VISUVALINGAM AND OTHERS

v.

LIYANAGE AND OTHERS

SUPREME COURT
SHARVANANDA, A.C.J., RANASINGHE, J. AND RODRIGO, J.
S.C. APPLICATION No. 74 OF 83.
NOVEMBER 22, 23, 30, 1983, DECEMBER 12, 13, 1983, AND FEBRUARY 6 AND 10, 1984.

Fundamental Rights – Sealing of office of newspaper – Prohibition of the printing, publishing or distribution of newspaper and of the use of the printing press – Regulation 14 of Emergency Regulations of 18.10.83 – Violation of fundamental rights under Articles 12 (1), 12 (2), 14 (1) (a) and 14 (1) (*g*) of the Constitution – Application for leave to proceed under Article 126 (2) of the Constitution.

The 1st to 4th petitioners who are described as citizens of Sri Lanka along with the 5th petitioner which is a Company of which the first four petitioners (together with three others) are the only members and the only directors complained that the 1st respondent by Order of 18.11.1983 purported to have been made under the

Emergency Regulation 14 (3), prohibited the printing, publishing or distribution of the newspaper called "Saturday Review" of which the 5th petitioner-company was publisher or the using of the printing press where this newspaper was printed for any purpose whatever. The 2nd respondent purporting to act under this Order had sealed the office of the said "Saturday Review". These acts the petitioners claimed constitute a violation of their fundamental rights embodied in Articles 12 (1), 12 (2), 14 (1) (*a*) and 14 (1) (*g*) of the Constitution.

Earlier the same petitioners along with two others had filed application No. 47 of 1983 against the same respondents claiming relief on the basis of similar acts committed by the 1st and 2nd respondents on the basis of an earlier Emergency Regulation 14 (3) then in force and whose terms were identical with those of the Emergency Regulations in force during the events which led to the present application. In this earlier application the petitioners had claimed that there had been a violation of their fundamental rights embodied in Article 14 (1), 14 (1) (*a*) and 14 (1) (*g*) of the Constitution. While that application was pending the same petitioners filed application No. 53/83 this time claiming additionally, infringement of fundamental rights under Articles 12 (1) and 12 (2) by reason of a fresh Order on the same lines as before made by the 1st respondent under Regulation 14 (3) of the Emergency Regulations renewed in identical terms as in the earlier month, and similar action taken on it by the 2nd respondent. While both these applications were pending a third application No. 61/83 was filed by four of the earlier petitioners along with the Company joined as the 5th petitioner alleging the same type of violations as in application No. 53/83 in respect of a similar Order, in the subsequent month made by the 1st respondent under the renewed Emergency Regulations and action taken on it by the 2nd respondent, similar to what constituted the basis of the two earlier applications. All three applications were heard together by a Bench of five Judges. By a majority decision the question of locus standi was decided against the petitioners in all these cases and all five Judges unanimously held that the 1st respondent had justified the order made by him.

In view of the identity of the grievances alleged in the present petition with those alleged in the earlier cases and the identity of the Order made by the 1st respondent with the Orders impugned in them and the unanimous finding of the Bench of five Judges that the 1st respondent had justified his Orders, leave to proceed with the instant application was refused.

Per Ranasinghe, J : "It (the decision in the previous cases) is a decision which, though it may not be binding on this Court, must nevertheless weigh heavily with this Bench in considering the petitioners' application for leave, in terms of Article 126 (2) of the Constitution, to proceed."

Cases referred to

(1) *Dr. Neville Fernando and others v. Liyanage and others, S.C. Application No. 116/82, S.C. Minutes of 14.12.82.*

(2) *Dr. Neville Fernando and others v. Liyanage and others, S.C. Application No. 134 of 1982, S.C. Minutes of 7.2.1983.*

(3) *Ram Krishna Dalmia v. Justice Tendolkar, AIR 1958 S.C. 538.*

(4) *State of West Bengal v. Anwar Ali Sarkar, AIR 1952 S.C. 75.*

(5) *U. P. Electric Co. v. State of U.P., AIR 1970 S.C. 21.*

(6) *Dr. N. R. W. Perera et al v. The University Grants Commission, S.C. Application No. 57 of 1980 : S.C. Minutes of 4.8.1980.*

APPLICATION for leave to proceed under Article 126 of the Constitution.

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

Cur. adv. vult.

February 27, 1984.

RANASINGHE, J.

The 1st to the 4th petitioners, who are all said to be citizens of Sri Lanka and are also said to be, together with K. Kandasamy, S. Sivanayagam and A. Nallatamby, the only members and the only directors of the 5th petitioner-company which was, at all times material to this application, the publisher of a weekly newspaper called "Saturday Review", have filed this application on 16.11.83 to have the Order marked P 2, which prohibits the printing, publishing or distribution of the said newspaper "Saturday Review" for a period of one month and also directs that the printing press, in which the said newspaper was printed, be not used for any purpose whatever during the said period of one month, and which said Order the 1st respondent is stated to have made on 18.10.83, in terms of the provisions of Regulation 14 of the Emergency Regulations promulgated on 18.10.83, and, in pursuance of which said Order the office of the said "Saturday Review" is said to have been sealed by the 2nd respondent – declared null and void and/or to be in contravention of the Constitution for the reason that the said Order, and the subsequent acts of the 2nd respondent taken on the basis of the said Order, constitute a violation of the fundamental rights of the petitioners embodied in Articles 12 (1), 12 (2) 14 (1) (*a*), and 14 (1) (*g*) of the Constitution, and also because they have been made mala fide, in abuse of the powers conferred by the said Emergency Regulation (14) (3) for an ulterior purpose : for damages, by way of compensation in respect of the said prohibition, and the closure.

Prior to the filing of this petition,he 1st to 5th petitioners had, along with the aforementioned S. Sivanayagam and A. Nallatamby (as the 2nd and 4th petitioners respectively) filed in this Court, on 22.7.83, an application, numbered 47 of 1983, against the same three respondents as are referred to in this application, for similar relief against two similar Orders (marked P 2 dated 1.7.83 and P 3, dated 18.7.83) made by the 1st respondent. Certified copies of the petition and the affidavit filed by the petitioners, and the affidavit filed by the 1st respondent in the said application No. 47 of 83 have been produced by the petitioners along with the petition filed in these proceedings marked P 4, P 3 and P 6 respectively. The facts and

circumstances set out save and except the reference to the imposition of pre-censorship and the promulgation of the Sixth Amendment and the relief claimed except in regard to damages in P 4, and the facts and circumstances pleaded and the relief claimed in the petition filed in these proceedings are identical. The ground upon which relief was claimed in the said application No. 47/83 was, however, slightly different ; for, there the only fundamental rights, which were said to have been violated by the impugned Order and by the acts of the respondents, were stated to be those set out in Article 14 (1) (*a*) and 14 (1) (*g*) of the Constitution. No complaint of any infringment of any of the fundamental rights, set out in Article 12 (1) or 12 (2) of the Constitution, was made in those proceedings.

Whilst the aforesaid application No. 47 of 83 was still pending before this Court, the seven petitioners, who had filed the application bearing No. 47 of 83 and amongst whom were the five petitioners now before this Court, filed, on 25.8.83, an application, which was numbered 53 of 83, against the selfsame respondents, as in the present application, claiming upon the same basis, the selfsame relief as is now claimed by the petitioners in this application, against a similar Order and similar acts said to have been made and done by the said respondents. The order complained of in the said application was an order dated 18.8.83, which was also claimed by the respondents to have been made under Emergency Regulations similar to those said to be relied on by the respondents in both application No. 47 of 83 and the present application.

Thereafter, whilst the aforesaid applications bearing Nos. 47 of 83 and 53 of 83 were both still pending before this Court, the five petitioners filed, on 13.10.83, another application which was numbered 61 of 83, also against the three respondents, claiming the same relief as prayed for by them in the present petition, in respect of an Order (which was marked P 1) similar to the Order, P 2, and which was said to have been made by the 1st respondent on 18.9.83. The facts and circumstances relied on, the relief claimed and the basis upon which the relief is claimed in the said application No. 61 of 83 are all the same as those upon which the petitioners not only had come before this Court earlier in the aforesaid application No. 53 of 83 but have also founded the present application.

When the application No. 47 of 83 was taken up for hearing before this Court, of consent the two applications bearing Nos. 53 of 83 and 61 of 83 were also taken up for hearing along with it, and it was agreed that all three applications be argued together and that the submissions in respect of the three applications be considered together, and the issues arising in the three said applications be all determined in the course of the judgment to be delivered in one of the three said applications.

Learned Queen's Counsel, who appears for the petitioners in this application, also appeared for the petitioners in all three earlier applications Nos. 47, 53 and 61 of 83 referred to above ; and, in the course of his submissions made to this Court in respect of the three said earlier applications, maintained that, even if the 5th petitioner-company (which was the 7th petitioner in the two applications, numbered 47 of 83, and 53 of 83, and the 5th petitioner in application No. 61 of 83) has no status to complain of an infringement of the fundamental rights set out in Article 14 of the Constitution, yet the 1st to 4th petitioners (who were, as set out earlier, the 1st, 3rd, 5th, 6th petitioners respectively in both applications Nos. 47 of 83 and 53 of 83, and the 1st to 4th petitioners respectively in application No. 61of 83) who are shareholders of the said 5th petitioner-company can, as citizens of the Republic of Sri Lanka, complain of an infringement of the fundamental rights guaranteed to them by Article 14 (1) (*a*) and 14 (1) (*g*) of the Constitution : that the two judgments of Sharvananda, J. in the two cases, *Dr. Neville Fernando et al. v. D. J. F. D. Liyanage et al,* (1) and *Dr. Neville Fernando v. Liyanage and Others* (2) have been wrongly decided : that the Orders complained of (marked P 2 and P 3 in application No. 47 of 83 dated 18.8.83 and in application No. 53 of 83 and marked P 1 in application No. 61 of 83) are also bad in law for the several reasons set out, more particularly in paragraphs 19, 21, 22, 23, 24, 25, 32, 33, 34, 36, in the petition P 4 filed in application No. 47 of 83. All those grounds so relied on have been adopted and reiterated subsequently not only in the aforesaid applications numbered 53 of 83, and 61 of 83, but also in the present application.

The five-member Bench of this Court, by its judgment delivered on 18.11.83 held by a majority decision, that the petitioners in the three applications Nos : 47 of 83, 53 of 83 and 61 of 83 respectively cannot, in law, have and maintain any one of the said applications on the basis of an infringement of any of the fundamental rights set out in

Articles 14 (1) (*a*), 14 (1) (*g*) and or in Article 12 (2) of the Constitution : and, by a unanimous decision, that none of the impugned Orders made by the 1st respondent in the three said applications marked P2 and P3 in applications No.47 of 83, and in No.53/83 and P1 in application No. 61 of 83 – is bad in law, and that not one of the said Orders constitutes an infringement of any of the fundamental rights relied on by the said petitioners in the said applications. Thus, although the Bench was divided on the question of law – whether the petitioners, in the said applications, who are share-holders of the 7th petitioner-company (the 5th petitioner-company in application No. 61 of 83 and also in the present application) and include among them the 1st to the 4th petitioners in the present application, could maintain an application under the provisions of Article 126(1) of the Constitution in respect of an infringement of the fundamental rights set out in Article 14 (1) (*a*) and 14 (1) (*g*) and also Article 12 (2), of the Constitution – the members of the Bench were nevertheless unanimously of the opinion that, having regard to the relevant facts and circumstances – which are the same as those relied on by the petitioners in the present application – the impugned Orders made by the 1st respondent – the only difference between them and the Order P1 impugned in this application being the periods of time during which each is to be in operation – were valid and did not constitute an infringement of any of the fundamental rights relied on by the petitioners. The fundamental rights so relied on by the petitioners in every one of the three said applications were, as already stated – with the exception of application No. 47 of 83 wherein the fundamental right set out in Article 12 was not relied on – the same as those relied on once again by the petitioners in the present application. The view taken by the members of the said Bench in regard to the facts was unanimous.

Learned Queen's Counsel appearing for the petitioners, urged the following grounds in support of his motion for leave to proceed with the present application filed by the petitioners :–

(i) that the plea of discrimination, based upon an infringement of the petitioners' fundamental right under Article 12 (1) of the Constitution, put forward in two of the earlier applications, viz., applications bearing Nos. 53 of 83 and 61 of 83 (which have been referred to above) has not been considered by the earlier Bench, and that, though he (learned Queen's Counsel) "expected a judgment", he "didn't get it", and that "no order has been made in respect of this matter";

(ii) that in regard to the questions of fact that arose for consideration in the three said earlier applications the earlier Bench has misdirected itself in that –

(a) it has failed to consider several matters which had been strenuously urged on behalf of the petitioners as showing quite clearly that the 1st respondent had not, in making the said impugned Orders, addressed his mind to the propriety and the necessity of exercising the powers vested in him by the Emergency Regulations before he proceeded to make the said impugned Orders – viz., the statement of the 1st respondent that he was not aware of the composition of the directorate of the 5th petitioner-company, of those who were responsible for the publication of the newspaper "Saturday Review" and their "who's who", and of the objectives and the policy of the newspaper "Saturday Review", or of the situation of the printing press ; that the provisions of the Emergency Regulation 14 (3), under which the 1st respondent claims to have made the said impugned Orders, have, except for a few insignificant variations, been reproduced verbatim in the said impugned Orders ; that the Order P2; which was one of the two Orders, which were the subject-matter of application No. 47 of 83, had been made on 1.7.83 to be in operation for a period of one month when the said Regulation itself was due to expire on 18.7.83 ; that, in pursuance of P2 and P3, the printing press, in which the "Saturday Review" was in fact being published was not sealed but what was in fact sealed was the office of the newspaper "Saturday Review"; that, as the said Emergency Regulations created very serious offences and imposed severe punishments, it would be most unlikely that those responsible for the publication of a newspaper of the standing of the "Saturday Review" would risk committing any such offence ; that in any event the 1st Respondent has, even though other effective courses of action were open to him to control and contain any errant newspapers, most unreasonably and unjustifiably chosen to impose upon the "Saturday Review" the heaviest and the most oppressive punishment of them all :

(b) it has, in the judgment of Soza, J. arrived at findings which are not supported by any evidence, viz., that terrorist groups count in their ranks a sizeable percentage of Varsity educated intelligent young men and women especially in Jaffna : that they (terrorist group) employ very modern sophisticated techniques which often baffle the law enforcement authorities : that it must be expected that this paper has a circulation among the educated youth bent on wrecking the establishment : that it is reasonable to expect that the 1st respondent was aware of what was being published in this newspaper over a period of time ; and that the affidavit of the 1st respondent, P6, has not been read in the way it should have been read.

Learned Queen's Counsel for the petitioners strongly contended that, if he were given the opportunity, he could show that the aforesaid statements made in the said judgment were not supported by any evidence, that there is no evidence to show either that Varsity students are to be found in the ranks of the terrorists, or that the terrorists use modern sophisticated techniques which baffle the law enforcement authorities, and that the Varsity students of today do not have a knowledge of English and that the contents of a newspaper such as the "Saturday Review" are not meant for the Varsity students of today, who far from being able to understand its contents, would not even be able to pronounce most of the words contained in it, and that the tone and the standard set by the "Saturday Review" are such that it is meant only for the "elite" of the two races – Sinhala and Tamil.

The contents of several issues of the "Saturday Review"– published at the very early stages, and also both shortly before and after the declaration of the State of Emergency, and up to the time of the first of the said impugned Orders – were read at length to this Bench – just as he had done earlier in the course of the submissions made by him to the earlier Bench at the hearing of the three applications – by learned Queen's Counsel for the purpose of showing, in the words of learned Queen's Counsel himself, that : "my grievances have not been looked into, and adjudicated upon by Your Lordships' Court" : "A new Bench will consider the facts and circumstances anew" : " That some judges of the Supreme Court have expressed a certain view doesn't concern me" : he has "made out that there is something for Your Lordships' Court to look into".

In supporting the motion for leave, learned Queen's Counsel dealt at length with the fundamental right embodied in Article 12 (1) of the Constitution, citing several passages from Seervai on Constitutional Law of India Vol. 1 (2nd edt) Chap. 9 page 203 et seq, wherein the learned author deals with Article 14 of the Indian Constitution which corresponds to Article 12 of our Constitution ; and he also cited two Indian authorities : *Ramkrishna Dalmia v. Justice Tendolkar (3) and State of West Bengal v. Anwar Ali Sarkar* (4). It has however to be noted that neither the citation from Seervai, nor the Indian cases now cited were cited by learned Queen's Counsel to the earlier Bench at the hearing of the three aforesaid earlier applications. For that matter, not a single authority was cited on the earlier occasion in relation to Article 12 (1) of the Constitution. The plea of an infringement of the fundamental right set out in Article 12 (1) of the Constitution, which is now embodied in paragragh 17 of the present petition, and supported in paragraph 17 of the affidavit of the 4th petitioner, though embodied in paragraphs 5 of the petitions P7 and P9 filed in application Nos. 53 of 83, and 61 of 83 respectively, and referred to in the written submissions filed along with each of the said petitions, was not, however, dealt with in court before the earlier Bench by learned Queen's Counsel for the petitioner. Not a single submission – either on the facts or on the law – was made orally in Court in support of the said plea. The only reference, made in Court orally by learned Queen's Counsel, to Article 12 (1) was made on 2.11.83 when he read out the contents of the petitions and affidavits filed by the petitioners in Application Nos. 53 of 83 and 61 of 83. My own recollection in regard to this matter is borne out not only by my own notes of the submissions made by learned Queen's Counsel at that hearing, but also by the confirmation received by me from everyone of the other four judges who constituted the earlier Bench – Wanasundera, J., Rodrigo, J. and also Ratwatte, J. and Soza, J. (both of whom have since retired). It also finds confirmation – if further confirmation be necessary – in the very documents tendered to court, at the hearing of the three aforesaid earlier applications, by learned Queen's Counsel himself as embodying the oral submissions made by him to the Bench which heard the said applications. The said documents are : "Notes of oral submissions by S. Nadesan, Q.C." tendered on 8.9.83, consisting of twenty pages numbered 1 to 20 ; "Notes of oral submissions" consisting of ten pages numbered 1 to 9, tendered on 9.11.83 : "Notes of oral submissions of Reply by S. Nadesan, Q.C."

tendered to court on 9.11.83 and consisting of 7 pages numbered 1 to 7 : "Notes of oral submissions of Reply continued, by S. Nadesan, Q.C." consisting of fourteen pages 1 to 14. In not one of these documents is there a single reference to, or a single submission relating to any infringement of the fundamental right embodied in Article 12 (1) of the Constitution. Besides, there is not a single averment in either of the petitions marked P7 and P9, – or for that matter even in the petition filed in the present application – setting out the facts and circumstances which show how the petitioners have been treated unequally and have been unlawfully discriminated against, and upon which said acts the complaint of the infringement of the fundamental right of equality and equal protection of the law is founded. There is only a bare assertion in paragraph 17 of the present petition – and in the corresponding paragraphs in P7 and P9 – of an infringement, without a statement of the facts and circumstances which have given rise to such complaint. In the absence of any such express averments no burden is cast upon the 1st respondent to satisfy court that his acts do not amount to any discrimination against the petitioners and that they do not constitute any unequal treatment meted out to the petitioners. A bare assertion that a particular act of the 1st respondent violates the fundamental right of the petitioners embodied in Article 12(1) of the Constitution does not, by itself, cast an onus on the 1st respondent to justify his act on the basis of a permissible rational classification or on any other ground recognized by law. The petitioners, who put forward a complaint of denial of equal treatment, must in the first instance, place before court facts and circumstances which show that, as between the petitioners and others similarly placed, they have been unlawfully discriminated against and subject to unequal treatment to their prejudice – vide : *U.P. Electric Co. v. State of U.P.* (5) and *Dr. N. R. W. Perera et al. v. The University Grants Commission* (6).

The admission by the 1st respondent, in paragraph 3 of his affidavit, P8, of the averments in paragraph 8 of the petition P7 does not constitute an admission that other newspapers, which are similar to the "Saturday Review", have been differently treated by the 1st respondent. What is set out in paragraph 8 of P7 is that several newspapers "critical of the Government" are being published. The position of the 1st respondent in regard to the "Saturday Review", however, is that it is such a newspaper as is set out in paragraphs 15 and 16 of his affidavit P 6, viz : 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, eschewing democratic processes, negotiations and campaigns based on non-violence as a means of resolving the problems facing the Tamils of Sri Lanka, and openly encouraging the adoption of force and terrorism as the only means. This position is reiterated in paragraph 7 of P 8.

Even so, Soza J. has, in the judgment with which I have concurred, considered the plea of an infringement of the fundamental right set out in Article 12 (1) of the Constitution,–plea under 12 (2) being affected by the decision in respect of 14 (1). Having taken note of the 1st respondents averment that, apart from the "Saturday Review", another newspaper in Jaffna had been similarly dealt with, Soza, J. has, at page 23 of the said judgment, expressed the view that –

> "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 an analysis of Article 12 (1) with a view to ascertaining whether there are grounds for a complaint under that Article."

Thereafter, upon an examination of all the relevant facts and circumstances, it was held–not only by Soza, J. but unanimously by all the judges – that the fundamental rights of the 1st to the 6th petitioners, amongst whom were the 1st to the 4th petitioners in this application, have not been violated by any of the impugned Orders made by the 1st respondent. Wanasundera, J. expressed the view that, although the publishers of the "Saturday Review" had tried to live up to the objects and ideals set out in the brochure P1, and the "Saturday Review", judged by journalistic standards, appeared to be a cut above the average newspaper, there had unfortunately also crept into the "Saturday Review" material that must necessarily attract the attention of the authorities at a time when there are unsettled conditions in the country as today : and that, while some Emergency Regulations permit the authorities to apply a system of graduated pressure and restrictions on an errant newspaper, yet such provisions do not preclude the Competent Authority from directly resorting to the provisions of Regulation 14(3) in a fit case. The facts and circumstances relied on by the petitioners, if not in all three, at least in two of the three earlier applications and those set out in the present application, are as already set out, identical.

With regard to the matters set out in sub-paragraph (ii) (a) above, and which have been urged as being relevant to a consideration of the questions of fact, a perusal of the judgment of Soza, J. shows clearly that all those factors have received the attention of Soza, J. and have been considered in arriving at the conclusion so arrived at therein. A careful reading of pages 30, 32, 35 and 36 in particular shows quite clearly that the said grounds, which are urged on behalf of the petitioners, have all been dealt with. The views set out in the judgment may differ from what learned Queen's Counsel himself put forward and which he "expected" to be adopted. What matters is the fact that the said circumstances have in fact been considered in arriving at the decision which has been so arrived at in the said judgment.

With regard to the ground set out in sub-paragraph (ii) (b) above, on a careful consideration of the contents of several issues of the said "Saturday Review", which were produced and referred to by counsel, I find myself unable to agree with learned Queen's Counsel's criticism that the court has arrived at findings which are not supported by evidence. They do contain material which justify the said findings – in particular the issues dated 13.2.82, 27.2.82, 14.5.83, 21.5.83 (in regard to the Varsity student's ability to understand English and the "Saturday Review" being read by the Varsity students), and those dated 8.1.83, 22.1.83, 29.1.83, 7.5.83, 14.5.83 (in regard to the involvement of the Varsity students too), and those dated 8.1.83, 22.1.83, 7.5.83 (in regard to the adoption of sophisticated techniques which baffle the authorities), and that dated 8.1.83 (in regard to the 1st respondent having been aware of, over a period of time, as to what the "Saturday Review" was publishing.)

As was posed by learned Queen's Counsel, the question for consideration by this Bench at this stage, when leave to proceed is being sought, is : whether the petitioner has satisfied this Court, upon the material set out in the petition and affidavit "that there is something to be looked into", and that there is a case for consideration by this Court. The material set out in the petition and the affidavit filed by the petitioner in this application would, on the face of it, have ordinarily been sufficient to put this Court upon inquiry, at any rate in regard to the alleged infringement of the fundamental right set out in Article 14 of the Constitution. The petitioners have, however, already come before this Court on at least two earlier occasions making the same complaint and praying for the same relief as are set out in the said petition and affidavit ; and a Bench of five judges of this

Court, has, after according to the petitioners, and also the respondents, a full and patient hearing, spread over several days, and after examining the submissions of the parties unanimously concluded that there has been no infringement of the petitioners' fundamental rights by any of the impugned Orders made by the 1st respondent. Even though learned Queen's Counsel submitted that there are "other forums interested in this matter", and that the fact "that some judges of the Supreme Court have expressed a certain view doesn't concern me", this Bench however, is concerned only with this Court ; and the fact that five judges of this Court, constituted on a direction of the Chief Justice under Article 132 (3) of the Constitution, did, in the said judgment delivered on the earlier occasion, reach an unanimous decision not only upon the same questions of fact as are being once again sought to be canvassed in this application but also in regard to the same relief as is being once again sought to be obtained by this application, is a very relevant matter which can and must be taken into consideration by this Bench. It is a decision which, though it may not be binding on this Court, must nevertheless weigh heavily with this Bench in considering the petitioners' application for leave, in terms of Article 126 (2) of the Constitution, to proceed.

On a consideration of all the matters set out above, I am of the view that this is not a fit case in which leave ought to be granted by this Court under the provisions of Article 126 (2) of the Constitution.

I, therefore, make order accordingly, refusing the petitioners leave to proceed with this application.

SHARVANANDA, J.–I agree.

RODRIGO, J.

Counsel for the petitioner has exerted himself inordinately in supporting this application for leave to proceed. Notwithstanding his age, he has been on his feet morning and evening, day in day out, often consecutively, during a period stretching from 22nd November, 1983 to 10th February, 1984. Coming as it does for hearing on the heels of the judgment given in application No. 47 of 1983 by the same parties on the same subject matter against the same respondents (the occasion for this application being the same Emergency Order repeated with a different date to correspond to the monthly renewal of the Emergency,) I thought that this matter will be dropped, judgment

being against the petitioners albeit. It may well be therefore a measure of his conviction in the strength of his cause or correspondingly a measure of his grievance against the judgment delivered. Presumably the latter, for he complained that I, for instance (being one of the members that constituted the earlier Bench) had misdirected myself when I observed that Jaffna University students were readers of the paper and therefore subject to its influence, his submission being that the undergraduates are too poorly educated in English to comprehend the articles in the paper and that we had overlooked a material submission based on the discrimination clause – Art 12 (1) of the Constitution. Be that as it may it is unfortunate, though, that his view of the law governing these matters both in the previous application and in this, clouded perhaps by his personal interest in the matter – he being a member of the ethnic community the political causes and grievances of which the paper is alleged to espouse and air respectively – has not commended itself to this Court in either instance.

It has been unanimously held by the Bench of five Judges that heard the previous application that the Competent Authority was not unreasonable, though he may have acted differently, in forming the opinion which was his legitimate province that this paper must be closed as an Emergency measure on the material and information stated in his affidavit to have been available to him and which was made available to us. Though we on this Bench may not be technically bound by the decision of that Bench, it is an intrepid exercise for us now to undertake what in all truth is a review of the findings of that Bench. This I am not prepared to do.

The difficulties of Counsel should disappear if it is appreciated that Emergency Regulations are law to which the fundamental rights constitutionally have to give way. So it is enacted in Art. 15 (7). There is no point in harping, as he does on violations of fundamental rights. They take a back seat to the extent the Emergency Regulations take the front seat. There is no room for both in the front seat. Since the Emergency Regulation in question is not argued to be ultra vires, it must be given its full effect. An emergency is what the word means. In the political storm in which the Competent Authority was appointed and he acted to close the paper a 'crisis of civilisation' had arisen. It was notorious that murder and arson were the order of the day in that part of the country in which this paper was printed. Cause and effect, action and reaction have lost their threads in a vicious circle. So a

fireman was appointed in the person of the Competent Authority to put down the blaze. In the process he may have effected unnecessary though not unreasonable demolitions like the closing of this paper perhaps. But he was the sole judge of what he should do though subject to a supervisory jurisdiction where he is capricious. Authority for this proposition has been given in the judgment mentioned. For us to fault him – and we do not – is to handle the Emergency ourselves. It is not the Constitutional task of the Supreme Court. Counsel, however, would have us make an order to let the "Saturday Review" carry on regardless. He has read to us every line of the paper in its several issues over selected periods to satisfy us that this paper posed no threat at any time to public security or order but the Competent Authority has not shared that assessment or sanguinity of Counsel and we cannot say that he has been capricious. I would therefore disallow leave to proceed.

Leave to proceed refused.