PREM CHAND GARG

v.

EXCISE COMMISSIONER, U. P. ALLAHABAD

1962

November, 6.

(B. P. SINHA, C. J., P. B. GAJENDRAGADKAR, K. N. WANCHOO, K. C. DAS GUPTA and J. C. SHAH, JJ.)

Supreme Court—Writ Petition—Security for costs of respondent—Rule, validity of—Supreme Court Rules, O.XXXV, r. 12—Constitution of India, Arts. 32 and 145.

Rule 12 of O.XXXV Supreme Court Rules empowers the Supreme Court in writ petitions under Art. 32 to require the petitioner to furnish security for the costs of the respondent. The petitioner contended that the rule was invalid as it placed obstructions on the fundamental right guaranteed under Art. 32 to move the Supreme Court for the enforcement of fundamental rights.

Held, (per Sinha, C. J., Gajendragadkar, Wanchoo and Das Gupta, JJ., Shah, J., contra), that r. 12 of O.XXXV Supreme Court Rules is invalid in so far as it relates to the furnishing of security. The right to move the Supreme Court under Art. 32 is an absolute right and the content of this right cannot be circumscribed or impaired on any ground. An order for furnishing security for the respondent's costs retards the assertion or vindication of the fundamental right under Art. 32 and contravenes the said right. The fact that the rule is discretionary does not alter the position. Though Art. 142(1) empowers the Supreme Court to pass any order to do complete justice between the parties, the Court cannot make an order inconsistent with the fundamental rights guaranteed by Part III of the Constitution. No question of inconsistency between Art. 142(1) and Art. 32 arises as Art. 142(1) does not confer any power on the Supreme Court to contravene the provisions of Art. 32. Nor does Art. 145 which confers power upon the Supreme Court to make rules, empower it to contravene the provisions of Art. 32.

Ramesh Thapper v. *State of Madras*, [1950] S. C. R. 594, *State of Madras* v. *V. G. Row*, [1952] S. C. R. 597 and *Daryao* v. *State of U. P.*, [1962] 1 S. C. R. 574, relied on.

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Kavalappara Kottarathil Kochunni Moopil Nayar v. *State of Madras*, [1959] Supp. 2 S. C. R. 316, explained.

Pandit M. S. M. Sharma v. *Shri Sri Krishna Sinha*, [1959] Supp. 1 S. C. R. 806, *K. M. Nanavati* v. *State of Bombay*, [1961] 1 S. C. R. 497, distinguished.

Shah, J.—The impugned rule is not void. The rule does not directly place any restriction upon the right of a litigant to move the Supreme Court. It merely recognises the jurisdiction of the Court, in appropriate cases, to make an order demanding security. It is not, in substance, a rule relating to practice and procedure but it deals primarily with the jurisdiction of the Court, which has its source in Art. 142 of the Constitution. No question of conflict arises between the rule which merely declares the jurisdiction of the Court defined by Art. 142 and the right guaranteed under Art. 32. The provisions of Art. 142 and Art. 32(1) must be read harmoniously. Both being provisions in the Constitution, one cannot prevail over the other.

Pandit M. S. M. Sharma v. *Shri Sri Krishna Sinha*, [1959] Supp. 1 S. C. R. 806, relied on.

ORIGINAL JURISDICTION : Petition No. 52 of 1962.

Petition under Art. 32 of the Constitution of India for enforcement of fundamental rights.

G. S. Pathak, R. Gopalakrishnan and *Naunit Lal*, for the petitioners.

K. S. Hajela and *C. P. Lal*, for the respondents Nos. 1 & 2.

C. K. Daphtary, Solicitor-General of India, B. R. L. Iyengar and *R. H. Dhebar*, for respondent No. 3.

1962. November, 6. The Judgment of Sinha, C. J., Gajendragadkar, Wanchoo and Das Gupta, JJ., was delivered by Gajendragadkar, J. Shah, J., delivered a separate Judgment.

Gajendragadkar, J.

GAJENDRAGADKAR, J.—This is a petition under Art. 32 and it raises an interesting and important

question about the validity of one of the Rules made by this Court in exercise of its powers under Art. 145 of the Constitution. The impugned Rule is Rule 12 in Order XXXV. It provides that the Court may, in the proceedings to which the said Order applies, impose such terms as to costs and as to the giving of security as it thinks fit. One of the proceedings covered by Order XXXV is a petition under Art. 32. The petitioners Prem Chand Garg, 8 Anr., partners of M/s. Industrial Chemical Corporation, Ghaziabad, have filed under Art. 32 petition No. 348 of 1961 impeaching the validity of the order passed by the Excise Commissioner refusing permission to the Distillery to supply power alcohol to the petitioners. This petition was admitted on December 12, 1961 and a Rule was ordered to be issued to the respondents, the Excise Commissioner of U.P., Allahabad, and the State of U.P. At the time when the rule was thus issued, this Court directed under the impugned Rule that the petitioners should deposit a security of Rs. 2,500/- in cash within six weeks. According to the practice of this Court prevailing since 1959, this order is treated as a condition precedent for issuing rule Nisi to the impleaded respondents. The petitioners found it difficult to raise this amount and so, on January 24, 1962, they moved this Court for a modification of the said order as to security. This application was dismissed, but the petitioners were given further time to deposit the said amount by March 26, 1962. This order was passed on March 15, 1962. The petitioners then tried to collect the requisite fund, but failed in their efforts, and that has led to the present petition filed on March 24, 1962. By this petition, the petitioners contend that the impugned Rule, in so far as it relates to the giving of security, is *ultra vires*, because it contravenes the fundamental right guranteed to the petitioners under Art. 32 of the Constitution. That is how the question about the validity of the said Rule falls to be determined on the present application.

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Article 32 (1) provides that the right to move the Supreme Court by the appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed, and sub-Art. (4) lays down that this right shall not be suspended except as otherwise provided for by this Constitution. There is no doubt that the right to move this Court conferred on the citizens of this country by Art. 32 is itself a guaranteed right and it holds the same place of pride in the Constitution as do the other provisions in respect of the citizens' fundamental rights. The fundamental rights guaranteed by Part III which have been made justiciable, form the most outstanding and distinguishing feature of the Indian Constitution. It is true that the said rights are not absolute and they have to be adjusted in relation to the interests of the general public. But as the scheme of Art. 19 illustrates the difficult task of determining the propriety or the validity of adjustments made either legislatively or by executive action between the fundamental rights and the demands of socio-economic welfare has been ultimately left in charge of the High Courts and the Supreme Court by the Constitution. It is in the light of this position that the Constitution-makers thought it advisable to treat the citizens' right to move this Court for the enforcement of their fundamental rights as being a fundamental right by itself. The fundamental right to move this Court can, therefore be appropriately described as the corner-stone of the democratic edifice raised by the Constitution. That is why it is natural that this Court should, in the words of Patanjali Sastri, J., regard itself "as the protector and guarantor of fundamental rights, "and should declare that "it cannot, consistently with the responsibility laid upon it, refuse to entertain applications seeking protection against infringements of such rights" (Vide *Ramesh Thappar V. The State of Madras*). (1) In discharging the duties assigned to it, this Court has to play

(1) [1950] S.C.R. 594. 597.

the role "of a sentinel on the *qui vive*" (Vide *State of Madras* v. *V. G. Row*) [1], and it must always regard it as its solemn duty to protect the said fundamental rights zealously and vigilantly (Vide *Daryao* v. *The State of U. P.*) [2]. Mr. Pathak for the petitioners contends that the right guaranteed under Art. 32 (1) is not subject to any exceptions as are the rights guaranteed by Art. 19. The right to move this Court is an absolute right and the content of this right cannot be circumscribed or impaired on any ground, such as the interests of the general public. It is in this connection that Mr. Pathak preferred to describe the guaranteed right under Art. 32 as "absolutely absolute". The key role assigned to the right guaranteed by Art. 32 and the width of its content are writ large on the face of its provisions, and so, it is, in our opinion unnecessary and even inappropriate to employ hyperboles or use superlatives to emphasise its significance or importance.

Mr. Pathak however, conceded that the right to move this Court can be validly regulated by rules of precedure and regulations made with a view to aid the assertion and vindication of the right and to provide for a fair trial of the points raised by the petitioners. For instance, he agrees that a rule can be made that the petition proposed to be filed under Art. 32 should be legibly written, or typed, before it is filed, or that the relevant paper book should be prepared in the prescribed manner in order to facilitate the reference in Court, or that a notice should be issued to the respondent, or for the making of the affidavit in the prescribed manner. These rules, he argues, can be legitimately made because they serve to aid and facilitate a fair disposal of the petition made by the petitioner on the merits. If, however, a rule is made which retards or obstructs the petitioner's attempt to assert his fundamental right under Art. 32, that rule must be struck down as being violative of Art. 32. His argument is that the impugned rule imposes upon the petitioners an obligation to deposit

(1) [1952] S.C.R. 597, 605. (2) [1962] 1 S.C.R. 574, 582.

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a certain amount in Court as security for the respondents costs, and far from siding or assisting the petitioners' assertion of fundamental right, it has the effect of retarding or obstructing the same. If, as in this case the petitioners are unable to deposit the security, their petition is liable to be dismissed for non-prosecution. That clearly illustrates the hardship that the rule will work, and thus brings out how it contravenes Art. 32.

On the other hand, the learned Solicitor-General who has appeared for the Registrar of this Court, has argued that the rule cannot be said to contravene Art. 32 because it is a discretionary rule and it vests discretion in this Court either to make an order as to the giving of the security or not to make it, as it may deem fit according to the circumstances of each case. He conceded that for some time past it has been the practice of this Court generally to make an order as to security in Art. 32 petitions, though in some cases, on the motion of the petitioner, the amount of security has been reduced and sometimes security has even been dispensed with. But he argues that if the prevailing practice is found to be unsatisfactory or inconsistent with the spirit of the rule itself, the remedy is to change the practice; there is, however, no vice in the rule. In a proper case, security can be demanded from the petitioner because that is the normal rule of procedure recognised by the Civil Procedure Code. In this connection, he relied on the provisions of O.25 r. 1 & 2 and O.41 r. 10. Like all judicial trials, even in respect of the trial of the petition filed under Art. 32, the Court must act fairly by both the parties, and so, if it appears to the Court that it is in the interest of justice that the costs of the respondent should be secured, it would be open to the Court to make an order of security in that behalf and a rule which permits such an order to be made in a proper case, cannot be said to be inconsistent with Art. 32. In support of this

argument, the Solicitor-General relied upon the provisions of Art. 145(1)(f) and more particularly on the wide power conferred on this Court under Art. 142(1) of the Constitution. He also suggested that in determining the effect of the wide provisions of Art. 142, we ought to adopt the rule of harmonious construction so as to reconcile the said powers with Art. 32.

If the present dispute had been confined to the narrow question about the construction of the impugned rule and the propriety or otherwise of the prevailing practice, it would have become necessary for us to consider whether the rule can be said to be valid and the practice prevailing irregular inasmuch as in some cases security may perhaps have been demanded from the petitioner without full examination as to the special features of the case. In that case, it would have become necessary also to consider whether the rule cannot be sustained in so far as it vests the discretion in the highest Court of this country and can be used only in cases where, for reasons like those contemplated by Order 25 r. 1 & 2 and O. 41 r. 10 an order of security is made. In this connection, two rival contentions have been urged before us. Mr. Pathak argues that the rule is very wide and would justify the making of an order for security even in cases which do not satisfy the tests laid down for instance, by O. 25 r. 1 and O. 41 r. 10 of the Code and he argues that in such a case, the rule must be struck down as a whole. In support of his contention Mr. Pathak has relied on the decision of this Court in *Ramesh Thappar* v. *The State of Madras*(1), *Chintaman Rao* v. *The State of Madhya Pradesh*(2) and *Kameshwar Prasad* v. *State of Bihar*(3). On the other hand, the Solicitor-General contends that the rule should be so construed as to enable this Court to make orders of security only in proper cases and on that narrow construction its validity should be upheld. If in some cases orders have been passed without a full examination of the merits of the question, that

(1) [1950] S.C.R. 594, 597. (2) [1950] S.C.R. 759.
(3) [1962] Supp. 3 S.C.R. 369.

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may only mean that the said orders may not have been properly passed under the rule. The exercise of the power conferred on the Court in such cases will not, however, invalidate the rule itself. In support of this argument, reliance has been placed on the decisions of this Court in the cases of *R.M.D. Chamarbaugwalla* v. *The Union of India*(1) and *Kedar Nath Singh* v. *State of Bihar*(2).

As we have just indicated, it would have become necessary for us to examine these contentions if the power to make an order for security in appropriate cases had been conceded by the petitioners. But since the existence of the power is disputed, we have to decide the larger issue raised by Mr. Pathak. Mr. Pathak argues that even in cases to which the relevant provisions of O.25 and O.41 may ordinarily apply, this Court has no power to make an order of security in a petition under Art. 32. The only test, says Mr. Pathak, which can be legitimately applied in dealing with the matter is : does the rule aid or assist the assertion or vindication of the fundamental right, or does it retard or obstruct it ? If the answer to the question is that the rule retards or obstructs the assertion or vindication of the fundamental right by imposing a pecuniary obligation on the petitioner, the rule is bad and there is no authority in this Court to make such a rule under Art. 145 and there is no jurisdiction in the Court to make such an order under Art. 142. It is this larger question which calls for our decision in the present petition.

In support of his argument that this Court has no power to make such a rule, Mr. Pathak has relied on the decisicn of this Court in the case of *Kavalappara Kottarathil Kochunni Moopil Nayar* v. *The State of Madras*(3). In that case, Das, C. J., has examined the scope and effect of the provisions of Art. 32 and has observed that an application made under Art. 32 cannot be rejected on the simple ground that the petitioner has an alternative remedy open to him. Then

(1) [1957] S.C.R. 930. (2) [1962] Supp. 2 S.C.R. 769.

(3) [1959] 2 S.C.R. 316, 335.

the learned C. J. addressed himself to the question as to whether such an application could be dismissed on the ground that it involves the determination of disputed questions of fact, and in answering this question in the negative, he has stated his conclusion in these words : "But we do not countenance the proposition that, on an application under Art. 32, this Court may decline to entertain the same on the simple ground that it involves the determination of disputed questions of fact or on any other ground." It is on the last clause of the sentence that Mr. Pathak relies. He contends that the statement of the learned C. J., is categorical that a petition under Art. 32 cannot be dismissed on the ground that it involves the decision of disputed questions of fact or on any other ground, and that excludes the ground of non-payment of security. We do not think that this argument is well-founded. The words "or on any other ground" on which the argument rests, cannot be torn from their context. The context shows that 'any other ground', which the learned C. J., had in mind must be similar to the ground which he had enumerated before using the said clause. Take, for instance, the case of a petition which is barred by res judicata. This Court has held that the principles of res judicata apply to petitions under Art. 32 (Vide *Daryao* v. *The State of U. P.*) (1). Take also the case where a petition under Art. 32 would be liable to be dismissed on the preliminary ground that it purports to challenge an order of assessment made by an authority under a taxing statute which is intra vires, on the sole ground that it is based on a mis-construction of a provision of the Act or of a notification issued thereunder, *Vide Smt. Ujjam Bai* v. *The State of Uttar Pradesh* (2). If the words "or on any other ground" used by Das, C. J., are literally construed, they would have to be treated as inconsistent with these subsequent decisions. That, however, is plainly not the true position and so, the argument based on the said words used by Das, C. J., cannot, in our opinion, be

(1) [1962] 1 S.C.R. 574, 582. (2) [1963] 1 S.C.R. 778.

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accepted. It would, we think, be unfair to assume that in using the words "or on any other ground" this Court wanted to imply, as Mr. Pathak seems to assume, that once a petition is made under Art. 32, there is no alternative but to consider its merits apart from considerations like res judicata or the competence of the petition itself. Therefore, the argument that the rule is inconsistent with the decision in *Kochunni Moopil Nayar's*(1) case must be rejected.

The next question to consider is whether an order for security can be said to retard or obstruct the assertion or vindication of a fundamental right under Art. 32. For anology, we may refer to O. 25 r. 1 and O. 41 r. 10. These rules give us an idea as to the circumstances in which orders of security are made under the Code of Civil Procedure. O. 25 r. 1 provides inter alia, that if the plaintiffs reside out of India and do not possess any sufficient immovable property within India other than the property in suit, the Court may, on its own motion or on the application of any defendant, order security to be deposited by them. A similar order can be passed where any party to the suit leaves India under circumstances which would show that in all probability he will not be forthcoming to pay the costs of his opponent when called upon to do so. Such an order can also be passed if the plaintiff happens to be a woman and the Court is satisfied that she does not possess sufficient immovable property within India. O.41 r. 10 confers on the appellate Court discretion to demand from the appellant security for the costs of the appeal or of the original suit or of both in somewhat similar circumstances. Now if an order is made calling upon the petitioner to furnish security in cases similar to those covered by O. 25 r. 1 and O. 41 r. 10, would it not be reasonable to say that the order of security would retard the assertion or vindication of the fundamental right ? The order imposes on the petitioner a financial obligation and if he is not able to comply

(1) [1959] 2 S.C.R. 316, 335,

with the order, his petition would fail. In our opinion, there is no doubt that an order of security for the respondent's costs would, in some cases effectively bar, and in all cases amount to a hindrance in, the further progress of the petition. It cannot be said that the said order aids a fair hearing of the petition like the order prescribing the manner in which the paper books have to be prepared, or other steps in connection with the petition have to be taken. It may be conceded that the order is intended to protect the interest of the respondent and in that sense, may be treated as fair; but the fairness of the order or of the object intended to be achieved by it will not disguise the fact that its effect is not to aid the petition but to retard it to some extent. In considering the constitutionality of the order or the rule which permits the order to be made, the fact that the object intended to be achieved is good, just or unexceptionable would be immaterial, *vide the State of Bombay* v. *Bombay Education Society*(1) and *Punjab Province* v. *Daulat Singh*(2). Therefore, we do not see how it is possible to escape the conclusion that the order for security retards the assertion or vindication of the fundamental right under Art. 32 and in that sense, must be held to contravene the said right.

It is true that the statistics of the Art. 32 petitions filed in this Court during the last decade may show that the majority of the petitions are filed by citizens who complain about the contravention of their fundamental right under Art. 19(1)(f) and (g) and in that sense, the validity of the impact of the welfare policies of the States or the Union Government on the property rights of the citizens has more frequently fallen to be considered by this Court. Contravention of fundamental rights in respect of the freedom of speech and expression, and the freedom to form assemblies, associations or Unions, which some jurists describe as "preferred freedoms"

(1) [1955] 1 S.C.R. 568, 583. (2) (1946) L.R. 73 I.A. 39, 74.

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has not given rise to as many petitions as the contravention of property rights has, and in that sense; it may be permissible to assume that the petitioners who complain against the infringement of their property rights may be able to comply with the orders of security passed by the Court under the impugned rule; but that, in our opinion, is hardly relevant. If the right under Art. 32 is circumscribed or impaired by such an order, the fact that the petitioner may be able to comply with the order would not help to make the order or the rule valid. Therefore, the practical considerations to which reference was made during the course of the arguments have no material bearing in deciding the validity or the constitutionality of the rule or the existence of the relevant power in this Court under Art. 142.

It is, however, urged by the learned Solicitor-General that the powers of this Court under Art. 142 are very wide and cannot be controlled by Art. 32. He has put his argument in two ways. He urges that the words used in Art. 142 are very wide and since they constitute the constitutional charter of this Court's powers, they must be very liberally construed. This contention is undoubtedly well founded. Article 142(1) provides that in exercise of its jurisdiction, this Court may pass such decree or make such order as is necessary for doing complete justice in any cause or matter pending before it; and it adds that a decree or order so made shall be enforceable throughout the territory of India in the manner prescribed by any law made by Parliament and, until provision in that behalf is so made, in such manner as the President may by order prescribe. The Solicitor-General wants us to compare Art. 142(1) with Art. 194(3) and he suggests that just as the powers, privileges and immunities specified by the latter Article are not subject to the provisions in respect of fundamental rights, so is the power specified by Art. 142 (1) not subject to the said rights.

In support of this argument, he has relied on the decision of this Court in the case of *Pandit M. S. M. Sharma* v. *Shri Sri Krishna Sinha* (1). It may be recalled that Art. 194 deals with the powers, privileges and immunities of State Legislatures and their members and Art. 194(3) provides that in other respects, the powers, privileges and immunities shall be such as may from time to time be defined by the Legislature by law, and until so defined shall be those of the House of Commons of the Parliament of the United Kingdom, and of its members and committees, at the commencement of this Constitution. The effect of this provision is that until law is made in that behalf, the powers enjoyed by the members of the House of Commons and its Committees at the commencement of this Constitution shall continue to be enjoyed by the members of the State Legislatures and their committees. One of the points which fell to be considered by this Court in the case of *Sharma* (1), was whether the rights, powers and privileges of the members of the House of Commons which could be claimed by the members of the State Legislatures had to stand the scrutiny of the test prescribed by Art. 19. In other words, if it appears that the said rights were inconsistent with the provisions of Art. 19(1), had the said rights to yield before the fundamental rights guaranteed by Art.19(1); and this Court held that Art. 19(1)(a) and Art. 194(3) have to be reconciled and the only way of reconciling the same is to read Art. 19(1)(a) as subject to the latter part of Art. 194(3) just as Art. 31 has been read as subject to Art. 265 in the earlier decisions of this Court. In other words, the effect of this decision is that if there is a conflict between the rights claimed under the latter part of Art. 194(3) and the fundamental rights of citizens under Art. 19, the validity of the said rights cannot be impeached on the ground that they are inconsistent with the provisions of Art. 19(1)(a).

(1) [1959] 1 S.C.R. 806, 859-860.

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Basing himself on this decision, the Solicitor-General argues that the power conferred on this Court under Art. 142(1) is comparable to the privileges claimed by the members of the State Legislatures under the latter part of Art. 194(3), and so, there can be no question of striking down an order passed by this Court under Art. 142(1) on the ground that it is inconsistent with Art. 32. It would be noticed that this argument proceeds on the basis that the order for security infringes the fundamental right guaranteed by Art. 32 and it suggests that under Art. 142(1) this Court has jurisdiction to pass such an order. In our opinion, the argument thus presented is misconceived. In this connection, it is necessary to appreciate the actual decision in the case of *Sharma* (1) and its effect. The actual decision was that the rights claimable under the latter part of Art. 194(3) were not subject to Art. 19(1)(a), because the said rights had been expressly provided for by a Constitutional provision, viz., Art. 194(3), and it would be impossible to hold that one part of the Constitution is inconsistent with another part. The position would, however, be entirely different if the State Legislature was to pass a law in regard to the privileges of its members. Such a law would obviously have to be consistent with Art. 19(1)(a). If any of the provisions of such a law were to contravene any of the fundamental rights guaranteed by Part III, they would be struck down as being unconstitutional. Similarly, there can be no doubt that if in respect of petitions under Art. 32 a law is made by Parliament as contemplated by Art. 145(1), and such a law, in substance, corresponds to the provisions of O.25 r. 1 or O.41 r. 10, it would be struck down on the ground that it purports to restrict the fundamental right guaranteed by Art. 32. The position of an order made either under the rules framed by this Court or under the jurisdiction of this Court under Art. 142(1) can be no different. If this aspect of the matter is borne in mind, there would be no difficulty in rejecting

(1) [1959] 1 S.C.R. 806, 859-860.

the Solicitor-General's argument based on Art. 142(1). The powers of this Court are no doubt very wide and they are intended to be and will always be exercised in the interest of justice. But that is not to say that an order can be made by this Court which is inconsistent with the fundamental rights guaranteed by Part III of the Constitution. An order which this Court can make in order to do complete justice between the parties, must not only be consistent with the fundamental rights guaranteed by the Constitution, but it eannot even be inconsistent with the substantive provisions of the relevant statutory laws. Therefore, we do not think it would be possible to hold that Art. 142(1) confers upon this Court powers which can contravene the provisions of Article 32.

In this connection, it may be pertinent to point out that the wide powers which are given to this Court for doing complete justice between the parties, can be used by this court for instance, in adding parties to the proceedings pending before it, or in admitting additional evidence, or in remanding the case, or in allowing a new point to be taken for the first time. It is plain that in exercising these and similar other powers, this Court would not be bound by the relevant provisions of procedure if it is satisfied that a departure from the said procedure is necessary to do complete justice between the parties.

That takes us to the second argument urged by the Solicitor-General that Art. 142 and Art. 32 should be reconciled by the adoption of the rule of harmonious construction. In this connection, we ought to bear in mind that though the powers conferred on this Court by Art. 142(1) are very wide, and the same can be exercised for doing complete justice in any case, as we have already observed, this Court cannot even under Art. 142(1) make an order plainly inconsistent with the express statutory provisions of substantive

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law, much less, inconsistent with any Constitutional provisions. There can, therefore, be no conflict between Art. 142(1) and Art. 32. In the case of *K. M. Nanavati* v. *The State of Bombay*(1) on which the Solicitor-General relies, it was conceded, and rightly, that under Art. 142(1) this Court had the power to grant bail in cases brought before it, and so, there was obviously a conflict between the power vested in this Court under the said Article and that vested in the Governor of the State under Art. 161. The possibility of a conflict between these powers necessitated the application of the rule of harmonious construction. The said rule can have no application to the present case, because on a fair construction of Art. 142(1). This Court has no power to circumscribe the fundamental right guaranteed under Art. 32. The existence of the said power is itself in dispute, and so, the present case is clearly distinguishable from the case of *K. M. Nanavati*(1).

Let us now consider whether a rule can be made under Art. 145(1) providing for the making of an order for furnishing security in cases of petitions under Art. 32 where the Court is satisfied that in case the petition fails, the petitioner may not be able to pay the costs of the respondent. The impugned rule is presumably based upon the provisions of Art. 145(1)(f). It may be assumed that the expression "costs of and incidental to any proceedings in the Court" used in clause (f) may cover in order of security ; but if an order for security amounts to a contravention of Art. 32, there would be no power to make such a rule under Art. 145(1)(f). After all, rules framed under Art. 145 are in exercise of the delegated power of legislation, and the said power cannot be exercised so as to affect the fundamental rights. If the wide words used in Art. 142 cannot justify an order of security in an Art. 32 petition, it follows that a rule made under Art. 145 cannot authorise the making of such an order. We ought to add that cases of frivolous petitions filed

(1) [1961] 1 S.C.R. 497.

under Art. 32 can be eliminated at the preliminary hearing of such petitions. Since 1959, petitions filed under Art. 32 are set down for a preliminary hearing and it is only after the Court is satisfied that a prima facie case has been made out by the petitioner that a rule Nisi is ordered to be issued against the respondent. In order to decide this question, sometimes notice is issued to the respondent even at the preliminary hearing and it is after hearing the respondent that a rule is issued on the petition. It may be that in some cases, the respondent may not be able to recover its costs from the petitioner even if the petition is dismissed on the merits. But that, in our opinion, cannot justify the making of an order for security, because even impecunious citizens, or citizens living abroad, must be entitled to move this Court if they feel that their fundamental rights have been contravened. Similarly, women who own no property would be entitled to move this Court in case their fundamental rights are contravened, and following the anology of O.25 r. 1(3), no order for security can be made against them, because that would make their right illusory. That obviously is the content of the fundamental right guaranteed under Art. 32, and since the impugned rule, in so far as it relates to security for costs, impairs the content of that right, it must be struck down as being unconstitutional. Rules framed under Art. 145 which govern the practice and procedure in respect of the petitions under Art. 32 with the object of aiding and facilitating the orderly course of their presentation and further progress until their decision, cannot be said to contravene Art. 32. All proceedings in Court must be orderly and must follow the well recognised pattern usually adopted for a fair and satisfactory hearing; petitions under Art. 32 are no exception in that behalf. Besides, orders can be passed on the merits of the petitions either at an interlocutory stage or after their final decision, and no objection can be taken against such orders on the ground that they contravene Art. 32. In a proper

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case, proceedings threatened against the petitioners may be stayed unconditionally or on condition or may not be stayed, or a Receiver may be appointed in respect of the property in dispute, or at the end of the final hearing if the petition fails, the petitioner may be ordered to pay the costs of the respondent. All these are matters whose validity cannot be challenged on the ground that they contravene Art. 32. But if a rule or an order imposes a financial liability on the petitioner at the thresh-hold of his petition and that too for the benefit of the respondent, and non-compliance with the said rule or order brings to an end the career of the said petition, that must be held to constitute an infringement of the fundamental right guaranteed to the citizens to move this Court under Art. 32. That is why we think Rule 12 in respect of the imposing of security is invalid.

There is another aspect of the matter to which reference must incidentally be made. The rule is obviously intended to secure the costs of the respondent in a proper case. Let us see how this rule will work if it is interpreted and acted upon in the manner suggested by the learned Solicitor-General. In practice, at present, an order of security is normally made unless a request is made by the petitioner either for the reduction of the amount or for dispensing with the security altogether. If the petitioner is not impecunious, an order for security will not serve any essential purpose, because if the costs are awarded against him after the final hearing, the respondent may be able to secure his costs. If, however, the petitioner is impecunious, the Court may not, after granting a rule on the petition, in its discretion, pass an order of security and in that sense, the very object of securing the respondent's costs would not be served. It is true that if the discretion is exercised by the Court in favour of impecunious petitioners and orders for security are not passed in their cases, no hardship will be caused to them. But it seems to us

that what would be left to the discretion of the Court on this construction of the rule, is really a matter of the right of impecunious petitioners under Art. 32. That is why we think that the impugned rule in so far as it relates to the giving of security cannot be sustained.

In the result, the petition is allowed and the order passed against the petitioners on December 12, 1961, calling upon them to furnish security of Rs. 2,500/- is set aside. There would be no order as to costs.

SHAH, J.—The petitioner filed petition No. 348 of 1961 invoking jurisdiction of this Court to issue a writ under Art. 32 of the Constitution on the plea that certain orders passed by the Excise Commissioner, U.P. were invalid. The petitioner was directed on December 12, 1961 when rule was ordered to issue to the respondents—Excise Commissioner, U.P. Allahabad, and the State of Uttar Pradesh to "furnish security in the sum of Rs. 2,500/- in cash within six weeks for the costs of the respondents". The petitioner failed to comply with the order, and moved this Court for modification thereof. This application was dismissed, but at the request of the petitioner time for furnishing security was extended till March 26, 1962. Stating that his efforts to collect the requisite amount were unsuccessful, the petitioner presented this petition and prayed that the order requiring him to furnish security in the sum of Rs. 2,500/- be vacated because R. 12 O. XXXV of the Supreme Court Rules under which presumably the order was made, contravened the fundamental right guranteed by Art. 32(1) of the Constitution.

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The petitioner contends that the rule infringes the fundamental right to move this Court guaranteed by Art. 32 (1) of the Constitution. *Prima facie,* by the rule no restriction is placed directly upon the

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right of a litigant to move this Court for relief against infringement of fundamental rights. The rule merely envisages exercise of jurisdiction of this Court in appropriate cases to impose upon a party under an order—final or interlocutory—such terms as to costs, and to security for costs or for other purposes, as the Court thinks fit. Undoubtedly an order directing the petitioner to furnish security for the costs of the respondent raises some obstacle to the prosecution of a petition for relief against infringement of fundamental rights claimed by the petitioner. Are the order, and the authority in exercise of which the order is made on that account void ?

Article 32 substantially makes two provisions. By the first clause it guarantees the right to move the Supreme Court by appropriate proceedings. As a corollary thereof by cl. (4) it is provided that the guarantee under cl. (1) shall not be suspended except as provided by the Constitution. Clause (2) declares the jurisdiction of the Court to issue directions, orders or writs including certain specified writs for enforcement of any of the rights conferred by Part III. A truly democratic Constitution recognizes not only certain important natural rights which are the attributes of a free citizen, but also sets up adequate machinery for protection against invasion of those rights. Our Constitution has in Ch. III enumerated certain fundamental rights such as equality before the law, with the concommitant guarantee against discrimination, right of freedom of speech, assembly, association, movement aud residence, right to acquire, hold and dispose of property and to practise any profession or to carry on occupation, trade or business, freedom of conscience and the right to practise and propagate religion, freedom to manage religious affairs and cultural and educational rights. After enunciating the rights some in terms positive, some in negative, exercisable absolutely or subject to reasonable restrictions the Constitution has rendered all laws

inconsistent therewith if pre-existing, or made in contravention, thereof if enacted after the commencement of the Constitution, void to the extent of the inconsistency or contravention. For relief against infringement of these rights by action legislative or executive by the State, recourse may undoubtedly be had to the ordinary Courts by institution of civil proceedings for appropriate relief. But the Constitution has conferred upon the High Courts and the Supreme Court power to issue writs for the protection of those fundamental rights, and the Constitution has guaranteed by Art. 32(1) the right to move this Court for enforcement of those rights. The right to move this Court for enforcement of the fundamental rights is therefore itself made a fundamental right. Law which is repugnant to the effective exercise of the right to move this Court in enforcement of the rights described in Ch. III therefore to the extent of inconsistency or contravention would be void. Is it that the exercise of the right is to be so unfettered, that any law which imposes any restriction in any form whatever against the exercise of that right direct or indirect must be regarded as void ? Counsel for the petitioner using the language of hyperbole submitted that the right was "absolutely absolute", and even a law which by itself does not place any restriction upon the exercise of the right but which contemplates the exercise of the jurisdiction of this Court to impose restriction upon the exercise of the right, must be regarded as void.

But the right guaranteed is not wholly unfettered or unrestricted as claimed. Art. 32(1) guarantees a right to move by "appropriate proceedings" : there is therefore in the Article itself limitation upon the exercise of the right. Appropriate proceedings would include the procedure relating to form, conditions of lodgment of petitions, and compliance with all reasonable directions imposed which would conduce to the smooth conduct of proceeding in this Court.

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Power to make rules for practice and procedure of this Court read with the guarantee under Art. 32(1) to move by appropriate proceedings implies the power to impose procedural restrictions conducive to the orderly progress of the petition for relief for breach of a fundamental right.

The argument of counsel of the petitioner that the right to move this Court for enforcement of a fundamental right is absolute, may involve the plea that rules of the Court which require a petition to be filed, legibly written, type-written or lithographed, submission of translation of documents not in the English language, presentation of affidavits, payment of court-fee on the petition and process fee for service of notice upon the parties concerned and similar rules would be invalid, for all these rules in a sense obstruct the exercise of the right, and impose financial obligations which are not insignificant. But this rather extravagant view of the absolute character of the right to move this Court was very properly not attempted to be sustained. It was conceded that the right conferred by Art. 32(1) to move this Court may be regulated by all such directions general or *ad hoc* which serve to aid and facilitate a fair disposal of the case, according to an orderly procedure.

What the Constitution has guaranteed is the right to move this Court i.e. the right to claim redress against an alleged infringement of a fundamental right. This Court is doubtless made the custodian of the fundamental rights guaranteed by the Constitution and we would be failing in our duty if we were to refuse to entertain a petition for enforcement of a fundamental right or to decline to adjudicate upon the same. We cannot direct the litigant to seek relief by recourse to a Civil Court or other remedy where *prima facie* an infringement of the fundamental right is made out, but that is not to say that, after the petition is entertained the Court is

not bound to hold the scales even between the litigating parties. The party complaining of infringement of a fundamental right has undoubtedly the right to demand that his petition shall be entertained and heard and disposed of according to law, but in the investigation of the claim to relief the petitioner is not entitled to any higher privileges than any other litigant would be entitled to in respect of a *lis* which is brought up for adjudicating before this Court. The claim of the parties must be supported by evidence, witnesses in support must be brought before the Court or examined on commission; if the party dies or ceases legally to exist representative of the party should be brought on record, if the pleadings are not proper they may be struck off or amended and if the claim sought to be litigated has been previously adjudicated upon the rule of *res judicata* would apply. The procedure for trial and adjudication of a claim which does not involve enforcement of a fundamental right is in substance the same as in the case of a petition for enforcement of a right under Ch. III. An order for security for costs of the respondent or for other purposes is a procedural order, and unless imposition of an order for furnishing security may be regarded as amounting substantially to a denial of the right to move this Court, the insistence of a special rule warranting an exception in proceedings for enforcement of fundamental rights cannot be appreciated. It may be observed that the impugned rule does not contemplate that the order is to be made as a matter of course. It merely recognises the jurisdiction of the Court in appropriate cases to demand security; it does not prescribe or even indicate the stage at which this order has to be made. The jurisdiction of the Court is declared in the most general terms and is to be exercised only when the Court thinks it necessary in order to do justice in the proceeding.

Undoubtedly a practice has grown up lately that when rule is issued in petition for enforcement

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of a fundamental right, the Court is requested to consider whether the petitioner should furnish security for the costs of the respondent. The matter is then judicially considered and an order requiring the petitioner to furnish security if the Court is satisfied about the necessity of passing such an order is made. But even orders so passed are often recalled and modified having regard to the justice of the case. The practice of considering the question at the initial stage of issuing the rule may require to be altered, but there is nothing in the rule which requires that practice to be followed. In an appropriate case the Court may make an order *suo motu* at the threshold of the proceeding, or at any time in another, on the request made by the respondent. All such orders are in the exercise of the jurisdiction of the Court, having regard to the circumstances and for doing complete justice between the parties.

In considering the nature of the jurisdiction exercise by the Court reference must be made to Art. 142 of the Coustitution which in so far as it is material in this case provides by the first clause that "the Supreme Court in the exercise of its jurisdiction may pass such decree or make such order as is necessary for doing complete justice in any cause or matter pending before it x x x x x x". The jurisdiction of the Court so described undoubtedly embraces power to make an order requiring security in appropriate cases, and the impugned rule does no more than enunciate a facet of the jurisdiction of this Court which is conferred by Art. 142. The expression 'as it thinks fit' must in the context in which it occurs mean that where the Court deems it necessary for doing complete justice in the cause or matter pending before it, the Court may make the order as to giving of security.

It is not necessary to consider whether in exercise of the delegated power of legislation conferred

by Art. 145 (1) it is open to this Court to make a rule requiring security for costs from a litigating party which may apparently place a restriction upon the exercise of the fundamental right under Art. 32. The impugned rule is not in substance a rule relating to practice and procedure, but deals primarily with the jurisdiction of the Court, which has its source in Art. 142.

Can the petitioner claim immunity from an order for furnishing security for costs or for other purposes merely because he has commenced a proceeding under Art. 32 (1) of the Constitution, even if the Court is of the opinion that it is necessary in doing complete justice to make the order ? The impugned rule does not contemplate that the order is to be made as a matter of course. It merely recognises the jurisdiction of the Court in appropriate cases to make an order demanding security. It also does not prescribe the stage at which the order is to be made.

Assuming that an order made in a given case may be erroneous the jurisdiction of the Court conferred by the Constitution under Art. 142 to make such orders as may be necessary for doing complete justice is not on that account affected. I am unable to countenance the proposition that in dealing with a claim for relief for infringement of a fundamental right in a petition under Art. 32 the power which is inherent in its constitution to demand security for costs of the respondent cannot be exercised, even if the Court is satisfied that such an order is preeminently called for. It frequently happens that mixed up with pleas of constitutional invalidity of statutes or executive acts having an impact upon fundamental rights, allegations of bad faith, arbitrariness, exercise of power for ulterior purposes and similar allegations are made by litigants resorting to this Court, and there is no recognised procedure by which investigation of such allegations of improper conduct may be

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disentangled from those to be dealt with on a strictly interpretational plane. The Court has, therefore, to hear the entire case dealing both with the validity of the statutes or executive acts and the allegations of improper conduct before it can finally adjudicate upon the claim made by the petitioner. If because of the nature of the proceeding brought before it, the Court is precluded from ordering even in appropriate cases an applicant for redress to furnish security before exercising his privilege of prosecuting his claim, the Court would be acting not as a Court of justice but as an instrument of oppression.

The impugned rule being merely declaratory of the jurisdiction which is defined by Art. 142 of the Constitution no question of conflict between law made by the State, and the guarantee of right to move this Court under Art. 32(1) by appropriate proceedings for enforcement of fundamental rights arises. The provisions of the Constitution contained in Art. 142 and Art. 32(1) must be read harmoniously. On the one hand there is the guaranteed right in favour of the litigant by an appropriate proceeding to move this Court for enforcement of a fundamental right, on the other there is the jurisdiction vested in this Court to pass all such orders as may be necessary in the interests of justice—such orders including inappropriate cases an order for payment of costs by the petitioner. There is no warrant for assuming that the exercise of this jurisdiction has to be subordinated to the exercise of the right to move this Court. Article 32(1) is included in Ch. III and the right to move this Court is itself made a fundamental right, whereas Art. 142 falls in Part V dealing with Union Judiciary. But these being parts of a Constitutional document no special sanctity attaches to the provisions contained in Ch. III so as to prevail over the other provisions. In *Pandit M.S.M. Sharma* v. *Shri Sri Krishna Sinha*[1], this Court had to consider whether Art. 194 dealing with the powers, privileges and immunities of

(1) [1959] 1 S.C.R. 806.

the State Legislatures and of their members was subordinate to fundamental right of speech under Art.19(1)(a) of the Constitution. The petitioner in that case urged that rights, powers and privileges of the members of the House of Commons in England which could be claimed by the members of the State Legislatures by virtue of Art. 194 had still to stand the test of reasonableness prescribed by Art. 19(2), and to the extent of inconsistency the right had to yield before the fundamental right guaranteed by Art. 19(1). It was held by the Court that Art. 19(1)(a) and Art. 194 have to be harmoniously interpreted and the only method of reconciling the two is to read the general provision of Art. 19(1)(a) as subject to Art. 194 just as Art. 31 is read as subject to Art. 265. Generality of the provision is not however the sole criterion. Clause (1) and (2) of Art. 13 render laws either pre-existing or enacted since the Constitution, void if they are inconsistent with or take away or abridge any fundamental rights. Exercise of legislative authority under powers derived from the Constitution is undoubtedly hit by Art. 13(2). But one part of the Constitution cannot render nugatory another part: the two must be read together and harmonized. So read, the gurantee of the right to move this Court by appropriate proceedings, for enforcement of fundamental rights cannot be permitted to encroach upon the jurisdiction of the Court, where exercise thereof is necessary for doing complete justice. Therefore even in a proceeding under Art. 32(1), this Court is competent to make all such orders as it deems proper including an order for security for costs of the respondent.

The impugned rule which enunciates the jurisdiction of the Court to impose terms as to giving of security is not therefore void.

BY COURT : In accordance with the opinion of the majority the writ petition is allowed and the order

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calling upon the petitioners to furnish security of Rs. 2,500/- is set aside. There will be no order as to costs.

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November, 7.

MAHENDRA LAL JAINI

v.

THE STATE OF UTTAR PRADESH AND OTHERS

(B. P. SINHA, C. J., P. B. GAJENDRAGADKAR, K. N. WANCHOO, K. C. DAS GUPTA and J. C. SHAH, JJ.)

Compulsory acquisition—Permanent Lease—Statute declaring transfer void—No provision for compensation—Statute, if provides for compulsory acquisition—Constitutionality of—Doctrine of eclipse—If not applicable to post—Constitution statutes—U.P. Land Tenures (Regulation of Transfers) Act, 1952 (U.P. 15 of 1952), s. 3—Constitution of India Arts. 13, 31—Constitution (Fourth Amendment) Act, 1955.

Forest—Declaration as reserve forest—Statute providing for interim control—Constitutionality of—Indian Forest Act, 1927 (16 of 1927), Chs. II and V—Indian Forest (U.P. Amendment) Act, 1956 (U.P. 5 of 1956), s. 3.

By a registered lease dated June 14, 1952, one M granted a perpetual lease of certain lands to the petitioner. Formally a large number of trees stood on these lands and the lease deed recited that the entire land had been cleared of the trees and possession given to the petitioner who was made a hereditary tenant of the land. The U. P. Zamindari Abolition and Land Reforms Act, 1951, (hereinafter referred to as the Abolition Act) was made applicable from July 1, 1952, In the meantime the U. P. Land Tenures (Regulation of Transfers) Act, 1952 (hereinafter referred to as the Transfer Act) was passed which came into force with retrospective effect from May 21,