

1960

February 26

SAHIBZADA SAIYED MUHAMMED  
AMIRABBAS ABBASI & OTHERS

v.

THE STATE OF MADHYA BHARAT  
& OTHERS

(B. P. SINHA, C.J., JAFER IMAM, A.K. SARKAR,  
K. N. WANCHOO AND J. C. SHAH, JJ.)

*Personal Law—Right to Guardianship—If can be enforced by way of constitutional remedy—Constitution of India, Art. 32.*

The first petitioner, who had migrated to West Pakistan, applied to the High Court of Madhya Bharat for a writ of *habeas corpus* for directions to produce petitioners 2 and 3, his minor children, before the Court on the allegation that they were wrongfully confined and, upon the dismissal of the said application, applied to the District Judge of Ratlam under the Guardian and Wards Act for his appointment as guardian of the person and property of the said minors. The District Judge rejected the application and appointed the second respondent as such guardian. The first petitioner appealed to the High Court against the said order of the District Judge but that appeal was dismissed. He applied for special leave to appeal to this Court but that application was also rejected. Thereafter the first petitioner, as natural guardian of petitioners 2 and 3, filed the present petition under Art. 32 of the Constitution. His case in substance was that the interest of the second respondent was adverse to that of the minors, that he had misappropriated their property and that the first respondent, the State of Madhya Bharat, was bound to take steps to protect the property of the minors which it had failed to do and had thus rendered itself liable to make good the loss sustained by the minors in consequence.

*Held*, that the petition was wholly misconceived, and must be dismissed.

The Court can exercise jurisdiction under Art. 32 of the Constitution only in enforcement of the fundamental rights guaranteed by Part III of the Constitution. Where on account of the decision of a court of competent jurisdiction, the right alleged by the petitioner does not exist and therefore its infringement cannot arise, this Court cannot entertain a petition under that Article for protection of the alleged right.

A claim as to denial of equality before the law or the equal protection of the laws can be made against executive action or against legislative process but not against the decision of a court of competent jurisdiction.

Nor can an order of this Court rejecting an application for special leave under Art. 136 of the Constitution be circumvented by an application for a writ under Art. 32.

ORIGINAL JURISDICTION: Petition No. 217 of 1956.

Petition under Article 32 of the Constitution of India for enforcement of Fundamental rights.

*Pandit Nanak Chand*, for the petitioners.

*I. N. Shroff*, for respondent No. 1.

1960 February, 26. The Judgment of the Court was delivered by

SHAH, J.—This is a petition filed by Sahibzada Saiyed Muhammed Amirabbas Abbasi, who will hereinafter be referred to as the first petitioner on behalf of himself and as the natural guardian of his two minor children, Kamal Abbas and Jehanzeb Bano, petitioners Nos. 2 and 3 against the State of Madhya Bharat (now the State of Madhya Pradesh) and three other respondents for an appropriate writ or writs of Habeas Corpus, Mandamus, Certiorari, Prohibition and any other writ, direction or order directing the State of Madhya Bharat immediately to assume charge of the properties of the minor petitioners 2 and 3 and determining the amount of loss sustained by the minors and calling upon the State of Madhya Bharat and the other respondents to compensate the minors for the full value of the property lost due to their negligence in the discharge of their respective duties in failing to protect the minors' properties, and calling upon the 4th respondent to produce the minors before this court and directing that the minors be handed over to the custody of some relation who is competent under the Personal Law to have their custody, and calling upon the Chief Secretary of the State of Madhya Bharat to furnish full particulars of the trust property released in favour of the 2nd respondent and directing the 1st respondent to produce in this court the box of jewellery entrusted to it with full particulars regarding its custody from March 29, 1948, and ascertaining whether the contents have been misappropriated and further ascertaining the loss, if any, occasioned to the minor petitioners and its quantum and declaring liability of the respondents in that behalf and for further relief which the court may award in the circumstances of the case, as just and proper.

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Prima facie, the reliefs claimed are not within the scope of a petition for a writ under Art. 32 of the Constitution. This court has power under that Article to issue directions, orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari whichever may be appropriate for the enforcement of any of the fundamental rights; but by this petition, the first petitioner claims on the plea that the respondents have misappropriated or misapplied the property of petitioners 2 and 3, a writ or writs directing that loss sustained by the minors be ascertained and made good and also asks this court to provide for the custody of the minors according to their Personal Law.

The facts which give rise to the petition are these:

The first petitioner married in 1940 one Naiyar Jahan Begam and by her he had two children—petitioners 2 and 3. Naiyar Jahan Begam died in the year 1943 and petitioners 2 and 3 were thereafter looked after by Musharraf Jahan Begam, mother of Naiyar Jahan Begam. From her father Naiyar Jahan Begam had inherited certain valuable property and from her mother, Musharraf Jahan Begam, she had received a dowry of substantial value at the time of her marriage. Before she died on March 6, 1949, Musharraf Jehan Begam had made a trust in respect of certain property of the benefit of petitioners 2 and 3. The first petitioner had after the death of Naiyar Jehan Begam contracted a second marriage and of that marriage there were three children. During the life of Musharraf Jehan Begam the first petitioner took no interest in petitioners 2 and 3 and at some-time in the year 1948, he migrated to West Pakistan and took up residence in Rawalpindi. After the death of Musharraf Jehan Begam, the first petitioner applied to the Madhya Bharat High Court for a writ in the nature of habeas corpus for a direction to produce petitioners 2 and 3 before the court on the allegation that the latter were wrongfully detained. The High Court refused to give the direction and ordered that the first petitioner might, if so advised, apply under the Guardian and Wards Act for appropriate relief. The first petitioner then applied to the

court of the District Judge at Ratlam for an order that he be appointed a guardian of the person and property of petitioners 2 and 3. On November 23, 1949, the second respondent, Sultan Hamid Khan, cousin of Musharraf Jehan Begam applied that he be appointed guardian of the person and property of petitioners 2 and 3 and by order dated December 5, 1949, the District Court appointed him guardian and rejected the application filed by the first petitioner. Against the order passed by the District Court, Ratlam, Appeal No. 20 of 1950 was filed in the High Court of Madhya Bharat. This appeal was dismissed on March 29, 1954. An application for special leave to appeal to this court under Act. 136 against that order of the High Court was rejected on November 12, 1956.

The first petitioner had, in the meantime, applied to this court under Art. 32 of the Constitution for the reliefs which have already been set out. To this petition, petitioners 2 and 3 were impleaded as party petitioners, the first petitioner alleging that he was their natural guardian and next friend. Evidently, the first petitioner could not claim to be the next friend of the minor petitioners 2 and 3, a guardian of their person and property having been appointed by the District Court, Ratlam, unless this court for reasons to be recorded deemed it to be for the welfare of the minors that the first petitioner be permitted to act or be appointed as the case may be (vide O. 32, r. 4 of the Code of Civil Procedure). The first petitioner did not obtain any order of this court permitting him to act as the next friend of petitioners 2 and 3 notwithstanding the order passed by the District Court appointing respondent No. 2 as their guardian.

The petition filed by the first petitioner is a somewhat prolix document. The first petitioner claimed that the interest of the second respondent who was appointed a guardian by the District Court was adverse to the interests of the minors, and that the latter was, in any event, unfit to be appointed a guardian of the minors, that the second respondent had misappropriated the property of the minors and that he was not looking after the minors and was

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acting contrary to their interest and that proceedings in the District Court were vitiated on account of 'partiality and collusion' and by reason of deliberate violation of the order passed by the High Court. The petitioner also claimed that the State of Madhya Bharat was bound to take steps to protect the entire property of the minor petitioners 2 and 3, but the first respondent had neglected to do so and had thereby rendered itself liable to make good the loss.

On these allegations, the first petitioner submitted that the minor petitioners were deprived of the equal protection of the laws in force including the Personal Law and were accordingly discriminated against and their property was, by reason of such discrimination in serious danger of being wasted or mis-appropriated. He also submitted that he could not be denied his rights under the Personal Law governing the minors as their natural guardian, merely because he had acquired a foreign domicile.

Exercising jurisdiction under Art. 32 of the Constitution, this court may grant relief for enforcement, only of the rights conferred by Part III of the Constitution. The alleged right of the first petitioner to guardianship of his minor children under the Personal Law is not one of the fundamental rights guaranteed to him by the Constitution; nor by appointing respondent No. 2 as the guardian of the minors under the Guardian and Wards Act is discrimination practised against the minors. The second respondent was appointed guardian of the minors by order of a competent court, and denial of equality before the law or the equal protection of the laws can be claimed against executive action or legislative process but not against the decision of a competent tribunal. The remedy of a person aggrieved by the decision of a competent judicial tribunal is to approach for redress a superior tribunal, if there be one. In the present case, against the order of the District Court appointing the second respondent the guardian of the person and property of the minors, an appeal was preferred to the High Court and that appeal was dismissed. Even an application for special leave to appeal to this court was rejected, and the order of the District Court

became final. If, since the date on which the order appointing the guardian of the minors, events have transpired which necessitate a modification of that order, the proper remedy of the first petitioner is to apply to the District Court for relief in that behalf and not to approach this court for a writ under Art. 32 of the Constitution. This court has rejected the application for special leave to appeal under Art. 136; and that order cannot be circumvented by resorting to an application for a writ under Art. 32. Relief under Art. 32 for enforcement of a right conferred by ch. III can be granted only on proof of that right and infringement thereof, and if, by the adjudication by a court of competent jurisdiction the right claimed has been negatived, a petition to this court under Art. 32 of the Constitution for enforcement of that right, notwithstanding the adjudication of the civil court, cannot be entertained.

The relief claimed by the first petitioner for assessing the liability of the respondents on the plea that they have either misappropriated the estate or by negligence caused loss to the estate of the minors, may be obtained in a properly constituted suit and not in a petition under Art. 32 of the Constitution. The property to which the minors are or may be entitled may be ascertained in a proceeding under the Guardian and Wards Act or in a suit in the civil court and not in a petition under Art. 32 of the Constitution.

In our judgment, the petition is wholly misconceived and must be dismissed with costs payable by the first petitioner personally.

*Petition dismissed.*

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