand examined the contents of the " Saturday Reviews " from 30th January, 1982 to 25th June 1982, and he was satisfied :

(a) That it was a political newspaper advocating the cause of dividing the country and the establishment of a State known as Eelam for the Tamils in the North and East of the country,

(b) That the tenor of the articles and news items was blatantly communalistic and the alleged grievances and injustices committed against the Tamils were constantly being

highlighted and the editorial policy was in the context of the circumstances prevailing capable of arousing communal feelings among the Tamils, and encouraging conduct which would be prejudicial to the maintenance of public order and security, and imperilling the safety of the country and its citizens,

(c) That many of the articles and items published in the newspapers suggested that its publishers eschewed democratic processes, negotiations and campaigns based on non-violence as a means of resolving the problems facing the Tamils of Sri Lanka and that they openly encouraged the adoption of force and terrorism by giving prominent publicity to and eulogising the acts of terrorist movements operating in the North, particularly those of the Tamil Eelam Liberation Front ;

(d) The conduct of the law enforcement agencies and military authorities and excesses alleged to have been committed by them were given prominent coverage sometimes in grossly exaggerated form in an endeavour to arouse communal passions among the people.

Immediately prior to the making of order P2, a Hartal sponsored by the Tamil Eelam Liberation Front led to large-scale violence in the North resulting in serious loss and damage to property. The sealing of the " Saturday Review " and another paper in Jaffna was necessary to prevent the further escalation of violence. In fact, the recent communal disturbances were motivated, inter alia, by resentment of the population in the Sinhalese areas to the separatist tendencies in the North which the " Saturday Review " was openly espousing. The 1st respondent has annexed as IR1 to 1R14 random extracts of articles and news items which appeared in the " Saturday Review "

The main questions arise for our determination :

(1) Is this Petition (No. 47/83) maintainable ?

(2) If this question is answered in the affirmative, do the facts justify the making of the orders P2 and P3 and the action taken in pursuance of them ?

Maintainability

The 1st to the 6th petitioners are seeking in this application to vindicate their own fundamental rights guaranteed to them under Articles 14(1) (a) and 14(1) (g) of the Constitution, and not of the 7th petitioner-company. The 1st to 6th petitioners have merely utilised the institution of a company, here the 7th petitioner, to exercise their fundamental right of freedom of speech and expression including publication (Article 14(1) (a)) and the fundamental right of freedom to engage with one another in the newspaper business (Article 14(1) (g)). The 1st to 6th petitioners are citizens of Sri Lanka and they did not intend to forego their fundamental rights when they decided to operate through the institutional device of a company.

The argument advanced on behalf of the petitioners goes thus :

> In law a company is a fictitious person and an entity different to its shareholders. But this does not mean that the 1st to 6th petitioners cannot utilise it as an institutional device to exercise their fundamental rights. In a matter of fundamental rights the Courts should adopt a liberal attitude and approach the question from the angle of the factual relationship between the company and its shareholders. The factual approach is jurisprudentially warranted. Salmond supports this approach in his work on Jurisprudence (7th Edition, 1924).

Although the 7th petitioner-company owns the " Saturday Review " in fact it owns the paper as a trustee for or otherwise on behalf of actual human beings, namely, the shareholders who are citizens of Sri Lanka.

In the way of the petitioners, however, are the two judgments of Sharvananda, J. in the applications filed in the Supreme Court by *Dr. S. N. A. Fernando and Others against D. J. F. D. Liyanage and Others* (18) and S.C. Application No. 134/82 (17). In the first proceeding, Dr. S. N. A. Fernando and the other

shareholders of Janatha Finance and Investments Ltd., a duly incorporated company which was the 6th petitioner in the case, complained of infringement of the fundamental right of freedom of speech and expression including publication guaranteed under Articles 14(1) (a) and of the fundamental right of freedom to engage in any lawful occupation, profession or trade by himself or in association with others guaranteed by Article 14(1) (g) of the Constitution. In the second application the same petitioners sought a review of the judgment in the first application on the grounds that it had been made per incuriam and that their fundamental rights guaranteed by Articles 12(1), 12(2), 13(2), 13(5), 14(1) (a), 14(1) (b) and 14(1)(c) of the Constitution had been infringed.

The facts relevant to the question of maintainability of the applications were that the 6th petitioner, Janatha Finance and Investments Ltd., was the owner of the business and of the press which had been sealed in pursuance of orders made under Regulation 14(7) of the Emergency (Miscellaneous Provisions & Powers) Regulations No. 2/82. The other petitioners were shareholders of the 6th Petitioner-company.

In case No. 116/82 Sharvananda J. pointed out that in Chapter 3 dealing with Fundamental Rights our Constitution draws a distinction between persons and citizens. He pointed out that Articles 10 to 13 deal with fundamental rights guaranteed to all persons while Article 14 enumerates fundamental rights guaranteed to citizens. Perhaps a slight correction is necessary here because Article 12 (2) deals with fundamental rights guaranteed to citizens. But there is no gainsaying that the inference is clear that a distinction is drawn between persons and citizens in the provisions of Chapter 3 of our Constitution. Although a corporate body occupies an important place in the economic life of society and is a legal person, it is not a citizen and cannot claim the fundamental rights guaranteed in Article 14 of our Constitution. A similar view has been taken by the Supreme Court of India interpreting Article 19 of the Indian Constitution which, with certain differences, corresponds to our Article 14 — see the cases of *State of Gujerat v. Shri Ambica Mills,* (10), *Tata Engineering & Locomotive Co. Ltd. v. State of Bihar* (generally referred to as the

Telco case) (7) *R. C. Cooper v. Union of India* (generally referred to as the *Bank Nationalisation Case* (4) and *Bennett Coleman & Co. Ltd. v. Union of India* (1).

I might add that even in America, the corporation is not treated as a citizen — see American Jurisprudence, Vol. 13, paragraph 13, p. 168. This proposition then admits of no dispute. In fact, learned Senior Counsel for the petitioners readily conceded that a corporation is in law a separate entity and although it is a legal person it is not a citizen and cannot, therefore avail itself of the fundamental rights constitutionally guaranteed by Article 14.

Sharvananda, J. proceeds (in case No. 116/82) to point out that in accordance with the provisions of Articles 17 and 126 of our Constitution the Court will grant relief only if the infringement is by executive or administrative action and the complainant is directly affected by the infringement. A complainant cannot seek relief because someone else in whom he is interested is affected by the act complained of. Sharvananda J. formulated the problem before him as follows in the case (supra) :

> " An answer to the question whether the 1st to the 5th petitioners qua shareholders of the 6th petitioner-company, can maintain the application depends on a proper appreciation of the relationship in law of shareholders to the company "

Learned Senior Counsel for the petitioners contended that this formulation is wrong. The Court should have considered the relationship *in fact* (and not in law) of the shareholders to the company. When fundamental rights are concerned the Court should adopt a liberal attitude and approach the question not from the angle of the law, but from the angle of the facts. In fact the company is the agent or trustee of the shareholders. The terms 'agent' and 'trustee' are used in a popular but jurisprudential sense. There is warrant for such use in the high authority of the great jurist John Salmond and of successive editors of his work on Jurisprudence.

In the seventh edition (1924) which was the last edition, Salmond himself edited, he had this to say on corporate personality at page 343 :

> " A corporation, having neither soul nor body, cannot act save through the agency of some representative in the world of real men. For the same reason it can have no interests, and therefore no rights, save those which are attributed to it as a trustee for or otherwise on behalf of actual human beings ".

It is apposite at this stage to consider the validity of the contention of learned Senior Counsel for the petitioners. I will first take the statement of Salmond that a company can have no interests and, therefore, no rights save those which are attributed to it as a trustee for or otherwise on behalf of actual human beings. To begin with, Salmond himself was not without misgivings about the accuracy of his statement and appended the following footnote to it by way of qualification :

> " The relation between a corporation and its beneficiaries may or may not amount to a *trust* in the proper sense of the term. A share in a company is not the beneficial ownership of a certain proportion of the company's property, but a benefit of a contract made by the shareholder with the company, under which he is entitled to be paid a share of the profits made by the company, and of the surplus assets on its dissolution. A share is a chose in action — an *obligation* between the company and the shareholder. *Colonial Bank v. Whinney,* 11 A.C. 426 " (11).

Salmond's view that a corporation can have no interests, and, therefore, no rights, save those which are attributed to it as a trustee for or otherwise on behalf of actual human beings has not, as far as I have been able to gather, been adopted by any other writer on jurisprudence. In fact, Paton points out to some confusion is Salmond's approach to the nature of legal personality. Salmond said :

> " So far as legal theory is concerned, a person is any being whom the law regards as capable of rights and duties. Any

being that is so capable is a person, whether a human being or not, and no being that is not so capable is a person, even though he be a man ". (Jurisprudence, 12th Ed. p. 299).

And yet a little later Salmond said :

> " A legal person is any subject matter other than a human being to which the law attributes personality. This extension, for good and sufficient reasons, of the conception of personality beyond the class of human beings is one of the most noteworthy feats of the legal imagination...." ibid. p. 305.

Paton commenting on these two passages says as follows :

> " Here are the seeds of confusion. In one passage *person* refers to anything recognized by the law as capable of bearing rights and duties whether human or not, in the other human beings are *persons* with *personality* but non-human beings may be *legal persons* ". (Paton on Jurisprudence, (1972) 4th Ed. pp. 391-392).

On the basis of Salmond's view, I would like to point out that a trustee-Company is a fictitious owner having neither soul nor body. But the fact is that the so-called trustee's ownership of the company is far from fictitious. It is real apart from being legal. It exists like human beings, plants, rivers, books, ideas, rules — see Wolff *" On the Nature of Legal Persons "* — 54 Law Quarterly Review, pp. 494-505.

Even if in a popular sense the company can be said to carry on business for and on behalf of its shareholders, we must not overlook the fact that the corporate capacity for action depends on the majority voting strength of the directors and, may be ultimately, of the shareholders. But what of the corporate capacity of action which is disapproved by the minority shareholders ? Their liberty cannot involve a right to paralyse that common action. Further, what if the shareholders of the company are themselves companies ? We will then have a fictitious trustee for fictitious beneficiaries or a fictitious agent acting for a number of fictitious shareholders. The use of the popular notion of agency or trusteeship will not help. M. Hauriou, the French Jurist, was prepared to concede to corporate

institutions a personality in fact as well as in law — see the discussion of Hauriou's approach to the nature of corporate personality by Hallis in his book " The Corporate Personality ", p. 223. Hallis himself put his own view thus at page 240 :

> The concept of corporate personality expresses a juristic reality, that is, a reality from the juristic point of view, nothing more and nothing less. While it is not simply descriptive of an observable fact, its reality is, nevertheless, rooted to the world of empirical fact ".

On this question, we were referred by the learned Deputy Solicitor-General to the decision of the Court of Appeal in England in the case of *Tunstall v. Steigmann* (12). This case involved the application of Sections 24(1) and 30(1) (g) of the Landlord and Tenant Act 1954. Under Section 24(1) of the Act, a tenant of premises applied for a renewal of his tenancy at the termination of his tenancy. The landlord could resist this application under Section 30(1) (g) if he intended to occupy the building for the purposes of a business carried on by him. In the case however, there was a problem about the identity of the landlord. The landlord at the time was a company in which a Mrs. Steigmann held all the shares save two held by her nominees. The business was at one time Mrs. Steigmann's and she assigned it to the company for some reason which she considered to be an advantage to her. In this case, Ormerod L. J. explained the position thus :

> ".It may be that in practice the landlord will continue to carry on the business as it has been carried on in the past when she was undoubtedly the proprietor of it. It may be that she will derive a profit or otherwise from the business as she has done in the past. But the fact remains that she has disposed of her business to a limited company. It is the limited company that will carry on the business in the future, and, if she acts as the manager of the business, it is for and on behalf of the limited company. In my judgment the fact that she holds virtually the whole of the shares in the limited company and has complete control of its affairs makes no difference to this proposition. . . She cannot say

that in a case of this kind she is entitled to take the benefit of any advantages that the formation of a company gave to her, without at the same time accepting the liabilities arising therefrom ".

In the same case Willmer L.J. said as follows at page 423 :

" Here the landlord and her company are entirely separate entities. This is no matter of form; it is a *matter of substance and reality.* Each can sue and be sued in its own right; indeed, there is nothing to prevent the one from suing the other. Even the holder of one hundred per cent of the shares in a company does not by such holding become so identified with the company that he or she can be said to carry on the business of the company.

This clearly appears from *Gramaphone & Typewriter, Ltd. v. Stanley* " (13). As was pointed out by Fletcher Moulton, L.J. control of a company by a corporator is wholly different *in fact* and law from carrying on the business himself . . . This being so, I do not see how it is possible for the landlord in the present case to assert that she intends to occupy the holding for the purpose of a busines to be carried on by her. Her intention, as has been made plain, is that the company which she controls shall carry on its business on the holding ". (emphasis mine)

Senior Counsel for the petitioners submitted that on incorporation the liability of the shareholders became limited. They were not liable for any breach of contract of the company; they could not be sued for the debts of the company, nor were they liable to pay any taxes in respect of profits made by the company. What Ormerod L.J. said in *Tunstall's* case (supra) becomes very apposite. The 1st to 6th petitioners cannot then say they are entitled to take the benefit of any advantages that the formation of the company gave them without at the same time accepting the liabilities arising therefrom. Their intention was that the company should exercise its own right of speech and its own right to engage in the newspaper business. But our Constitution has not elevated these rights of companies to the class of fundamental rights. Only citizens enjoy these rights as fundamental rights. It is clear that unless we treat corporate personality as a real thing and apply the fact of that reality as a basic principle, we will find ourselves in an illogical and chaotic muddle.

It is only in exceptional and special circumstances that the Court will lift the veil of corporate personality. The cases reveal no consistent principle as to when the Courts will lift the veil beyond a refusal to apply the logic of the principle of corporate personality where it is too flagrantly opposed to justice, convenience or the interests of the revenue. But as Wolff has said :

> " The persons veiled by corporate personality are, as a rule, not allowed to pierce the veil themselves ". (ibid. p. 520)

I would add that this statement accords with logic and sound sense.

The fact that we are dealing with a question of fundamental rights will make no difference. The Court no doubt will be liberal in favour of the citizen when called upon to uphold and protect fundamental rights guaranteed to him by our Constitution. Learned Senior Counsel for the petitioners pointed out that the fundamental rights set out in the Universal Declaration of Human Rights (December 10, 1948) as a common standard of achievement for all people and all nations have largely influenced the enunciation of fundamental rights in our Constitution. Article 19 of the Declaration states, inter alia, that " everyone has the right to freedom of opinion and expression ", and Article 22 states " everyone shall have the right of freedom of association with others, including the right to form and join trade unions for the protection of his interests. " To give effect to the Declaration the United Nations adopted two International Covenants: The International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights. These two Covenants are completed by an Optional Protocol to enable complaints to be made by persons whose rights have been violated. The two Covenants and Protocol came into force in 1976. Sri Lanka has signed the Declaration and the two Covenants but not the Protocol. The Court will respect the Declaration and the Covenants but their legal relevance here is only in the field of interpretation. So far as our municipal law goes, they have not the force of law. England, for example, is a signatory to the European Convention on

Human Rights but the Court of Appeal has held that the Convention did not have the force of law in England — see the cases of *R. v. Chief Immigration Officer, Heathrow Airport, Ex parte Bibi* (14) and *R. v. Secretary for the Home Department, Ex parte Fernandes* (15).

So much of the Declaration and the two Covenants as have been written into our Constitution alone have the force of law in Sri Lanka. So far as the Declaration is concerned Dennis Lloyd in his " The Idea of Law " (1979 revised reprint) p. 181, described it as "little more than a resounding statement of principle, useful, perhaps, in influencing public opinion, but not likely to have more than a marginal effect so far as individual grievances are concerned."

The fundamental rights declared and recognised in our Constitution and set out in Chapter 3 must, no doubt, evoke the special concern of this Court. Yet even fundamental rights fall under the panoply of legal rights. Fundamental rights form an integral part of the principles of law which the Court enforces— see the case of *Firma Neld v. European Communities Commission* (16) (extract reproduced in Lloyd on Jurisprudence (1979) 4th ed. pp. 161 to 164). The test of a legal right is a simple one — is the right recognised and protected by the legal system itself ? (Paton — ibid p. 284). There is nothing special in the nature of fundamental rights to justify a departure from the usual approach which the Court would adopt in enforcing a legal right. In fact, it should be observed that Article 16 (1) of our Constitution makes all existing written law and unwritten law valid notwithstanding any inconsistency with Articles 10 to 15 and this includes even fundamental rights.

Several Indian cases were cited to us, but in applying them we must remember that the basic norm of our Constitution is that Sovereignty is in the People and is inalienable. Sovereignty includes the powers of Government, fundamental rights and the franchise. Most of the powers of Government of the Sovereign People are exercised by Their delegates: the President and Parliament. The judicial power of the People is exercised by

Parliament through Courts, Tribunals and Institutions but Parliament is empowered to exercise judicial power directly in matters relating to its own privileges, immunities and powers and those of its members. Fundamental rights constitute an integral part of the Sovereignty of the people. Those fundamental rights which are declared and recognized by the Constitution must be secured and advanced by all organs of government and may not be abridged, restricted or denied except in the manner and to the extent provided in the Constitution.

Our Constitution of 1978 was enacted by utilising the legal framework for amendment provided in the first Republican Constitution of 1972. The first Republican Constitution was a truly autochthonous Constitution rooted entirely in Sri Lanka's own native soil. In the enactment of the Constitution, the legal and constitutional link with the past was completely severed though Westminister traditions are still being drawn on as background material. The 1972 Constitution effected a break in legal continuity, a legal revolution as it has been called. This Constitution was structured on the basic norm of the Sovereignty of the people.

The Indian Constitution does not postulate any such principles of Sovereignty and distribution of power as does our Constitution of 1978. There is thus a fundamental difference in the Constitutional edifice of the Constitutions of the two countries and this must be borne in mind when applying interpretations of the Indian constitutional provisions. Further, in formulation, the fundamental rights recognised in Article 19 of the Indian Constitution are not cast in terms exactly identical with those spelt out in our Article 14 which corresponds to it. Add to this the fact that the Indian Constitution recognizes fundamental rights to property which our Constitution does not and then it will be realised that there is every need to be circumspect in adopting the interpretations found in the Indian decisions.

Of the Indian cases cited I will take first the case of *State Trading Corporation of India Ltd. v. The Commercial Tax Officer*

and Others (6). The case first came up on a reference before the Supreme Court for determination of two preliminary points :

(1) Whether the State Trading Corporation is a citizen within the meaning of Article 19 and could ask for the enforcement of fundamental rights ;

(2) Whether the State Trading Corporation is, notwithstanding the formality of incorporation, in substance a department or organ of the Government of India and hence whether it could claim to enforce fundamental rights.

The first question was answered by Sinha, C.J. who delivered the judgment of the majority in the negative. It is not necessary to discuss the reasons he gave because so far as the instant case is concerned, the parties concede that a corporation is not a citizen and is not, therefore, endowed with the fundamental rights set out in Article 14 which corresponds to Article 19 of the Indian Constitution. In view of his answer to the first question, Sinha, C.J. did not proceed to consider the second question. Hidayatullah, J. answered both questions against the State Trading Corporation, but Das Gupta J. answered both questions in favour. Shah J. answered the first question and the first part of the second question in the negative. The second part of the second question he answered as follows :

> " Even if the State Trading Corporation be regarded as a department or organ of the Government of India, it will, if it be a citizen, be competent to enforce fundamental rights ". On the basis of the majority decision the case was sent back to be heard on the merits.

The decision on the second hearing is reported as *Tata Engineering & Locomotive Co. Ltd. v. State of Bihar* (referred to generally as the *Telco* case) (7). There were three petitions. The first was that of Tata Engineering & Locomotive Co. Ltd., the second of Automobile Products of India Ltd., and the third was that of the State Trading Corporation of India Ltd. The petitioners'

grievance was that a Sales Tax was being levied against them in respect of transactions protected by Article 286 (1) (a) which grants immunity from Sales Taxes in respect of the sale or purchase of goods outside the State. This, it was alleged, constituted a breach of their fundamental right under Article 31 (1). The majority of the shareholders of the second petitioner were citizens of India and one of them was impleaded as a petitioner. The shareholders of the third petitioner were the President of India and two Additional Secretaries, Ministry of Commerce and Industry, one of whom joined the petition. It was argued on behalf of the petitioners that, though the Company or the Corporation may not be an Indian citizen, in substance it is no more than an instrument or agent appointed by its Indian shareholders. Two preliminary objections were raised one of them being that the principle that the State Trading Corporation is not a citizen necessarily means that the fundamental rights guaranteed by Article 19 cannot be claimed by such a corporation. The petitioners, however, contended that when fundamental rights are involved the Court should disregard the doctrinaire approach which recognises the existence of companies as separate juristic or legal persons and should not hesitate to look at the substance of the matter. Where the shareholders of the petitioning Companies are Indian citizens, the Court should look at the substance of the matter by lifting the veil of corporate personality and " give the shareholders the right to challenge that the contravention of their fundamental rights should be prevented ". Gajendragadkar C.J. observed that while it is true that the Court as the guardian of the fundamental rights of the citizens will always attempt to safeguard their fundamental rights, yet if the Court upholds the petitions before it, " it would really mean that what the corporations or the companies cannot achieve directly, can be achieved by them indirectly by relying upon the doctrine of lifting the veil. If the corporations and companies are not citizens, it means that the Constitution intended that they should not get the benefit of Art. 19 ". (p. 48).

A second argument was also advanced on behalf of the petitioners. Under paragraph (c) of Article 19 (1) citizens were

guaranteed the right " to form associations or unions " while paragraph (g) guaranteed the right " to practise any profession, or to carry on any occupation, trade or business ". It was argued that the distinction between the two rights enables the Court to lift the veil because by looking at the substance of the matter the Court would really be giving effect to two fundamental rights guaranteed by Article 19 (1). Article 19 (1) (c) enables the citizens to choose their instruments or agents to carry on the business which it is their fundamental right to carry on. The Court rejected this argument because the fundamental right to form an association cannot in this manner be coupled with the fundamental right to carry on any trade or business. The respective rights cannot be combined but must be asserted each in its own way and within its own limits ". (p. 48). As soon as citizens form a company, the right guaranteed to them by Article 19 (1) (c) has been exercised and no restraint has been placed on that right and no infringement of that right is made. Once a company or a corporation is formed, the business which is carried on by the said company or corporation is the business of the company or corporation and is not the busines of the citizens who get the company or corporation formed or incorporated, and the rights of the incorporated body must be judged on that footing and cannot be judged on the assumption that they are the rights attributable to the business of individual citizens ". (p. 48). The Court then upheld the preliminary objection and the writ petitions were dismissed as being incompetent.

Learned Senior Counsel for the petitioners has submitted that this decision is correct because Sales Tax or Income Tax is imposed by law on transactions of the Company. The shareholders are not called upon to pay these taxes. But this was not the ground on which the petitions were dismissed. The case never got that far because the suit was dismissed on a preliminary objection. The Court held that the shareholders cannot get behind the fact that the company is not a citizen and not endowed with fundamental rights. Although dividends of the shareholders are affected by erroneous taxation, it affects them only indirectly and will not amount to an infringement of their fundamental rights.

In our Constitution, too, the freedom of association (Article 14(1)(c) is distinct from the freedom to engage in business alone or in association with others (Article 14(1)(g)). The terminology is not identical with that in the Indian formulation. Our right extends to the carrying on of business in association with others. But it is obvious that a shareholder of a company cannot be said to be carrying on business in association with his own company unless he is in partnership with it. The difference in language will not affect the applicability of the principles enunciated in the Indian decision to the case before us.

I will now discuss the case of *R. C. Cooper v. Union of India* (commonly referred to as the Bank Nationalisation Case (4)). In this case, R. C. Cooper, an Indian citizen, was the first petitioner. He held shares in four banks and in addition deposit and current accounts in all of them. Further, he was a member of the Board of Directors in one of the banks. Cooper filed two petitions and one T. M. Gurubaxani filed two others. Seven Indian States joined as interveners. The Union of India was named as respondent in all the petitions. New legislation (the Banking Companies (Acquisition and Transfer of Undertakings) Ordinance No. 8 of 1969 and the Banking Companies (Acquisition and Transfer of Undertakings) Act No. 22 of 1969) had been enacted. The effect of the legislation was to transfer the undertaking of each named bank and to vest it in the corresponding new bank controlled by the Central Government and its entire capital was vested in and allotted to the Central Government. Fourteen banks including the four with which Cooper was concerned were to be nationalised in this way. Payment of compensation was provided for.

The petitioner (Cooper) claimed that by the Act and Ordinance the rights guaranteed to him under Articles 14, 19 and 31 of the Constitution were impaired. He complained that the acquisition was not for a public purpose and the Act and the Ordinance were invalid because the subject-matter of the Act and Ordinance was partially at least within the State List and because they vest the undertaking of the named banks in new corporations without a public purpose. Further, there were no settled principles for the payment of compensation. He also complained, inter alia, that in

consequence of the hostile discrimination practised by the State the value of his investment in the shares was substantially reduced, his right to receive dividends had ceased, and he had suffered great financial loss. He was deprived of his rights as a shareholder to carry on business through the agency of the Company. In respect of the deposits, the obligations of the corresponding new banks not of his choice were being substituted without his consent.

Article 14 of the Indian Constitution stipulates that the State shall not deny any person equality before the law or the equal protection of the laws within the territory of India. Article 19 (1) guarantees to all citizens the right to acquire, hold and dispose of property and to practise any profession or to carry on any occupation, trade or business while Article 31 (2) provided that no property shall be compulsorily acquired save for a public purpose and save by the authority of a law.

By way of defence the contention put forward on behalf of the Union of India was that the petition was not maintainable because the undertaking that had been taken over was not an undertaking belonging to Cooper. No fundamental rights of the petitioner were directly impaired.

Shah J. who delivered the majority judgment enunciated the principles applicable thus :

> " The shareholder of a Company, it is true, is not the owner of its assets; he has merely a right to participate in the profits of the Company subject to the contract contained in the Articles of Association. But on that account the petitions will not fail. A measure executive or legislative may impair the rights of the Company alone, and not of its shareholders; it may impair the rights of the shareholders as well as of the Company. Jurisdiction of the Court to grant relief cannot be denied, when by State action the rights of the individual shareholder are impaired, if that action impairs the rights of the Company as well. The test in determining whether the shareholder's right is impaired is

not formal; it is essentially qualitative; if the State action impairs the right of the shareholders as well as of the Company, the Court will not, concentrating merely upon the technical operation of the action, deny itself jurisdiction to grant relief ". (1970) A.I.R. Vol. 57 p. 585)

A single act may be violative of the rights of the shareholder, but not of the Company; or it may be violative of the rights of the Company, but not of the shareholder; or it may be violative of the rights of both the shareholder and the Company. In this connection, three principles must be emphatically noted as applicable:

(1) It is the violation of the shareholder's fundamental right that must be established regardless of whether the Company is also affected or not. It must be a violation separate and distinct from the violation suffered by the Company ;

(2) The act in question must be directly violative of the shareholder's fundamental right ;

(3) Violation of property rights does not amount to a violation of a fundamental right in Sri Lanka.

It is not without interest that in this case Ray J. wrote a dissenting judgment and dismissed the petitions. In regard to Shah J's judgment, Sharvananda J. who points out very appropriately that although Cooper claimed relief on the ground that his own fundamental rights had been violated, and Shah J. held he had locus standi to maintain his petition, the ultimate finding of the Court was that the Bank's fundamental rights had been violated under Articles 14, 19 and 31. This finding had been reached without any discussion respecting the validity of Cooper's claim that his fundamental rights under Articles 14 and 19 (1) (g) had been impaired.

Shah J. appears to have treated the Nationalisation Act and Ordinance as having had an adverse impact commercially on the

shareholders' right to property. As Sharvananda J. said in the case of *Neville Fernando and others v. Liyanage and others* (17) — the decision does not support the proposition that when the Company is nationalised, the shareholder is deprived of his right to carry on business through the agency of his Company.

I will turn now to the case of *Bennett Coleman & Co. Ltd. v. Union of India* (1). Three petitions were filed in this case and among the petitioners were a shareholder, a reader, three editors and the company itself. The Import Policy for newsprint for the year April, 1972, to March, 1973, and some provisions of the Newsprint Control Order 1962 were impeached as an infringement of the fundamental right to freedom of speech and expression guaranteed by Article 19 (1) (a) and the right to equality guaranteed by Article 14 of the Indian Constitution. Ray J. who delivered the majority judgment in the case said as follows at page 115 :

> " As a result of the *Bank Nationalisation case* (supra) it follows that the Court finds out whether the legislative measure directly touches the company of which the petitioner is a shareholder. A shareholder is entitled to protection of Article 19. That individual right is not lost by reason of the fact that he is a shareholder of the company. The *Bank Nationalisation case* (supra) has established the view that the fundamental rights of shareholders as citizens are not lost when they associate to form a company. When their fundamental rights as shareholders are impaired by State action their rights as shareholders are protected. The reason is that the shareholders' rights are equally and necessarily affected if the rights of the company are affected. The rights of the shareholders with regard to Article 19 (1) (a) are projected and manifested by the newspapers owned and controlled by the shareholders through the medium of the corporation. In the present case, the individual rights of freedom of speech and expression of editors, Directors and shareholders are all exercised

through their newspapers through which they speak. The press reaches the public through the newspapers. The shareholders speak through their editors. The fact that the companies are the petitioners does not prevent this Court from giving relief to the shareholders, editors, printers who have asked for protection of their fundamental rights by reason of the effect of the law and of the action upon their rights. The locus standi of the shareholder petitioners is beyond challenge after the ruling of this Court in the Bank Nationalisation case (supra). The presence of the company is on the same ruling not a bar to the grant of relief.

The rulings in *Sakal Papers case* (3), and *Express Newspapers case* (2) also support the competence of the petitioners to maintain the proceedings ".

In the first place, the manner in which Ray J. interpreted the decision in the *Bank Nationalisation* case does not appear to be justified. In the *Bank Nationalisation* case Shah J. considered the decisions in the *State Trading Corporation case* and *Telco* case as not having any bearing on the case before him and naturally in that view of the matter did not purport to overrule them. What Shah J. said in the *Bank Nationalisation Case* is that where the rights of a company are infringed, it does not necessarily follow that the shareholders' rights are also infringed. In fact, Shah J. himself said as follows at page 565 :

" A shareholder, a depositor or a director may not therefore be entitled to move a petition for infringement of the rights of the Company, unless by the action impugned by him, his rights are also infringed ".

The interpretation of Ray J. that " shareholders " rights are equally and necessarily affected if the rights of the company are affected " must be confined to the particular facts of the case before Court. As they stand, the words represent too sweeping a generalisation which Shah J. obviously did not intend. Ray J.

apparently failed to appreciate that the infringement of a citizen shareholder's rights and the infringement of a company's rights are two separate and distinct matters to be evaluated and assessed separately. Moreover, there was no finding in law or fact by Shah J. on the concept of a shareholder carrying on business through the medium or agency of a company.

Further, Ray J.'s statement that *Sakal* and *Express Newspapers* support the competence of the petitioners to maintain the proceedings is incorrect. In these two cases the question of whether a company not being a citizen is entitled to fundamental rights was not raised and, therefore, those two cases cannot be treated as authority for such a proposition.

Seervai in his well-known work on the Constitutional Law of India (1975) 2nd Ed. Vol. 1 pp. 634 to 636 takes the view that *Bennett Coleman* was wrongly decided. Learned Senior Counsel disputed the validity of the reasons Seervai gives for his view. The reasons Seervai gives are anchored to the doctrine of stare decisis. I am unable to agree that these reasons are irrelevant or invalid.

In his decision in the case of *Neville Fernando v. Liyanage* (18) Sharvananda J. did not accept the correctness of *Bennett Coleman.* On that occasion, I agreed with Sharvananda J. and even now I do not see any ground on which I could take a different view. I might add that the petitioners in Application No. 116/82 made a second application (Application No. 134/82 — S.C. Minute of 9.2.83) inviting the Court to treat the earlier decision as one given per incuriam. Sharvananda J. then wrote a second judgment discussing the *Bank Nationalisation case* in detail. In his second judgment, Sharvananda J. affirmed his earlier view. In my opinion, both decisions of Sharvananda J. are correct.

In a case involving fundamental rights, the Court, no doubt, will be liberal in its interpretation, but this does not mean that it should abandon the legal approach in favour of a factual approach. Such a course can be fraught with danger. It could result in uncertainty and even confusion.

In the first case of *Neville Fernando v. Liyanage* (18) Sharvananda J. quite rightly considered the question before him on the basis of the relationship in law of the shareholders to the company and supported himself with some very apt dicta from the case of *Saloman v. Saloman & Co. Ltd* (19) and *Short v. Treasury Commissioner* (20), which it is not necessary to reproduce.

I am unable to agree that the 7th petitioner-company is merely an institutional device functioning as an agent or trustee for the shareholders. This is not a case where the shareholders' right of publication in association with others is directly affected. The party directly affected is the company. The company and its shareholders are in law and even in fact two distinct entities. The company must be treated like any other independent person with rights and liabilities appropriate to itself. The objects and designs of the shareholders in incorporating are irrelevant in discussing what those rights and liabilities are.

In the instant case, the impugned orders P2 and P3 directly affected the right of speech and expression and publication of the 7th petitioner-company who, it must be reiterated, is seeking compensation for the loss sustained by it only for itself. The impugned orders at most affect the 1st to 6th petitioners indirectly. Any rights of the 7th petitioner that may be affected are not in any event fundamental rights recognised and enforceable under the provisions of our Constitution. Hence, the application (No. 47/83) is not maintainable for want of competence.

In view of my conclusions on the question of maintainability, it is not necessary to go into the question of whether the impugned orders P2 and P3 and the action taken in pursuance of them are justified.

For the reasons I have given, application No. 47/83 must be dismissed. I so order.

I will now turn to consider application No. 53/83 and No. 61/83 where the infringements complained of cover a wider ground.

Applications No. 53/83 and No. 61/83

In these two cases the petitioners complain of infringement of their fundamental rights guaranteed to them under Articles 14(1) particularly 14(1) (a), 14(1) (g) and 12(1) and 12(2) of the Constitution. Only citizens are endowed with fundamental rights under Articles 14(1) and 12(2) of the Constitution. In these circumstances what I have already said on the question of competency applies with equal force to the question of maintainability of these two applications also insofar as relief under Articles 14(1) and 12(2) are concerned.

There remains however for consideration the question whether there has been an infringement of the fundamental right guaranteed under Article 12(1) of the Constitution. This Article reads as follows :

" All persons are equal before the law and are entitled to the equal protection of the law ". " By equal protection of the law " of course is meant the protection of equal laws, that is, laws that operate alike on all persons under like circumstances.

A company is a legal person and hence has locus standi to claim the fundamental right of equality guaranteed under Article 12(1). By virtue of the provisions of Article 15(7) the exercise and operation of the fundamental right declared and recognized by Article 12(1) are subject to such restrictions as may be prescribed by law (including regulations relating to public security) in the interests of national security, public order and the protection of public health or morality, or for the purpose of securing due recognition and respect for the right and freedoms of others, or of meeting the just requirements of the general welfare of a democratic society.

The first respondent seeks to justify his action and in the circumstances of these cases it is preferable to examine the question whether the first respondent has established his plea of justification rather than to embark upon on analysis of Article 12(1) with a view to ascertaining whether there are grounds for a complaint under that Article.

The first respondent placed before this Court random extracts of news and views that were published in the " Saturday Review ". Learned senior counsel for the petitioners has very kindly made available to this Court copies of all the issues of the " Saturday Review " and also copies of all the editorials that appeared in this paper.

I will first examine the extracts tendered by the 1st respondent :

1R1 : This presents the views of the Nava Lanka Sama Samaja Party that the actions of the Government have made Eelam a fait accompli but if the liberation of the Tamil speaking people takes place with a revolutionary change in the South, then separation would not be necessary. This is interpreted as meaning that the liberation of the Tamils and revolutionary change in the South should go hand in hand and then separatism would not be necessary.

1R3 : Bold headlines announce Massachusetts State Legislature support for Eelam and the Sri Lankan Tamils. The news item opens with the comment : " The Thamil Eelam lobby in the United States of America scored another triumph this week ".

1R4 : On this page of the issue of 18.6.1983 there are two Articles. One is captioned " Appearances are dangerously deceptive in Sri Lanka " and is by a Hindu reader from Ooty. It decries the fact that the identity of the Tamils as a separate ethnic, cultural and linguistic minority and their right to live with dignity and self-respect as equal citizens with the Sinhalese is jeopardised by the Enoch Powells of the Sinhalese ruling clique.

Hinduism has suffered as a result of Buddhism being elevated as the state religion. Even the famous Muruga at Kataragama has been converted into a Sinhalese deity.

The second article is on " Cultural Racism in Vavuniya ". It describes cultural racism as being a recognized technique of oppression. Statues of the Tamils are demolished, libraries are burnt, temples set on fire, Buddha statues are erected and cultural museums are built in their homelands.

1R5 : An article by one Ariyadurai speaks of change in the Tamil mood. Ahimsa, satyagraha and Gandhian style leadership has not moved the hearts of the Pharaohs. The army stationed in the North has unleashed a campaign of terror, persecution and intimidation.

1R6 : This is a letter to the editor written by one Samudran from Tokyo. A caption has been provided for it: " State Terrorism and TULF opportunism ". It refers to a display of barbarism and savagery by the Army in attacking Kantharmadam. It accuses the TULF of political impotence.

1R7 : This is the front page of the issue of 11.6.1983. It refers to bomb-throwing, violence and armed attacks at Trincomalee despite the curfew being on. Another news item refers to posters coming up in Jaffna calling upon the people to take up arms.

1R9 : From the issue of June 11, 1983, N. Sanmuganathan is reported as having said that the new law which enables the disposal of bodies without an inquest amounts to a declaration of war against the Tamils. On the same page there is a report of 4 Tamils killed in racial violence. Another report speaks of the fact that the Tamil Eelam cause was being canvassed at an international conference in Paris.

1R10 : This publication emphasises the futility of non-violence. Bhagavat Singh who shot a cruel white Superintendent of Police was called a courageous man by Gandhi himself.

Another news report describes the death of Sivakumaran was a turning-point in the Tamil liberation struggle.

Navaratnarajan was killed in the Army camp and the body of Sriskandarajah was brought by Army personnel to the hospital. Both were cases of homicide.

1R11 : (1) Bold headlines — Armed forces attack Gandhiyam farm :

Vavuniya-shops burnt.

(2) Sabaratnam Vadivel a young van driver of Valvettiturai Army Camp shot dead, and an Army truck driven over his body.

1R12 : An anonymous Post Card from Sri Kotha address demands that the Tamils should leave all the nine provinces of Sinhala Sri Lanka soon and go back to their traditional homeland — Tamil Nadu. A civil war to drive away the Tamil menace is threatened.

1R13 : Report of support in Australia for Tamil Eelam.

1R14 : Editorial comment that failure of the Government to solve the Tamil problem has resulted in a movement of militant youth rooted in the soil of Jaffna and nourished by material frustration, a feeling of humiliation and bitterness.

Issue of 6.2.1982 : The editorial comment poses a rhetorical question in the penultimate paragraph :

" Where is the logic in talking of Tigers and bemoaning the spectre of Eelam when the Government appears not to be concerned about the needs of one section of its own citizens ? "

At page 3 a staff writer gives a grim account of the Army attack at the Cement Factory.

At page 7 a foreign correspondent's views are published. The demand for separation is the final rung on a ladder of steadily escalating demands. The " extremist Sinhalas " including those at various levels in the administration, are unwittingly strengthening the case for Eelam. Too little has been given, too late.

At page 12 of this issue there appears news of an Eelam Declaration in New York and the text of the unilaterel declaration.

The foreign correspondent also states :

" A Tamil intellectual in state service (assured of anonymity) told the REVIEW: " We may finally agree to remain part of Sri Lanka but nothing short of a separate administration complete with flag and national anthem is going to satisfy our people ". One of the secessionist leaders, interviewed separately, remarked: " If only 10,000 of our young men can be trained abroad militarily, we can chase out of the northern and eastern provinces not only the police but also the army which we consider as an army of occupation. "

" FOREIGN SUPPORT

There have been charges made already in parliament that some Tamil youths are training abroad. "

Issue of May 21, 1983: Refers to the Army running amok. About 64 houses, 3 mini buses, 9 cars, 3 motorcycles and 36 bicyces were set on fire by the Army on rampage at Kantharmadam. A 100 strong gang in civils who were trying to set fire to the Jaffna Co-operative Stores opposite the Jaffna General Hospital suddenly turned their fury on the hospital itself when they realised that they were being observed from the House Officers' quarters. They fired wildly in the air and at the hospital building and in the process a pump operator attached to the hospital got wounded in the thigh. Both the House Officers' quarters and the administration block were shot at, while doctors and other staff scampered for safety.

Issue of January 1, 1983: The editorial says a wrong move on the part of the Army Commanders and intelligence officers could ignite a fuse that could leave behind a chain-effect of cumulative damage, and accelerate a historical process that could change the face of this country's history.

Issue of May, 7, 1983: Publicity is given to a report in the Times of India that tension is again mounting in the mainly Tamil Northern parts of Sri Lanka in the wake of surprise attacks by militant youths who have put the security forces on the defence. The freedom fighters have launched a new phase in their struggle for independence for the Tamils from the major Sinhalese community.

Issue of 25th June, 1983: A front page article with a bold headline reading " Regional autonomy as an alternative to Tamil Eelam " states —

" A draft plan for a form of regional autonomy as an alternative to TAMIL EELAM is being given the final touches by a 3-man Ministerial team.

The trio-Fisheries Minister Festus Perera, Trade Minister Lalith Athulathmudali and Transport Minister M. H. Mohamed — will submit their proposals to the Cabinet when it meets on the 28th of this month, after President Jayewardene's return.

The TULF MP for Vaddukoddai, Dr. Neelan Tiruchelvam, is believed to have been in constant touch with the 3 Ministers drafting the proposals.

The regional autonomy move comes against a backdrop of peace feelers being put out in various quarters. A U.S. based group of Sri Lanka expatriates, both Sinhalese and Tamils, has formulated a 12-point peace plan (see Page 2) and TULF Secretary General A. Amirthalingam is

reported to have told SUN'S Ranil Weerasinghe that the TULF is ready to go before the Tamil people and seek its mandate for a 'genuine alternative'.

The concluding portion reads thus:

" Whether the Ministers' draft proposals envisage revamped District Development Councils with more 'teeth' or are more far-reaching is still not known. A key issue in any regional autonomy plan is colonisation: the TULF has all along stressed this. This issue could prove a stumbling block to any negotiated settlement.

Militant Tamil youths have yet to make known their stand on these peace plans and regional autonomy moves. So far the only reaction has been from the THAMIL EELAM LIBERATION ARMY (TELA). This group, believed to be aligned to Kuttimani and Thangathurai, distributed a 4-page pamphlet on Thursday (23 June) categorically declaring its opposition to any peace talks which rule out Tamil Eelam. The TELA pamphlet is also critical of Amirthalingam, who had hush-hush talks with Kuttimani. Thangathurai and Jegan at Welikade Prison about a fortnight ago ".

It was submitted that the fact that the " Saturday Review " enjoys a circulation only among a small circle of the English educated elite should have been taken into consideration in assessing its potential for mischief and harm. On this it must be remembered that terrorist groups count in their ranks a sizeable percentage of University educated intelligent young men and women. This is so specially in Jaffna. They employ very modern sophisticated techniques which often baffle the law enforcement authorities. It must be expected that this paper has a circulation among the educated youth bent on wrecking the establishment. Terrorism thrives on propaganda and publicity and high morale. The news of acceptance of Eelam by groups in the great capitals of the world and the reports of successful terrorist activities in

the Jaffna district, no doubt, can be regarded as serving as an encouragement to the terrorist youth.

I will now take up the submission that the Competent Authority has chosen the most oppressive line of action when less oppressive action might have served just as well. The control of publications is dealt with by Regulation 14 of the Emergency (Miscellaneous Provisions and Powers) Regulations.

Under Regulation 14 (1), the Competent Authority may take much measures and give such directions as he may consider necessary for preventing or restricting the publication of matter which would or might be prejudicial to the interests of national security or the preservation of public order or the maintenance of supplies and services essential to the life of the community or of matter inciting or encouraging persons to mutiny, riot or civil commotion, and the directions may contain such incidental and supplementary provisions as appear to the Competent Authority to be necessary or expedient.

The Competent Authority can act in terms of Regulation 14 (1) if he is of the view that the publication will produce the result contemplated in the Regulation. He can act even if the publication might produce such a result. That is, even if he has doubts, he can avoid the risk of such result. He could impose a precensorship to ensure the deletion of prejudicial matter before publication. Other newspapers have been subject to censorship and the same step could have been taken in regard to the " Saturday Review ".

Contravention of a direction given under Regulation 14 (1) is an offence (Regulation 14 (2) (a) and can be dealt with in two ways (Regulation (2) (a) and (b) :

(1) If any person is convicted of such an offence by reason of his having published a newspaper, the President may by order direct that, during such period as may be specified in that order, that person shall not publish any newspaper in Sri Lanka — Regulation 14 (2) (a),

(2) If the contravention is in respect of any publication in any newspaper, the Competent Authority may, after issuing one or two warnings as he may consider reasonable, order—

(i) that no person shall print, publish or distribute or in any way be concerned in the printing, publication or distribution of such newspaper for such period as may be specified in the order ; or

(ii) that the printing press in which such newspaper was printed shall, for such period as may be specified in the order, not be used for any purpose whatsoever or only for such purpose as may be specified in the order.

The term 'newspaper' as used in Regulation 14 includes " any journal, magazine, pamphlet or other publication " — Regulation 14 (13) (c). It was submitted that the words 'other publication' are wide enough to include a book or other single publication. In fact, 'pamphlet' also refers to a single publication. In my view, the words " other publication " must be interpreted euisdem generis. They will not refer to a single publication like a book, but rather to a periodical publication. So also I do not think the expression " pamphlet " is used in the sense of a single publication. Pamphlets are a well-known literary medium and have been used very effectively for exposition and criticism, for pungent invective and trenchant rejoinder as, for example, during the Martin Marprelate controversy of old or in more modern times during Bernard Shaw's agitation for alphabet reform. Perhaps, it is not inappropriate to mention that during the Marprelate controversy even the seizure of the Puritan press failed to abate the flow of pamphlets. Pamphlets in a series are common literary form. As I understand it, the expression " pamphlet " and " other publications " as used in the definition refer to periodical publications. To say that the expression " newspaper " in paragraph (2) of Regulation 14 refers to newspapers strictly so called and so to argue that as the freedom of the press is

involved action against a newspaper should be taken only under paragraph 2 (a) or (b), but not under paragraph 3 of Regulation 14 would be to ignore the definition given in paragraph 13 for application throughout the Regulation. The fact that the Competent Authority acted under Regulation 14 (3) rather than under Regulation 14 (2) by itself does not support any inference of failure on his part to give his mind to the nature of and justification for the order he had to make.

Regulation 14 (3) empowers the Competent Authority by order to direct that no person shall print, publish, distribute or in any way be concerned in the printing, publication or distribution of a newspaper for the period specified in the order when he is of the opinion that there has been or is likely to be in any newspaper, publication of matter which is, in his opinion, calculated to be prejudicial to the interests of national security or the preservation of public order or the maintenance of supplies and services essential to the life of the community, or matter inciting or encouraging persons to mutiny, riot or civil commotion. The order may direct that the printing press in which such newspaper was printed shall, for the period specified in the order not be used for any purpose whatsoever or only for such purpose as is specified in the order. He may also authorise any person specified therein to take such steps (including the taking possession of any printing press with respect to which the order is made or of any premises in which it is contained or of any part of such printing press or premises) as may appear to him (the person authorised) to be necessary for securing compliance with the order.

Alternatively, the Competent Authority may make an order as provided in paragraphs (1) and (2) of Regulation 14, as for example, censorship.

The Competent Authority had the discretion and the choice of other courses of action. But it is complained, he chose the most oppressive course of action.

It was well established that judicial review of the exercise of a discretion is permissible, but within limits. Ranasinghe J. has dealt with this question fully in his judgment in the case of *Janatha Finance and Investments Ltd. v. Liyanage and Others* (17) —and his decision constitutes the latest pronouncement on the subject.

In England, the House of Lords has rejected the theory of unfettered and uncontrolled discretion. When a discretion is vested in a statutory body, it is never unfettered. It must be exercised according to law. The statutory body must be guided by relevant considerations and exclude from consideration matters that are irrelevant. (*See Padfield v. Minister of Agriculture, Fisheries and Food* (21) and *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation* (22). The Court will assert its powers to scrutinise the factual basis upon which discretionary powers have been exercised. The decision must be found to be reasonable, that is, one that can be supported with good reasons or one which a reasonable person might reach — *Secretary of State for Education and Science v. Tameside Metropolitan Borough Council* (23) ; see also *Hirdaramani v. Ratnavel* (24) ; and the case of *Siriwardena and others v. Liyanage and others* (commonly known as the *Aththa* case) (25).

Wade in his work on Administrative Law (1977 — 4th ed.) after pointing out that a statute which confers a variety of discretionary powers may confer a wider or a narrower discretion according to the context and the general scheme of the Act, adds at p. 344 :

> " Translated into terms of the traditional rule that powers must be exercised reasonably, this means that the standard of reasonableness varies with the situation. The pitfalls which must always be avoided are those of literal verbal interpretation and of rigid standards ".

Equally it has to be borne in mind that in reviewing the exercise of discretion, the Court must not usurp the discretion of the public authority. If the decision is within the bounds of reasonableness, it is not part of the Court's function to look further into the merits — Wade (ibid) p. 348. Lord Hailsham explained how the Court should approach the question in the case of *In Re W. (An Infant)* (26) :

> " Two reasonable parents can perfectly reasonably come to opposite conclusions on the same set of facts without forfeiting their title to be regarded as reasonable . . . . . Not every reasonable exercise of judgment is right, and not every mistaken exercise of judgment is unreasonable. There is a band of decisions within which no Court should seek to replace the individual's judgment with his own ".

In the *Tameside* case (supra), Lord Salmon cited the above dictum of Lord Hailsham with approval while Lord Diplock in his speech observed as follows at page 681 :

> " The very concept of administrative discretion involves a right to choose between more than one possible course of action upon which there is room for reasonable people to hold differing opinions as to which is to be preferred ".

When the *Tameside* case was before the Court of Appeal, Lord Denning said at page 652 :

> " No one can properly be labelled as being unreasonable unless he is not only wrong but unreasonably wrong, as wrong that no reasonable person could sensibly take that view ".

At times of crisis, the question of reasonableness must be evaluated against the subject-matter dealt with and the circumstances of the situation in which the authority is called upon to act and to act quickly. This aspect of the matter was considered

by Lord Denning in the case of *Secretary of State for Employment v. ASLEF (No. 2) (N.I.R.C.)* (27). At page 1390 he said as follows :

> " What is the effect of the words " If it appears to the Secretary of State " ? This, in my opinion, does not mean that the Minister's decision is put beyond challenge. The scope available to the challenger depends very much on the subject-matter with which the Minister is dealing. In this case I would think that, if the Minister does not act in good faith, or if he acts on extraneous considerations which ought not to influence him, or if he plainly misdirects himself in fact or in law, it may well be that a court would interfere; but when he honestly takes a view of the facts or the law which could reasonably be entertained, then his decision is not to be set aside simply because thereafter someone thinks that his view was wrong. After all, this is an emergency procedure. It has to be set in motion quickly, when there is no time for minute analysis of facts or of law. The whole process would be made of no effect if the Minister's decision was afterwards to be conned over word by word, letter by letter, to see if he has in any way misdirected himself. That cannot be right ".

As de Smith points out in his book " Judicial Review of Administrative Action " (1980) 4th Ed. p. 349, the scope of review is determined by practical realities, the nature of the subject-matter and the surrounding circumstances, as for example, the necessity for taking quick action for the preservation of public order. In dealing with a newspaper the effect on the reader's mind must receive the highest consideration. Further, what is not obnoxious at one time may be obnoxious at another time. It would be difficult for anyone but the repository of power to form an opinion as to the occasion for its exercise. He is entrusted with the maintenance of public security. He has a better "feel" of the crisis with the intelligence services at his command than anyone else. When it is public order that is involved, the authority should not afterwards be blamed if it is found he has committed an error of judgment or erred on the side of being over-cautious.

As Lord *Atkin* said in *Liversidge v. Anderson* (28), " If there are reasonable grounds, the judge has no further duty of deciding whether he would have formed the same belief ". I might add that this was the test adopted by Ranasinghe J. (Sharvananda J. and Victor Perera J. agreeing) in the case of *Janatha Finance and Investments Ltd. v. Liyanage and others* (17).

I have already referred to some of the matters that had appeared in the " Saturday Review ". It is reasonable to expect that the 1st respondent was aware of what was being published in this newspaper over a period of time. It is not suggested that he read the issues of this newspaper only immediately before making his first order P2. No doubt, the Competent Authority was unaware of the constitution of the " Saturday Review " and details of the internal arrangements pertaining to it or the status of the Directors. To do his duty, it was sufficient for him to be conversant with the contents of the newspaper.

The fact that no action was taken against the newspaper earlier or even after the Emergency Regulations came into force on 18th May, 1983, is hardly relevant. The Government, too, undoubtedly values the freedom of the Press and believes that democracy will sustain itself best, as has been said, in the free market of ideas, and when the channels of communication are left open, the newspapers give ideas. The newspapers give people the freedom to find out what ideas are correct. The Courts, too, will always uphold the freedom of speech and expression and publication enshrined in the Constitution.

But at times of national crisis, the safety of the nation becomes paramount and some inroads have of necessity to be made into the freedom of the Press. This is provided for in the Constitution itself.

I will turn to the argument that the Competent Authority should have addressed his mind to the fact that the severity of the punishments prescribed would make it unlikely that any responsible newspaper will run the gauntlet of the punitive restrictions imposed during the Emergency. Dire penalties, however, are no bar to those fighting for a cause. The

" Saturday Review " was fighting the cause of the Tamils. The paper highlighted the grievances of the Tamils. Of cause, no one will deny them that right. But at times when ethnic hatreds are mounting, curbs become necessary. At times of grave national emergency headline exposure of Army and Police atrocities will not help the cause of peace and public security. It can cause deep resentment, fan passions, provoke defiance. It can set off a chain-reaction of violence. And violence begets violence. It happened before our very eyes. There are very few issues of the " Saturday Review " which do not carry some grim account of Army or Police brutality. The object may have been to mould public opinion and get the authorities to take remedial action. But in the context of race dissensions, it could be counter-productive. Prominent coverage was given to the activities of the Eelamists. News of the activities of supporters of the Eelam movement in foreign countries appeared regularly. One issue carried news of an unilateral declaration of Eelam. Surveys of opinions were published in several issues. A Tamil intellectual in State service had said that nothing short of a separte administration complete with flag and national anthem would satisfy the Tamils. Another secessionist leader felt a force of 10,000 young men trained abroad militarily would suffice to rid the North and East of the Army and Police. One cannot fault the Competent Authority if he thought these publications inflammatory especially after the Hartal. The very last issue of the " Saturday Review " carries the bold headline " Regional Autonomy as an alternative to Tamil Eelam " ? ". The preposition is posed as a question, but the article that follows ends on a pessimistic note. The issue of colonisation could prove to be a stumbling-block to any negotiated settlement and in any event the militant Tamil Youth of the " Thamil Eelam Liberation Army (TELA) " will settle for nothing less than Eelam — no peace talks without Eelam. Although the paper advocates Regional Autonomy, between the lines it is possible to discern a definite tilt towards, the Eelam cause. The Competent Authority was not being unreasonable if he took such a view. The reasons he gives in his affidavit are borne out by the contents of the paper.

No doubt, the first order P2 contains an error when it was made operative for a month. But that does not mean that

clamping down the paper was unjustified or that the order was made without due consideration. There is also the complaint that the order is a mere verbatim reproduction of the Regulation. Perhaps, the Competent Authority may have said the same thing in different words. It would then be a question of semantics. On the other hand the form in which the order is drawn could also show that the Competent Authority gave his mind to the requirements of the Regulation and it was only on being satisfied that the requirements were strictly fulfilled that he made his order.

Learned Senior Counsel for the petitioners submitted that censorship would have sufficed. But even with censorship, newspapers have been known to publish matter that could be harmful. More than one newspaper in this country had occasion to publish apologies for violating the censor's directions. It is true transgressions of censorship could be visited with extreme sanctions. But the object is to prevent and not to punish. The paper always devoted a very large proportion of its column to spotlighting the hardships and the discrimination which the Tamil people were being forced to endure. No doubt these were garnished with articles covering a wide range of subjects: the fine arts, literature, science and agriculture. But the Competent Authority may have felt, not unreasonably, that censorship was inadequate to deal with a newspaper whose editorial policy was such that accounts of the harassments and indignities suffered by the Tamil people filled most of its pages. At times of tension and strife, much publications can be very damaging and provocative. Therefore, one cannot say that the Competent Authority was unreasonable in deciding to act under Regulation 14 (3) of the Emergency Regulations. He acted on grounds that were reasonable.

On the facts, therefore, there has been no infringement. Applications No. 47/83, No. 53/83 and No. 61/83 are therefore, dismissed without costs.

RANASINGHE J.—

I agree. Even after further consideration, I am of opinion that the views expressed by Sharvananda J. in the case of *Dr. S. N. A. Fernando and others v. Liyanage and others* (18), with which I have concurred, are correct.

RODRIGO, J.

I join in the opinion of my brother Soza, J. whose judgment I have seen in draft that this application should be dismissed for the reasons that he has expressed but I would add a few words of my own on account of the injection of wide issues of law into the submissions. This judgment comes in the third lap of the course of this application in its pursuit of a just and equitable order relating to the clamp down put under the Emergency Regulations promulgated in the recent phase of domestic violence, on the " Saturday Review " which, it is said, and not wholly without justification is a forum for intellectual dialogue and exchange on, among others stated in an admirable brochure, the ethnic political problems that simmer and sometimes erupt into violence. I shall return to this later. For a start I wish to take a second look at s. 8 of the Public Security Ordinance and Regulation No. 2(2) of the Emergency Regulations No. 3 of 1983, now in force, for the reason that the view I took in the *"Aththa "case* (25) in line with the views expressed by Fernando, C.J. and Alles, J. in their leading judgments expressing the majority view of these provisions in *Hirdaramani's* (24) and *Gunasekera's case* (29) respectively, it is said, is now out of line with the present trends of judicial thinking on the subject. In the Hirdaramani case the matter was formulated as follows :—

" 1. Where a power cannot be exercised unless certain physical facts exist. In such a case if the validity of the exercise of the power is disputed, then the executive must prove that the requisite facts actually existed.

2. Where a power may be exercised by some authority if he is satisfied of the existence of certain facts. In such a case a Court can inquire into the circumstances, in order to ascertain whether it was reasonable for the authority to be satisfied of the existence of the facts.

3. Where, as in the instant case, the power can be exercised merely because of an opinion that it is necessary to exercise it. In such a case the mere production of the instrument ex facie valid whereby the power is exercised, concludes the matter, unless good faith is negatived.

Section 8 of the Public Security Ordinance reads :—

> " No emergency Regulation, and no order, rule or direction made or given thereunder shall be called in question in any Court. "

Emergency Regulation 2(2) reads :—

> " The Interpretation Ordinance shall apply to the interpretation of an emergency regulation and of any orders or rules made thereunder as it applies to the interpretation of an Act or Ordinance or Law. "

The relevant section, that is, s. 22 of the Interpretation (Amendment) Act No. 18 of 1972 states :

> " 22. Where there appears in any enactment whether passed or made before or after the commencement of this Ordinance, the expression " shall not be called in question in any Court " or any other expression of similar import whether or not accompanied by the words " whether by way of writ or otherwise " in relation to any order, decision, determination, direction or finding which any person, authority or Tribunal is empowered to make or issue under such enactment, no Court shall in any proceeding and upon any ground whatsoever have jurisdiction to pronounce upon the validity or legality of

such order, decision, determination, direction or finding, made or issued in the exercise or . . . exercise of the power conferred on such person, authority or Tribunal. "

The leading judgment in the *Aththa case* (supra) expressing its view on these provisions, has stated :

" Section 8 of the Public Security Ordinance ordains that no emergency regulation, and no order, rule or direction made or given thereunder shall be called in question in any Court. The effect of such finality clause has been stated as follows :—

' The Courts have made it a rule that such clauses cannot hamper operation of judicial control . . . there is a firm judicial policy against allowing the rule of law to be undermined by weakening the powers of the Courts. Statutory restrictions on judicial remedies are given the narrowest possible construction sometimes even against the plain meaning of the words. This is a sound policy since otherwise administrative authorities and tribunals would be given uncontrollable power which could violate the law at will.' Finality is a good thing but justice is a better " quoting Lord Atkin in *Ras Behari Lal v. King Emperor* (30)— Wade, Administrative Law (4th Ed.) 566. I am of the view that the above section 8 does not prevent the petitioners from obtaining relief if they are entitled to any ".

The judgment delivered in the *Janatha Press case* (17) has these paragraphs :—

" In times of grave emergency it is unlikely that the theoretical judicial control will be able to come to play as the ingredient of policy is so large by comparison with the ingredient of ascertainable and relevant fact — *Wade* — (supra) pp. 375-6. "

It continues :—

> " In regard to the exercise of a discretion in an emergency situation Lord Denning M. R. expressed himself in *Secretary of State v. ABLEF* (27) as follows :—
>
> " But, ... when he honestly takes a view of the facts or the law which would reasonably be entertained then his decision is not to be set aside simply because thereafter someone thinks that his view is wrong. After all this is an emergency proceeding. It has to be set in motion quickly. Where there is no time for minute analysis of fact or of law the whole process would be made of no effect if the Minister's decision was afterwards to be conned over word by word, letter by letter to see if he has in any way misdirected himself. That cannot be right. Take this very case. He has made a mistake in . . . but, that, in my opinion, was not sufficient to invalidate the application or the basis on which he acts. "

Then in the majority judgments (Bench of 9 Judges) in Revision Application APN/GEN 10/74 — D.C. Kandy — L/10569 et cetera — S.C. Minutes of 3rd September, 1974, a case which dealt with prohibition on Courts to grant injunctions against the State introduced by s. 24 of the Interpretation (Amendment) Act No. 18 of 1972, the view expressed by Lord Reid in the case of *Anisminic Ltd.* (31) when he said,

> " I would have expected to find something more specific than the bald statement that a determination shall not be called in question in any Court of law. Undoubtedly such a provision protects every determination which is not a nullity but I do not think that it is necessary or even reasonable to construe the word 'determination' as including everything which purports to be a determination but which is in effect no determination at all and there are no degrees of nullity. There are a number of reasons why the law will hold a purported decision to be a nullity . . . I have come without

> hesitation to the conclusion that in this case we are not prevented from inquiring whether the order of the Commission was a nullity "

was adopted with approval.

Again in *I. R. C. v. Rossminster Ltd.* (32) Lord Diplock observed :—

> " The words 'which he has reasonable cause to believe' appearing in the statute do not make conclusive. . .that he has reasonable cause for the prescribed belief. The grounds on which the officer acted must be sufficient to induce in a reasonable person the required belief. . .This was affirmed in *Nakkuda Ali v. Jayaratna* (33) a decision of the Privy Council in which Lord Radcliffe writing for the Board expressed the view that the majority speeches in *Liversidge v. Anderson* (28) — in which a contrary construction had been placed on similar words . . . should be regarded as an authority for the meaning of that phrase in that particular regulation alone. For my part, I think the time has come to acknowledge openly that the majority of this House in *Liversidge v. Anderson* were expediently and, at that time, perhaps excusably wrong and the dissenting speech of Lord Atkin was right. "

Having said this, however, Lord Diplock continues later,

> " The decision-making power is conferred by the statute on the officer of the Board. He is not required to give any reasons for his decision and the public interest immunity provides justifications for any refusal to do so. Since he does not disclose his reasons there can be no question of setting aside this decision for any error of law on the face of the record and the only ground on which it can be attacked on judicial review is that it was ultra vires because the condition precedent to its forming the belief which the statute prescribes, viz. that it should be based on reasonable grounds was not satisfied. Where Parliament has designated a public officer as decision-maker for a particular class of decision, the High Court, acting as a

> reviewing Court . . . is not a Court of Appeal. It must proceed on the omnia praesumuntur rite esse acta until that presumption can be displaced by the applicant for review on whom the onus lies of doing so. Since no reasons have been given by the decision-maker and no unfavourable inference can be drawn for this fact because there is obvious justification for his failure to do so, the presumption that he acted intra vires can only be displaced by evidence of facts which cannot be reconciled with there having been reasonable cause for its belief...."

Then in *A-G of St. Christopher v. Reynolds* (34) Lord Salmon in the Privy Council stated :—

> " The facts and background of the *Tameside case* (23), *Liversidge v. Anderson* (28) the *Nakkuda Ali case* (33) and the present case are, of course, all very different from each other. This is why their Lordships have reached their conclusion as to the true construction of reg 3(1) of the Emergency Powers Regulations 1967, in reliance chiefly on the light shed by the Constitution rather than on such light as may be thrown on that regulation by the authorities to which reference has been made. "

While some challenge therefore can be offered in the first and second situations formulated above what is the worthwhile challenge that can be made in the third situation applying the maxim *omnia praesumuntur rite esse acta* and that male fides cannot be made out on affidavit evidence alone without cross-examination of the respondents, an opportunity which is not permitted? In *Nakkuda Ali's* case (supra) Lord Radcliffe had this to say :—

> " If the question whether the condition had been satisfied is to be conclusively decided by the man who wields the power then the value of the intended restraint is in effect nothing. No doubt he must not exercise the power in bad faith, but the field in which this kind of question arises is such that the reservation for the case of bad faith is hardly more than a formality. "

So that when the passages quoted above from Lord Radcliffe, Lord Denning, Lord Diplock and Lord Salmon are read, the passage in *Wade* (supra) at pages 375-6, " In times of grave emergency it is unlikely that the theoretical judicial control will be able to come to play as the ingredient of policy is so large by comparison with the ingredient of ascertainable and relevant fact " is amply borne out. In judicial practice, therefore, the preposition " that the orders of the competent authority are not justiciable if they are ex facie valid and that the Court is precluded from considering the only possible issue which can be raised when a detention order valid on the face of it is produced before the Court, namely the issue of good faith " still holds good when construing emergency law provisions in the third situation formulated above not because the statutory injunction is considered a letter on Courts but because it is the only practical way of deciding the whole matter. The liberty claimed and asserted by the Courts to look behind the order is only theoretical.

In this instance, however, Counsel for the respondents has placed material before Court upon which he says the Competent Authority reached his opinion and invited us to test the reasonableness of his opinion. I, therefore, express my view on that aspect of the matter but later in the judgment.

The substantial point of law argued in this application is that the shareholders of a limited liability company — the 7th petitioner is an incorporated company limited by guarantee and the rest are shareholders — continued to be engaged in doing the selfsame business in fact that the company has been formed and incorporated to do in law so that when the company's business closed down by order of the competent authority the selfsame business of the shareholders was also closed down. That is to say, the prohibiton of the publication of the 'Saturday Review' is not only a prohibition imposed on the company but also a prohibition imposed jointly and severally on the petitioners from publishing the newspaper. Support for this is sought by reliance

on *Bennett Coleman & Co. v. Union of India* (1) and the order delivered on representations against the Press Council Bill in 1973 by the then Constitutional Court of Sri Lanka. It is sufficient for me to refer to the judgment of Sharvananda, J. delivered in this Court in *Dr. Neville Fernando's case* (18) and the connected application No. S.C. 134/82 (2) — and 11.2.83 (17) respectively — wherein Sharvananda J. has expressed the view for the reasons given by him that he cannot accept the reasoning of Ray, J. in the *Bennett Coleman case* that the shareholders carry on business through the agency of the company and that the shareholders' rights are equally and necessarily affected if the rights of the company are affected. Sharvananda, J. was mindful that there is in India a difference in the fundamental rights of a shareholder from that of a shareholder in Sri Lanka in as much as the fundamental right of a shareholder in India includes a right to acquire, hold and dispose of property and it is enacted there that no person shall be deprived of his property save by the authority of law. He reached the conclusion that the fundamental right of the petitioners therein, like here, to engage in business by themselves or in association with others, is not in any way infringed by the closure of the press of which they are shareholders. I respectfully agree with the reasons given therein and add a few words here, since it is submitted that the decision of Sharvananda, J. on both those applications is an erroneous interpretation of the Constitution. It is argued that the rights of a shareholder of a company viewed only from the angle of a company as a legal person, a concept founded on the principles of common law of England cannot be equated to the fundamental rights of a shareholder viewed from the angle of our Constitution and that the systems of common law obtaining in England, America or India afford no correct guide. The two Articles of the Constitution invoked to support this argument are Art. 12(1) and Art. 14(1) (g) read with Art. 14(1) (a). It is Art. 14(1) (g) that is pressed into argument. When distilled, Counsel's argument is that it is the factual position of the shareholders that is protected. To appreciate the factual position, it is said, one

must keep in mind that a shareholder is an " alter ego " or the " head and brains " of the company and that in fact it is the shareholders who pull and control the strings as real visible human beings. Such human beings are citizens of this country. It is said that the petitioners are also Directors of this company and that there is no gainsaying the physical fact that it is they who are running this newspaper.

What is contended for here is the Realist theory of jurisprudence — the group-person. Paton says :

> " With a little skill (and a lack of scruple) we can reach any practical result from any particular theory; so complicated are the issues that arise. "

But the judicial approach to the problem in English Common Law is exemplified by *Solomon v. Solomon & Company* (19) and the *Gramophone and Typewriter Company Ltd. v. Stanley.* (13) *Solomon* v. *Solomon & Co.* (19) can be reconciled, Duff suggests, with any theory but is authority for none. " While theories have provided shells for the attack, the decision as to where the ammunition was to be shot has been the result of the economic and social desires of those who use the artillery. " See Paton on Jurisprudence (3rd Ed.) 367. See also M. Wolff — 54 L.Q.R. (1938) 496. No doubt the Articles invoked — Art. 12(1) and Art. 14(1) (a) (g) — are Constitutional provisions designed to protect the personal rights therein declared to be fundamental rights of Sri Lankan citizens and these Articles are also declared subject to all existing written and unwritten laws, which in the event of inconsistency, prevail over the Articles. Judge made law is unwritten law and the legal rights of shareholders, in any case, vis-a-vis the company are settled by Judge made law. This is not disputed. Did they have any rights by reason of shareholding other than those that are rights of the company per se. Authority and principle are against a view that they have such rights. To say that they have such rights independently of the rights of the company is a dangerous doctrine, to borrow the language of Ormerod, L.J. in *Tunstally v. Strigmann* (12) a case which is

destructive of the arguments of the petitioner's Counsel. In that case, the company and the landlord were one in the realistic sense. The landlord held all the shares of the company barring two held by nominees and she had the sole control of the company. In an application under the Rent Acts a preliminary point was decided against her that though she in fact intended to occupy the premises to do her business she was not entitled to occupy it as the busines in law was that of her company. All the artillery of the Realist theory was pressed into service but to no avail. The submissions of Cousel for landlord in that case are identical with the submissions that have been made here. To quote from Ormerod, L.J :—

> " It has been contended in this case that a realistic view should be taken into consideration. It is submitted that any person in the street would say that the business was the landlord's business, notwithstanding that it was being carried on by the limited company."

He continues :

> " It has been argued in the course of this case that there had been a number of departures from the principle of *Solomon v. Solomon & Co. Ltd.* (19) in order that the Courts may give effect to what has been described as the reality of the situation and it is submitted in these circumstances that the Court should look at the realities of the situation and that those realities that the business will in future be carried on by the landlord as it has been carried on in the past. "

Then he continues :

> " Whilst it may be argued ..... that the Courts have departed from a strict observation of the principle laid down in *Solomon's case,* it is true to say that any departure, if indeed any of the instances given can be treated as a departure, has been made to deal with special circumstances when a limited company might well be a facade concealing the real facts. "

In the same case Willmer, L.J. had this to say :

> " The business was in substance her business, the company being a mere piece of mechanism to enable the landlord's business to be carried on. This, it is said was the reality and we were invited to look at the reality and substance of the proposed occupation rather than at its form. As relevant to this argument I ventured to direct attention to *Leonard's Carrying Company Ltd. v. Asiatic Petroleum Co., Ltd.* and some reliance was placed on what was said by Lord Haldane in that case. He described the managing director of the appellant company as one who was " really the directing mind and will of the corporation, the very ego and centre of the personality of the corporation ".

Willmer, L.J. has later observed :

> " I have certainly felt the force of the argument on behalf of the landlord but in the end I am satisfied that it cannot prevail. There is no escape from the fact that a company is a legal entity entirely separate from its corporators — see *Solomon v. Solomon & Co. Ltd.* (19) Here the landlord and the corporation are entirely separte entities. This is no matter of form. It is a matter of substance and reality. . . . Even the holder of 100 per cent of the shares in a company does not by such holding become so identified with the company that he or she can be said to carry on the business of the company. The individual corporator does not carry out the business of the corporation. "

Danckwerts, L.J. having endorsed what had been said earlier by his brothers said this :—

> " As Ormerod, L.J. pointed out, if persons choose to conduct their operations through the medium of a limited company with the advantages in respect of responsibility for debts thereby conferred, they cannot really complain if they have to face some disadvantages also. "

As I have said already the Articles in question must be read subject to existing law. In my judgment therefore the shareholder — petitioners have no rights in the circumstances of this case independently of the company's that can be said to have been infringed by the order or orders that are impugned.

On the facts — We have been invited to review the order on the material placed before us. Virtually all the issues of the " Saturday Review " from its inception to the date of the first order have been placed before us.

The test to be applied as found in judgments in reviewing an executive order is,

(a) whether grounds exist which are capable of supporting the order or decision, and,

(b) whether the executive has misdirected himself on the law in arriving at his decision.

This test really is applied where an executive is required to be 'satisfied' of the existence of a condition precedent to his making a decision. But where the order could be made merely on the opinion of the executive the test is less exacting. For instance, where an executive is empowered to make an order where he " deems it necessary " to make such order, it has been held that such words give the executive the amplest possible discretion in the choice of method. See *A-G of Canada v. Hallet & Carry Ltd.* (35) per Lord Radcliffe, ; *A-G of St. Christopher v. Reynold* — per Lord Salmon (supra).

The Competent Authority has averred in his affidavit justifying his order that :—

16. Many of the articles and items published in the newspaper suggested that its publishers eschewed democratic processes, negotiations and campaigns based on non-violence as a means of resolving the problems facing the Tamils of Sri Lanka and that they openly encouraged the adoption of force and terrorism as the only means.

17. The said newspaper gave prominent publicity to the acts of terrorist movements operating in the North, particularly to those of the movement which called itself the Tamil Eeelam Liberation Front (T.E.L.F.) and often eulogised such conduct with a view to encouraging the growth of such movements and the use of force against the lawfully established Government.

18. The conduct and excesses alleged to be committed in the North by the law enforcement agencies and military authorities was given prominent coverage (often in bold type) and efforts were made to describe such conduct in detail in an endeavour to arouse communal passions and to create unrest among the populace. In some instances grossly exaggerated versions of certain incidents were given to serve a similar objective.

20. I also wish to bring to the attention of Your Lordship's Court that immediately prior to my order of 1st July 1983 an Hartal sponsored by a terrorist movement referred to above, namely Tamil Eelam Liberation Front, led to large-scale violence in the North resulting in serious loss and damage to property. I was of the view that the sealing of the 'Saturday Review' (and another newspaper in Jaffna) was a measure which was necessary to prevent further escalation of the violence.

21. I state that the two orders made by me were made bona fide and on being satisfied that upon a consideration of the contents of the " Saturday Review " newspapers published prior to the date of order of 1st July 1983 that they contained matter which was calculated to be prejudicial to the interest of national security, preservation of public order and matter likely to encourage or cause unrest, communal disharmony and civil commotion in the country.

23. I annex hereto marked " 1R1 " to " 1R14 " random extracts of articles and news items which appeared in the Saturday Review in its recent publication prior to its orders dated 1.7.83 and 18.7.83 by me.

The petitioners in their petition denied in advance the averments of the respondents-petitioners, particularly in paragraph 24. In paragraph 35 thereof they have stated that " Saturday Review " has been critical of some aspects of government policy. These criticisms were made bona fide in respect of public affairs. In Paragraph 36 they say that the order of the Competent Authority is a cover and a sham to achieve the purpose of preventing the " Saturday Review " in carrying views and news which may lead to criticism of the actions of the Government.

Counsel for the petitioners was at pains to satisfy us that a daily censorship of the offending news, if any, could have met the exigencies of the moment and the closure of the newspaper outright was apart from it being an infringement of Art. 12(1) was an act done in excess of jurisdiction in the circumstances.

I have already cited passages from judgments which lay down that it is not for a Court to substitute its opinion for that of the Competent Authority where the Court is satisfied that the material before the Competent Authority was capable. of supporting the views and the opinion formed by the Competent Authority when making the order. All the issues of the newspaper have been placed before us and I have gone through practically every one of them and I find it difficult to take the view that the orders impugned are so unreasonable that no reasonable person in the shoes of the Competent Authority could reasonably have acted otherwise in the circumstances of grave domestic disorder against which such orders had been made. I must, however, confess that this newspaper in its earlier issues had more or less approximated to the laudable objectives of the brochure which it had published as its philosophy. It will be tedious to give excerpts of the news items and articles that must, in their impact, provoke and incite the readers to violence as also to give excerpts of articles and editorials which looked at the problems from an intellectual angle suggestive of reaching solutions to those problems. It has been said that this is an English newspaper and its readers are not drawn from the mob.

It is clear, however, from the paper itself that undergraduates in the Universities in the North and the East are some of the intended readers, and it is common knowledge that they are very agitated over these problems.

In all the circumstances, it is my view that the petitioners have failed to satisfy the legal test required by judgments to be sufficient to set aside the impugned order made during an Emergency in the exercise of our jurisdiction to review such orders.

I, therefore, dismiss these applications without costs.

Applications dismissed.