**IN THE SUPREME COURT OF INDIA**

Review Petition (C) No. 1841 of 1997 in Writ Petition (C) 824 of 1988

Decided on: 30.03.1998

Appellants: **(1) Gaurav Jain (2) Supreme Court Bar Association**
**Vs**.
Respondent: **Union of India and Ors.**

Citation - 1998 (4) SCC 270

1997 (8) SCC 114 Overruled in 1998 (4) SCC 270 Supreme Court of India

**BENCH**:

SUJATA V. MANOHAR, S.P. KURDUKAR, D.P. WADHWA, JJ

**JUDGMENT:**

Mrs. Sujata V. Manohar, J.

This is a somewhat unusual review petition filed by the Supreme Court Bar Association and supported by Gaurav Jain, the original petitioner, in respect of a decision of a Bench of two judges of this court, Ramaswamy and Wadhwa, JJ. in writ petition (c) No. 824 of 1988, Gaurav Jain v. Union of India & Ors. and reported in 1997 (8) SCC 114. By an order dated 5th of January, 1998 this review petition has been directed to be heard by a Bench of three judges of this Court. Hence the petition has been placed before us. The original writ petition under Article 32 of the constitution was filed as a public interest litigation by Gaurav Jain, an advocate of this Court. In the writ petition, the petitioner had asked for establishment of separate educational institutions for the children of prostitutes and for various other reliefs concerning children of prostitutes. The petition was heard and disposed of by a Bench of two judges - Ramaswamy and Wadhwa, JJ. In the judgment delivered by Ramaswamy, J., apart from a discussion of the plight of prostitutes and their children, various directions have been given, including directions for the constitution of a committee as set out in the judgment, to examine the plight of children of the prostitutes as also the problems of the prostitutes themselves and to devise ways and means for amelioration of their condition and for prevention and eradication of prostitution. On the other hand, Wadhwa, J. in his judgment, while agreeing with the directions given by Ramaswamy, J. pertaining to the children of the prostitutes, has not agreed to the directions given in respect of eradication of prostitution or succour and sustenance to be provided to them. He has stated: "The committee in its report which runs into over 100 pages has only referred in two paragraphs,

while examining target group, as to who are the prostitutes. Apart from this I do not find there is any discussion in the report of the Committee towards eradication of prostitution. As to what should be the scheme to be evolved to eradicate prostitution, i.e. the source itself; the basics; and what succour and sustenance can be provided to the fallen victims of flesh trade was not a question agitated in the proceedings. Certainly no one can dispute that evil of prostitution must be curbed. It is the mandate of the Constitution which prohibits traffic in human beings.....

I am not entering into the scope and width of public interest litigation but when the issue has not been squarely raised, concerned parties not informed, pleadings being not there, it may not be correct to embark upon that task and to give interpretation of the law applicable thereto and that too without hearing the parties when the issue is so profound certainly involving hearing of the Union of India and State Governments with respect to their problems. Thus considering the substratum of the judgment prepared by my learned brother relating to children of the prostitutes and establishment of the juvenile homes I would concur with the directions being issued by him in his order. I would, however, record my respectful dissent on the question of prostitution and the directions proposed to be issued on that account and also, in the circumstances of the case, what my learned brother has to say on the directions proposed to be issued referring to the provisions of to be issued referring to the provisions of Article 142 and 145(5) of the Constitution"

[underlining ours].

Despite this clear dissent voiced by his brother judge, Ramaswamy, J. has given directions relating to prostitution and its eradication. He has held that under Article 32 of the Constitution, when a public interest litigation is launched, it cannot be considered as adversarial. It involves cooperation between the State and the Court. Had it been an adversarial dispute, in view of the dissent expressed by his brother judge, he would have referred the matter to a three judge Bench in respect of the directions on which he and his brother judge had differed. However, since the petition was public interest litigation and was not adversarial in nature, and since the matter was pending for nearly a decade, if a reference were to be made to a three-judge Bench, it may be further delayed. Therefore, under Article 142 he could issue directions to enforce his order in its entirety even in respect of that portion of the order from which his brother judge had dissented, in order to do complete justice in the case. By availing of Article 142, a Single Judge sitting in a Division Bench of two judges has issued directions singly although there is a difference of opinion between him and his brother judge. It is this part of his order which is sought to be reviewed on the ground that it discloses and error apparent on the face of the record.

Article 145(1) of the Constitution provides that subject to the provisions of any law made by Parliament, the Supreme Court may, from time to time, with the approval of the President, make rules for regulating generally the practice and procedure of the court. The Supreme Court Rules have been framed under this provision. Under clause (2) of Article 145, subject to the provisions

of clause (3), rules made this Article may fix the minimum number of judges who are to sit for any purpose, and may provide for the powers of single judges and Division Courts. Clause (5) of Article 145 provides as follows:

"145(5): NO judgment and no such opinion shall b delivered by the Supreme Court save with the concurrence of a majority of the judges present at the hearing of the case, but nothing in this clause shall be deemed to prevent a judge who does not concur from delivering a dissenting judgment or opinion."

In view of Article 145(5) the concurrence of a majority of judges present at the hearing of a case is necessary for any judgment or order. When a Bench consists of two judges and they differ, the correct procedure is to refer the matter to the Chief justice for constituting a larger bench. Under Order VII Rule 1 of the Supreme Court rules, 1966, subject to the other provisions of these rules, every cause, appeal or matter shall be heard by a Bench consisting of not less than two judges nominated by the Chief Justice subject to certain provisos. Rule 2 of Order VII provides that where, in the course of the hearing of any cause, appeal or other proceeding, the Bench considers that the matter should be dealt with by a larger Bench, it shall refer the matter to the chief Justice, who shall thereupon constitute such a Bench for the hearing of it. Order XXXV deals with applications for enforcement of fundamental rights under Article 32 of the Constitution. Rule 1 of Order XXXV provides as follows:

"1. (1): Every petition under Article 35 of the Constitution shall be in writing and shall be heard by a Division Court of not less than five judges provided that a petition which does not raise a substantial question of law as to the interpretation of the Constitution may be heard and decided by a Division court of less than five judges, and, during vacation, by the Vacation Judge sitting singly."

Rules 10 (1) and (2) of Order XXXV are as follows: "10(1): Unless the court otherwise orders, the rule nisi together with a copy of the petition and of the affidavit in support thereof shall be served on the respondent not less than twenty-one days before the returnable persons directly affected and on such other persons as the Court may direct.

(2) Affidavits in opposition shall be filed in the Registry not later than four days before the returnable date and affidavits in reply shall be filed within two days of the service of the affidavit in opposition."

Therefore, counter affidavits can be filed by the respondents in a public interest litigation, and further affidavits in rejoinder etc. can also be filed. There is no provision under Order XXXV for any special procedure in respect of a public interest petition under Article 32. The petition will have to be served on the respondents who have a right to file a counter affidavit. Although the proceedings in a public interest litigation may not be adversarial in a given case, there can clearly

be different perceptions of the same problem or its solution and the respondents are entitled to put forth their own view before the Court which may or may not coincide with the view of the petitioner. The court may come to a view different from that of any of the parties. Therefore, even in a public interest litigation, if the members of the Bench hold different views, the provisions of Article 145(5) will apply and the matter will have to be decided by a majority. When a Bench consists of two judges and they differ, the matter must necessarily be referred to the Chief justice for constituting a larger Bench. In fact this legal position is expressly noted by Ramaswamy, J. However, he has taken the view that despite the provisions of Article 145(5), he can take the assistance of Article 142 for the purpose of issuing directions even though his brother judge has differed from these directions.

We do not find any thing in Article 142 which enables the court to do so. Article 142 provides as follows: "142. Enforcement of decrees and orders of Supreme Court and orders as to discovery, etc.-

(1) 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, and any decree so passed or order so made shall be enforceable throughout the territory of India in such manner as may be prescribed by or under any law made by parliament and, until provision in that behalf is so made, in such manner as the President may by order prescribe.

(2) ..... "

It does not and cannot override Article 145(5). The decrees or orders issued under Article 142 must be issued with the concurrence of the majority of judges hearing the matter. In the case of Prem Chand Garg and Anr. v. Excise Commissioner, U.P. and Ors. (AIR 1963 SC 996), a Bench of five judges of this Court considered a Rule made by this Court providing for imposition of terms as to costs and as to giving of security in a petition under Article 32. The Rule was sought to be justified, inter alia, on the ground that the powers conferred on this Court under Article 142 were very wide and could not be controlled by Article 32. Negativing this contention, this Court said, "The powers of this Court under Article 142(1) are no doubt very wide and they are intended and would 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 cannot even be inconsistent with the substantive provisions of the relevant statutory laws. Therefore, we do not think it would be possible to hold that Article 142(1) confers upon this Court powers which can contravene the provisions of Article 32". Similarly, powers conferred by Article 142(1) also cannot contravene the provisions of Article 145(5). Article 142 would not entitle a judge sitting on a Bench of two judges, who differs from his colleague to issue directions for the enforcement of his order although it may not be the

agreed order of the Bench of two judges. If this were to be permitted, it would lead to conflicting directions being issued by each judge under Article 142, directions which may quite possibly nullify the directions given by another judge on the same Bench. This would put the court in an untenable position. Because if in a Bench of two judges, one judge can resort to Article 142 for enforcement of his directions, the second judge can do likewise for the enforcement of his directions. And even in a larger Bench, a judge holding a minority view can issue his order under Article 142 although it may conflict with the order issued by the majority. This would put this Court in an indefensible situation and lead to total confusion. Article 142 is not meant for such a purpose and cannot be resorted to in this fashion. The learned judge is in error in resorting to Article 142 for the purpose of enforcement of his directions although his brother judge has dissented from those directions. The justification which is put forward for resorting to Article 142 is that reference to a larger Bench would cause delay. This cannot be a ground for not following the provisions of the Constitution under Article 145. Whenever a matter has to be referred to a larger Bench, there is bound to be some delay. But such a reference is necessary in the interest of justice. It is necessary that the Court speaks with one voice and that voice is the voice of the majority as propounded in Article 145(5). Only then can its orders be enforced. When two judges differ, the matter will have to be decided by a larger Bench. We, therefore, allow this review petition. The directions given by the learned judge relating to prostitution and/or its amelioration or eradication are set aside. This, however, should not be understood as preventing the Union or State Governments from formulating their own policies in this area or taking measures to implement them. His observations relating to the use of Article 142 in this connection are also set aside and the question of giving any directions in relation to prostitution, its eradication or amelioration will have to be placed before a larger bench if any directions are required to be given in that connection by this Court. The matter should be placed before the Hon'ble Chief Justice for considering whether a larger Bench should be constituted for this purpose. In view of this order, the application filed by the Union of India - I.A. No. 1 is not pressed. It is accordingly disposed of.