
(1961) 03 CAL CK 0015
In the Calcutta High Court
Case No : Matter No. 36 of 1959

Bijon Krishna Mukherjee and Another	APPELLANT
Vs	
Commissioner of Police and Others	RESPONDENT

Date of Decision : 10-03-1961

Acts Referred:

Constitution of India, 1950 — Article 13, 132, 132(1), 133(1), 134(1)

Citation : AIR 1961 Cal 521 : (1961) 1 CALLT 445 : (1962) 1 ILR (Cal) 291

Hon'ble Judges : P.N. Mookerjee, J;P.B. Mukharji, J;H.K. Bose, J

Bench : Full Bench

Advocate : S. Roy, for the Appellant; B. Das, for the Respondent

Judgement

P.B. Mukharji, J.—This is an application seeking Certificate both, under Articles 132 and 133 of the Constitution of India.

2. Although the certificate sought relates to a decision of this Special Bench, the application was first moved under the Rules of this Court before a Division Bench, presided over by the learned Chief Justice. Under the practice which has grown up in this Court, that Division Bench disposed of only that part of this application which was under Article 133 of the Constitution, and referred the rest of the application under Article 132 of the Constitution to be disposed of by this Special Bench. This Rule and practice have been severely criticised and challenged before us as illegal and ultra vires the Constitution.

3. Before discussing that Rule and practice it will be appropriate to state some relevant facts leading to this application. This Special Bench was constituted by the learned Chief Justice to determine and dispose of the application under Article 229 of the Constitution challenging orders of Police Commissioners prohibiting a particular type of vehicles to be used in Calcutta and its suburbs. The points involved in the determination of the application are :

(1) Whether Section 61A of the Calcutta Police Act, 1866 and Section 38A of the Calcutta Suburban Police Act, 1866 are ultra vires the Constitution being in

violation of the Articles 19(1)(g), 13, 14 and 81 of the Constitution of India.

(2) Whether the authorities concerned gave any opportunity to the petitioners to represent their case and whether in view of the lack of such opportunity the notification prohibiting owners of certain types of vehicles was against the principles of natural justice and therefore was illegal and without jurisdiction, and

(3) Whether the notification contravenes the provisions of Section 224 of the Calcutta Municipal Act.

This Special Bench disposed of the application on July 1, 1960 by discharging the Rule and dismissing the petition. No certificate from the Special Bench was sought at the time when it delivered its judgment dismissing the petition.

4. Thereafter, this application was made to the Division Bench as aforesaid. That Division Bench on December 13, 1960 made the following orders :

"IF the present application is to be treated as an application for certificate under Article 132 of the Constitution, the Special Bench which decided the case has exclusive jurisdiction to deal with this application. This point was decided by Division Bench of this Court in the case of Naresh Chandra Bose v. Sachindra Nath Deb, (S. C. A. No. 10 of 1956, decided by Chakravartti, C. J. and Sarkar, J. on June 1, 1956.) According to that judgment then, this application for a certificate under Article 133 has to be considered by the Special Bench. The petitioners, however, have also invoked Article 133 in their petition. In my opinion, the points involved in the case do not attract the Operation of Article 133 and Article 132 is the only Article under which the petitioners can ask for a certificate. In that view of the matter, I have no option but to send the application to be considered by the Special Bench which decided the case against the petitioners."

5. The Minutes of the order of that day make it clear that the application under Article 133 was dismissed and only the application under Article 132 was referred to this Special Bench for determination.

6. We therefore have no option but to deal with this application as only one seeking a certificate under Article 132 of the Constitution. In order to grant a certificate under Article 132 this Court has to be satisfied that "the case involves a substantial question of law as to the interpretation of this Constitution". We must emphasise the language of this Article and interpret it to mean that it must in the first instance be a substantial question of law and secondly that substantial question of law must be as to the interpretation of the Constitution.

It is not any and every question of the interpretation of the Constitution for which such certificate should be issued as a matter of course, but it must be a substantial question of law as to the interpretation of the Constitution. These two tests are not in our view satisfied in this case. No doubt it is true that the Police Commissioner's Orders and Notifications were challenged in this case under Articles 19(1)(g), 13, 14 and 31 of the Constitution.

But the decision in this case did not involve interpretation of those articles of the Constitution so much as their application to the facts of this case. Such interpretation of these articles of the Constitution which our decision involved has been laid down repeatedly in numerous decisions of the Supreme Court on these points.

These articles of the Constitution are authoritatively interpreted and explained by numerous decisions of the Supreme Court (to which reference has already been made in our judgment of this Special Bench) and our decision here only applied that interpretation to the facts in the instant case. No new, far less substantial question of law as to the interpretation of the Constitution arises any more in this case.

There is in this case no longer any substantial question within the meaning of Article 132(1). The numerous cases in which the Supreme Court has laid down the law under these different Articles of the Constitution involved in this case need not be recited and recounted here as they are sufficiently discussed and mentioned in our judgment in the Special Bench case. We are, therefore, of the opinion that no substantial question of law as to the interpretation of this Constitution is involved in this case.

We therefore refuse the certificate asked for. This view we are taking of the expression "substantial question of law as to the interpretation of the Constitution" finds support from the interpretation of the very same expression in Article 132(2) of the Constitution made by the Supreme Court in *State of Jammu and Kashmir and Others Vs. Thakur Ganga Singh for self and on behalf of other shareholders of Jammu and Kashmir Mechanics and Transport Workers Co-operative Society Limited and Another*, .

7. Realising this difficulty the appellant then tried to contend that we should certify it to be a fit case for appeal to the Supreme Court under Article 133(1)(c) of the Constitution. The main difficulty in the way of the applicant in this point is the order of the Division Bench dismissing the petitioners' application under Article 133 and asking us only to deal with the application in so far as it relates to Article 132 alone.

To get round this difficulty the applicant contends that the Division Bench order dismissing the portion of this application relating to Article 133 is not binding on this Special Bench. This argument requires to be carefully noticed, because the Rules of this Court have made the situation unnecessarily complicated and certain decisions have confused the picture still more on the point.

8. The present confusion under the Rules of this Court for application to grant certificate under Articles 132, 133 and 134 of the Constitution can be stated in a few words. Under Article 132(1) of the Constitution some Division Bench decisions of this High Court have interpreted the words "High Court" as meaning not only the particular Bench which decided and heard the case but also a different Bench constituted for dealing with Supreme Court matters.

Again strangely enough the same expression "High Court" in Article 133 is said by these Division Bench decisions to indicate not the Court which heard and decided the case in appeal but a some other Division Bench constituted by the Chief Justice dealing with Supreme Court matters. Again under Article 134(1)(c) of the Constitution the same expression "High Court" has found the meaning under the Rule 56 of Chapter VI, Part 2 of the Appellate Side Rules under the sub-heading "Criminal Appeals", to be the Bench which heard and decided the case, because of the express provision for oral application mentioned there at the time at the delivery of judgment.

But there again under Rule 57 it is expressly provided that "an application under Article 134(1)(c) of the Constitution, other than application submitted from jail shall be presented in Court before the Bench taking matters relating to appeals to the Supreme Court". The result is that the expression, "High Court" means different Benches although that expression occurs on the same subject of granting certificates under Articles 132, 133 and 134 of the Constitution.

9. The Rules as framed by this Court maintain this confusion. Chapter XXXIII A, Rule 2 of the Original Side Rules provide :

"Matters connected with appeals to the Supreme Court other than those with which the Registrar is authorised to deal, shall ordinarily be heard by the Division Bench appointed to deal with such matters (In this chapter called the Appellate Court)."

Mark the word "ordinarily" in this Rule. Then follows Rule 4 in this Chapter which lays down :

"Every application for leave to appeal to the Supreme Court shall be to the Appeal Court by notice of motion supported by a petition (verified by affidavit) which shall be in Form No. 3."

The rest of the Rule is not material for our present purpose. The counterpart of these Rules appear also on the Appellate Side of this Court.

10. Rules 2 and 5 of Chapter VI, Part 2 of the Appellate Side Rules provide as follows :

"2. Matters connected with appeals to the Supreme Court, other than those with which the Registrar is authorised to deal, shall ordinarily be heard at such time as the Division Bench appointed to deal with such matters shall fix. (Mark again the word "ordinarily" in this Rule also).

"5. In all other applications regarding matters connected with appeals to the Supreme Court, including petitions for leave to appeal, notice under Rule 6 of this Chapter is necessary in addition to any other notice herein prescribed."

Finally, Rule 14 of Chapter II, Vol. I of the Appellate Side Rules provides :

"The business of the Supreme Court Section on the Appellate Side of the High

Court shall be laid before the Division Bench presided over by the Chief Justice or such other Bench as the Chief Justice may direct, except in the case of appeals in suits instituted on the Original Side of the High Court."

11. The net result of these Rules as developed by practice and certain Division Bench decisions is, that instead of the Bench which hears and decides the actual case, some other Division Bench takes the application for certificate from that decision, and considers the question of granting certificate under the Constitution. It is necessary now to notice some of these authorities responsible for this peculiar practice. One is the case of S. C. A. No. 10 of 1956, D/-1-6-1956 (Cal) not reported but mentioned in the order in this case. A copy of that unreported judgment is appended herewith for ready reference" There Chakravarti, C. J. and Surkar, J. made the following observations :

"The scheme under Article 132 and Articles 133 & 134 as regards appeals to the Supreme Court is different. Under Article 132(1) it is the Judge who deals with the case in the High Court who has to certify whether the case involves a substantial question of law as to the interpretation of the Constitution. That, however, is not the final certificate for leave to appeal. With the expression of opinion contemplated by Article 132(1) if the Judges do express such an opinion, the intending appellant has to make an, application under Article 133 and then the Bench dealing with the application for leave to appeal to the Supreme Court examines the application and see whether the other requirements as to limitation and the like are satisfied. Where an application is made to this Court for leave to appeal to the Supreme Court under Article 132 (1) of the Constitution of India, but no certificate, as contemplated by that Article granted by the Judges who dealt with the case in this Court, is produced, the application is plainly not maintainable, The procedure applicable to applications under Article 132 is the same as explained by the Privy Council in relation to Section 205 of the Government of India Act, 1935."

12. In another Division Bench presided over by Chakravartti C. J. in Standard Vacuum Oil Co. Vs. The Commercial Tax Officer and Others, the learned Chief Justice again observed :

"For these reasons, it appears to me that a certificate under Article 132 (1), while it authorises an appeal, does not by itself bring an appeal into existence. It may also be pointed out that a certificate under Article 132(1) , embodied in the judgment, is a mere declaration as to the nature of the case and is not granted to any particular party. On the strength of that certificate, any of the parties aggrieved by the judgment can prefer an appeal. Unless therefore, there is a further petition by a party actually desiring to appeal, it cannot be known that anybody is going to appeal at all or who the appellant is or that the appeal is in time and in form. In order that there may be an appeal, a further petition is thus necessary."

13. Again Chakravartti, C. J. at the same page and in the same case proceeds to

observe :

"I would, therefore, hold that where a certificate under Article 132(1) of the Constitution has been granted by a learned Judge, sitting singly, there should be a further application to the Court, taking Supreme Court matters which will be in the form of a petition of appeal and which will set out the fact of a certificate having already been granted. That petition must be made within the period of limitation prescribed for appeals to the Supreme Court and must implead the necessary parties. Just as in cases under Article 133, it has to be established that the proposed appeal satisfies the valuation test or that it involves substantial questions of law or that it is otherwise a fit case for appeal, so must the second petition made in a case under Article 132 make out to the Court, taking Supreme Court matters, that a certificate which entitles the intending appellant to appeal to the Supreme Court has been granted. The prayer in such petition should be for an order that a formal certificate be drawn up and be issued."

14. The position then as a result of these observations is first, (1) that not only a Bench different from the Bench deciding the case itself, deals with the question whether a certificate should or should not be granted under Article 132 (1) and Article 133(1)(c), but also (2) that two applications have to be made and two certificates one informal and; another formal should be given, the informal certificate being granted under Article 132(1) by the Bench which decided the case.

We consider this whole procedure of duality of courts, applications and certificates created by these decisions and Rules, to be illogical and most cumbersome and places the proposed appellant to the Supreme Court in an unnecessarily inconvenient situation and we consider the position requires to be changed. The reasons why we have come to this conclusion may be stated briefly.

15. First, there is no reason why the same expression "High Court" should have multiple construction to mean different Benches in Articles 132, 133 and 134 of the Constitution of India. One consistent meaning to the expression "High Court" should be given in all these Articles of the Constitution which prescribe the same function to the High Court of granting certificates. Secondly, the Bench which decides the case is in our view the most appropriate Bench and the most properly equipped Bench to decide the question whether a certificate should be granted under Article 132 or 133 or 134 of the Constitution, because it is that Bench which is in full possession of the facts, law, issues and arguments involved in their decision.

Any other Bench would take a much longer time and it will lead to, as it often does, unnecessary waste of judicial time where another Bench without having known anything about the facts or law of the case has to collect them from the judgments which may in these matters involve long and complicated questions of fact and law. No question of bringing any fresh mind through a different Division Bench other than the Bench which decided the case, to bear on the question can

arise because the case is not being redecided but the only question is whether a certificate in the case already decided is to be given.

This also avoids the unconscious tendency of the Bench granting the certificate to play the role of an appeal court of one Division Bench sitting over another, a role repeatedly criticised as unwarrantable by the Supreme Court. Thirdly, the questions whether the appeal is within limitation or in proper form showing who are the appellants etc. are not in our view any reason why there should be duplication of Courts and Certificates as suggested by the Division Bench decisions in the unreported case of S. C. A. No. 10 of 1956, D/-1-6-1956 : (since reported in Naresh Chandra Bose Vs. Sachindra Nath Deb and Others,) and Standard Vacuum Oil Co. Vs. The Commercial Tax Officer and Others, .

These questions of limitation and form for such appeals should not in our view be confused with! the function specially assigned by the Constitution of India to the High Courts to grant certificates which is concerned to see (1) under Article 132(1) whether the "case involves a substantial question of law as to the interpretation of this Constitution", (2) under Article 133(1)(c) whether the case is a fit one for appeal to the Supreme Court or in case of affirmance the appeal involves substantial question of law and (3) under Article 134(1)(c) that the criminal case is a fit one for appeal to the Supreme Court.

These specific questions on which Certificates of the High Court are to be granted under these Articles of the Constitution do not at all relate to questions of form or limitation within which appeals are to be filed. These questions of form or limitation of such appeals or such other miscellaneous questions may perhaps be left to the Bench to which is assigned Supreme Court matters but they cannot and should not include the constitutional function of granting certificates.

Lastly, even a reference to the relevant provision of the CPC will confirm the same conclusion. Before quoting that relevant provision of the Code reference may be made to the following observations of Chakravarti, C. J. in Azamabad Tea Co. Private Ltd. and Another Vs. Suraj Ratan Thirani and Others, :

"To my mind the true position is that while the right of appeal is given by the Constitution and given by way of defining the jurisdiction of the Supreme Court the procedure for preferring and prosecuting such appeals is laid down, in the Civil Procedure Code. In so far as the Code also contains provisions relating to the right of appeal and in so far as Sections 109 and 119 lay down in what cases an appeal shall lie, there may be, as I have pointed out elsewhere, a duplication. That however does not involve the consequences that appeals contemplated by Article 133 of the Constitution are not governed by the Code. In my view, an appeal to the Supreme Court from a judgment, decree or order passed in a civil proceeding is an appeal under the CPC 89 well."

Now Order 45, Rule 2 of the CPC provides :

"Whoever desires to appeal to the Supreme Court shall apply by petition to the

Court whose decree is complained of."

The expression "the Court whose decree is complained of" appears to indicate the very Bench which decided the case.

16. Both in the Bombay and in the Madras High Courts the normal and usual practice is that certificates under these Articles of the Constitution are granted by the Bench which decided the case. It is only when any of the Judges who decided the case is not available that a separate Bench considers the question of the grant or refusal of certificates under these Articles of the Constitution. That practice and procedure seem to us to be more consistent (1) with the letter and spirit of the Constitution and the Articles concerned, (2) with common sense and (3) avoidance of unnecessary waste of judicial time. I understand this is the universal practice with every High Court in India and the sole exception is this High Court.

17. It is perhaps for these reasons that this peculiar Calcutta practice has been adversely criticised by the Supreme Court in a number of decisions. I shall refer only to one or two. In *Haripada Dey Vs. The State of West Bengal and Another*, dealing with question of the grant of certificate under Article 134(1)(c) of the Constitution, Bhagwati, J. noticed this peculiar practice in Calcutta by observing at pages 758-59 :

"The appellant filed a petition for leave to appeal to this Court and that petition according to what we are told is the practice obtaining in the Calcutta High Court came before a Division Bench differently constituted -- a Bench constituted by the learned Chief Justice and S. C. Lahiri, J."

18. Again the Supreme Court in the case of *Sidheswar Ganguly Vs. The State of West Bengal*, dealing with a certificate under Article 134(1)(c) of the Constitution mentions the danger of this Calcutta practice and procedure. That danger is that such a different Court consciously or unconsciously almost assumes the role of one Division Bench sitting in judgment over another Division Bench of the same Court B. P. Sinha, J, (as His Lordship then was) at page 753 of that report (SCR) : (at p. 145 of AIR) drew pointed attention to this feature by this observation :

"It appears that the learned Chief Justice and his Brother Judge, contrary to the legal position that one Bench of the High Court has no jurisdiction to sit in judgment on the decision of another Division Bench, have in fact, done so."

19. All this could have been avoided if the Calcutta practice ensured that in all cases calling for the exercise of the constitutional function of granting certificate under Articles 132, 133 and 134 of the Constitution, the Court deciding the case should give or refuse the certificate.

20. The only difference with regard to the number of Judges so far as the expression "High Court" is concerned in these Articles concerning the grant of certificates, is to be found in Article 133(3) of the Constitution. It expressly lays

down that notwithstanding anything contained in Article 133, no appeal shall lie to the Supreme Court from the judgment, decree or final order of one Judge of a High Court unless Parliament by law otherwise provides.

The appeals contemplated under Article 133 are those from judgments, decrees or final Orders in a civil proceeding of a Bench of two or more Judges of a High Court and hence the single Judge of a High Court who decides the case in the first instance cannot grant a certificate under Article 133 as there is no constitutional right thereunder to appeal to the Supreme Court unless the Parliament by law otherwise provides.

In such a case it will be the appeal Bench which decides the appeal from such Single Judge or any Bench of two or more Judges (such as here the Special Bench of three Judges) which decides the case that will deal with the Certificates under Article 133. But this limitation does not apply in the case of certificate under Article 132(1) or Article 134(1)(c) of the Constitution. This point is well-settled by the observations of Patanjali Sastri, C. J. in the Supreme Court decision of *Election Commission, India Vs. Saka Venkata Subba Rao and, .*

21. For the applicant this matter is of crucial importance because as he fails under Article 132(1) of the Constitution on the ground that the case does not involve a substantial question as to the interpretation of the Constitution he now turns round to urge before us the question that it involves a substantial question of law of public importance. But this he can only do under Article 133(1)(c) of the Constitution and his difficulty there is that, that application has already been dismissed by another Division Bench.

Mr. Sisir Das, learned Advocate for the appellant, has drawn our attention to the fact that we are a Special Bench, and our decision in the case must be regarded as the decision of the Full Bench of the High Court under Rule 3-A of Chapter 5 of the Original Side Rules providing "a decision of a Bench of 3 or more Judges constituted under Rule 2 and Rule 3 of this Chapter on or after the 1st July, 1953, shall be deemed to be a decision of a Full Bench." Therefore, he contends that the order of the Division Bench of the learned Chief Justice and Bose, J. dismissing the application so far as it related to Article 133(1)(c) is not binding on us as the Special Bench.

Ingenious as this argument is we do not think that we should take the course first because our decision as a Special Bench in this case is not concerned with the question, which Bench should grant certificate under Articles 132 and 133 of the Constitution, but on totally different points on which alone our decision is the decision of a Full Bench and secondly because having regard to the Rules made in this behalf to which reference has already been made by us and having regard to the practice followed, which Rule no doubt has been challenged as ultra vires the Constitution before us, we think the more appropriate and desirable course will be to recommend to the learned Chief Justice, which we hereby do, to take necessary steps for immediate amendment of these Rules to bring this whole

procedure of granting certificates by this High Court under Articles 132(1), 133(1) (c) and 134(1)(c) of the Constitution of India in conformity with the universal practice prevailing in all the other High Courts in India and in conformity, with the letter and spirit of the language of these Articles of the Constitution, so that the procedure can become more rational, less cumbersome and less harassing for the prospective appellant to the Supreme Court.

A Division Bench under the Rules of this High Court dealing with other Supreme Court matters can certainly be left free to deal with the many miscellaneous matters relating to appeals to the Supreme Court but not the constitutional duty of this High Court to grant certificates imposed by Articles 132, 133 and 134 of the Constitution. We think that is the proper course to follow. This will not prejudice the applicants in any way because after all they have still the right to apply for special leave before the Supreme Court and as Bhagwati, J. points out in the case of Haripada Dey Vs. The State of West Bengal and Another, , (already referred to on another point), at page 759 that if there has been a departure from a legal procedure the proper course will be to ask the parties to approach the Supreme Court for invoking its jurisdiction under Article 136(1) of the Constitution. Here the procedure under Article 132(2) of the Constitution is also open to the applicant.

22. For these reasons, we are of the opinion that our Rules and practice should be brought in line with those of the rest of India to give this constitutional duty under Articles 132(1), 133 (1) (c) and 134(1) (c) of the Constitution of India, of granting certificates to the Court which hears and decides the case from which an appeal is intended to be preferred to the Supreme Court and for which the certificate is sought. Having regard to our re-commendations, we direct that the Registrar do place this judgment before the learned Chief Justice for necessary steps being taken in the matter of revising the Rules accordingly.

23. No order as to costs of this application.

Bose, J.

24. I agree that the certificate asked for under Article 132(1) of the Constitution should be refused and the Rules of this Court should be suitably amended as suggested by my learned brother P. B. Mukharji, J.

P.N. Mookerjee, J.

25. I agree that this application should fail.

26. The application was made under Articles 132 and 133 of the Constitution. It was heard and rejected by the learned Chief Justice and Bose J. on December 13, 1960, so far as it purported to be under Article 133, and it was referred to us, under the prevailing practice of this Court, for decision of the question of certificate under Article 132, or, to be more precise, under Clause (1) of that Article. For granting such certificate, however, it is necessary to find that the case involves a substantial question of law as to the interpretation of the Constitution.

Such a finding is not possible in view of the judgments, delivered by us, in arriving at the decision, against which the petitioner desires to move the Supreme Court. At the most, the instant case may be said to involve questions of law as to the interpretation of the Constitution, but, having held that the said questions are covered and concluded by the several Supreme Court decisions, to which ample reference has been made by us in our aforesaid judgments, I do not think that we can still certify that they are substantial questions of law within the meaning of the relevant Article 132(1) of the Constitution. Indeed, as held by the Supreme Court in the recent case of State of Jammu and Kashmir and Others Vs. Thakur Ganga Singh for self and on behalf of other shareholders of Jammu and Kashmir Mechanics and Transport Workers Co-operative Society Limited and Another, , the instant case, in the aforesaid context, may well be said to involve only the question of application of certain settled principles of law. In the above view, the petitioner's prayer for a certificate under the aforesaid Article 132(1) of the Constitution would fail.

27. It is only necessary to add that, as held by the Supreme Court in the above cited case of State of Jammu and Kashmir and Others Vs. Thakur Ganga Singh for self and on behalf of other shareholders of Jammu and Kashmir Mechanics and Transport Workers Co-operative Society Limited and Another, , and as sufficiently indicated in its earlier judgment (Vide, Haripada Dey Vs. The State of West Bengal and Another,), though in a slightly different context, the High Court should, in circumstances like the present, refuse leave or certificate, leaving the petitioner to pray for special leave before the Supreme Court and, to my mind, that is the only way, now open to the petitioner.

28. As to my Lord's suggestions and observations on the question of procedure to be followed in the matter of applications under Articles 132 and 133 of the Constitution, -- and under Article 134 too, -- they obviously indicate a much better course from the Constitutional point of view as also from the point of view of reason and convenience and it is eminently desirable that the rules of this Court should be amended and the present practice suitably altered in terms of the said suggestions. The course recommended has apparently the support of the Supreme Court (Vide, Haripada Dey Vs. The State of West Bengal and Another,) and, as said above, it is obviously more in consonance with the letter and spirit of the Constitution as also with reason and convenience.