

DR. NEVILLE FERNANDO AND OTHERS
V.
LIYANAGE AND OTHERS

SUPREME COURT

SHARVANANDA, J., WANASUNDERA, J. AND VICTOR PERERA, J.

S.C. APPLICATION NO. 134/1982

JANUARY 10, 1983.

Fundamental Rights — Application under Article 126 of the Constitution — Shareholders in a company cannot complain of indirect violation of fundamental rights.

The 6th petitioner, a private limited liability company of which the 1st to 5th petitioners were shareholders, was running a printing establishment. The 1st respondent, in the exercise of powers vested in him under regulation 14(7) of the Emergency (Miscellaneous Provisions and Powers) Regulations, No. 2 of 1982 directed that the 6th petitioner's printing establishment be not used for any purpose whatsoever and authorized the 2nd respondent to take such steps as may be necessary for securing compliance with that order. The 2nd respondent, through his officers took possession of and sealed the premises. Thereupon the petitioners alleged that their fundamental rights of engaging in any lawful occupation, profession or trade guaranteed to them under Article 14(7) (g) and other Articles of the Constitution, had been violated.

Held —

The 1st to 5th petitioners had not been directly affected by the act of the Respondents as their injury stems from their shareholding in the 6th petitioner company and therefore they are entitled to complain to the court of the infringement of their fundamental rights under Article 126 of the Constitution.

Cases referred to:

1. *Bennet Coleman Case* AIR 1973 SC 106.
2. *R.C. Cooper V. Union of India* AIR 1970 S.C. 564.

APPLICATION under Article 126 of the Constitution.

Nihal Jayawickrema with Faiz Mustapha and D. J. C. Boange, instructed by *J. C. T. Kotelawala* for Petitioners.

February 7, 1983

SHARVANANDA, J.

The Petitioners in the present application No. 134/82 were the very petitioners in petition, S. C. Application No. 116/82. The Petitioners are (1) Dr. Neville Arthur Fernando, (2) Swarnamali Fernando, (3) Naomal Fernando, (4) Sharmali Fernando, (5) Devaka Fernando and (6) Janatha Finance and Investments Ltd., (a limited liability Company incorporated under the provisions of the Companies Ordinance).

In the earlier application No. 116/82, filed on 25th November 1982, the Petitioners stated that the 1st and 2nd Petitioners for the purpose and with the object *inter alia* of engaging in the business of printers etc., formed themselves into a private limited liability Company under the name of Janatha Finance and Investment Ltd., (6th Petitioner) and that in pursuance of the object, 6th Petitioner Company established in 1978 a business called and known as "J.F & I Printers", and that "J F & I Printers" was one of the most modern and sophisticated commercial printing establishments in Sri Lanka, having equipment to the value of over six million rupees and with a staff of over 50 persons and that the **6th petitioner Company** had, for the purpose of establishing the business, raised loans approximately aggregating to three million rupees from commercial banks. They further stated that the present shareholders of the 6th petitioner-company are the 1st, 2nd, 3rd, 4th, and 5th petitioners and the Panadura Clinic Ltd., whose shareholders are the 1st, and 2nd Petitioners. In that petition they complained that by orders dated 3rd November 1982 and 20th November 1982, the 1st respondent, who is the Secretary to the Ministry of State and Competent Authority, in the exercise of powers vested in him under regulations 14(7) of the Emergency (Miscellaneous Provisions and Powers) Regulations No. 2/82, directed that J F & I Printers be not used for any purpose whatsoever and authorised the 2nd Respondent who is the Inspector-General of Police to take such steps as appear to be necessary for securing compliance of the said order and that the **2nd Respondent**,

accordingly through his officers and agents took possession of and sealed up the premises of the business. They stated that they had been thus prevented from engaging in the business of commercial printing and that the 6th petitioner company had suffered loss and damage in a sum of Rs. 30,000/- on each day that the Company had been prevented from engaging in the business, since 3rd November 1982. They alleged that consequently, the fundamental freedom of each petitioner 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, had been infringed.

By its judgment dated 14.12.1982, this Court dismissed the Petitioners' application No. 116/82 on the ground that the 6th petitioner company, not being a citizen, was not entitled to claim the fundamental right to engage in any trade or business referred to in Article 14 of the Constitution, and that 1-5th petitioners as shareholders of the 6th petitioner company could not maintain the application on the basis that their freedom to engage by themselves or in association with others in any lawful trade or business, as warranted by Article 14(1) (g), was infringed by the impugned action of the Respondents as the business that was taken possession of in pursuance of the impugned orders was the business of the 6th petitioner company and not that of the shareholders of the company.

The Petitioners have since then filed the present application No. 134/82 on the 19th December 1982, complaining against the very same orders dated 3rd November 1982 and 20th November 1982 and the consequent action on the ground that they infringed their fundamental rights guaranteed by Articles 12(1), 12(2), 13(2), 13(5), 14(1)(a), 14(1)(c) and 14(1)(b) of the Constitution.

In the present application the Petitioners state that **they** were carrying on the business of commercial printing, "J F & I Printers Ltd., "Rajagiriya. They further state that J F & I Printers is a printing establishment with equipment to the value of six million rupees and a working staff of over 50 persons and that to establish the business **they** raised money by way of a loan

approximately aggregating to 3 million rupees from commercial banks and that they have suffered loss and damage in a sum of rupees 45,000/- on each day that they had been prevented from engaging in their business, since 20th November 1982. The divergence in the statement of facts by the petitioners is apparent. In the earlier application No. 116/82, the Petitioners had stated that the 6th petitioner company was the owner of the business and of the printing establishment and that the company had borrowed sums of money aggregating to 3 million rupees and that the company, by the seizure of the Press, in pursuance of the orders of the Respondent had suffered loss and damage in a sum of Rs. 30,000/- on each day the company was prevented from engaging in the business since 3rd November 1982. It is to be noted that the affidavit in support of both applications have been deposed to by the same person, Dr. Neville Fernando. It is strange how this deponent came to affirm to two inconsistent versions.

When the attention of Petitioners' Counsel was drawn to this factual inconsistency or contradictions as to the ownership of the business of J F & I Printers and of the ownership of the Press, Counsel was constrained to abandon the position taken up in the present petition that the first five Petitioners and the 6th Petitioner were the owners of the business and of the Press that was taken possession in pursuance of the impugned orders dated 3.11.82 and 20.11.82. He admitted that the business of "J F & I Printers" and the said Press belong to the 6th petitioner-company and that the other petitioners did not have any interest in the said business or the Press other than whatever interest, they, as shareholders had in law in the company which owned the said business and the Press. It is on the basis of these admitted facts that the validity of the allegation of the 1st-5th petitioners that their fundamental rights have been violated has to be examined.

Counsel submitted that the 1st-5th Petitioners are not seeking in this application to vindicate the 6th petitioner company's rights, but are complaining that the fundamental rights guaranteed to them by Article 14,(1)(g) and other Articles

have been infringed by the impugned orders dated 3rd November and 20th November 1982, marked P1 & P2. Though this contention was held to be untenable by this Court in its order dated 14.12.1982, in application No. 116/82, Counsel however alleged that the said order "had been made *per incuriam* inasmuch as the said order had failed *inter alia* to take into account the nature, scope and effect of the declaration of fundamental rights contained in Chap. 3 of the Constitution and of the special remedy which the petitioners are entitled to avail themselves of in terms of Articles 17 and 126 of the Constitution."

In my view there is no foundation for this allegation. This Court had in its earlier order dated 14.12.82 considered the interests of the 1st-5th petitioners in the company's business and assets and had rejected the contention that the 6th petitioner Company was the means by which the 1st-5th Petitioners carried their printing business and that there was **no infraction of their fundamental rights by reason of** the impugned action of the 1st and 2nd Respondents in taking possession of the business of J F & I Printers.

Counsel in his submission in application No. 116/82 had relied heavily on the judgment of Ray, J., in *Bennet Coleman* case⁽¹⁾. I had in my judgment in that case, with regret, disagreed with the proposition of law enunciated therein "that a shareholder carries on business through the agency of the Company and that the shareholders' right to carry on business are affected if the company's rights to carry on business are affected." and had held that the freedom of each of the 1-5th Petitioners to engage by himself or in association with others in any lawful trade or business (Article 14(1)(g)) was not impaired or impugned by the action of the 1st and 2nd respondents against the 6th petitioner-company.

Counsel in the present case fell back on the majority judgment pronounced by Shah, J., in *R. C. Cooper v. Union of India*,⁽²⁾ which was the authority quoted by Ray, J., for his above ruling in *Bennet Coleman's* case - 1973 S.C. 106 with which I had disagreed.

In Cooper's case, which is known as the **Bank Nationalisation Case**, the petitioner had held shares in the Central Bank of India Ltd., and was also a Director of the Bank. He was a shareholder also of three other nationalised banks and had current and fixed deposit accounts with all the four banks that have been nationalised. By his petition he complained that the Banking Companies (Acquisition and Transfer Undertakings) Ordinance No. 8 of 1969 and the Indian Companies (Acquisition Transfer) of Undertakings Act No. 22 of 1969, impaired his fundamental rights guaranteed by Articles 14, 19 and 31 of the Indian Constitution and were on that account invalid. He challenged the validity of the Act on the ground *inter alia* that by the enactment of that Act, the fundamental rights of petitioner, guaranteed by Articles 14, 19 (1) (f) and (g) and 31(2) are impaired.

Article 14 provided that "the State shall not deny to any person, equality before the law or the equal protection of the laws within the territory of India."

Article 19(1) provided "all citizens shall have the right :—

- (f) to acquire, hold and dispose of property, and
- (g) to practise any profession or to carry on any occupation, trade or business.

Article 31(2) provided: "no property shall be compulsorily acquired, save for a public purpose and save by authority of a law."

The Attorney-General in that case contended that the petition of the petitioner Cooper was not tenable because no fundamental right of the petitioner was directly impaired by the enactment of the Act or by any action taken thereunder. He submitted that the petitioner who claimed to be a shareholder, Director and holder of deposit and current accounts with the banks was not the owner of the property of the undertaking taken over and was on that account incompetent to maintain the petition. In countering this contention of the Attorney-General, Shah, J., who delivered the majority judgment stated the Indian Law —

“a company, registered under the Companies Act is a legal person, separate and distinct from its individual members. Property of the company is not the property of the shareholders. A shareholder has merely an interest in the company arising under its Articles of Association, measured by a sum of money for the purpose of liability, and by a share in the profit. Again a Director of a Company is merely its agent for the purpose of its management. The holder of a deposit account in a company is its creditor; he is not the owner of any specific fund lying with the company. A shareholder, a depositor, a Director may not therefore be entitled to move a petition for infringement of the rights of the company unless by the act impugned by him his rights are also infringed. By a petition praying for a Writ against infringement of fundamental rights, except in a case where the petition is for a Writ of Habeas Corpus and probably for the infringement of guarantees under Articles 17, 23 and 24, the petitioner may seek relief in respect of his own rights and not of others. 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 a 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 the company. Jurisdiction of the Court to grant relief cannot be denied when by State action the rights of an individual shareholder are impaired, if that action impaired 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 rights of the shareholders, as well as the company, the Court will not, concentrating merely upon the technical operation of the action deny itself jurisdiction to grant relief.”

The above statement represents our law too, subject to the significant proviso that the fundamental rights of an Indian shareholder are larger than those of his local counterpart. Our

Constitution has not elevated the right to acquire and dispose property (Article 19(1)(f) of the Indian Constitution) and the right of freedom from acquisition of property save by authority of law and the right to payment of adequate compensation (Article 31(1) & (2) of the Indian Constitution) into fundamental rights; these rights have not have been incorporated into our Constitution. This important qualification has a material bearing on the question in issue in the present case, namely, whether any fundamental right, guaranteed under Chap 3 of our Constitution, of the 1-5th Petitioners has been infringed by the action of the 1st and 2nd Respondents in taking possession of the company's business and assets.

This point of difference has to be borne in mind in appreciating the Indian Supreme Court's holding that Cooper, the shareholder had *locus standi* to challenge the nationalisation of the Banks, of which he was a shareholder. According to Shah, J., the claims of the petitioner Cooper were as follows:

"The petitioner claims that by the Act and the Ordinance, the rights guaranteed to him under Articles 14, 19 and 31 of the Constitution are impaired. He says that the Act and the Ordinance are without legislative competence, in that they interfere with the guarantee of freedom of trade and were not made in the public interest; that the Parliament had no legislative competence to enact the Act and the President has no power to promulgate the Ordinance, because He says that in consequence of the hostile discrimination practised by the State, the value of his investments in the shares is substantially reduced, his right to receive dividends from his investments has ceased and he has suffered great financial loss, he is deprived of his rights as a shareholder to carry on business through the agency of the company, and that in respect of the deposits the obligation of the corresponding new banks, not of his choice, are substituted without his consent."

At the end of his judgment, Shah, J., stated his conclusions:-

“Accordingly we hold that (a) the Act is within the legislative competence of the Parliament; but (b) it makes hostile discrimination against the named banks from carrying on banking business, whereas other banks - Indian and Foreign - are permitted to carry on banking business, and even new banks may be formed which may engage in banking business; (c) it in reality restricts the named banks from carrying on business other than banking as defined in Section 5(b) of the Banking Regulation Act, 1949; and (d) that the Act violates the guarantee of compensation under Act 31 (2), in that it provides for giving certain amounts determined according to principles, which are not relevant in the determination of compensation of the undertaking of the named banks and by the method prescribed amounts so declared cannot be regarded as compensation.”

Finding (a) is not relevant here. Finding (b) is a finding that the Bank's right to equality under Article 14 was violated. Finding (c) read with the discussion in the judgment under Article 19 is a finding that the Bank's rights under Article 19 were violated. Finding (d) read with the discussion in the judgment on Article 31 (2) is a finding that the compensation payable to the Banks for the acquisition of their undertakings violated rights conferred on the Banks by Article 31(2).

It is relevant to note that though the petitioner Cooper claimed relief on the ground that his own fundamental rights had been violated and the Court countenanced his *locus standi* on the basis of such claim the ultimate finding of the Court was that the Nationalisation Act and the Regulations violated the bank's fundamental rights under Articles 14, 19 and 31. The judgment of Shah, J., does not contain any discussion or finding respecting the validity of the petitioning shareholder's claim that his fundamental rights under Article 14 and 19(1) (g) had been impaired. His observation:

"By reason of the transfer of the undertaking of the named Banks, the interest of the Banks and the shareholders are virtually affected. Investments in banks - shares is regarded in India, especially the shares of the larger banks, as safe investments on attractive terms with a steady return and fluidity of conversion Since the taking over of the undertaking, there has resulted a steep fall in the ruling market quotation of the shares of a majority of the named banks. The market quotations have slumped to less than 50% in the case of the Bank of India, Central Bank Dividends may no longer be distributed, for the banks have no liquid assets and they are not engaged in any commercial activity" (Para 81).

tends to show that the Court regarded the Nationalisation Act and the Ordinance as having an adverse impact only on the shareholder's right to property, which is protected by Article 19(1)(f) of the Indian Constitution. This Article enunciates the basic right to property of a citizen. The judgment is not an authority for the proposition that when the business of the Company is taken over the shareholder's rights of equality and of freedom "to engage by themselves or in association with others in any lawful trade or business" as guaranteed to any individual under our Articles 12 and 14(1)(g) got consequently impaired. It "certainly does not lend any support for the misconceived contention that a shareholder is deprived of the right to carry on business through the agency of the Company."

In my view the 1-5th Petitioners, namely, shareholders, cannot found any complaint of violation of their own fundamental rights as recognised by our Constitution, the action of the Respondents in taking possession of and sealing the Press of the 6th Respondent Company. No injury to the shareholders, distinct and separate from the injury, if any, to the Company has been inflicted.

The right to complain to this Court of the infringement of fundamental rights, under Article 126 of the Constitution is

available only for the violation of one's own fundamental rights. One cannot claim standing in this Court to vindicate the constitutional rights of some third party, however much one may be interested in that party. The 1-5th Petitioners' injury stems from their shareholding in the 6th petitioner Company. They have not been injured directly by the action of the Respondents and hence are not entitled to challenge its constitutionality, by way of application under Article 126.

I see no reason to depart from or to modify the view of the law expressed by this Court in its judgment in S.C. 116/82 (S. C. M. of 14.12.1982) that a company, not being a citizen, cannot complain of infringement of the fundamental rights specified in Article 14 of our Constitution, and that its shareholders too cannot complain of violation of any of their fundamental rights by the impugned action of the Respondents, since they have not suffered any distinct and separate injury such as to entitle them to allege infringement of their fundamental rights.

The 6th petitioner Company has preferred another application No. 127/1982 to this Court complaining of infringement of its rights under Articles 12 & 13 of the Constitution. Without prejudice to the Company's said application, the present application of the Petitioner is dismissed.

WANASUNDERA, J.

I am in agreement with the above order that the application should be dismissed as this matter has already been decided and concluded by the decision in S.C. 116/82

VICTOR PERERA, J. — I agree.

Application dismissed.