

**(1976) 12 KL CK 0010**

**In the High Court Of Kerala**

**Case No :** O.P. No's. 3909, 3970, 4252 and 4256 of 1974

A. K. ABRAHAM and Others

APPELLANT

Vs

THE STATE OF KERALA and Another

RESPONDENT

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**Date of Decision :** 21-12-1976

**Acts Referred:**

Constitution of India, 1950 — Article 14, 16, 19, 21, 22

**Citation :** (1977) 6 CTR 77

**Hon'ble Judges :** Govindan Nair, C.J

**Bench :** Division Bench

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## **Judgement**

Govindan Nair, C. J. - When these Original Petitions came up for hearing before a Division Bench, the petitions were directed to be posted before Full a Bench of five Judges.

2. The question that arises for consideration is whether by virtue of the Proclamation of Emergency issued under Article 352 of the Constitution of India on 26.6.75 and the Order under Art. 359(1) passed by the President declaring that the right to move any Court for the enforcement of such of the rights conferred by part III as are mentioned in the Order and all proceedings pending in any Court for the enforcement of the rights so mentioned, shall remain suspended for the period during which the Proclamation is in force, the interim orders of stay passed on the Civil Miscellaneous Petitions in these cases should be vacated. It was contended by counsel for the petitioners that the orders must be sustained. The Advocate General appearing for the respondents urged that if the Original Petitions are suspended, the interim orders of stay passed by this Court on the Civil Miscellaneous Petitions Nos. 11931 of 1974 in the O.P. No. 3909 of 1974, 12118 of 1974 in O.P. No. 3970 of 1974, 13077 of 1974 in O.P. No. 4252 of 1974 and 13082 of 1974 in O.P. No. 4256 of 1974 must be vacated.

3. We shall at this stage read the Proclamation under Art. 352 of the Constitution and the Presidential Order under Artical 359(1) :

## "PROCLAMATION OF EMERGENCY

In exercise of the powers conferred by Cl. (1) of Article 352 of the Constitution, I, Fakhruddin Ali Ahamed, President of India, by this Proclamation declare that a grave emergency exists whereby the security of India is threatened by internal disturbance.

" .....

.....

## ORDER

New Delhi, the

27th June, 1975

G.S.R. 361 (E). - In exercise of the Powers conferred by Cl. (1) of Article 359 of the Constitution, the President hereby declares that the right of any person (including a foreigner) to move any court for the enforcement of the rights conferred by Article 14, Article 21 and Article 22 of the Constitution and all proceedings pending in any court for the enforcement of the above mentioned rights, shall remain suspended for the period during which the Proclamations of Emergency made under clause (1) of Article 352 of the Constitution of the 3rd December, 1971 and on the 25th June, 1975 are both in force.

This Order shall extend to the whole of the territory of India except the State of Jammu and Kashmir.

This Order shall be in addition to and not in derogation of any Order made before the date of this Order under cl. (1) of Article 359 of the Constitution.

4. Before we proceed to deal with the controversy, it is necessary to refer briefly to the contentions raised by the petitioners in the Original Petitions. The main challenge is against the validity of the Kerala Building Tax Act, 1975. The grounds urged in support of this challenge are that the provisions of the Act are violative of Art. 14 of the Constitution, also of Art. 19(1)(g), that the Act is confiscatory in nature and the Act being expropriatory, it is hit by Art. 31. It is further urged that in substance and effect, the tax is on income and not a tax on buildings, as it purports to be. Alternatively, it is contended that the tax imposed is a tax on capital value and not on buildings and if it is so, it was urged that the Act lacks legislative competence as it can fall, if at all, only under entry 82 of List I or under entry 86 of List I, and it cannot fall under List II of the Seventh Schedule to the Constitution. There is the further contention that the Act is a colourable device to take away property and hence beyond legislative competence.

5. We shall refer to the contentions raised in O.P. No. 3909 of 1974 and it was agreed at the time of arguments that the points raised in this petition may be taken to be the points to be considered in all the petitions.

6. Turning now to the other averments in the affidavit in the petition we find that

the petitioner has alleged that he had to spend Rs. 2,79,656 and that he has got a liability of Rs. 2,24,656 and odd arising from finding money for the construction of the building. The total monthly rent for the building admittedly is Rs. 11,200/-. The building stands on 11 cents and 700 sq. links. If calculation is made in accordance with the provisions of the Act, the building tax due, it is alleged, will come to Rs. 3,04,660.

7. The petitioner in O.P. No. 3909/74 in C.M.P. No. 11931 of 1974 prayed for an appropriate order of injunction from enforcing any of the provisions of the Kerala Building Tax Ordinance, 1974 (Ordinance No. 10 of 1974) against the petitioners firm and their buildings till the final disposal of the Original Petition. This petition came up for hearing on 10-9-1974 and the following order was passed : "Notice taken by the Additional Advocate General. Post the C.M.P. on 18-9-1974."

8. Notice was taken by the 1st respondent thereafter and the matter came up for hearing on 18-9-1974 and the following order was passed : "Heard. Interim stay until further orders. Post the O.P. for orders on 30-9-1974". No motion appears to have been made for cancellation of the order passed on 18-9-1974. The facts relating to the stay in O.P. No. 3970 of 1974 are similar. C.M.P. No. 12118 of 1974 was the petition for injunction and an order was passed on 12-9-1974. "Notice returnable in one week. Post C.M.P. on 18-9-1974". The 1st respondent, State of Kerala, was served on 16-9-74 and on 18-9-1974, an order was passed "Heard. Int. Stay until further orders. Post O.P. for orders on 30-9-74". In O.P. No. 4252 of 1974, C.M.P. No. 13077 of 1974 came up for hearing on 1-10-74 and the court ordered "Notice and Int. Stay". The 1st and 2nd respondents, State of Kerala and the Tahsildar, Ernakulam were served on 9-1-1974. No motion was made to cancel this interim order. In O.P. No. 4256 of 1974, C.M.P. Number 13082 of 1974 was moved for injunction on the terms identical to those contained in the other petitions referred to and the court on 1-10-1974 ordered "Notice & Int. stay". In this case too, the 1st respondent, the State of Kerala and the 2nd respondent, the Tahsildar, Ernakulam were served with notice but no motion was made for cancellation of the interim stay. It is evident from what we have stated above that the contentions raised in the Original Petitions that the violation of Art. 14 of the Constitution is one of the grounds taken in support of the reliefs prayed for in the petitions and the Order of the President under Art. 359(1) declared that the right of any person to move any court for the enforcement of the rights conferred by Art. 14 of the Constitution and all proceedings pending in any court for the enforcement of the rights shall remain suspended for the period during which the Proclamations of Emergency made under clause (1) of Art. 352 of the Constitution on the 3rd December, 1971 and on the 25th June, 1975 were in force. The Original Petitions having been filed as early as 1974, long before the Proclamation under Art 352, and the Order of the 27th June, 1975 under Art. 359, the petitions before us will fall under "proceedings pending in any court for the enforcement of Art. 14 of the Constitution. "There can be little doubt therefore that these petitions, or proceedings, have to remain suspended for the period during which the

Proclamation of Emergency are in force and there has been no dispute regarding this position. The Advocate General however contended that if the petitions are to remain suspended, the interim orders passed on the stay petitions to which we have already made reference, must be cancelled. His contention was based on a Division-Bench decision of this Court in Kunhi Moyin vs. Pathumma and an order passed by a Full Bench of this Court cancelling the interim direction issued in O.P. No. 4661 of 1974. He also heavily relied on the decisions in Makhan Singh Tarsikka vs. The State of Punjab and in Mohan Chowdhury vs. The Chief Commissioner, Union Territory of Tripura for the proposition that the petitioner has no locus standi after the Order of the President, as the Fundamental Rights under Art. 14 of the Constitution got suspended and therefore the interim orders which must be taken to be based on a prima facie satisfaction of the court that Art. 14 has been violated must necessarily be vacated. He also referred to a number of passages from what has been known as the Habeas Corpus case in Addl. Distt. Magistrate, Jabalpur vs. Shivakant Shukla for the same proposition. Apart from these three decisions, he relied on two Patna decisions; one in Kailashe Pati Singh vs. The State of Bihar and others, and the other referred to in the above decision.

9. Counsel on behalf of the petitioners in the Original Petitions urged that orders passed before the Presidential Order under Art. 359(1) cannot be said to be affected in any manner by the Presidential Order under Art 359. They too relied on a number of decisions; Jagadish Ch. Agarwal vs. Union of India and others, Raj Kumar Rajindra Singh vs. The Union of India and others, Vijay Kumar and another vs. B. K. Thappar and another, and The State of Orissa vs. Khageswar Das and others. Before we refer to any of these decisions, we shall read Art, 359(1) and try to interpret that Article without reference to any judicial pronouncements. Art. 359(1) which alone is relevant for our purpose is in these terms :-

"Where a Proclamation of Emergency is in operation, the President may by Order declare that the right to move any court for the enforcement of such of the rights conferred by Part III as may be mentioned in the order and all proceedings pending in any court for the enforcement of the rights so mentioned shall remain suspended for the period during which the Proclamation is in force or for such shorter period as may be specified in the Order."

It appears to us to be clear that the Order of the President under Art. 359(1) does not take away the rights conferred by the Articles mentioned in the Order but it only affects "the right to move any court for the enforcement of such of the rights." If the court is moved after the Order of the president to enforce any of the rights specified in the Order under Art. 359, the petitioner having no right to move the court for the enforcement of such rights, the petition will necessarily have to be dismissed in limine. But in regard to the "proceeding pending in any court for the enforcement of the rights so mentioned", the proceedings shall remain suspended for the period during which the Proclamation is in force or for

such shorter period as may be specified in the Order. When a court is moved for the first time after an Order has been passed under Art. 359, the petition will have to be dismissed. But regarding a proceeding which had commenced before the Order, the proceeding will only be suspended.

10. Certain courts have taken the view that the interim orders passed must necessarily continue when the proceedings should remain suspended. See *Jagdish Ch. Agarwal vs. Union of India and others*. The Full Bench decision of the Himachal Pradesh High Court in *Raj Kumar Rajindra Singh vs. The Union of India and others*, dealing with an application for cancellation of certain interim orders passed on the petitions moved before the Presidential Order under Art. 359, came to the conclusion that "By no argument can the view be justified that an adjudication or enforcement is involved of the rights claimed by the petitioners in the present proceeding". The petitioners referred to therein are those who moved for the cancellation of the stay. The court also ruled that "an application for modifying or vacating an interim injunction already granted cannot be described as a proceeding for the enforcement of the rights claimed in the present case. Such an application is concerned merely with the question of determining what should be the interim position of the parties with respect to the property in dispute so long as the rights thereto are not adjudicated by the court. An order of that character does not amount to an adjudication of the rights of the parties or the enforcement of such rights". The question that arose in the decision in *Vijay Kumar and another vs. B. K. Thappar and another*, did not touch the point for consideration arising before us. There, in a suit of ejectment, the defendant had contended that Section 1(3)(iii) of the J and K Act was violative of Article 14 and that the effect of such a contention was that the controversy was not capable of adjudication without considering the plea based on Art. 14. The court held that "the proceedings in the suit did not require to be kept in a state of suspension during the period when the Presidential Order is in force and the plea raised by the defendant about the constitutionality of the Rent Act, based as it is on the violation of Article 14, will have to be rejected as incompetent and the suit would proceed without taking into consideration the plea raised by the defendants". The Patna decision in *Kailash Pati Singh vs. The State of Bihar and others* has drawn a distinction between the word "suspended" used in Art. 359 and the word "stayed" and has ruled that the interim stay of proceedings granted before the Presidential Order under Art. 359 cannot remain in force after the Presidential Order. The judgment proceeds on the basis that the suspension of the proceedings would necessarily involve the cancellation of the interim orders.

11. The decision of this Court in *Kunhi Moyin vs. Pathumma*, has also categorically stated that "Although an interim order of stay is an order passed on a prima facie satisfaction such an order cannot be allowed to be in force in view of the wide language and wide import of Art. 359(1) of the Constitution and notifications issued thereunder." Reliance has been placed mainly on the decision of the Supreme Court in *Makhan Singh Tarsikka vs. The State of Punjab*, for this observation. Thereafter the decision of the Supreme Court in the State of Orissa

vs. Khageswar Das and other, was referred to and purporting to apply the principle of that decision the court observed that

"It has to be held that even interim orders passed in proceedings cannot be kept alive ....."

With the greatest respect neither the decision Makhan Singh Vs. State of Punjab (and connected appeals), nor the decision The State of Orissa Vs. Khageswar Das and Others, supports this view. The learned Judges apparently failed to note the facts of the decision in Makhan Singh Vs. State of Punjab (and connected appeals), and that in The State of Orissa Vs. Khageswar Das and Others, . In the earlier decision the petitions were moved after the Presidential Order under Art. 359. As we pointed out earlier, in such cases the court have no alternative but to dismiss those petitions because the right to move the court for the enforcement of any of the rights conferred by the Articles mentioned in the Order of the President had been suspended. That is the reason why in the judgment reference is made to the fact that the petitioner would have no locus standi. Anything said in that decision must be understood with reference to these basic facts. It has been held long long years ago in Queen vs. Leatham, that no decision of any court is authority for a proposition unless the circumstances and facts under which the judgment is rendered are identical to the facts of the case before a court. The Supreme Court also recently warned that the observations in a judgment torn from their context and without reference to the relevant facts of the case with reference to which they have been made should not be relied on for deciding cases where the position is different. The reliance on the decision of the Supreme Court in Makhan Singh Vs. State of Punjab (and connected appeals), , we think, therefore, with respect, is clearly a misapplication of a decision which did not apply to the facts of the case. As far as the decision in The State of Orissa Vs. Khageswar Das and Others, is concerned, the facts were the following :

The Orissa High Court had struck down certain notification on the ground of violation of Articles 14 and 16 of the Constitution and the State of Orissa had taken an appeal before the Supreme Court before the Presidential Order under Art. 359 and that appeal was pending. When that appeal came up for hearing, the respondent, who succeeded before the High Court, contended that the appeal must be stayed by virtue of the provision in Art. 359 of the Constitution. The court ruled that there was no proceeding before the Supreme Court for the enforcement of any rights conferred by Part III as was mentioned in the Order of the President under Art. 359. The court emphasised that that was a case where the State of Orissa was seeking to cancel an order the Orissa Court enforcing the right under Part III of the Constitution. The appeal therefore did not involve the enforcement of any such right. The Supreme Court after hearing the appeal on the merits sustained the order passed by the Orissa High Court by dismissing the appeal. The Court observed :

"The rule in that regard has rightly been held to be violative of Articles 14 and 16

of the Constitution by the High Court. But striking down of the whole of clause (ii) of R. 3(1) of the Rules was not necessary. Only the words in parenthesis that account. That would serve the purpose of making the posts of principal of all Engineering Schools including the Mining Engineering School being the posts in the Junior grade, Class I."

And for the reasons, the Court held :

"We find no merit in this appeal. It is accordingly dismissed ...."

12. We fail to understand how from this decision, it could be said, as has been mentioned in 1976 KLT 87, "The only payer before the Supreme Court was for deletion of enforcement of the order of the High Court since to keep alive the order of the High Court would in effect be to be defeat the second part of Art, 359(1) of the Constitution." with great respect, we think this is a clear misunderstanding of the decision. The only question that arose before the Supreme Court was whether an appeal before the Supreme Court by a State against an order enforcing Arts. 14 and 16 of the Constitution can be said to be a proceeding seeking to enforce the rights under those Articles. The Supreme Court said that the appeal was not seeking to enforce the rights under Arts. 14 and 16 but was seeking to cancel the enforcement of those rights by the High Court decision of the Supreme Court cannot be an authority for the proposition stated by the Division Bench decision in 1976 KL T87 :

"Applying this principle, it has to be held that even interim orders passed in pending proceedings cannot be kept alive, when the main petitions are adjourned sine die, since to do so would be to defeat the purpose of Art. 359(1) of the Constitution."

In the decision in 1976 KLT 87, this Court failed to note that by dismissing the appeal after making slight modifications which we have already noticed the High Court decision applying Art. 14 was upheld by the Supreme Court after the Presidential Order under Art. 359. If the analogy of this decision is to be applied to interim orders, though attempts can be made on the merits to have such orders cancelled, if those attempts fail, the interim orders will have to be sustained notwithstanding the Presidential Order under Art. 359. Thus the conclusion we reached, with great respect, would just be the opposite of that taken in Kunhi Moyin vs. Pathumma.

13. When these petitions came up before the Division Bench, the learned Judges who heard them referring to the decision 1976 KLT 87 observed :

"But we have considerable doubts regarding the correctness of the said ruling in so far as it lays down this proposition."

The proposition was that "while staying the proceedings, the interim direction in C.M.P. No. 8585 of 1975 has to be vacated. He relied upon the decision of a Division Bench of this Court in Kunhi Moyin vs. Pathumma. That ruling seems to support the learned Government Pleader." But when the matter came up before

the Full Bench of three Judges, the very same Judge who wrote the Reference Order observed :

"It is also clear from a reading of the Division Bench ruling that the Division Bench did not contemplate an automatic vacation of the interim orders but only a vacation of the same after consideration on the merits. We entirely agree with the principle of the said Division Bench ruling."

The passage that we have quoted from the judgment in 1976 KLT 87 are categorical that when proceedings are stayed, the interim orders cannot be kept alive. There is no qualification anywhere in the judgment that there should be any consideration of the question of the merits. Any consideration of a question whether an interim order should stand or not, would arise in every case where an interim order had been passed but not with reference to Art. 359 or the Presidential Order thereunder. There is not even a whisper in the judgment about the consideration of the interim order on the merits. With great respect, we think that the observation made in the Full Bench decision are unsupported and it appears to us to be even against the Reference Order that has been made.

14. One important feature that has to be borne in mind is that the Presidential Order under Art. 359(1) of the Constitution does not take away the Fundamental Rights conferred on the citizens of India which are mentioned in the Order. The Order only takes away the remedy or what may be called, the right to enforce such rights. The wording of the Articles is clear that it is the right to move any court for the enforcement of the rights to move any court for the enforcement of the rights under Part III mentioned in the Presidential Order that has to be suspended. That is in regard to the first part of Art. 359. The second part speaks of "pending proceedings" and the Art. Says that pending shall be suspended. The view is possible that an interim application in support of a main petition seeking to enforce certain Fundamental Rights would itself be in a way, a proceeding to enforce the Fundamental Rights as an interim measure and the interim orders passed on those petitions will be an interim enforcement of the Fundamental Rights. If the interim Applications are proceedings for enforcement of any of the Fundamental Rights mentioned in the Presidential Order, those applications also will have to be suspended and no orders can be passed on those proceedings. But we do not wish to express any final opinion on this aspect because we have no doubt whatever that an interim order of stay passed by a court in exercise of its jurisdiction before the Presidential Order was passed under Art. 359 can never get automatically vacated by virtue of the mere fact that a Presidential Order had been passed under Art. 359. We must bear in mind that the Constitution nowhere contemplates the setting aside of any order or judgment passed by courts. To understand therefore, that the Presidential Order under Art. 359 will have the effect of automatically vacating interim judicial order passed with jurisdiction, and it must be taken, on a prima facie satisfaction of the need to pass such an order, would be opposed to the very concept of the Constitution in that no authority shall have the power to touch a judicial order.



15. In the cases before us, from the facts we have stated, interim orders have been passed as ago long as in 1974. In two cases. O.P. Nos. 3909 of 1974 and 3970 of 1974, orders have been passed after notices have been served on the respondents and after hearing them. No doubt the orders stated "until further orders" and so they were established. But for more than two years, no attempt whatever has been made for the cancellation of those orders. In the other cases, O.P. No. 4252 of 1874 and 4256 of 1974, orders of interim stay had been passed and though notices had been served on those petitions soon after, no attempt was made to cancel those orders. Apparently the State Government had acquiesced in the orders of stay. It is not contended before us by the Advocate General that the interim orders passed have to be vacated because there is no prima facie case for the petitioners or because of certain other facts which would not justify the continuance of the orders. What he went on emphasising was that the petitioners have no locus standi to move the court. It must be remembered that the petitioners had not moved this Court but it was the Advocate General who moved this Court for the cancellation of the orders and that only on the ground that the Presidential Order under Art. 359 passed on the 27th of June, 1975 had taken away the locus standi of the petitioners. We cannot accept this submission.

16. The decision of the Bombay High Court in Miscellaneous Petition No. 501 of 1975 was made available to us by counsel for the petitioner in O.P.N. 3909 of 1974. We may extract observations from that judgment.

"Coming to the petition in this case which was pending at the date of the said Presidential Order the same of ex-facie for the enforcement of Fundamental Right under Art. 14 of the Constitution and the relief sought therein could not be granted without the court enforcing the said right, in that case, in the view that I am taking this petition is covered by the said Presidential Order and the same shall stand suspended till the existence of the said Order.

There is one more thing which has also to be dealt with in this case. The learned Counsel for the respondents has contended in the alternative that of the petitions were to stand suspended now then along with the petitions, in this case certain injunction including a mandatory injunction granted against the Respondents to issue temporary licence for mild liquor to the petitioners, should also stand suspended.

In My view the effect of the said Presidential Order suspending the pending proceedings cannot necessarily result in suspending the interim orders validly passed prior to the date of the said Presidential Order. The terms of the said Orders do not deal with such orders already validly passed, nor do they otherwise invalidate the order otherwise validly passed by a Court acting within its jurisdiction. The Court after admitting the petition deals with the question of injunction on the application of a party and after hearing such application the Court passes such interim orders by way of an injunction or otherwise as it deems fit. The said proceedings by way of an application for interim order, once

an order is passed therein come to an end and cannot be considered to be pending proceedings at the date of the proclamation so that operation of such interim orders validly passed may stand suspended along with the pending proceedings".

17. We do not wish to go to the extent to which the Bombay High Court has gone but no order validly passed with jurisdiction by a court before the Presidential Order under Art. 359 whether it be an interim order of stay or a confirmed order of stay pending disposal of the Original Petition after hearing the other side can get automatically vacated by the mere fact that an order under Art. 359 had been passed by the President, after such orders had been passed by the courts. It is always open to a party against whom an interim order had been passed to move the court and satisfy the court that justice demanded and circumstances warranted the vacation of the interim order. In such cases, various questions may arise but not the one that by virtue of the Presidential Order under Art. 359 the stay order should be vacated. As we said earlier, no attempt was made seeking cancellation of the interim orders on any grounds on the merits in the arguments now advanced before us or at any earlier time. On the other hand, the conduct of the party indicates acquiescence in the orders. The Presidential Order came only on 25th June, 1975, which is more than a year after the interim orders have been passed in these cases. The respondents could have moved for cancellation of the interim orders or at least pressed for the hearing of the Original Petitions urgently. No such attempt had been made. In all the circumstances, we see no reason whatever to accept the arguments of the Advocate General that the interim orders should be cancelled.

18. The proceedings pending in the Court will stand suspended for the period during which the Proclamations of Emergency made under clause (1) of Articles 352 of the Constitution on the 3rd December, 1971 and on the 25th June, 1975 are both in force. We make no order as to costs.