

**RATNASARA THERO
V.
UDUGAMPOLA**

SUPREME COURT

**WIMALARATNE J., RATWATTE J.,
COLIN THOME J., ABDUL CADER J.
AND RODRIGO J.**

**S.C. APPLICATION NO. 125/1982
JANUARY 19TH 1983.**

Fundamental rights - Confiscation of printed matter prepared for distribution - S 398 and S 453 of Penal Code - Article 14 (1) (a) of the Constitution - Freedom of speech and expression including publication.

The petitioner who had printed some leaflets for distribution on the subject of the referendum to be held for extending the life of the parliament, complained that the 1st respondent had taken some of the leaflets into custody. The 1st respondent had initiated inquiries on the receipt of a complaint by one Wimaladasa that he had seen a copy of the leaflets on public display. Subsequently one Rev. Father Basil Nicholas had complained that he had been deceived by one Father Reid Fernando into signing a copy of the same document.

The original copy signed by Rev. Father Basil Nicholas was not taken into custody and Father Reid Fernando was not questioned. Wimaladasa's statement had not been produced in court and it was admitted that the contents of the leaflet were not unlawful.

The 1st respondent had not stated under what provisions of the law he chose to act and the learned Deputy - Solicitor General suggested that he could have acted under S 398 and S 453 of the Penal Code.

Held -

S. 398 and S. 453 of the Penal Code had no application and that the fundamental rights of the petitioner that is the freedom of speech and expression including publication had been violated.

Case referred to:-

Emperor vs. Raghunath Singh - 1946 A.I.R. (Lahore) at p. 459.

S. Nadesan, Q.C. with Sri Ranjan and S.H.M. Reeza, for the petitioners.

Priyantha Perera, D.S.G., with C.R. de Silva S.C for the respondents.

Cur Adv Vult.

February 2, 1983.

ABDUL CADER J.

The petitioner is the Viharadhipathi of the Sama Vihara situated at Gampaha. He has stated that an organisation called the "Pavidi Handa" was constituted by a considerable number of the clergy, Buddhist and Christian, in Sri Lanka, who were opposed to the proposal to extend the life of the present Parliament for a further period of 6 years. At a meeting held on 18th November, 1982, it was decided that a statement of the reasons for their opposition should be sent to different parts of the Island and signatures obtained from those who were in agreement and to print and distribute them. Accordingly, some statements were prepared and sent to the clergy in various parts of the Island for signature. The petitioner placed an order

for printing 50,000 copies of this statement with the names of the signatories for the purpose of distribution to the members of "Pavidi Handa" for being given to or posted to voters. 10,000 leaflets were delivered to the petitioner while the balance was in the course of printing of which 5,000 copies had been given out or had been posted to the voters, and the balance was with the petitioner awaiting distribution. He had in addition in his possession 5,000 copies of the statement in English.

On 8th December, 1982, on a complaint, the Gampaha Police went to the press in which there were some copies of this leaflet which had already been printed. While the other copies were being printed, they seized and removed about 20,000 printed copies and also "composed matter" and stopped further printing of this statement. Thereafter, the Police went to Sama Vihara and the Sub-Inspector told the petitioner that they had seized leaflets from the press and they wanted from the petitioner the originals of the documents signed by the clergy. The petitioner gave them about a dozen such signed statements. The petitioner states that when he questioned the Inspector why they seized and removed the leaflets from the press, he replied that they were taken away because it is illegal to print them under Emergency Rules and Election Law. He had also told the petitioner that 3 persons from the press had been arrested and it is likely that the press would be sealed and that the first three signatories of whom the petitioner was the third were likely to be arrested. The Sub-Inspector did not take away the 5,000 copies which were in his possession. He was asked to report at the Police Station the next day, that is 9th December, 1982. He filed this petition on the 9th, stating that after his statement was recorded he feared that these 5,000 copies also may be seized and taken away by the Police and that he would be arrested and his work in connection with the Referendum may

be obstructed. He has also expressed the fear that the Gampaha Police would continue not to give him and other members of the "Pavidi Handa" the opportunity to meet at the Vihara or elsewhere "to discuss our problem." He has prayed for a declaration that the steps taken by the 1st respondent in taking away the leaflets printed at the said press are unlawful and in violation of the fundamental rights of the petitioner, to direct the 1st respondent to restore the copies seized from the said press to the petitioner, and for compensation in a sum of Rs.25,000/=. I shall refer to prayer "D" later.

The 1st respondent, the Superintendent of Police, Gampaha, with reference to the above allegations has stated that at 9.55 a.m. on 8.12.82, a complaint was made at the Police Station at Gampaha by one Wimaladasa to the effect that he had seen a copy of the document marked "A1" pasted on a letter box in the Gampaha town, and at 10 a.m., about 5 minutes later, Rev. Father Basil Nicholas complained at the Police Station that he had been deceived into signing on a blank paper and that his name now appears as the 70th signatory on the said pamphlets to which he had never consented to be a signatory and that he requested an investigation; a party of Police Officers was sent to ascertain if there were any of these pamphlets pasted anywhere; that it was reported to him that these pamphlets were seen pasted everywhere in town; that he traced the original of these pamphlets to a printing press in Gampaha; caused the pamphlets found therein to be seized and, as it transpired that the petitioner was responsible for getting these pamphlets printed, he visited the Sama Vihara and recorded the statement of the petitioner. In his affidavit, he has referred to the statements recorded subsequently of five other persons, copies of which statements have been annexed to his affidavit, which are totally irrelevant to these proceedings.

as they were recorded after the seizure of these pamphlets and, therefore, could not have formed the material on which the 1st respondent acted.

In the affidavit filed by the 1st respondent, he has not stated under what provisions of law he chose to act in this manner. The petitioner's statement that the Sub-Inspector told him that the pamphlets were taken away "because it was illegal to print them under Emergency Laws and Election Laws" has not been expressly contradicted. There is, however, a general denial in paragraph 2 of the affidavit of the 1st respondent. The Deputy Solicitor-General, however, did not support the seizure of these pamphlets on the ground that the printing of these pamphlets was a violation of the Emergency Laws and the Election Laws. The Deputy Solicitor-General referred to Section 50 (1)(b) of the Referendum Act No.7 of 1981, the violation of which is a cognizable offence. Section 50 (1)(b) reads as follows :-

"50. (1) During the period commencing from the date of publication of the Proclamation under section 2 and ending on the day following the day of which a poll is taken at Referendum, no person shall, for the purpose of promoting a Referendum, display-

(a)

(b) any handbill, placard, poster, drawing, notice, symbol or sign on any place to which the public have a right of, or are granted, access except in or on any premises on any day on which a meeting to promote the Referendum is due to be held in that premises;"

Wimaladasa's statement has not been produced in Court; the pamphlets which Wimaladasa saw pasted had not been removed and exhibited in this Court;

nor an affidavit filed from Wimaladasa. Even the statement of the 1st respondent that it was reported to him that his officers saw these pamphlets "pasted in the town" is hearsay as no affidavit has been filed from these officers. In the light of these circumstances, the Deputy Solicitor-General did not support the action of the 1st respondent under this provision.

The Deputy Solicitor-General then submitted that the 1st respondent could have acted under Sections 398 and 453 of the Penal Code. Section 398 deals with cheating and Section 453 with the making of a false document. Even assuming that the petitioner or, for that matter, anyone else had committed the act complained against by Father Basil Nicholas, there is doubt whether an offence of cheating or forging a document would arise on that material. However, I would adopt the submission made by the Deputy Solicitor-General that the 1st respondent could well make a mistake as regards the application of these sections to the facts reported to him although in the final result a Court might hold that no offence had been, in fact, committed under these sections. But what is significant is that the 1st respondent has not stated that he acted under either or both these sections. It is merely a proposition put forward by the Deputy Solicitor-General at the argument before us, so that it is yet open to question whether the 1st respondent acted whilst investigating an offence under the Penal Code or an offence under the Emergency and Election Laws.

The Deputy Solicitor-General drew our attention to Section 112(1) of the Code of Criminal Procedure Act and submitted that since the respondent was investigating a cognisable offence, he was entitled to search for any document which he considered necessary for the conduct of the investigation and, therefore, he was justified in taking

charge of the pamphlets.

The burden is on him to satisfy us that he complied with the requirements of this Section; viz. that:

(1) he considered that the production of these pamphlets were necessary to the conduct of the investigation, and

(2) there was reason to believe that the petitioner.....will not produce these pamphlets in response to summons or order issued by court under Section 66, or

(3) that such document is not known to be in the possession of the petitioner.

In respect of the first of these conditions, Mr. Nadesan raised a very pertinent question whether it was necessary that the respondent should take charge of about 20,000 printed leaflets to prove the charges of cheating or forging a document. In fact, the Police had in their possession one of these printed documents before the respondent seized these leaflets because the statement of the Rev. Father recorded by the Police commences with the words that the printed pamphlet was shown to the Rev. Father before his statement was recorded. I agree with Mr. Nadesan that it was not necessary to take charge of 20,000 pamphlets to prove either of these charges.

In respect of the second requirement, I cannot see how the respondent could have entertained any doubts that the petitioner would not produce the printed leaflets when required to do so by Court when the petitioner had admittedly printed this large number of pamphlets for distribution for a cause which he believed to be right.

The third requirement is also not fulfilled

inasmuch as the 1st respondent himself had disclosed that in the course of the investigation it transpired "that the petitioner was responsible for getting these pamphlets printed" and secondly he did not seize the documents that were in the possession of the petitioner.

An examination of the facts will lend support to my conclusion that this Section has no application. Assuming that the 1st respondent went out to investigate one of these two offences, the first and important material document that he should have taken charge of should have been the original document in which the Rev. Father placed his signature. He did not do so. According to the petitioner he took charge of some other original documents. Obviously, the respondent did not give his mind to the document signed by the Rev. Father. In fact, it was produced in Court at the hearing by Counsel for the petitioner. What Father Basil Nicholas had stated was that Father Reid Fernando saw him and asked him to sign a document on which the data was on one sheet and the signatures on another, and so far as he could remember, he was the second person to sign the document and that there were no signatures of any Buddhist priests on that document. One would expect any intelligent Police Officer to call for and obtain the documents on which Rev. Father had placed his signature which, as I said earlier, was not done. Secondly, the respondent has stated that the statement of the petitioner was recorded, but that statement had not been produced before us to consider whether the petitioner had been questioned in the light of the submissions made by the Deputy Solicitor before us. Thirdly, the Police showed the pamphlet to Father Nicholas before recording his statement and, therefore, it has to be presumed that the Police had started an investigation after recording the information furnished by Wimaladasa. Though the priest had complained of cheating and requested the Police to hold an inqui-

ry, it would appear that the motive for the seizure was actually based on Wimaladasa's complaint. It is significant that apart from the fact that the respondent has not taken shelter behind the Penal Code, even the written submissions refer to the complaint of Wimaladasa as one of the reasons for seizing the pamphlets. Fourthly, if at all any person cheated the Rev. Father, according to him, it was Father Reid Fernando who took the signature, but Father Fernando was not questioned before the seizure of these pamphlets. Fifthly, no affidavit has been filed from Father Basil Nicholas or from Father Reid Fernando.

Bhandari J. quoted Lord Camden C.J. in *Emperor vs. Raghunath Singh* reported in 1946 A.I.R. Lahore, at page 459 as follows:-

"The great end, for which men entered into society, was to secure their property. That right is preserved sacred and incommunicable in all instances, where it has not been taken away or abridged by some public law for the good of the whole. The cases where this right of property is set aside by positive law, are various. Distresses, executions, for feitures, taxes & c., are all of this description; wherein every man by common consent gives up that right, for the sake of justice and the general good. By the laws of England, every invasion of private property, be it ever so minute, is a trespass. No man can set his foot upon my ground without my licence, but he is liable to an action, though the damage be nothing; which is proved by every declaration in trespass, where the defendant is called upon to answer for bruising the grass and even treading upon the soil. If he admits the fact, he is bound to show by way of justification that some positive law has empowered or ex-

cused him. The justification is submitted to the Judges, who are to look into the books if such justification can be maintained by the text of the statute law, or by the principles of common law. If no such excuse can be found or produced, the silence of the books is an authority against the defendant, and the plaintiff must have judgment."

"Good faith" was discussed, but not put forward as a defence for seizure of these pamphlets. I do not intend to discuss the question whether "good faith" on the part of a public servant would constitute a defence for the violation of fundamental rights. Section 51 of the Penal Code defines "good faith" as follows:-

"Nothing is said to be done or believed in good faith which is done or believed without due care and attention."

On the facts in this case, the respondent has, therefore, failed in this regard, too.

The respondent having admitted the seizure of pamphlets, the burden lies on the respondent to justify his conduct. In my opinion, the Deputy Solicitor-General has failed in his attempt to vindicate the conduct of the 1st respondent.

I hold that the petitioner is entitled to relief in terms of his prayers "B", "C", "D", "E" and "F".

Prayer "G" is for a direction to the respondent to permit the petitioner to hold lawful meetings and "not to carry out the assurance that he (1st respondent) "gave the unruly mob on the 3rd December, 1982;". The 1st respondent has denied that he gave any such assurance or that he prevented the petitioner from holding lawful meetings. He has given the assurance that the Police do not intend

to prevent the holding of a meeting by the petitioner. Now that the occasion for such meetings is no more and that the respondent has given the assurance that the petitioner will not be obstructed from holding lawful meetings, I do not think it necessary to go into the matters raised in paragraphs 14 and 15 of the petition.

The petitioner has been prevented from exercising his fundamental rights of "freedom of speech and expression including publication." (Article 14(1)(a) of the Constitution). About 20,000 copies of pamphlets which he printed for publication to espouse a cause which he believed to be right had been seized by the 1st respondent and the petitioner had been prevented from distributing them. The D.S.G. agreed that the contents of these documents were not unlawful and that he was not relying on the contents to justify the seizure of these pamphlets. In my view, this is a serious violation of the fundamental rights of a citizen of this country which calls for the award of substantial damages. A mere declaration without more in the form of some penalty will not deter such future abuse of fundamental rights of citizens. This Court does have the power "to grant such relief or make such directions as it may deem just and equitable in the circumstance" in terms of Article 126 (4) of the Constitution.

Keeping in mind that 20,000 pamphlets were seized, I direct the 1st respondent to pay a sum of Rs.10,000/- as compensation and costs fixed at Rs.2,100/- to the petitioner.

WIMALARATNE J. - I agree.

RATWATTE J. - I agree.

PERCY COLIN-THOME J. - I agree.

RODRIGO J. - I agree

Application upheld.