## IS CONSTITUTIONAL RIGHT SUBJECT TO TRIMMINGS BY SUPREME COURT?

A TWO judge bench of the Supreme Court,[1] in *Union of India* v. *Paul Manickam*,[2] a case challenging the preventive detention of the respondent's daughter as unlawful has observed as under:[3]

> It is appropriate that the concerned High Court under whose jurisdiction the order of detention has been passed by the State Government or Union Territory should be approached first. In order to invoke jurisdiction under article 32 of the Constitution to approach this court directly, it has to be shown by the petitioner as to why the high court has not been approached, could not be approached or it is futile to approach the high court. Unless satisfactory reasons are indicated in this regard, filing of petition on such matters, directly under article 32 of the Constitution is to be discouraged.

This observation of the apex court that before a person complaining of violation of his fundamental rights approach the Supreme Court under article 32 should approach the high court first under article 226, raises serious questions as to the true scope and ambit of article 32.

In the instant case the respondent who is the father of the detenue who was detained under section 3(1)(i) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 for possessing a huge quantity of contraband articles, addressed a representation on her behalf to the President of India. He also filed a *habeas corpus* petition before the Madras High Court challenging the detention order. The court dismissed the writ petition but on his application for review it quashed the order of detention. Hence this appeal by the Union of India to the Supreme Court.

Thus, it was not the petitioner who approached the Supreme Court by way of a writ under article 32 for setting aside the order of detention. Instead it was the Union of India which approached the Supreme Court by way of appeal under article 136 of the Constitution by raising various contentions, *inter alia*, that:[4]

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1. Doraiswamy Raju and Arijit Passayat JJ.
2. AIR 2003 SC 4622.
3. *Id.* at 4630. (Emphasis added).
4. *Id.* at 4624.

> [R]enegades who disturb peace and tranquillity of citizens are like termites which corrode financial stability of the country with vicious designs file petitions full of falsehood and at times approach this court under article 32 even without approaching the jurisdictional High Court.

What made the Union of India to take this pea is not clear from the facts of the case since the petitioner had not approached the apex court directly. It was against this plea, the Supreme Court, while dismissing the appeal by the Union of India in the instant case expressed the above quoted view.

In essence it was submitted that prerogative writs should not be issued in such cases to encourage unscrupulous petitioners from gaining any advantage. In this context it is worthwhile to examine the ancestory of Article 32 which has been acclaimed to be an effective fundamental right.

It may be recalled that when the sub-committee on fundamental rights assembled for the first time on 27.2.1947, Alladi Krishnaswami Ayyar had pointed out that the citizens' rights to be embodied in the Constitution should consist of guarantees enforceable in courts of law and it was no use laying down precepts which remained unenforceable or ineffective. As to the precise means by which these rights were to be guaranteed K.M. Munshi was emphatically of the view that the Constitution should provide for writs to be issued by the courts.[5]

In his note on fundamental rights K.M. Munshi had pointed out that fundamental rights in the United States and Civil Liberties in Britain had been preserved by reason of two factors: (a) an independent judiciary, and (b) the prerogative writs of *habeas corpus*, *mandamus*, prohibition, *certiorari* and *quo warranto*. In India, he added only the high courts of Madras, Bombay and Calcutta were vested with the power to issue writs and this power extended only to the respective city areas where these courts exercised jurisdiction; with the result that except in these three cities the machinery for enforcing civil rights was the tardy remedy of the suit and the public conscience was not, therefore, keenly alive to the assertion of rights against the executive. If writs were not provided for in the new Constitution, people would have to subject themselves to the loss of valuable rights before the constitutionality of an act of the government was tested in a suit which might take years to be finally decided. He observed:[6]

> The object of the fundamental law will be frustrated if people have to serve sentences, pay fines or deny themselves the

5. See Munshi's Note on Fundamental Rights, Select Documents II, 4(ii)(b) at 71-73.

6. *Id.* at 79.

> privileges given by the Constitution for a long time under an invalid law. Without prompt machinery of enforcement the Union and State Governments might conceivably lapse into a programme inimical to freedom. The existence of a legal right in the Constitution must necessarily imply a right in the individual to intervene in order to make the legal right effective.

Thus, in his draft provisions on fundamental rights, the right to constitutional remedies was incorporated as a fundamental right. This view was strongly supported by BR Ambedkar himself and thus took shape article 32 of the Constitution in the present form.[7]

Alladi Krishnaswami Ayyar, however, thought that having regard to the variety of rights embodied in the list of fundamental rights an omnibus clause would be inappropriate and the result might well be that the Supreme Court be flooded with applications of all sorts. He, therefore, suggested that original jurisdiction should be conferred on the Supreme Court only in certain matters and that over the rest of the field its jurisdiction should be revisionary or appellate.[8]

This proposal, however, did not find favour with any one. Ambedkar stated that the jurisdiction of the Supreme Court to issue all types of writs should be expressly derived from the Constitution so that no legislature under any circumstances except in an emergency would have the power to take away the right.[9]

About article 32 Ambedkar asserted thus: [10]

> If I was asked to name any particular article in this Constitution as the most important article without which this Constitution would be a nullity, I could not refer to any other article except this one. It is the very soul of the Constitution and the very heart of it.

This observation of the architect of the Constitution amply demonstrates in bold relief the importance and pre-eminence of article 32 to the Indian citizenry. In fact article 32 embodies the aspirations of the framers of the Constitution to provide direct access to the highest judicial forum in the country for the enforcement of fundamental right.

In keeping with this view of the framers of the Constitution the Supreme Court has been interpreting article 32 as an important and integral part of the basic structure of the Constitution because it is

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7. See Select Documents II, 4(iii) and (iv) at 131-32.

8. See Minute of Dissent to Report of Sub-Committee, Select Documents II 4(ix) at 181-82.

9. See Select Documents II 7(1) at 299.

10. See Constitutional Assembly Debates, vol. VII at 950.

meaningless to confer fundamental rights without providing for an effective remedy for their enforcement, if and when they are violated. Thus, the power conferred on it by this article has been characterised by the court as that of a "sentinel on the qui vive".[11] It may be true that in the matter of enforcement of fundamental rights, the high courts under article 226 and the Supreme Court under article 32 enjoy concurrent jurisdiction. But the nature of article 32 is different. It is a fundamental right in itself. This was made clear as early as in 1950 when a five judge bench of the Supreme Court[12] in *Romesh Thapar* v. *State of Madras*[13] had held thus:[14]

> Article 32 does not merely confer power on the Supreme Court, as Article 226 does on the High Courts, to issue certain writs for the enforcement of the rights conferred by Part III of the Constitution or for any other purpose as part of its general jurisdiction. Article 32 provides a "guaranteed" remedy for the enforcement of those rights, and this remedial right is itself made a fundamental right by being included in Part III. The Supreme Court is thus constituted the protector and guarantor of fundamental rights, and *it cannot consistently with the responsibility so laid upon it, refuse to entertain applications seeking protection against infringements of such rights. The jurisdiction thus conferred on the Supreme Court by Article 32 is not concurrent with the one given to High Courts by Article 226.*

This view was reiterated by another five judge bench of the Supreme Court[15] in *K.K. Kochunni* v. *State of Madras*.[16] It was observed:[17]

> Even if the existence of other adequate legal remedy may be taken into consideration by the High Court in deciding whether it should issue any of the prerogative writs on an application under Article 226 of the Constitution… *the court cannot decline to entertain a petition under Article 32 for the right to move this Court by appropriate proceedings for the enforcement of the rights conferred by part III of the Constitution is itself a*

11. *State of Madras* v. *V.G. Row*, AIR 1952 SC 196.

12. Consisting of Kania CJ, Fazal Ali, Patanjali Sastri, Mahajan, B.K. Mukherjee and Das JJ.

13. AIR 1950 SC 124.

14. *Id.* at 126 (Emphasis added).

15. The bench consisted S.R. Das CJ; N.H. Bhagwati, B.P. Sinha, K. Subba Rao and K.N. Wanchoo, JJ.

16. AIR 1959 SC 725.

17. *Id.* at 730.

> *guaranteed right … the mere existence of an adequate alternative legal remedy cannot per se be a good and sufficient ground for throwing out a petition under Article 32,* if the existence of a fundamental right and a breach actual or threatened, of such right is alleged and is prima facie established on the petition.

In the same vein is the observation of a six judge bench of the Supreme Court[18] in *Kharak Singh* v. *State of U.P.*[19] It was observed therein thus:[20]

> It is wholly erroneous to assume that before the jurisdiction of the Supreme Court under Article 32 could be invoked the applicant must either establish that he has no other remedy adequate or otherwise or that he has exhausted such remedies as the law affords and has yet not obtained proper redress, for when once it is proved to the satisfaction of the Supreme Court that by state action the fundamental right of a petitioner under Article 32 has been infringed, *it is not only the right but the duty of the Supreme Court to afford relief to him by passing appropriate orders in that behalf.*

In fact this exposition of the vitality of Article 32 would dismiss the validity of the ruling under comment. Over the years it has been the consistent view of the Supreme Court that when once it is satisfied that the petitioners' fundamental right has been infringed, it is not only its right but also its duty to afford relief to the petitioners, and he need not establish either that he has no other adequate remedy or that he has exhausted all remedies provided by law, but has not obtained proper redress. Once the petitioner establishes infringement of fundamental right, the court has no discretion but to issue an appropriate writ in his favour.[21] Article 32 being a fundamental right in itself, the existence of an alternative remedy is no bar to the Supreme Court entertaining a petition under this article for the enforcement of a fundamental right.[22]

The constitutional basis of this substantive right emanating from procedural context, has, however, come to be watered down by smaller benches of the Supreme Court. This is unfortunate. The decisions in *Kanubhai Brahmbhatt* v. *State of Gujarat*,[23] *P.N. Kumar* v. *Municipal*

18. The bench consisted of B.P. Sinha CJ; S.J. Imam, K. Subba Rao, J.C. Shah, N. Rajagopala Ayyangar and J.R. Madholkar JJ.

19. AIR 1963 SC 1295.

20. *Id.* at 1301-02.

21. See *Kochhunni, supra* note 16. Also see *Kharak Singh, supra* note 19; *Daryai* v. *Uttar Pradesh,* AIR 1961 SC 1457.

22. See *Kochhunni, ibid.*

23. AIR 1987 SC 1159 (The Bench consisted of MP Thakkar and BC Ray, JJ.).

*Corpn. of Delhi*[24] and *Paul Manickam*,[25] are in point. In *Kanubhai*[26] the court directed the petitioners to file the writ petition in the high court for two reasons: (a) entertainment of such petitions by the Supreme Court would result in alarming increase in arrears pertaining to matters within its exclusive jurisdiction; and (ii) not entertaining such writ petitions would necessarily inspire confidence of litigants in the high courts. It may be said that both these reasons are fragile.

In this context, Thakkar J's comparison of the Supreme Court with a super speciality national hospital and the high courts with regional hospitals with adequate facilities is interesting. To quote the judge:[27]

> Suppose there is only one national hospital established especially for performing open-heart surgery which cannot be performed elsewhere in any of the eighteen regional hospitals. What will happen to the patients needing such surgery, if the national hospital which alone is specially equipped for this type of surgery, throws its doors wide open also for patients suffering from other ailments who can be treated by any and every one of the eighteen regional hospitals?… Will it not be more merciful to all concerned (by being firm enough) to tell those suffering from other than heart problems to go to regional hospitals instead of insisting on being treated at the National Hospital, which also can of course treat them, but only at the cost of neglecting the heart patients who have nowhere to go?

According to the judge if the Supreme Court were to take up everything which the high courts also can do it would not be able to do what it alone can do under article 136 and other provisions of the Constitution conferring exclusive jurisdiction on it. Besides, there is no reason to assume that high courts will not do justice or that the apex court alone will do justice. He has further held:[28]

> If this court entertains writ petitions at the instance of parties who approached this court directly instead of approaching the concerned High Court in the first instance, tens of thousands of writ petitions would in course of time be instituted in this court directly. (More than 9,000 are already pending now). The inevitable result will be that the arrears pertaining to matters in respect of which the court exercises exclusive jurisdiction under the Constitution will assume more alarming proportions. … The

24. (1987) 4 SCC 609 (The Bench consisted of E.S. Venkataramiah and K.V. Singh, JJ).
25. *Supra* note 2.
26. *Supra* note 21, *ibid*.
27. *Id.* at 1159-60.
28. *Ibid.*

> time for imposing self discipline has already come even if it involves shedding of some amount of institutional ego, or raising of some eye brows. Again, it is as important to do justice at this level, as to inspire confidence in the litigants that justice will be meted out to them at the high court level, and other levels. Faith must be inspired in the hierarchy of courts and the institution as a whole. Not only in this court alone. And this objective can be achieved only by this court showing trust in the high court by directing the litigants to approach the high court in the first instance.

In the same vein are the observations of the two judge bench of the apex court in *P.N. Kumar* v. *Municipal Coprn. of Delhi*.[29] While disposing of the instant case the court expressed no "opinion on the merits of the case reserving liberty to the petitioners to file a petition, if so advised, before the High Court under Article 226 of the Constitution."[30] The court, then enumerated 10 reasons why a petitioner should approach the High Court at the first instance and not the Supreme Court. Among the reasons mentioned, *inter alia*, are:[31]

> The relief prayed for in the petition is one which may be granted by the High Court and *any of the parties who is dissatisfied with the judgment of the High Court can approach this Court by way of an appeal*. The fact that some case involving the very same point of law is pending in this Court is no ground to entertain a petition directly by-passing the High Court…
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> Our High Courts are High Courts. Each High Court has its own high traditions. They have judges of eminence who have initiative, necessary skills and enthusiasm. Their capacity should be harnessed to deal with every type of case arising from their respective areas, which they are competent to dispose of.
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> Every High Court Bar has also its high traditions. There are eminent lawyers practising in the High Courts with wide experience in handling different kinds of cases, both original and appellate. They are fully aware of the history of every legislation in their States. Their services should be made available to the litigants in the respective States…
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> Lastly, the time saved by this Court by not entertaining the cases which may be filed before the High Courts can be utilised to dispose of old matters in which parties are crying for relief.

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29. See *supra* note 24.
30. *Ibid.* (emphasis added).
31. *Id.* at 610, 611.

Constitutionally speaking the Supreme Court has no right to lament thus. It cannot disown its constitutional obligation to deal with violation of fundamental rights under article 32. It is different thing if it advises the citizens to seek justice in high courts. If these views as expressed in *Kanubhai, P.N. Kumar* and *Paul Manikam* were to be put strictly into practice, then article 32 would practically become redundant. If a petitioner were to approach the high court under article 226 he can then approach the Supreme Court only under article 136 by way of special leave to appeal. His fundamental right to judicial remedies under article 32 is then lost and he is thus deprived of a valuable right. The power of the Supreme Court under article 136 to entertain an appeal is an appellate power – discretionary to an extent – whereas its power under article 32 is an original power.

When an appellant approaches the Supreme Court under article 136, it may or may not entertain the appeal even if there has been a violation of his fundamental right but that would not be the case if he approaches the Supreme Court under article 32 for violation of his fundamental right, the only condition which is a *sine-qua-non* for approaching the apex court by way of a writ. When a petitioner approaches the Supreme Court under article 32, the mater is finally decided by the court. But when he approaches the high court under article 226, in the first instance, the petition is first taken cognisance of by a single judge of the high court and on appeal by a division bench of that court. Only thereafter can the petitioner come to the Supreme Court by way of appeal under article 136. All these will cause delay and prove to be more costly to the seeker of fundamental rights when compared to the speedy and efficacious remedy available to him under article 32.

Article 32 being a fundamental right in itself is neither circumscribed nor subject to article 226 nor any other article for that matter.

The present interpretation would make article 32 subservient to article 226, which is illogical and impermissible. While one appreciates the concern of the judges in these three cases, the question is, can this interpretation be given effect to in the face of five and six judge bench decisions holding otherwise as quoted above? Therefore, the issues need to be decided by a Constitution bench of seven judges if it has to have any binding force. Also this right, which according to the framers of our Constitution "no legislature under any circumstances except in an emergency would have the power to take away"[32] be effectuated by a mere judicial *fiat*?

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32. See *supra* note 10.

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