

**BERNARD SOYSA AND TWO OTHERS****V.****THE ATTORNEY—GENERAL AND TWO OTHERS**

SUPREME COURT.

FERNANDO, J., KULATUNGA, J. AND GOONEWARDENA, J.

S.C. APPLICATION NO. 2/91.

AUGUST 29, 1991.

*Fundamental Rights – Right to hold Satyagraha at Maha Maluwa of the Dalada Maligawa – Articles 14(1) (a) and (b) of the Constitution – Public place – Code of Criminal Procedure Act, No. 15 of 1979, S. 95, 97 – Police Ordinance S. 56.*

The Maha Maluwa of the Dalada Maligawa is a place to which public have access for the purposes of worship. It cannot be treated as a public place for the purposes of holding a Satyagraha by persons standing together in a single line and displaying posters and placards and sometimes shouting slogans or other vociferous protest. Satyagraha was a political event for which no implied permission can be presumed in relation to the Dalada Maligawa. Express permission would be required for the purpose.

The rights claimed by the petitioners are subject to such restrictions as may be prescribed in the interests of public order. The meeting itself was not peaceful.

The Police were entitled in terms of the duties cast on them by the Code of Criminal Procedure Act and the Police Ordinance to take steps to disperse the Satyagrahas. The Police action was justified and there was no infringement of their fundamental rights of peaceful assembly and expression.

Cases referred to :

1. *Whitney v. California* (1927) 274 US, 357, 375
2. *Schenck v. U.S.* (1949) 249 US, 47, 52
3. *Perry Education Association v. Perry Local Educators' Association* (1983) 460 US 37, 45 - 46
4. *Haque v. C.I.O.* (1939) 307 US 496, 515
5. *Railway Board v. Niranjan Singh* (1969) 1 SCC 502

APPLICATION for infringement of fundamental rights.

*Faiz Mustapha P.C. with Jayampathy Wickremaratne, M.S.M. Subaid, Kusal Subasinghe, Gaston Jayakody and Rummy Marook for Petitioners.*

*Upawansa Yapa D.S.G. with Kalinga Indatissa S.C. for respondent.*

*Cur.adv. vult.*

October 16, 1991.

**FERNANDO, J:**

While agreeing with the judgment of my brother Kula-tunga, I wish to state my reasons briefly. The Petitioners were granted leave to proceed upon averments in their affidavits that the Maha Maluwa is a public place, implying thereby that no permission was required for a satyagraha; and that it had been used on various occasions to conduct satyagrahas, in particular in 1974 by the then Leader of the Opposition. It was further averred that a peaceful assembly was violently disrupted by the Police, in violation of Article 14(1)(a) and (b). When the Respondents averred in reply that the Maha Maluwa is not a public place, but belonged to the Sri Dalada Maligawa and is under the control of the Diyawadana Nilame, the Petitioners modified their position in a counter-affidavit, stating that it was "a public place to which the public has free access"; a supporting affidavit added that members of the public habitually had access for purposes of leisure. In other words, *defacto* access. From this learned President's Counsel sought to contend that the public had a right of access, i.e. *de jure* access, and even for other purposes. This is clearly unsustainable: firstly, even if the public had been permitted access for certain purposes, such permission was revocable; secondly, the grant of permission for one purpose cannot lead to any inference of permission for other dissimilar purposes. In regard to the previous occasions on which the Maha Maluwa was said to have been used for satyagrahas, it was not suggested that this was without permission from the proper authorities; the fact of such use, with or without permission, cannot create a prescriptive public right to use the Maha Maluwa for satyagrahas without permission.

“Freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth”, and thus vital for a free society (cf *Whitney v California*) (1). However, freedom of speech (and its associated rights) is not absolute; it has inherent limitations; “the character of every act depends upon the circumstances in which it is done.... The most stringent protection of free speech would not protect a man in falsely shouting “fire” in a theatre and causing panic” (*Schenck v U.S.*) (2). What may be said or done in the exercise of the freedom of speech, expression or peaceful assembly would also depend on the place. In *Perry Education Association v. Perry Local Educators Association* (3), three categories of public places were identified: (i) traditional, quintessential public forums, “places which by long tradition or by government fiat have been devoted to assembly and debate”, such as streets and parks which “have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions” (*Haque v C.I.O.*, (4)) ; (ii) limited-purpose, semi-public forums, “public property which the state has opened for use by the public as a place for expressive activity”; and (iii) “public property which is not by tradition or designation a forum for public communication”. It is unnecessary to consider whether such a classification is applicable in Sri Lanka. However, it demonstrates that what is permissible in a traditional public forum, or a semi-public forum, is not necessarily permissible in other public places (even assuming the Maha Maluwa to be a public place), especially those devoted to or ancillary to religious purposes. What is patently proper as being free speech or peaceful assembly at Galle Face Green or the Pettah bus stand may not necessarily be permissible in the precincts of Parliament or a Court of law, and could well be gravely provocative in the vicinity of places of worship or religious shrines, and therefore such activities, especially when political or non-religious, require greater scrutiny, where the requisite permission is lacking. Even though their objectives were primarily

political and not religious, the Petitioners and their supporters would, justifiably, have resented any interference with their right to pay their respects at the Dalada Maligawa; I cannot subscribe to a view which would diminish the rights of others gathered there, with no other motive than to exercise their religious freedoms as embodied in Articles 10 and 14 (1)(e) in a calm and serene atmosphere. It is admitted that the Petitioners had not obtained the permission of the Diyawadana Nilame (and had not even extended the courtesy of informing him) in regard to the use of the Maha Maluwa for a satyagraha. The Diyawadana Nilame in his statement to the Police stated that he was informed that some persons were behaving in a manner which would disturb the religious ceremonies being performed; this he investigated; he then observed a group of persons behaving in a manner detrimental to the peaceful atmosphere normally prevalent in the precincts of the Maligawa; he then informed the Police Post at the Maligawa; almost simultaneously he observed the arrival of a Police party which dispersed those who were causing the disturbance. That statement was subjected to a minute analysis, detailed comparisons being made with another statement made by the officiating monk. Minor discrepancies as to details and the sequence of events are inevitable in such circumstances. As against that, it would seem that just as the Petitioners have exaggerated the injuries suffered by them - my brother Kulatunga has referred to the allegation that the 2nd Petitioner's finger had been fractured - they have sought to minimise the disruptive nature of their gathering. What is important is that there was some disturbance, of which the Diyawadana Nilame disapproved, and that he desired that the peaceful environment be restored by the Police; and if they had not acted, there might have been an unseemly disturbance in a place venerated by a large section of the people of Sri Lanka. In all the circumstances it would be unreal to attribute to their conduct anything more sinister than the *bona fide* dispersal of an unruly gathering near a religious place.

For these reasons, I am of the opinion that the Petitioners did not have the right to conduct a "satyagraha" at the Maha Maluwa without the prior permission of the Diyawadana Nilame; that in any event what occurred was not a legitimate, proper or acceptable exercise of the freedom of speech, expression or assembly, appropriate to the Maha Maluwa, and that there has been no infringement of the Petitioners' fundamental rights under Article 14(1)(a) and (b). Their application must therefore be dismissed with costs.

#### **KULATUNGA, J.**

The 1st petitioner is the General Secretary of the Lanka Samasamaja Party, the 2nd petitioner is the General Secretary of the Communist Party of Sri Lanka and the 3rd petitioner is the General Secretary of the Bahujana Nidahas Peramuna being political parties recognised under the law. They complain that the police have unlawfully disrupted a Sathyagraha and a picket organised by them in Kandy along with about 300 members representing their parties and thereby infringed their freedom of expression and peaceful assembly guaranteed by Articles 14(1) (a) and 14(1)(b) of the Constitution.

The petitioners state that in October 1990 the political parties referred to above decided to protest against the rising cost of living, fall in real wages and the violation of human rights by the State and the denial of democratic rights. For this purpose they held a picket at the Lipton Circus, Colombo in November 1990 to which there was no hindrance by the police. They decided to follow it up with a Sathyagraha and a picket in Kandy and similar events in other principal towns. The first Sathyagraha was scheduled to be performed on 15.12.1990 in the Maha Maluwa opposite the Dalada Maligawa to be followed by a picket near George E. de Silva Park.

The petitioners explain that a picket consists of persons standing together in a single line and displaying posters and placard. Sometimes slogans too are shouted; there may be

“vociferous protest”. Sathyagraha is observed seated and in silence with placards or posters displayed so as to indicate the object of such action. It was arranged that about 100 supporters from each party should participate in the said events which were scheduled to take place in Kandy.

On 15.12.1990 at about 9.00 a.m. the petitioners met about 300 of their supporters in Kandy. All of them first visited the Dalada Maligawa and paid their respects there. While they were walking to the Maligawa Inspector of Police Senaratne took into custody one of the participants on the ground that he had with him a poster. The petitioners protested against the arrest and sought to justify the display of posters on the basis of a letter dated 26.09.90 (P1) addressed by the Minister of State for Defence to the 1st petitioner informing him that the police had been directed not to prevent the distribution of leaflets. At the same time the Minister hoped that the petitioners would conduct themselves peacefully. This is not a letter with reference to the proposed Sathyagraha but a confirmation of the general right of citizens to peacefully assemble and display leaflets in public regarding which the 1st petitioner had addressed the Minister on 20.09.90. After worshipping at the Maligawa they returned to the Maha Maluwa (which they describe as a public place) to perform Sathyagraha. They were seated on the ground when they observed a large number of police officers standing by. These officers led by the 2nd respondent (Chief Inspector of Police, Kandy) suddenly pounced on the participants and assaulted them. By such action they dispersed the gathering and disrupted the Sathyagraha.

The petitioners allege that the police had planned the assault on the Sathyagrahis and that the 2nd respondent and his superior officers had conspired in order to deny to the petitioners and their supporters their right of peaceful assembly and expression. They also allege that as a result of the assault injuries were caused to them including a fracture of the 2nd

petitioner's hand; and that the policemen snatched the cameras of those who were taking photographs and destroyed the used films.

The respondents admit the dispersal of the Sathyagrahis but deny the alleged violation of fundamental rights. Their version is that in view of certain information regarding an attempt by a crowd of persons to hold an unlawful demonstration on 15.12.1990 the Superintendent of Police Kandy directed the 2nd respondent to be on duty near the Sri Dalada Maligawa. At about 9.45 a.m. the 2nd respondent obtained leave from the S.P. to take his wife to the Peradeniya Hospital; that on his way to the hospital he overheard a conversation between the S.P. Kandy and I.P. Senaratne who was also on duty in the course of which the latter informed over the walkie-talkie that a crowd which had assembled at the Maligawa premises was behaving in an unruly manner.

On hearing the above information the 2nd respondent returned to the scene and found a crowd led by the petitioners conducting an unauthorised demonstration and shouting anti-government slogans and thereby disturbing the peace around the Maligawa premises. This incident took place in the Maha Maluwa which belongs to the Dalada Maligawa and was under the control of the Diyawadana Nilame of the said Maligawa. The 2nd respondent advised the crowd to disperse peacefully. As this was not heeded he with his officers took steps to disperse the gathering.

The 3rd respondent (Inspector-General of Police) states that on 15.12.1990 Mr. Neranjan Wijeyaratne, Diyawadana Nilame had himself requested the Police Post at the Maligawa premises to take necessary action to prevent the crowd led by the petitioners from acting in an unruly manner so as to disturb the peaceful surrounding of the Maligawa. In support of this the 3rd respondent has produced marked 3R1 and 3R2 respectively the statements of Rev. Palipane Siri Nivasa Thero officiating monk at the Dalada Maligawa and Mr. Neranjan

Wijeratne Diyawadana Nilame made to the S.P. Kandy on 16.12.90. They had told the police that a crowd led by the petitioners had attended the morning service at the Dalada Maligawa and had thereafter conducted themselves in an objectionable manner.

Diyawadana Nilame also told the police that the Maha Maluwa belongs to the Dalada Maligawa and that nobody had informed him of the visit to the Maligawa by the petitioners and his men or of the proposed Sathyagraha in the vicinity of the Maligawa; nor had he permitted such event. The petitioners do not claim to have obtained any such permission; leave to proceed was granted upon averments in their petition that the Maha Maluwa is a public place where it is lawful to conduct a Sathyagraha and that the law does not require any permission to be obtained for such activity. When confronted with the claim in the respondent's affidavits that the Maha Maluwa is private property owned by the Dalada Maligawa, the petitioners have filed a further affidavit wherein they now take up the position that at some stage the wall that stood around the Maha Maluwa was removed and it was joined to the Madduma Bandara Park which belongs to the Kandy Municipal Council; that as a result an open green stretching from Trincomalee Street to the Maligawa has come into existence; that the said green is used as a public park where members of the public including children and tourists are seen in the evenings enjoying their leisure; and that the Sathyagrahis were seated at the Maligawa end of the green which is a place which the public had been habitually using. Mr. Faiz Musthapha, President's Counsel for the petitioners submits that as such the petitioners were entitled to meet there without the permission of the Maligawa authorities.

In answer to the allegation that by reason of the police assault the petitioners sustained injuries including a fracture of the 2nd petitioner's hand the 3rd respondent has produced marked 3R3 and 3R4 Medical Reports according to which the

1st petitioner had abrasions and the 2nd petitioner had abrasions and contusions. These are non-grievous. There was no fracture. In reply the petitioners in their further affidavit claim that the 2nd petitioner had a fracture of the fourth finger of his left hand. In support of this they have produced a requisition for an X-ray marked P4(b) and have stated that the relevant X-ray will be produced at the hearing of the application. However, no X-ray was produced before us.

Upon a careful consideration of the evidence, I am satisfied that the petitioners had planned the proposed events in Kandy well ahead of the date. They admit having invited about 300 supporters to participate in the events. The 2nd respondent states that the police had information of an unlawful demonstration. The petitioners state that the proposed Sathyagraha was a peaceful one having spiritual overtones and that they did not conduct themselves in an unruly manner or shout slogans. Whatever that may be, I am satisfied that the police had prior information of the events and hence took steps to maintain the public peace particularly in the premises of the Dalada Maligawa and that the police did not engage in a conspiracy to deny the petitioners their right of peaceful assembly and expression as alleged in the petition.

The petitioners and their supporters were not prevented from paying their respects inside the Maligawa even though their mission was different from that of the other devotees. Thus one of them carried a poster while going there. The situation appears to have changed when they returned to the Maha Maluwa. I accept the 2nd respondent's version that at that stage the Diyawadana Nilame himself had sought police assistance to maintain the public peace and that some degree of unrest had arisen by reason of the conduct of the petitioners and their supporters.

I do not accept the claim that the petitioners were entirely calm and peaceful. Admittedly some of the participants were taking photographs which conduct though legitimate shows

that the crowd was very active. One of them had displayed a poster and was arrested whereupon the petitioners protested relying upon the letter P1 as lawful authority for exhibiting posters in the Maligawa premises; that letter does not constitute any such authority. There is also no evidence that the participants had been given any instructions as to their conduct at the Sathyagraha as against the picket which was to follow at which they were free to shout slogans and display placards. In all the circumstances, I am satisfied that the crowd viewed with displeasure the order by the police to disperse and resisted it which in turn required the police to use force.

I now proceed to determiné the complaint of the petitioners in the light of the aforementioned findings of fact. The question is whether their right of peaceful assembly and expression has been infringed having regard to:—

- (a) the fact that the petitioners had no permission to use the Maha Maluwa; and
- (b) the need to maintain public order.

Firstly, even if an open green joining the Madduma Bandara Park belonging to the Kandy Municipal Council with the Maha Maluwa had come into existence, the petitioners were seated in the Maha Maluwa area which is the property of the Dalada Maligawa. They went there for a political purpose and not to enjoy their leisure as members of the public. That being so, they had no right to be there without the permission of the Maligawa authorities. There is no right to hold meetings on the lands belonging to others *Railway Board v. Niranjan Singh*, (5). The Maligawa authorities had not permitted the petitioners either expressly or impliedly to hold a Sathyagraha in the Maha Maluwa that day. The petitioners appear to rely on implied permission; I am of the view that they had no such permission. Whether implied permission exists in a given case would depend on the nature of the proposed activity and the character of the premises. The Sathyagraha was a political event for which no implied permission can be presumed in

relation to the Dalada Maligawa. On the contrary it seems that nothing short of express permission could authorise the proposed Sathyagraha there.

Secondly, even if the petitioners' presence in the Maha Maluwa was per se lawful and they are not guilty of any offence by reason of such presence the rights invoked by them shall be subject to such restrictions as may be prescribed by law in the interests of public order. Such restrictions are found in the Code of Criminal Procedure Act, No. 15 of 1979 and the Police Ordinance (Cap. 53). Chapter VIII of the Code, S.95 empowers a police officer not below the rank of Inspector of Police to command any assembly of five or more persons likely to cause a disturbance of the public peace to disperse whereupon it shall be the duty of the members of such assembly to disperse accordingly. If upon being so commanded such assembly does not disperse or if without being so commanded it conducts itself in such a manner as to show a determination not to disperse, the police officer is empowered to proceed to disperse such assembly by the use of such force as may reasonably be necessary to disperse such assembly. S. 97 provides to a police officer exercising such power in good faith immunity from civil or criminal proceedings for an act purported to be done under this chapter.

S. 56 of the Police Ordinance provides that it shall be the duty of a police officer inter alia, to preserve the public peace and to collect and communicate intelligence affecting the public peace.

Whilst the protest planned by the petitioners is within their rights in a democratic set up, it is to be noted that this was a period of unrest and civil disturbance in the country when the law enforcement agencies had to act with the utmost vigilance to ensure the maintenance of public order. Places of religious worship particularly sacred places such as the Dalada Maligawa require special protection during such periods. The Police Ordinance imposes a duty on the police to take necessary

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action and the Code of Criminal Procedure Act confers necessary powers on the police in that regard. In the light of the evidence before this Court and the applicable law I am of the view that all the steps taken by the police are justified.

Had the petitioners paid their respects at the Dalada Maligawa and proceeded to George E. de Silva Park which was the main venue without attempting to stage a Sathyagraha in the Maha Maluwa the situation might have been different. If, however, they were keen to conduct the proposed Sathyagraha the appropriate course would have been to give prior notice of their intention to the Maligawa authorities. They did not do so in the belief that the Maha Maluwa is public property and that they had a constitutional right to conduct a Sathyagraha there. They have no such right; and as I have found, the meeting itself was not peaceful. Hence the police have not infringed their fundamental rights in dispersing them. In the result, I dismiss this application with costs.

Goonewardena J.— I agree.

*Application dismissed.*

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