P. N. Eswara Iyer and Others

Vs

Registrar, Supreme Court of India

Writ Petitions Nos. 151, 187, 238, 458, 1038, 1069 and 1277 of 1979

(V. R. Krishna Iyer, Syed M. Fazal Ali, D. A. Desai JJ)

01.02.1980

JUDGMENT

KRISHNA IYER, J.(Fazal Ali and Desai, JJ.) –

1. Tersely expressed, this bunch of cases challenges the vires of a recent amendment made by the Supreme Court under Article 145 in the matter of review petitions whereby the judges will decide in circulation, without the aid of oral submission, whether there is merit in the motion and, in their discretion, choose to hear further arguments in court.

2. Is orality in advocacy - that genius of Indo-Anglian Justice - an inalienable and ubiquitous presence in the court process, or does it admit of abbreviated appearance and - more pertinent to the point here - discretionary eclipse, at least when it has been preceded by a sufficient oral session ? Secondly, is hearing on Bench in public, in contrast to considering the matter in conferential circulation, the only hallmark of judicial justice, absent which the proceeding always violates the norms of equality implicit in Article 14, the limits of 'reasonableness' bedrocked in Article 19, the procedural fairness rooted in Article 21 ? And, finally, by resort to operational secrecy, does rationing or burking of oral hearing travesty the values of our Justice System ?

3. These basic problems of the forensic process, of pervasive impact and seminal import, fall for consideration in these writ petitions under Article 32 of the Constitution. The charge is that the novel expedient of substitution of oral arguments by written submissions and orders in circulation dispensing with public sitting, save where - and that may be rare - the judges in their discretion choose to hear arguments in court, is a dangerous deviance from the fundamentals of the Judicial Process. Apprehending maybe, the futuristic repercussions of a decision on these questions, even though now restricted to review petitions, in other fields of 'hearing' at a later time, the Supreme Court Bar Association has intervened and argued to impugn the amended rule through its President, Dr. L. M. Singhvi, in supplementation of parties' submissions. We have allowed even other advocates to make brief contributions, because, when this Court considers issues of moment and pronounces thereon, the law so declared binds all, and it is ensouled in democratic propriety that the voice of reason and instruction be received from every permissible source in the nation, if processed according to cursus curiae. This participative principle lends people's legitimation to the judicial process and strengthens the credentials of the rule of law.

4. The composite question, which settles the fate of these petitions, emerges this way. Article 137 provides for review of judgments or orders of this Court, subject to the provisions of any law made by Parliament or any rule made under Article 145. We are here concerned with a rule made by this Court. The rule-making power under Article 145 is geared to 'regulating generally the practice and

procedure of the court'. In particular, Article 145(1)(b) and (e) authorise such 'judicial' legislation in the shape of rules as to "the procedure for hearing appeals, and other matters pertaining to appeals" and also "as to the conditions subject to which any judgment pronounced or order made by the court may be reviewed and the procedure for such review." Such rules, like any other law, are subject to the imperatives of Part III and become non est if violative of the proscriptions and prescriptions of the Constitution vide Prem Chand Garg case (Prem Chand Garg v. Excise Commr., 1963 Supp 1 SCR 885 : AIR 1963 SC 996). Even the Supreme Court, in the scheme of our Republic, is no imperium in imperio.

5. The substantive power of review and the procedure for its exercise are essential for any judicial system if unwitting injustice is to be obviated to the extent pragmatically possible, without being blinded by any claim to impervious infallibility in the first judgment. Even judges, more than other mortals, to (sic are to) correct injustice if the error is discovered within working limits. Thus, the root principle of judicial review is profound. Judge Learned Hand commended to the judges the great rule of humility contained in the oft-repeated words of Cromwell : "I beseech ye in the bowels in Christ, think that ye may be mistaken" said Oliver Cromwell just before the battle of Dunbar. These words Judge Hand said he would like to have written "over the portals of every church, every court-house and at every crossroad in the nation". (Learned Hand : THE SPIRIT OF LIBERTY, p, XXIV) Such is the high-minded tolerance with which this Court re-examines its own orders to eliminate the happenstance of injustice unhampered by judicial hubris.

6. This Court had framed rules for review, right from the start, but a certain amendment, recently made, has curtailed oral hearing in court as a matter of course and this measure of discretionary truncation is attacked as fundamentally offensive to judicial justice of which this Court is the highest custodian. "If the salt hath lost his savour, wherewith shall it be salted ?" Surely, this Court's procedure should be the paradigm, nothing short of it. So, the question is whether it is so heathen to make oral hearing discretionary at the review stage and at the Supreme Court level that the rule can be condemned as constitutionally apostate ? Another fatal infirmity was also pointed out as the arguments proceeded, viz., that a hostile discrimination had been made by Rule 2(1) against litigants who moved for review in criminal proceedings as against those in the civil jurisdiction. We will relegate it for consideration to a later stage.

7. The relevant original rules ran thus :

> 2. (1) An application for review shall be by a petition, and shall be filed within thirty days from the date of the judgment or order sought to be reviewed. It shall set out clearly the grounds for review and shall, unless otherwise ordered by the court, be accompanied by a certificate from the advocate who appeared at the hearing of the case for the party seeking review, or where the party, appeared in person, from any advocate of this Court, that it is supported by proper grounds. The certificate shall be in the form of a reasoned opinion.
>
> (2) No application for review in a civil proceeding shall be entertained unless the party seeking review furnishes to the Registrar of this Court at the time of filing the petition for review, cash security to the extent of two thousand rupees for the costs of the opposite party.
>
> 3. An application for review shall be posted before the court for preliminary hearing and order as to be issue of notice to the opposite party. Union such hearing, the court

may either dismiss the petition or direct a notice to the opposite party and adjourn the hearing for such party to be heard. A petition for review shall as far as practicable be posted before the same Judge or Bench of Judges that delivered the judgment or order sought to be reviewed.

4. Where on application for review the court reverses or modifies its former decision in the case on the ground of mistake of law or fact, the court may, if thinks fit in the interests of justice to do so, direct the refund to the petitioner of the court fee paid on the application in whole or in part, as it may think fit.

8. The corresponding amended rules read thus :

2. (1) An application for review shall be by a petition, and shall be filed within thirty days from the date of the judgment or order sought to be reviewed. It shall set out clearly the grounds for review. (Subs. by GSR 387 dated March 3, 1978 and came into force on March 18, 1978)

(2) (No change)

3. [Unless otherwise ordered by the court] (Added by GSR 1024 dated August 9, 1978 and came into force on August 19, 1978) an application for review shall be disposed of by circulation without any oral argument, but the petitioner may supplement his petition by additional written arguments. The court may either dismiss the petition or direct notice to the opposite party. An application for review shall as far as practicable be circulated to the same Judge or Bench of Judges that delivered the judgment or order sought to be reviewed.

4. (No change)

5. Where an application for review of any judgment or order has been made and disposed of, no further application for review shall be entertained in the same matter. (newly inserted)

The vital difference, vis-a-vis the first point, is that now oral hearing is no longer a right of the petitioner but facultative with the Bench and the 'circulatory' system replaces the public hearing method. A brief study of the anatomy of the rules will highlight the points urged.

9. Dissecting the rules and comparing their directives we find that unchecked review has never been the rule. It must be supported by proper grounds. Otherwise, every disappointed litigant may avenge his defeat by a routine review adventure and thus obstruct the disposal of the 'virgin' dockets waiting in the long queue for preliminary screening or careful final hearing. It is perfectly reasonable to insist that the existence of proper grounds for review should be responsibly vouched for before the further time of the court is taken. So, the original rule required a certificate to that effect by the advocate who earlier had appeared in the case. Here, counsel functioned as an officer of the court and, under the mandate of the old Rule 2(1) the court granted or refused a certificate of review-worthiness. If it was so certified, then a preliminary oral hearing followed. After such oral argument, the court issued notice to the other side or dismissed the petition. The system was fair enough if the certification process worked well and real errors and apparent mistakes marring the original judgment were the restricted grounds for review. But as it turned out, laxity in certification

and promiscuity in filing review applications crowded and court with 'unwanted review babies'. The docket crisis which quaked the calendar deepened, to the detriment of litigative justice to the deserving who awaited their turn for hearing. Even otherwise, frivolous motions for review would ignite the 'gambling' element in litigation with the finality of judgments even by the highest court, being left in suspense. If, every vanquished party has a fling at 'review' lucky dip and if, perchance, notice were issued in some cases to the opponent the latter - and, of course, the former, - would be put to great expense and anxiety. The very solemnity of finality, so crucial to judicial justice, would be frustrated if such a game were to become popular. And it did become popular, as experience showed. The inflow of meritless review petitions, which were heard and dismissed, interrupted the stream of public justice. This Court in Sow Chandra Kante v. Sheikh Habib ((1975) 3 SCR 933 : (1975) 1 SCC 674, 675) was faced with this problem and, while dismissing the review petition, observed how the opportunity for correction of grave errors was being perverted into the purchase of a fresh appeal to the same court against its own appellate or other judgment on the same grounds which were earlier rejected. This Court said : (Ibid., pp. 933-34) (SCC p. 675, para 1)

A review of a judgment is a serious step and reluctant resort to it is proper only where a glaring omission or patent mistake or like grave error has crept in earlier by judicial fallibility. A mere repetition, through different counsel, of old and overruled arguments, a second trip over ineffectually covered ground or minor mistakes of inconsequential import are obviously insufficient. The very strict need for compliance with these factors is the rational behind the insistence of counsel's certificate which should not be a routine affair or a habitual step. It is neither fairness to the court which decided nor awareness of the precious public time lost what with a huge backlog of dockets waiting in the queue for disposal, for counsel to issue easy certificates for entertainment of review of fight over again the same battle which has been fought and lost. The Bench and the Bar, we are sure, are jointly concerned in the conservation of judicial time for maximum use. We regret to say that this case is typical of the unfortunate but frequent phenomenon of repeat performance with the review label as passport. Nothing which we did not hear then has been heard now, except a couple of rulings on points earlier put forward. Maybe, as counsel now urges and then pressed, our order refusing special leave was capable of a different course. The present stage is not a virgin ground but review of an earlier order which has the normal feature of finality.

These observations were symptomatic of the 'review syndrome' which, therefore, demanded remedying. And the amended rule purposefully incarnated under such auspices to remove the evil of reckless reviews by the introduction of preliminary judicial screening in circulation, replacing counsel's certification with court's scanning exercise - an added but necessitous judicial burden. If the review .... and written submissions (for which provision was made) convinced the court, prima facie, that material error had marred the justice or legality of the earlier judgment or order the case would be posted for oral hearing in court. Otherwise, not. 'Certworthiness' - an American judicial shorthand for 'certificate-worthiness' - was, by this amendment, shifted from counsel to court. This, in pith and substance, is the rationale of the amended rule.

10. Counsel, at one stage, asked whether there was back-up empirical research to warrant the assumptions in the amendment, whether facts and figures about the number and nature of wasted 'review' time of court and a host of other related aspects were available. No such material is before us now. It is fair to confess that the scientific method of undertaking research and study into public problems as prelude to legislation is a 'consummation devoutly to be wished' and lamentably lacking in our county; and court management, with special reference to maximisation of judicial time - a matter of great national moment - is a problem the very existence of which is currently beyond the ken of juristic research. Where 'awareness' is absent, ad hocism is inevitable. But here the

experiential evidence of the judges who considered and decided on the amendment and the inference available from the decisions on review petitions make good the proposition or makes do for empirical research.

11. Be that as it may, we are satisfied that enough justification exists in the daily experience of this Court to warrant the change the way it has been done. Even so, constitutional canons cannot be contravened even by pragmatic compulsions. Paramountcy is paramountcy and exigency must bow before it. What, then, are the paramount principles of constitutionality violated by the amended rule ? Absence of public hearing and oral presentation are the vices identified in counsel's arguments.

12. Two major submissions were made to invalidate Rule 2(1). The scuttling of oral presentation and open hearing is subversive of the basic creed that public justice shall be rendered from the public seat, not in secret conclave, that hearing becomes 'deaf' if oral impressiveness is inhibited by the circulation process, more congenial to the seclusion of bureaucratic cells, fed on files, than to the audio-visual argumentation heard in the halls of court, which is the insignia of judicial justice. Secrecy and circulation are the negation of judicial procedure. A review is a judicial proceeding and its hearing, to fill and bill, must not run away from the essentials of processual jurisprudence, however allergic some judges may be to the 'sound system' which is the heart of our forensics. With allotropic modifications, counsel's arguments stressed this recurrent theme.

13. We must make it perfectly plain, right at the outset, that audi alteram partem is a basic value of our judicial system. Hearing the party affected is too deeply embedded in the consciousness of our constitutional order. The question is about the quality, content and character of 'hearing' in the special 'review' situation. Incidentally, we may deal with oral hearing and its importance in the court process, the possibilities of its miniaturisation and, in certain categories its substitution by written submissions.

14. We agree that public hearing is of paramount significance. Justice, in the Indian Republic, is public; and if judges shun the halls of court, read papers at home, confer in private and issue final fiats without listening to the Bar as the representative of the seekers of justice, the rule of law could well darken into an arcane trick and back-door diktats issued from 'robed' adjudicators stain the escutcheon of justice. We also agree that oral advocacy has a non-fungible importance in the forensic process which the most brilliant brief cannot match and the most alert judge cannot go without. The intellectual jallywork of intricate legal reasoning ad impassioned sculpture of delicate factual emphasis may often be beyond the craftsmanship of pen and paper. There is no controversy that disposal by circulation, Secretariat fashion, cannot become a general judicial technique nor silent notings replace Bench-Bar dialogues. We must clarify one point. 'Circulation', in the judicial context, merely means, not in court through oral arguments but by discussion at judicial conference. Judges, even under the amended rule, must meet, collectively cerebrate and reach conclusions. Movement of files with notings cannot make do. Otherwise, mutual persuasion, reasoned dissent and joint judgment will be defeated and machinisation of opinion and assertions of views in absentia will deprive judicial noetics of that mental cross-fertilisation essential for a Bench decision. The learned Solicitor-General strongly urged that he was at one with counsel opposite on this point. We agree.

15. The key question is different. Does it mean that by receiving written arguments as provided in the new rule, and reading and discussing at the conference table, as distinguished from the 'robed' appearance on the Bench and hearing oral submissions, what is perpetrated is so arbitrary, unfair and unreasonable a 'Pantomimi' as to crescendo into unconstitutionality ? This phantasmagoric

distortion must be dismissed as too morbid to be regarded seriously - in the matter of review petitions at the Supreme Court level.

16. Let us look at the actuality without being scary. The rule under challenge does not implicate or attract an original hearing at all. It relates to 'review' situations. Ex hypothesi, an antecedent judicial hearing and judicial order exist. Indeed, if a full oral hearing on the Bench has already taken place and dangerousness of secret disposals dies out. What is asked for is a review or second look at the first order. Should this second consideration be plenary ? Never. The focus must be limited to obvious, serious errors in the first order. Indiscriminate second consideration cannot be purchased by more payment of court fee. We reject the strange plea one of the advocates put forward that since the petitioner had paid court fee fore review he had the right to the full panoply of oral hearing ad libitem covering the whole range.

17. Review must be restricted if the hard-pressed judicial process is not to be a wasting disease. There are many ways of limiting its scope, content and modality. The confinement to certain special grounds, as in Order 47, Rule 1, CPC, is one way. The requirement of counsel's reasoned certificate of fitness (certworthiness) for review is another. Judicial screening to discover the presence, prima facie, of good grounds to hear counsel in oral submission is a third. The first is good and continues. The second was tried and found ineffective and the third is being tried. Legislative policy is experimental as life itself is a trial-and-error adventure. What is shocking about this third alternative ? Judges scrutinise - the same judges who have once heard oral arguments and are familiar with the case - and, if they do not play truant, direct a hearing in court if they find good grounds. If there is ground, oral hearing follows. It is not as if all oral advocacy is altogether shut out. Only if preliminary judicial scrutiny is not able to discern any reason to review is oral exercise inhibited. The court process is not a circus or opera where the audience can clamour for encore. When the system is under the severe stress of escalating case-load, management of Justice Business justifies forbiddance of frivolous reviews by scrutiny in limine on the written brief. Justicing too is in need of engineering.

18. In many jurisdictions oral submissions and public hearings are disallowed in like circumstances. In England and America where orality in advocacy has been apotheosised, certain extended stages of 'hearing' in the superior courts have been slimmed or removed. Even disposal of petitions for leave in judicial conference, without a Bench hearing, has been in vogue.

19. This Court, as Sri rightly emphasised, has assigned special value to public hearing, and courts are not caves nor cloisters but shrines of justice accessible for public prayer to all the people. Rulings need not be cited for this basic proposition. But every judicial exercise need not be a public show. When judges meet in conference to discuss it need not be televised on the nation's network. The right to be heard is of the essence but hearing does not mean more than fair opportunity to present one's point on a dispute, followed by a fair consideration thereof by fair minded judges. Let us not romanticise this process nor stretch it to snap it. Presentation can be written or oral, depending on the justice of the situation. Where oral persuasiveness is necessary it is unfair to exclude it and, therefore, arbitrary too. But where oral presentation is not that essential, its exclusion is not obnoxious. What is crucial is the guarantee of the application of an instructed, intelligent, impartial and open mind to the points presented. A blank judge wearied by oral aggression is prone to slumber while an alters mind probing the 'papered' argument may land on vital aspects. To swear by orality or to swear at manuscript advocacy is as wrong as judicial allergy to argument in court. Often-times, it is the judge who will ask for oral argument as it aids him much. To be left helpless among ponderous paper books without the oral highlights of counsel, is counter-productive.

Extremism fails in law and life.

20. We agree that the normal rule of the judicial process is oral hearing and its elimination an unusual exception. We are now on the vires of a rule relating to review in the highest court. A full-dress hearing, to the abundant accompaniment of public presence and oral submission, is over. It is a second probe. Here written arguments are given. The entire papers are with the judges. The judges themselves are the same persons who have heard oral presentation earlier. Moreover, it is a plurality of judges, not only one. Above all, if prima facie grounds are made out a further oral hearing is directed. Granting basic bona fides in the judges of the highest court it is impossible to argue that partial foreclosure of oral arguments in court is either unfair or unreasonable or so vicious an invasion of natural justice as to be ostracised from our constitutional jurisprudence. It must be remembered that review is not a second does of the same arguments once considered and rejected. The rejection might have been wrong but that cannot be helped. Dissenting minorities regard the dominant majorities wrong in their judgments but there is no helping it.

21. It may not be inept to refer to the critical distinction, even where review of fundamental rights proceeding is sought, between an original or virgin hearing and a second look at or review of the order already passed after a full hearing. In Lala Ram case (Lala Ram v. Supreme Court of India, (1967) 2 SCR 14 : AIR 1967 SC 847 : (1967) 2 SCJ 225) this Court accented on the essential distinction between an original application for the enforcement of fundamental rights and an application to review the order made therein. It was there observed : (Ibid., p. 17)

The main purpose of a review petition is not to enforce a fundamental right, but to reopen an order vitiated by an error on the face of the record or for such other reasons. But it is said that the effect of reopening of the earlier order would be to restore his application to enforce the fundamental right and, therefore, in effect and substance, an application to review such an order is also an application to enforce the fundamental right. It may be that this is a consequence of reopening an order, but the application itself, as we have said, is not to enforce the fundamental right.

22. Is there any nexus between the elimination of oral advocacy and the goal of dispensation of justice ? Counsel urge there is none. We cannot agree. The goal to be attained is maximisation of judicial time and celerity of disposal of review petitions. And, despite the heavier burden thrown on the judges during the hours outside court sittings by agreeing to read through and discuss the review papers for themselves, there is obvious acceleration of disposal of review petitions without intrusion into court time. Equally clearly, the Benches are able to spare more time for hearing cases. To sum up, the advantages of the circulation system linked up with the objects of saving judge-time in court and prompter despatch of review petitions are obvious. To organize review Benches of the same judges who first heard the case only to last for a few minutes or a little longer, then to disperse and rearrange regular Benches, especially when most of the review petitions are repeat performances in futility, is a judicial circus the court can ill afford. The rule is rational, the injury is marginal.

23. The magic of the spoken word, the power of the Socratic process and the instant clarity of the bar-Bench dialogue are too precious to be parted with although a bad advocate can successfully spoil a good case if the judges rely only on oral arguments for weaving their decision. The written brief, before careful judges, can be a surer process of deeper communication than the 'vanishing cream' of speaking submissions. And a new skill - preparation of an effective brief, truly brief, highly telling and tersely instructive - is an art of the pen worth the acquisition especially when, in practice, there are many gifted lawyers who go with Goldsmith who 'wrote like an angel and talked like poor Paul'. India is neither England nor America and our forensic technology must be fashioned

by our needs and resources. Indeed, in this Court, counsel have begun to rely heavily, with good reason, on written submissions and oral 'sweeteners'. The Bench can never go it alone. The bar must collaborate and catalyse.

24. Nor is there any attempt, in this circulation rule, to run away from the open. Secret sittings, exclusion of the public and cabals in conclave are bete noire for the judicial process. A review implies an earlier full hearing and, if warranted, a future further hearing. Every measure has to be viewed in perspective, not out of focus. The consternation that the court, by hidden procedures, may undo the 'open' heritage is a chimerical fear or a disingenuous dread.

25. In other jurisdictions, which our jurists hold in anglophilic esteem, this practice is current coin. The balancing of oral advocacy and written presentation is as much a matter of principle as of pragmatism. The compulsions of realities, without compromise on basics, offer the sound solution in a given situation. There are no absolutes in a universe of relativity. The pressure of the case-load on the judges' limited time, the serious responsibility to bestow the best thought on the great issues of the country projected on the court's agenda, the deep study and large research which must lend wisdom to the pronouncements of the Supreme Court which enjoy awesome finality and the unconscionable backlog of chronic litigation which converts the expensive end-product through sheer protection into sour injustice - all these emphasise the urgency of rationalising and streamlining court management with a view to saving court time for the most number of cases with the least sacrifice of quality and turn over. If, without much injury, a certain class of cases can be disposed of without oral hearing, there is no good reason for not making such an experiment. If, on a close perusal of the paper book, the judges find that there is no merit or statable case, there is no special virtue in sanctifying the dismissal by an oral ritual. The problem really is to find out which class of cases may, without risk of injustice, be disposed of without oral presentation. This is the final court of provisional infallibility, the summit court, which not merely disposes of cases beyond challenge, but is also the judicial institution entrusted with the constitutional responsibility of authoritatively declaring the law of the land. Therefore, if oral hearing will perfect the process it should not be dispensed with. Even so, where issues of national moment which the Supreme Court alone can adequately tackle are not involved, and if a considerable oral hearing and considered order have already been rendered, a review petition may not be so demanding upon the judge's 'Bench' attention especially if, on the face of it, there is nothing new, nothing grave at stake. Even here, if there is some case calling for examination or suggestive of an earlier error, the court may well post the case for an oral hearing. (Disposal by circulation is a calculated risk where no problem or peril is visible.)

26. Oral argument has been restricted at several stages in the judicial process in many countries. In the United States the problem of a large number of frivolous petitions for rehearing (in our diction, review) filed by counsel provoked the court into framing restrictive rules of hearing. One of the rules prescribes :

A petition for rehearing is not subject to oral argument, and will not be granted, unless a justice who concurred in the judgment or decision desires it, and a majority of the court so determines.

In England, leave to appeal to the House of Lords is a pattern of proceedings where obligatory oral hearing does not always exist. The recent practice direction may be usefully referred to here :

As from October 1, 1976 petitions for leave to appeal to the House of Lords will be referred to an Appeal Committee consisting of three Lords of Appeal, who will consider whether the petition

appears to be competent to be received by the House and, if so, whether it should be referred for an oral hearing.

Where a petition is not considered fit for an oral hearing, the Clerk of the Parliaments will notify the parties that the petition is dismissed. ((1979) 1 WLR 497)

Justice John M. Harlan of the U.S. Supreme Court wrote, while explaining the need for controlling court work within manageable proportions,

> . . . . it would be short-sighted and unwise not to recognise that preserving the certiorari system in good health, and in proper balance with the other work of the court, are matters that will increasingly demand thoughtful and imaginative attention. As I have tried to show, the essence of the problem as things stand today is to guard against wasteful encroachments upon the court's time by preventing an increase in, if not reducing, the volume of improvident applications for certiorari.

27. It is significant that in the U.S. Supreme Court leave to appeal is decided in conference, not in court and even in regular hearing the maximum time for argument is often restricted in the highest court. Under Rule 28 it is one hour for each side. The mechanics of controlling argument time is interesting and instructive : (SUPREME COURT PRACTICE (supra) p. 303)

Counsel arguing should keep track of his own time - when he started and how much he has left. There is a large clock in front of him. A note on the counsel table admonishes counsel not to ask the Chief Justice what time remains.

When counsel has only five minutes left, a white light on the lectern immediately in front of him goes on. When time has expired, a red light goes on. The Chief Justice is likely to stop counsel immediately, seldom allowing him to do more than to finish his sentence. The red light also marks the time to recess for lunch at two o'clock, and the end of the day's session at 4.30 p.m.

The rationale of reducing oral submissions without danger to efficacy or advocacy is explained by George Rossman, Associate Justice of the Supreme Court of Oregon : (American Bar Association Journal, Jan. 1959, Vol. 45, No. 1, p. 676)

Crowded dockets have forced appellate Courts to curtail the time allotted for oral argument, with the result that some members of the profession wonder whether courts care for oral argument . . . . The practice of today shows that advocacy can be effective even though the period of delivery is short. Some attorneys can be effective even though the period of delivery is short. Some attorneys can do wonders in thirty minutes when nothing more is available.

The English practice, of course, is different. Delmar Karlen has correctly set out the situation : (1962 Vol. 78 LQR 371 at pp. 379-80)

In the United States, oral arguments are secondary in importance to the briefs, and are rigidly limited in duration. In the United States Supreme Court, one hour is allowed to each side, but in many appellate Courts, less time allowed to each side, but if that is permitted, frequently no more than fifteen minutes or a half-hour for each side. Reading by counsel if frowned upon. The judges do not wish to hear what they can read for themselves. They expect to get all the information they need about the judgment below, the evidence, and the authorities relied upon from studying the briefs and record on appeal. They do not even encourage counsel to discuss in detail the precedents

claimed to govern the decision, preferring to do that job by themselves in the relative privacy of their chambers, with or without the assistance of law clerks.

In England, where there are no written briefs, oral arguments are all important. They are never arbitrarily limited in duration. While some last for only a few minutes, others go on for many days, even weeks. The only control ordinarily exercised over the time of oral argument are informal, ad hoc suggestions from the judges.

28. The methods of the Marble Palace in Washington D.C. have some relevance though certainly not compulsiveness for us. John Frank writes :

As the docket of the court became more crowed, necessarily the time allowed for argument had no shrink. Under today's system the time is either a half-hour or an hour for each side, depending on the complexities of the case. This obviously precludes long introductions or eloquent perorations. Time is usually rigidly controlled; the legend is that Chief Justice Hughes once cut off an attorney in the middle of the word "if". If there are not too many interruptions, the hour is sufficient; lawyers must learn to be brief.

We assume that judges will be up to the additional strain. We have stated enough to establish that judicial justice is not sabotaged by the eclipse of oral argument in a small sector of the forensic process. That is all that has been done by the amendment. A brief comparison between the earlier and the current position will bring this out.

29. In the earlier rule a certificate by the lawyer was a condition precedent for entertainment of the review proceeding. In the revised rule, no certificate by counsel but certification by the Bench that, prima facie an infirmity of the kind mentioned in the rule vitiates the judgment takes its place. Thereafter in both cases oral advocacy follows. Thus the only difference is not, as is sometimes assumed, that oral arguments are for the first time and finally cut out. Even now, oral hearing may be given and is given, not routinely but if ground is made out to the satisfaction of the judges who first heard the case (ignoring exceptional situations for the present). We have stated enough to repel the attack on the vires of the rule. Nothing arbitrary, nothing arcane, nothing obnoxious, given a sober appraisal.

29-A. The possible impression that we are debunking the value of oral advocacy in open court must be erased. Experience has shown that, at all levels, the bar, through the spoken word and the written brief, has aided the process of judicial justice. Justicing is an art even as advocacy is an art. Happy interaction between the two makes for the functional fulfilment of the court system. No judicial 'emergency' can jettison the vital breath of spoken advocacy in an open forum. Indeed, there is no judicial cry for extinguishment of oral argument altogether. But the time has come for a proper evaluation of the role of oral argument at the appellate level in the decisional process. Justice Harlan has insisted that oral argument should play a leading part. It is not "a traditionally tolerated part of the appellate process" but a decisively effective instrument of appellate advocacy. He rightly stresses that there are many judges "who are more receptive to the spoken than the written word". He hits the nail on the head when he states :

> For my part, there is no substitute, even within the time-limits afforded by the busy calendars of modern appellate Courts, for the Socratic method of procedure in getting at the real heart of an issue and in finding out where the truth lies. (Cornell Law Qly., Vol. 41, 1955-56, p. 7)

> We wholly endorse the conclusion of that experienced Judge of the United States Supreme Court when he concludes his thesis on oral arguments : (Ibid., p. 11)

Oral argument is exciting and will return rich dividends if it is done well. And I think it will be a sorry day for the American Bar if the place of the oral argument in our appellate Courts is depreciated and oral advocacy becomes looked upon as a proforma exercise which, because of tradition or because of the insistence of his client, a lawyer has to go through.

30. The importance of oral advocacy has been the subject of many articles by learned writers. As Frederick Bernays Wiener writes in the Harvard Law Review : (Vol. 62, p. 59)

Appellate judges, virtually without exception, say that a case should never be submitted without oral argument. A good many are on record in print to the same effect, and add that they feel a sense of genuine regret whenever the clerk announces that a case is being submitted on briefs alone. These expressions reflect the fact the task of judgment is infinitely harder when counsel is not present to be questioned regarding his exact position or the limits of a principle he has argued in the brief.

We concur with the view expressed by American Judges on oral advocacy : (SUPREME COURT PRACTICE (supra) p. 316)

In the Supreme Court, flexibility is especially essential, Chief Justice Hughes in 1928 characterised the argument before the Supreme Court as an "oral discussions". The then Professor Frankfurter stated in 1933, "The atmosphere of the court is uncongenial to oratory and the restrictions imposed on counsel tend to delete rhetoric. But true argument - the exploration of issues, particularly through sharp questioning from the Bench - continues to be one of the liveliest traditions of the court".

Thus, among the methods of persuasion, the power of the spoken word cannot be sacrificed without paying too high a price in the quality of justice especially in the Supreme Court litigation. Maybe, that the brief is valuable; indeed, a well prepared brief gives the detailed story of the case; the oral argument gives the high spots. The Supreme success of oral argument and the grave risk of jettisoning it from the repertoire of persuasive arts in the judicial process consists in George Rossman's observation : (American Bar Association Journal (supra), p. 676)

The oral argument can portray the case as a human experience which engulfed the parties but which they could not solve. Thus, the oral argument can help to keep the law human and adapted to the needs of life. It typifes the Bar at its best.

31. We may sum up that the value of oral submissions need not be underrated nor of written briefs overrated. A blend of both is the best. It is apt to repeat the words of Judge Brian Mckenna :

> The fault is that the rules of our procedure which by their discouragement of written argument make possible extensively protracted hearings in open court. Those responsible might think more of changing them. In civil cases a written argument supplemented by a short oral discussion, would sometimes save a great deal of time.

The judicial process is in crisis not because there is a flood of cases flowing into the courts. In a developing country with an awakened people and democratic rights, it is inevitable that the litigative Ganga may swell in its stream, but as Justice Warren Burger wrote :

> In the final third of the century we are still trying to operate the courts with

> fundamentally the same basic methods, the same procedures and the same machinery, Roscoe Pound said were not good enough in 1906. In the super-market age we are trying to operate the courts with cracker-barrel corner grocer methods and equipment - vintage 1900.

We have to introduce management techniques and sensitive skills in the administration of justice if its present pathological conditions are to receive therapeutic attention. The rule regarding the disposal of review petitions by circulatory conference, supplemented by oral hearing in appropriate cases, is one small step in the right direction. Indeed, by modernising our procedure we are furthering social justice for which the litigant community is waiting.

32. We have set out the parameters of judicial procedure vis-a-vis original hearings and review hearings having due regard to the realities of forensic life. In the dynamics of hearing orality does play a role at the first round, but at the second round in the same court is partly expendable. After all, romance with oral hearing must terminate at some point. Nor can it be made a "sacred cow" of the judicial process. Comparative law lends confidence and from that angle we may refer to Halsbury (Vol. 10, para 761) where disposal, without oral hearing, of petitions to leave to appeal to the House of Lords is mentioned. Likewise, AMERICAN JURISPRUDENCE (Vol. 5, para 979, especially footnote 13) endorse a similar procedure.

33. Sri Mridul pressed upon us that this judge-made legislation at the highest level was so plainly violative of Article 14 - an objection not spelt out in any writ petition before us that, without seeking refuge under the rule of practice that a point not raised in the writ petition may not be allowed to be urged, the judges must invalidate their own handiwork. Surely, Justice and Truth are never afraid of exposure nor bothered about prestige. Certainly, drafting legislation is not an easy art and judges are not artists beyond their orbit. Even otherwise, Homer nods. Therefore, if we find our rules void we must declare so and we will. The omission of the ground of discrimination in the pleadings may often forbid the argument because the other side may be prejudiced or the necessary facts may not be on record. But here no such disability exists. A technical objection should not throw out a suitor from the plea for justice. After all, the courts belong to the people, as Jerome Frank once said. And litigants are legal patients suffering from injustices seeking healing for their wounds. Would you tell a sufferer in hospital that because he disclosed a certain symptom very late therefore he would be discharged without treatment for the sin of delayed disclosure ? Humanism, which, at bottom sustains justice, cannot refuse relief unless, by entertaining the plea, another may sustain injury. We have permitted the contention and proceed to consider it.

34. The rule, on its face, affords a wider set of grounds for review for orders in civil proceedings, but limits the ground vis-a-vis criminal proceedings to 'errors apparent on the face of the record'. If at all, the concern of the law to avoid judicial error should be heightened when life or liberty is in peril since civil penalties are often less traumatic. So, it is reasonable to assume that the farmers of the rules could not have intended a restrictive review over criminal orders or judgments. It is likely to be the other way about. Supposing an accused is sentenced to death by the Supreme Court and the 'deceased' shows up in court and the court discovers the tragic treachery of the recorded testimony. Is the court helpless to review and set aside the sentence of hanging ? We think not. The power to review is in Article 137 and it is equally wide in all proceedings. The rule merely canalises the flow from the reservoir of power. The stream cannot stifle the source. Moreover, the dynamics of interpretation depend on the demand of the context and the lexical limits of the test. Here 'record' means any material which is already on record or may, with the permission of the court, be brought on record. If justice summons the judges to allow a vital material in, it becomes part of the record;

and if apparent error is there, correction becomes necessitous.

35. The purpose is plain, the language is elastic and interpretation of a necessary power must naturally be expansive. The substantive power is derived from Article 137 and is as wide for criminal as for civil proceedings. Even the difference in phraseology in the rule (Order 40, Rule 2) must, therefore, be read to encompass the same area and not to engraft an artificial divergence productive of anomaly. If the expression 'record' is read to mean, in its semantic sweep, any material even later brought on record, with the leave of the court, it will embrace subsequent events, new light and other grounds which we find in Order 47, Rule 1, CPC. We see no insuperable difficulty in equating the area in civil and criminal proceedings when review power is invoked from the same source.

36. True, the review power vis-a-vis criminal matters was raised only in the course of the debate at the Bar. But when the whole case is before us we must surely deal comprehensively with every aspect argued and not piece-meal with truncated parts. That will be avoidance of our obligation. We have, therefore, cleared the ground as the question is of moment, of frequent occurrence and was mooted in the course of the hearing. This pronouncement on review jurisdiction in criminal proceedings sets at rest a possible controversy and is as much binding on this Court itself (unless overruled) as on litigants. That is the discipline of the law of precedents and the import of Article 141.

37. As we conclude, we wish to set the sights aright vis-a-vis oral hearings in judicial proceedings. To put superstitious faith in oral submissions or unlimited argumentation as the sole means of presentation and persuasion and to debunk the potency of well drawn-up manuscript representations may be condemned as absurd. True, our judicial culture nourishes oral advocacy and public hearing since secret cerebrations and cabal deliberations are ordinarily anathema. Speaking generally, oral advocacy is a decisive art in promoting justice. The Bench cannot dispense with the Bar. In our system advocacy becomes functional when presented viva voce and is enfeabled if presented in muted print. We do not claim that orality can be given a permanent holiday. Such an attitude is an over-reaction to argumentum ad nauseum. But we must importantly underscore that while lawyer's advocacy cannot be made to judicial measure especially if judges are impatient, there is a strong case for processing argumentation by rationalisation, streamlining, abbreviation and in, special situations, elimination. Review proceedings in the Supreme Court belongs to the last category. There is no rigidity about forensic strategies and the court must retain a flexible power in regard to limiting the time of oral arguments or, in exceptional cases, eliminating orality altogether, the paramount principle being fair justice. Therefore, it is quite on the cards that where no injury to justice will befall, orality may suffers partial eclipse in the shape of time-limitation or substitution by written submission even in categories other than review proceedings. All that we mean to indicate is that the mode of 'hearing', whether it should be oral or written or both, whether it should be full-length or rationed, must depend on myriad factors and future developments. 'Judges of the Supreme Court must be trusted in this regard and the Bar will ordinarily be associated when decisions affecting processual justice are taken'. We thus see no disparity given flexibility in decoding the meaning of meanings.

38. We see no force in the challenges and do hope that the Bar will make its contribution to making experiments in modernization and humanisation of the Justice System and court culture.

PATHAK, J. (for himself and Koshal, J.) (concurring) –

We are in general agreement with our brother V. R. Krishna Iyer on the points directly in controversy in this writ petition, but we consider it desirable to say a few words on certain aspects concerning the scope of Rule 3 of Order XL of the Supreme Court Rules, 1966.

40. At the outset, we may state that as we are considering the question of the need for an oral hearing in relation to a review application only, we refrain from expressing any opinion on the point whether an oral hearing is an imperative requirement in the disposal of other kinds of cases brought before the court. That is a point to which, we think, we should address ourselves only when it directly arises.

41. In regard to a review application, we are clear that an oral hearing is not an essential requirement if on a preliminary examination the review application is found to be devoid of substance. A review application is an attempt to obtain a reconsideration of the judgment of the court disposing of the substantive proceeding. It attempts nothing more. The merits of the controversy have already been examined by the court and, in view of the ordinary scope of the power of review, the re-examination sought cannot proceed beyond the controversy already disposed of. It is substantially the same ground traversed again, either entirely or in part. However, the rule takes care to provide for oral arguments should the court consider that necessary. That necessity may arise in either of two cases. On the review application being placed before the judges, they will consider it together with any additional written arguments filed by the petitioner in supplementation of the review application. If the judges hold on that screening of the review application that there is no case whatever for review, they will reject the review application. On the contrary, they may find that a good prima facie case for review has been made out, and so they will direct notice to issue to the respondent, and upon that an oral hearing will take place in the presence of the parties. That is one occasion on which an oral hearing is necessary. If the judges are not convinced that a prima facie case has been made out by the review application, but are also not satisfied that there is not merit whatever in it, and are of opinion that in order to come to a definite opinion prima facie on the merits of the review application it is desirable to hear the applicant orally they will notify him accordingly and afford an opportunity of oral hearing. On such oral hearing, the judges may dismiss the review application if finally satisfied that there is no prima facie case for review, but in the event of a prima facie case being made out they will issue notice to the respondent and an oral hearing will follow in the presence of the parties. It is apparent that the denial of oral argument is confined to the preliminary stage only, when the review application is placed before the judges and, as it were, they screen it for the purpose of determining whether there is reason to proceed further in the matter or whether it merits outright rejection. It is not possible to hold on principle that at that preliminary stage also, the applicant for review is entitled to be heard orally. The merit of an oral hearing lies in this that counsel addressing the court are able to discern what are the aspects of the controversy on which more light is needed. The court likewise can utilise an oral hearing in order to express its doubts on a point and seek clarification thereon from counsel. But if there is no doubt whatever that the review application is totally without substance, an oral hearing becomes a superfluity and, at best, a mere formality.

42. A written submission is capable of careful drafting and explicit expression, and is amenable to such arrangement in its written content that it pointedly brings to the notice of the reader the true scope and merit of the submission. We do not believe that a written submission in a review application cannot do adequate justice in the matter of setting forth the case of the litigant. If there is need for an oral hearing it is for the reason mentioned earlier, that counsel come to know of the doubts in the mind of the court and the court has an opportunity of having its doubts resolved. It is this feature of an oral hearing which gives to it its primary value and relevance. But that an oral

hearing is mandatory in all classes of cases and at every stage of every case is a proposition to which we find ourselves unable to accede.

43. The writ petition is dismissed, but without any order as to costs.

</html