

. DESHAPRIYA AND ANOTHER  
V.  
MUNICIPAL COUNCIL, NUWARA ELIYA AND OTHERS

SUPREME COURT.  
FERNANDO, J.  
DHEERARATNE, J. AND  
WADUGODAPITIYA, J.  
S.C. APPLICATION NO. 884/92  
FEBRUARY 10 AND MARCH 06, 1995.

*Fundamental Rights – Freedom of speech and expression – Article 14(1) (a) of the Constitution – Seizure of the newspaper “Yukthiya”*

The petitioners are the Editor and Proprietor, respectively of the weekly newspaper “Yukthiya”. They allege that the 2nd respondent who is an Attorney-at-Law and Mayoress of the Nuwara Eliya Municipal Council forcibly took away four bundles containing about 450 copies of the “Yukthiya” on 10.10.92 from the stall of one Jayasundera and thus prevented this newspaper from reaching its readers.

**Held:**

(1) The 2nd respondent took away these copies of the “Yukthiya” while acting under colour of her office as Mayoress of the Nuwara Eliya Municipal Council. The seizure was therefore by executive or administrative action. Her motive was to discourage an anti-government newspaper for political ends. The seizure directly prevented the publication of one issue of the ‘Yukthiya’ not entirely but in just a small part of Sri Lanka and related only to 450 copies of the newspaper. The Freedom of Speech and Expression, including publication of the Editor and Proprietor was thereby abridged, even though not totally denied.

**(2) Per Fernando, J.**

The infringement of Article 14(1) (a) by executive or administrative action, can take many forms, and may be direct or indirect; the exclusion of anti-government news and views in newspapers owned and controlled by Government, particularly when it amounts to a denial of equal treatment or discrimination because of political opinion (of Article 12), would be as much an infringement in this case as the suppression (by force or otherwise) of such news and views in newspapers independent of the Government. The infringement in this case was in the latter category, and in my opinion was more serious.

(3) Another aggravating factor was that the 2nd respondent attempted to use the power of Lake House newspapers 75% of the shareholding of which was held by Government to reinforce her efforts to discourage the publication and distribution of the “Yukthiya”. Thus the 2nd respondent not only infringed the petitioners rights directly, but aggravated her conduct by threatening also to procure an improper exercise of the powers of the Government.

**Cases referred to:**

1. *Ratnasara Thero v. Udugampola* (1983) 1 Sri LR 461.
2. *De Jonge v. Oregon* (1937) 299 U.S. 353.
3. *Amaratunga v. Sirimal* (1993) 1 Sri L.R. 264.
4. *Wijeratne v. Perera S.C.* 379/93 SCM of 2.3.1994.
5. *Pieris v. A.G. S.C.* 156-155 LC 166/92 SCM of 17.6.1994.

**APPLICATION** for relief for infringement of fundamental rights.

*R. K. W. Goonesekera with J. C. Weliamuna and L. C. M. Swarnadhipathi* for petitioners.

*L. C. Seneviratne, P.C. with Ronald Perera and H. Situge* for the 1st and 2nd respondents.

*Cur. adv. vult.*

March 10, 1995.

**FERNANDO, J.**

The petitioners are the Editor and Proprietor, respectively, of the weekly newspaper "Yukthiya" which is printed in Colombo. They complain that their fundamental right of Freedom of Speech and Expression guaranteed by Article 14(1) (a) was infringed by the 2nd respondent, an Attorney-at-Law and the Mayoress of Nuwara Eliya, who, they allege, forcibly took away four bundles (containing about 450 copies) of the "Yukthiya" on 10.10.92, thereby preventing the newspaper from reaching its intended readers.

The practice followed in regard to the distribution of the "Yukthiya" in and around Nuwara Eliya was to entrust 450 copies in four bundles to its transport agent, Weliwatta, in Colombo, for delivery by him to the Lake House newspaper stall run by one Jayasundere at Nuwara Eliya; these newspapers were not sold at this stall, but Jayasundere was responsible for transporting them to "Yukthiya" selling agents at Halgran Oya, Nanu Oya, Keppetipola and Welimada.

There is no dispute that on 10.10.92 Weliwatta did deliver four bundles of the "Yukthiya" (as well as the "Ravaya" newspaper) to the Lake House newspaper stall situated near the entrance to the Park; that Jayasundere's sister-in-law, Mrs. Sarojanee Jayawardene, was the agent for the newspapers published by the Associated Newspapers of Ceylon Ltd.; that because Jayasundere had to be away in Colombo from 8.10.92, he had asked one Thevapalan to work at the stall; that Thevapalan had been carrying on business as a handling agent for newspapers in Nuwara Eliya for many years; that

Thevapalan took delivery of the newspapers to be handed to Jayasundere on his return; that the 2nd respondent, her husband and another person, came to the stall that morning; that the 2nd Respondent went into the stall and spoke to Thevapalan; that this stall belonged to the 1st respondent, the Municipal Council of Nuwara Eliya. The 2nd respondent was an ardent supporter of the United National Party, then in power both in Parliament and in the Municipal Council.

There is a sharp conflict in the affidavits as to what happened that morning: the exact time is not important – it was at about 11.00 a.m., according to the petitioners, or a little before 10.30 a.m., according to the respondents. The petitioners case was that the 2nd respondent asked Thevapalan “Why are you taking these newspapers? Your newspaper agency will be cancelled”; this is supported by the affidavits of Weliwatta and one Medagama who was also at the stall at that time. Weliwatta stated that he then left to meet a relative upon some (unspecified) urgent personal matter. The 2nd respondent then said “You can’t be allowed to do these things as you please”, and directed the other person who was with her to put the bundles of newspapers into her car; this was done; this is supported only by Medagama’s affidavit. Half an hour later Weliwatta returned to the stall, whereupon, he says, Thevapalan told him that the 2nd respondent had taken the “Yukthiya” and “Ravaya” newspapers in her car, saying that these would be sent to Lake House; Thevapalan denied having said this, but confirmed that Weliwatta did return to the stall. After he returned to Colombo, Weliwatta informed the “Yukthiya” management of the incident, and swore an affidavit on 13.10.92 setting out what happened. Joe Seneviratne, the Managing Editor of the “Yukthiya”, says that the incident was reported to him on 12.10.92, and that on 15.10.92 he submitted a written complaint, dated 14.10.92, to the IGP, annexing this affidavit. Admittedly, but regrettably, the Police took no action. Before making that complaint Seneviratne telephoned the 2nd respondent on 13.10.92 at 5.30 p.m. for verification; he introduced himself, and asked her why she had forcibly taken away the “Yukthiya” newspapers delivered to Jayasundere’s stall on 10.10.92; and she replied that the stall run by Jayasundere was owned by the Municipal Council of Nuwara Eliya and that he could not sell anti-government newspapers such as “Yukthiya”. The petitioners stated that in consequence of this incident, the “Yukthiya” selling agents at Halgran Oya, Nanu Oya, Keppetipola and Welimada were refusing to accept that newspaper, but there were neither affidavits nor documentary proof of this.

The petitioners further alleged that, as a protest against the 2nd respondent's conduct, a demonstration was held on 17.10.92, that this was disrupted by the Police, and so on. They have produced some news items and editorials about this demonstration. One was the "Island" editorial of 28.10.92 which stated that the "Yukthiya" was seized "by armed thugs"; and it went on to claim that for three weeks in succession the newspaper had been seized. However, the petitioners have not alleged that there was any thuggery or violence; Medagama did not say that Thevapalan had been intimidated by any show of force; no one even hinted that there were any weapons; and all referred to one single seizure on 10.10.92. Another news item in the "Island" of 4.10.92 stated that the papers were "hijacked ... while being transported from Colombo for distribution", which is nobody's case. Newspapers have a wide margin for comment, which of course is free, but facts are sacred: here the facts have been exaggerated to the point of distortion. Not only is this material unreliable, but it does not show that this was a demonstration against the seizure of newspapers by the 2nd respondent. Even if there had been such a demonstration, that would have shown, at best, that there was a widespread belief in her complicity; but not that that belief was probably justified. In the final analysis, therefore, the Petitioners case depends on whether the direct evidence establishes, on a balance of probability, that the 2nd respondent was responsible for the seizure, and it is unnecessary for me to consider the sequel to the alleged seizure.

The 2nd respondent's case was that twice or thrice a month she toured the town accompanied by officials, to ensure that the town was kept in a clean and sanitary condition; one such visit was on 10.10.92 when she was accompanied by her husband as well as four others: S. M. Withanage (Secretary to the Municipal Council), S. E. Jeyarajah (Municipal Engineer), and M. Ghany Cassim and D. Madhavan (Members of the Municipal Council).

She did not deny the presence of Weliwatta and Medagama; she said that she went to Jayasundere's stall to buy a newspaper; noticing that the precincts of the stall were in an insanitary condition, she told Thevapalan, who was then the sole occupant, to have the place cleaned up. Thevapalan confirmed this in his affidavit, and

stated that he engaged a labourer the same day and had the place cleaned up. He also admitted that bundles of the "Yukthiya" were delivered to him, but denies that they were seized by the 2nd respondent; but neither he nor anyone else explains what happened to the four bundles – whether they were seized by someone else, or delivered in due course to Jayasundere or the "Yukthiya" selling agents, or remained undelivered.

The 2nd respondent's denial of the seizure is supported by the affidavits of Withanage, Cassim and Thevapalan. I do not regard the absence of affidavits from her husband and the other officials as weakening her case.

The 2nd respondent admitted receiving a telephone call from a person calling himself the Editor of the "Yukthiya", but did not give any particulars about the conversation, saying only that "the telephone call was in the nature of a threat to my life and I replied that I was not afraid of such threats and replaced the receiver". She did not take steps to verify the source of the call or to complain to the Police. Seneviratne's assertion that he did accuse her of the alleged seizure of the "Yukthiya" thus remained uncontradicted.

The evidence as to the seizure of the newspapers by the 2nd respondent is thus fairly evenly balanced. The petitioners depend on the direct evidence of Medagama, who seems not to have been connected to either party; however, the 2nd respondent alleged that he was "closely associated with the DUNF, and [was] politically opposed to the UNP", although she did not allege that he was ill-disposed towards her personally. That is not a sufficient reason to disbelieve Medagama, just as the affidavits of Withanage and Cassim cannot be discredited simply because of their official or political association with the 2nd respondent. No reason has been suggested why Weliwatta should falsely implicate the 2nd respondent, who had once appeared for him in a criminal case; his evidence contradicts the 2nd respondent's version that she merely bought a newspaper, because he says that she threatened cancellation of the Lake House newspaper agency if "Yukthiya" newspapers were kept in the premises. It was submitted that Weliwatte's evidence was not satisfactory because he failed to make a prompt complaint about the incident to anyone until 12.10.92; and that he did not even telephone

the "Yukthiya" management. But one can understand his reluctance to get too involved; the newspaper had not been taken from him; he had discharged his responsibility, and so was content to wait until he got back to Colombo. He was not an employee of the newspaper, and the fact that he waited till he had finished his business and returned to Colombo is hardly sufficient to discredit his evidence. Seneviratne's evidence of his telephone call to the 2nd respondent shows, at the lowest, that the 2nd respondent failed to deny a direct accusation made against her that it was she who had seized the newspapers. Finally, if the 2nd respondent had not seized the newspapers, what happened to them? Thevapalan's failure to explain such a simple matter tends to cast some doubt on his veracity. It is true that the petitioners themselves could have obtained affidavits from the "Yukthiya" selling agents, but they have a plausible explanation, namely, that after this incident these agents feared to handle the newspaper. If that is true, they would also have feared to give affidavits. Learned President's Counsel submitted that the burden was on the petitioners to obtain an affidavit from Jayasundera, to the effect that Thevapalan did not give him any newspapers, in the circumstances, it would be unreal for the petitioners to have expected Jayasundera to say anything unfavourable to the 2nd respondent, for there was much to lose by antagonising the 2nd respondent - stall, agency and livelihood.

Learned President's Counsel for the respondent also submitted that the "Yukthiya" was being published in breach of the law prior to 8.10.92, because, he said, it was only on that day that information was given under section 2 of the Newspapers Ordinance (Cap. 180) to the Registrar of Newspapers; he contended that it was unlikely that the "Yukthiya" could have had a network of agents prior to October 1992. However, there is nothing to suggest that this was the first information given under section 2, and may well have been given pursuant to a change. Since this submission was made for the first time in the course of the hearing, it is not possible to come to a finding that the "Yukthiya" was being published in breach of the law.

It would not have been possible to decide between these two conflicting versions, but for two significant matters. It was by no means improper or unusual for Seneviratne to have confronted the 2nd respondent with the accusation which Weliwatta had conveyed

to him, before making a complaint to the Police against her; he had no personal knowledge of the truth of what Weliwatta had told him. While saying that her life was threatened, she does not clarify whether any reason was given; as it was not an anonymous call, if no reason was given, did she not inquire why she was being threatened? If a reason **was** given, what was her response or reaction? It is unsatisfactory that she did not clarify the matter by replying to the specific averments in Jayasundere's affidavit. Seneviratne filed a second affidavit to clarify the telephone call, and specifically denied making any threat; although she filed a further affidavit, the 2nd respondent did not clarify her version of the telephone call, contenting herself with a bare denial of Seneviratne's averments. It was urged that Seneviratne's complaint to the IGP made no mention of his telephone call to the 2nd respondent. If he made that call in order to check on the truth of Weliwatta's story, which by then had been reduced to an affidavit, it was not necessary for him to refer to that conversation, for he was only making a complaint having satisfied himself that there were grounds for complaint. I find Seneviratne's version of the telephone call to be more probable. Secondly, the question whether the newspapers had been seized by the 2nd respondent could have been conclusively settled by the affidavit of the person into whose custody they were delivered, Thevapalan. Although the 2nd respondent obtained an affidavit from him, Thevapalan did not explain what happened to the newspapers subsequently; since he said he took charge of them to be handed to Jayasundere on his return, why did he not clarify whether that was done? Or whether they were delivered to the "Yukthiya" selling agents, and if so what records existed as to such delivery or if they had been stolen by another while in his custody, whether that was reported to the Police, or to the transport agent? The matter was especially within his knowledge, and his failure to clarify it suggests that he had no explanation to offer. It was submitted that Thevapalan was only answering the specific allegation that the 2nd respondent had seized the newspapers from his custody, and need not have explained anything else; but his affidavit purports to do much more than rebut the allegation of seizure, and proceeds to explain his conduct that day. His default assumes greater significance in contrast to the pains he took to explain a much less important matter – how he had carried out the 2nd respondent's

order to clean up the premises, although that was no part of his duties. If there had been no seizure, then as in the past the newspapers would have been delivered to the "Yukthiya" selling agents at Halgran Oya, Nanu Oya, K ppetipola and Welimada; and there is no reason why Thevapalan could not have said so. But if there had been a seizure, Thevapalan could not have alleged delivery without running the risk of contradiction by those selling agents. It seems to me therefore that, intrinsically, Thevapalan's affidavit cannot be relied on, particularly because if the 2nd respondent had threatened cancellation of the Lake House agency, an affidavit by him, contradicting her, might have jeopardized the interests of Jayasundere and the Lake House agent.

I hold that the 2nd respondent did seize 450 copies of the "Yukthiya" on 10.10.92; that she did so while purporting to exercise her functions, and while acting under colour of her office, as Mayoress of the Nuwara Eliya Municipal Council. The seizure was therefore by executive or administrative action. I further hold that her motive was to discourage an anti-Government newspaper, for political ends.

The seizure directly prevented the publication of one issue of the "Yukthiya", not entirely but in just a small part of Sri Lanka; and related to only 450 copies of the newspaper. I hold that the freedom of speech and expression, including publication, of the Editor and Proprietor was thereby abridged, even though not totally denied. In *Ratnasara Thero v. Udugampola* <sup>(1)</sup> the seizure of 20,000 pamphlets was held to be a serious violation of the freedom of speech and expression, including publication, which called for the award of substantial damages; Rs. 10,000/- was awarded, which was perhaps no more than the value of the pamphlets.

In my view the gravity of an infringement can only be determined by a deeper scrutiny of its context.

While infringements of Article 14(1) (a) may sometimes have to be viewed in isolation, they often do involve other factors, such as denial of equal treatment or political discrimination violative of Article 12. Suppressing freedom of speech and expression, including



publication, whether by preventing a newspaper being published or otherwise, would be graver if motivated either by a desire to benefit a rival or by political antagonism. The facts that the "Yukthiya" was an anti-Government newspaper, and that the 2nd respondent threatened cancellation of the Lake House newspaper agency, are therefore relevant.

The infringement of Article 14(1) (a), by executive or administrative action, can take many forms, and may be direct or indirect; the exclusion of anti-Government news and views in newspapers owned or controlled by the Government, particularly when it amounts to a denial of equal treatment or discrimination because of political opinion (of Article 12), would be as much an infringement as the suppression (by force or otherwise) of such news and views in newspapers independent of the Government. The infringement in this case was in the latter category, and in my opinion was more serious. The right to support or to criticise governments and political parties, policies and programmes is fundamental to the democratic way of life; the freedom of speech and expression is one "which cannot be denied without violating those fundamental principles of liberty and justice which lie at the base of all civil and political institutions"; and democracy requires not merely that dissent be tolerated, but that it be encouraged (*De Jonge v. Oregon* <sup>(2)</sup>, *Amaratunga v. Sirimal* <sup>(3)</sup>, *Wijeratne v. Perera* <sup>(4)</sup> and *Pieris v. A. G.* <sup>(5)</sup>.)

Another aggravating factor was that the 2nd respondent attempted to use the power of the Lake House newspapers to reinforce her efforts to discourage the publication and distribution of the "Yukthiya". Under the Associated Newspapers of Ceylon Ltd. (Special Provisions) Law, No. 28 of 1973, 75% of the shareholding of the company is vested in the Government, which is thus effectively in control of the company's newspapers. Thus the 2nd respondent not only infringed the petitioners' rights directly, but aggravated her conduct by threatening also to procure an improper exercise of the powers of the Government.

Here, those powers were not actually used. But it is clear that in seizing the "Yukthiya" the 2nd respondent was not only influenced by the fact that it was an anti-Government newspaper, but also by the

desire to promote the expression of views politically favoured by her; her threat to cancel the Lake House newspaper agency would undoubtedly have seemed very real to Thevapalan, and therefore quite sufficient to inhibit lawful resistance – particularly as the stall itself belonged to the Municipal Council of which she was the Mayoress.

These are circumstances which aggravate the infringement. It would not be right to assess compensation at a few thousand rupees, simply because the newspaper was sold for seven rupees a copy; that would only be the pecuniary loss caused by the violation of the petitioners' rights of property under ordinary law. We are here concerned with a fundamental right, which not only transcends property rights but which is guaranteed by the Constitution; and with an infringement which darkens the climate of freedom in which the peaceful clash of ideas and the exchange of information must take place in a democratic society. Compensation must therefore be measured by the yardstick of liberty, and not weighed in the scales of commerce.

The seizure was thus a grave, deliberate and unprovoked infringement, and not one which occurred in a sudden emergency or at a time of public disorder, or through an error of judgment in a borderline case. Having regard to awards in *Amaratunga v. Sirmal*, *Wijeratne v. Perera*, and *Pieris v. A. G.*, I hold that the petitioners are entitled to compensation in a sum of Rs. 100,000/-. In the circumstances, it is neither just nor equitable to order the State or the Municipal Council to pay that compensation. I direct the 2nd respondent to pay the petitioners compensation in a sum of Rs. 100,000/- together with costs in a sum of Rs. 10,000/-.

**DHEERARATNE, J.** – I agree.

**WADUGODAPITIYA, J.** – I agree.

*Relief granted.*