

(1976) 01 J&K CK 0007
In the Jammu And Kashmir High Court
Case No : Petition No. 20 of 1975

B.K.Thapper and another

APPELLANT

Vs

Vijay Kumar and another

RESPONDENT

Date of Decision : 15-01-1976

Acts Referred:

Constitution of India, 1950 — Article 132, 133

Citation : AIR 1976 J&K 66 : (1976) JKLR 1

Hon'ble Judges : A.S.ANAND, J

Bench : Single Bench

Advocate : I.D. Grover, S.P. Gupta, Advocates appearing for the Parties

Judgement

Mian JalalUdDin, J.—This is an application under Articles 132 and 133 of the Constitution of India for leave to appeal to the Supreme

Court against the judgment of this Court dt. 29.12.75. Reported in AIR 1976 J and K 51 (FB).

2. In a suit for ejectment brought by the respondents against the petitioners the following agreed issue was framed by the learned Single Judge:

Whether the provisions of Section 1 (3) (iii) of Jammu and Kashmir Houses and Shops Rent Control Act of 1966 are ultra vires of the

Constitution; if so, what is its effect on the present suit?

3. During the pendency of the suit the President issued an order under Article 359 (1) of the Constitution suspending the operation of Arts.14, 21

and 22 of Constitution. According to the said order all the pending proceedings in which right for the enforcement of any of the Articles specified

therein is claimed have to remain suspended during the operation of the order. As a result of this an application was moved before the learned

Single Judge by the defendants for suspension of the proceedings. The learned Judge was of the opinion that the point raised was an important

question of law of general importance which has farreaching implications in the sense that the decision bearing on the application would affect a

large number of pending cases, he therefore, referred the following question to the Full Bench:

What is the effect of the Presidential Order issued under Article 359 (1) on pending proceedings particularly suits, writ petitions and appeals

involving pleas based on any Article mentioned in the order as ground of claim or defence, alone or in conjunction with other grounds?

The Full Bench by majority judgment pronounced on the question that pending proceedings could not be suspended and the suit could be decided

minus the issue raised relating to the constitutionality of the impugned provision of law. The minority judgment dissented from the majority view and

held that the Presidential Order affected the pending proceedings and the true effect of the Order is that all pending proceedings in which any of the

rights specified in the order is claimed either by way of attack or defence have to be stayed till the enforcement of the order. Against this judgment

delivered by the Full Court leave to appeal to the Supreme Court is being sought by the defendant.

4. Mr I.D. Grover appearing for the defendants has submitted that the question decided by the Full Bench has farreaching implications and is going

to affect a large number of pending cases and it also raises an important and substantial question of law of general importance as to the

interpretation of the Constitution. He has further submitted that the learned Single Judge who made reference to the Full Court was himself of the

opinion that the matter raised before him was of general importance which had bearing on a large number of cases. He has urged that the

Presidential order or for the matter of that Article 14 of the Constitution makes no difference whether the right is sought to be enforced by way of

claim or by way of defence. It is a right available to a citizen in appropriate proceedings. Even in the majority judgment, it is argued, there is

divergence of view expressed on construction of the Order of the President. According to one view right under Article 14 could not be enforced at

all during the operation of the order either by way of claim or defence and that the plea raised must be held as incompetent and suit tried minus the

plea raised. The view has been enunciated on the principle that a party be he plaintiff or defendant loses locus standi to raise the plea in all

proceedings he they fresh or pending. According to the other view the order affects only such pending proceedings in which right under Art.14 is

sought to be enforced only by way of claim and not by way of defence can be suspended. In other words tending proceeding in which right is

sought to be enforced by way of claim will remain stayed but, if the right is claimed by way of defence that right will not survive and the plea raised

in defence must be dismissed as incompetent. It is, therefore, all the more necessary that the matter should go to the Supreme Court for an

authoritative pronouncement on the question, Leave, it is requested may, therefore, be granted.

5. Shri S.P. Gupta the learned counsel for the plaintiff has, on the other hand, vehemently opposed this application. He has raised two fold

arguments; (1) that the order of the Full Bench is neither a 'judgment' nor a 'final order' within the meaning of Articles 132 and 133 of the

Constitution of India and therefore, leave cannot be granted. According to the learned counsel the order is only an interlocutory order, a mere

expression of opinion of the court on a question referred to it for decision. The order does not finally adjudicate upon the rights of the parties in the

case. No issue has been decided in which rights of the parties have been finally determined. The suit has to go back to the learned Single Judge for

trial. Reliance is placed on AIR 1970 SC 1168, AIR 1975 Delhi 77 (FB), and AIR 1965 All 457.

6. The learned counsel has further urged that the order passed by the Full Bench does not in any way raise a question of general importance and it

has got no bearing on the interpretation of Constitution. Therefore, the requirements of the above mentioned Articles are not satisfied. The court

may for these reasons decline to grant leave to the defendants to file appeal in the Supreme Court.

7. I have given my anxious consideration to the matter raised before us.

8. It is true that their Lordships of the Supreme Court in AIR 1970 SC 1168 (supra) have construed the expression 'final order' occurring in

Article 133 (1) to mean a final decision on the rights of the parties in dispute in a suit or proceeding, and if the rights of the parties in dispute in a

suit or proceeding remain to be tried, after the order, the order has been held not to be a final order. Therefore, an order which does not finally

decide the rights of the parties in dispute has been held not to be a final order. The Delhi High Court has also enunciated the same view following

the observations made by their Lordship of the Supreme Court. But the view has been laid down in the aforesaid judgment in respect of an

application made under Article 133 (1) and not under Article 132. The petitioners in the present case claim leave to appeal both under Articles

132 and 133 of the Constitution of India. Their application may not be competent under Article 133 but in so far as Article 132 is concerned it has

wider scope as it explains the expression 'final order' to include an order deciding an issue which if decided in favour of the appellant, would be

sufficient for the final disposal of the case. The explanation has been added only for the purpose of this Article. It is, therefore, clear that this has

enlarged the scope of the Article in so far as its application to the final order is concerned.

9. In my view the order passed by the Full Bench has virtually decided the issue of the constitutionality of the impugned provision of law which is

germane to the case. The order of the Full Bench has practically shut out the material defence of the defendants relating to the vires of Section 1

(3) (iii) of the Rent Control Act. If the Full Bench had decided the question in favour of the petitioners that the plea of the defendants could not be

dismissed as incompetent and the right to claim enforcement of Article 14 survived and could be revived after the revocation of the Presidential

Order, then the position would be different for in that event if the defendants successfully established the constitutionality of the impugned law, the

issue would be decided in their favour and in that case the defendants could successfully claim protection of the Rent Control Act by virtue of their

being statutory tenants and this would be sufficient for the final disposal of the case. The effect of the decision of the Full Bench, on the other hand,

is that it has to all intents and purposes practically decided the material issue germane to the case itself.

10. In my view the said order therefore, comes within the purview of the explanation appended to Article 132 of the Constitution.

11. Again, there can be no denying the fact that the question decided by the Full Bench is of substantial importance as also of general importance.

This has bearing on a large number of pending cases. The judgment has decided an important issue relating to the interpretation and the applicability of Art.14 of the Constitution.

12. Again, the matter needs to be decided by the Supreme Court because there is divergence of view expressed in the two majority judgments in respect of the application of Article 14 and the Presidential Order with reference to pending cases as pointed out by the learned counsel for the defendants. There is no unanimity in the view that all the pending proceedings in which right under Article 14 is claimed must continue regardless of the fact whether the right is grounded by way of claim or defence. There is thus no positive guideline laid down unanimously in the judgment for the courts to follow. The matter having been heard by the Full Bench on reference no further appeal can lie to this Court and the party aggrieved also can have no right of appeal in the court. Therefore, for an effective decision and for an authoritative pronouncement by the Supreme Court on a question of general importance, leave must be granted to the petitioners.

13. For the foregoing reasons I would, therefore, allow the application and grant the defendants leave to file appeal in the Supreme Court within the prescribed time.

14. As regards, the prayer for stay of the proceedings the question is left to the learned Single Judge for his consideration. He will pass appropriate orders thereon according to his discretion.

15. MUFTI, J.: This petition must be dismissed on the short ground that the decision of the Full Bench dt. 29.12.75*is not appealable to the Supreme Court under Article 132 or under Article 133 of the constitution of India.

* Reported in AIR 1976 J and K 51 (FB).

16. The law is well settled that each one of the expressions 'judgment', 'decree' and 'final order' occurring in Article 133 (1) of the Constitution bear the same connotation viz. that there is a final adjudication of the rights of the parties in relation to the whole suit or proceeding. (See AIR 1968 SC 733; AIR 1970 SC 1168).

17. The decision of this court dated 29.12.75*finally disposes of the proceeding for the stay of the trial of the suit. The proceeding followed the promulgation of the Presidential order dated 27.6.75 under Article 359 (1) of the

Constitution on the application of the defendants who claimed

that, in accordance with the said order, the trial of the suit was liable to be stayed and sought a direction to that effect. The plaintiffs resisted the

application. The question naturally arose whether the trial of the suit was liable to be stayed under the Presidential order. By its decision dated

29.12.75 this court, by a majority, dismissed the application holding that the Presidential order did not warrant the stay of the trial of the suit. Thus

the decision finally disposes of the question of stay of the trial of the suit and not the suit itself. The suit is still alive and has got to be tried and

disposed of on merits. The decision merely decides a point which incidentally arose in the suit. It does not determine the rights, and obligations of

the parties in relation to the matters in dispute in the suit. That being so, the decision cannot be deemed to be a 'judgment, decree or final order' for

purposes of Article 133 (1) of the Constitution, as also held by my learned brother Mian JalaludDin J.

* Reported in AIR 1976 J and K 51 (FB).

18. On a parity of reasoning the decision of this court cannot also be held to fall within the purview of the expression "'judgment, decree or final

order'" occurring in Article 132 unless it is covered by the explanation appended at the end of this Article in these words :

For purposes of this Article, the expression 'final order' includes an order deciding an issue which, if decided in favour of the appellant, would be

sufficient for the final disposal of the case.

19. Dwelling on this aspect of the matter the learned counsel for the defendants argued that the majority judgment had virtually decided issue No. 6

against the defendants which, if decided in their favour, would be sufficient for the final disposal of the suit, and, so viewed, the decision squarely fell

within the purview of Article 132 of the Constitution. My learned brother, Mian JalaludDin has upheld the argument and held that an appeal would

lie to the Supreme Court from the decision in question under Article 132 of the Constitution. With utmost respect I venture to say that this view is

not correct.

20. The effect of the decision no doubt is that challenge to Section 1 (3) (iii) of the Jammu and Kashmir Houses and Shops Rent Control Act must

be dismissed as incompetent and that way the court may have virtually decided

the question of vires of that section against the defendants but, so doing, the court has merely disposed of first part of issue, No. 6 which reads :

Whether the provisions of Sec. 1 (3) (iii) of the Jammu and Kashmir Houses and Shops Rent Control Act are ultra vires of the Constitution?

The second part of this issue providing :

If so, what is its effect on the present suit"" still remains and so also the other issues raised in the suit which have got to be tried deride on their merits before the quit can be finally disposed of by this court.

21. It will not be correct to assume, as the argument of the learned counsel suggests, that if the impugned provision was held to be bad, then, what

follows is that the defendants would successfully claim protection of Jammu and Kashmir Houses and Shops Rent Control Act, particularly so,

having regard to the following observations made by me in my order dated 10th January, 1975 : (AIR 1976 J and K 30) regarding appointment of

a Receiver, an order which was confirmed in appeal by the Supreme Court by its dated 15.4.1975.

Leave that alone, there is a more strong impediment in accepting the case of the defendants based on statutory tenancy. That impediment lies in

Sec. 2 (5) of the Houses and Shops Rent Control Act, 1966. That Section reads :

Shop"" means a building or a part of a building suitable for occupation as such and includes a piece of land, with or without structure let for the

purpose of being used principally for business or trade;

By virtue of Notification No. 193 of 1961 dated 2451981 issued under the second proviso to S.1 (3) of Jammu and Kashmir Houses and Shops

Rent Control Act, 2009, the Government was pleased to direct that the said Act shall apply to the buildings let for the purpose of any trade or

business or use for any industrial or commercial purpose in any area in which the said Act was in force and any such building shall be construed as

a 'shop' within the meaning of the said Act. That Act was repealed by the J and K Houses and Shops Rent Control Ordinance, 1966 which

however continued the notifications issued under the previous Act by virtue of Section 34 (2) thereof as if such notifications were issued under the

Ordinance. A similar provision appeared in the Act replacing the Ordinance styled as the J and K Houses and Shops Rent Control Act, 1966. The

notification must therefore, be read as one issued under the existing Act namely J and K Houses and Shops Rent Control Act, 1966. In

accordance with the said notification any building let for commercial purposes must be construed as a 'shop' within the meaning of the said Act.

In the present case what was demised to the defendants is described in clause 1 of the lease deed' dated 12th December, 1966 which says :

The lessors granted and the lessees as joint tenants accepted a lease of the property known as Hari Talkies, situated at Raghunath Bazar Jammu ,

consisting of a Cinema Hall with its premises consisting of structures, fixtures and chobara in fit and perfect condition in accordance with the

Cinematograph Act and Municipal ByeLaws for the purpose of a licence, along with the Cine Machine, electric fittings, fans and furniture in perfect

order the list of which is attached as Annexure A for the sole purpose of running the cinema business for the years from 1st October, 1964 at a

monthly rent of Rs. 4100/ (Rs. four thousand and one hundred only) payable in advance on the tenth of each month at the Dharmarth chest, Jammu

or at such place as the lessor may instruct in this behalf.

Thus the lease was a composite lease of cinema premises and the talkie equipment including machinery, fittings and furniture and not a lease of a

mere building or building with land and structures or the like covered by the definition of 'shop' in the said Act. On a parity of reasoning it was held

in *S. Raja Chetty v. Jagannathadas Govindas*, (AIR 1950 Madras 284) that the lease of land and building together with fixtures, talkie equipment

machinery and other articles is not the lease of mere building or the building with mere furniture of the sort covered by the definition of the 'building'

under S.2 of the Madras Buildings (Lease and Rent Control) Act, 1946. In that case there was a provision in the deed which split up the monthly

rent and hire of Rs. 3200/ into Rs. 1600 being rent for the ground and superstructure, Rs. 800/ being hire of furniture and Rs. 800/ being hire of

talkie equipment machinery and fixtures, but the court held it was extremely artificial and not to effect a division of lease, into two separate

contracts, namely one of the rent of the building and the other of hire of the furniture so as to make the provisions of the Act applicable. Here the

position is even worse. No separate provision has been made for hire and rent. The amount payable by the lessee represents a gross amount in lieu

of both rent and hire. It was stated that the machinery and equipment were purchased by the defendant when they took the lease for the first time

in 1954 and the property therein could not be treated to have passed to the lessor when he demised it along with the premises in the year 1964.

There is no evidence on the file so far to justify the conclusion that the machinery and equipment were purchased by the defendants or in any case

that property therein had not passed to the lessor when he demised it in the year 1964. That evidence may come in the course of trial. But presently no case can be found in favour of defendants on that plea.

22. Accordingly if by virtue of the decision in question this court has found that challenge to Section 1 (3) (iii) is incompetent, it cannot be said that

the court has decided issue No. 6 in its entirety or even that it has decided a part of an issue which, if decided in favour of the defendants would

finally dispose of the suit.

23. Again it must be remembered that the question involved in the suit is whether the defendantslessees surrendered the possession at the expiry of

the period of the lease and, alternatively, whether they are liable to be ejected and not merely whether they are liable to be ejected. So, even if it

were assumed that this court has decided issue No. 6 in its entirety against the defendants, it cannot be said that the court has decided an issue

which, if decided in favour of the defendants, would finally dispose of the suit.

24. Viewed from any angle, therefore, the decision in question cannot be held to fall within the purview of the explanation to Article 132 and I hold

so. In that view the decision cannot be deemed to be 'judgment, decree or final order for purposes of Article 132.

25. Apart from this there is another formidable obstacle in the way of the defendants under Article 132. It is this. The case does not directly

involve interpretation of any provisions of the Constitution. The question before the Full Bench was: what was the effect of the Presidential order

on the pending actions? So viewed, the question directly involved was the interpretation of the Presidential Order. That may have incidentally

raised question as regards the interpretation of some provision of the Constitution but that is not enough for purposes of Article 132 which, I think,

requires that the case should directly involve the interpretation of some particular provision of the Constitution.

26. In these circumstances I am of the opinion that the decision in question is not appealable to the Supreme Court either under Art.132 or under

Art.133. Accordingly the question of giving any certificate under these Articles does not arise. No doubt, the decision pertains to an important

question of law of general importance but that requirement, by itself, is not sufficient to entitle a party to get certificate for leave to appeal, as I

thought it to be, when, simultaneously with the filing of the petition for leave to appeal to the Supreme Court, the matter was briefly argued before

us.

27. The result is that the petition is dismissed but there will be no order as to costs.

(In view of difference of opinion between Mian JalaludDin and Mufti BahaudDin Farooqi JJ., the matter was placed before Dr. Anand J. who

delivered the following Judgment).

28. Dr. ANAND, J.: I have had the advantage of going through the orders prepared by my learned brothers Mian JalaludDin J. and Mufti

BahaudDin Farooqi J. I respectfully agree with the reasonings and conclusions arrived at by my learned brother Mufti BahaudDin Farooqi J. and

respectfully accord my dissent from the reasonings and the conclusions arrived at by my learned brother Mian JalaludDin J. However, I would like

to add a few words of my own.

29. Under Article 132 of the Constitution of India an appeal shall lie to the Supreme Court from any judgment, decree or final order of a High

Court, if the High Court certifies that the case involves a substantial question of law as to the interpretation of this Constitution. Thus, one of basic

requirements which must be satisfied before the High Court can issue the certificate is that the 'case' involves a substantial question of law as to the

interpretation of the Constitution. In the application of the petitionersdefendants for the stay of the proceedings which had come up before the Full

Bench, no question with regard to the interpretation of any provision of the Constitution was taken up nor was any such question canvassed at the

time of the hearing of that application by the Full Bench. The Full Bench did not dwell on the interpretation of any provision of the Constitution

other than what was necessary for interpreting the Presidential Order. The Full Bench was only called upon to interpret the effect of the

Presidential Order issued under Art.359 (1) of the Constitution and of no specific provision of the Constitution of India as such. In my opinion

under these circumstances when the question of interpretation of the Constitution was not involved in the application of the defendants which was

disposed of by the Full Bench, it cannot be said that the "case" involves any substantial question of law as to the interpretation of the Constitution.

In the application of the petitioners for the grant of certificate under Article 132 of the Constitution it has been pleaded that the case involves

interpretation of Article 359 of the Constitution. I do not think that any interpretation of Article 359 of the Constitution of India is involved in the

present case. Moreover, the interpretation of Article 359 of the Constitution of India which is sought to be raised before the Supreme Court was

never raised in the stay application which was disposed of by the Full Bench. The so-called substantial question of law relating to the interpretation

of Article 359 of the Constitution of India would, therefore, be an entirely new question which is raised for the first time at the hearing of the

petition for a certificate of fitness to file an appeal in the Supreme Court. Such an application cannot be entertained. Reference in this connection

may be made with advantage to AIR 1949 All. 632, wherein on a parity of reasoning such a certificate was refused under Section 205 of the

Government of India Act, 1935, which section in all its essentials is akin to Article 132 (1) of the Constitution of India. Even otherwise

interpretation of Article 359 of the Constitution of India has been finally settled by the Supreme Court of India in numerous pronouncements. (See

AIR 1964 SC 381, AIR 1966 SC 740, AIR 1968 SC 765 etc). A substantial question of law, therefore, cannot arise where that law has been

finally and authoritatively decided by the Supreme Court (Reference may be made to AIR 1960 SC 356 in this connection). Even the

interpretation of the Presidential order which was the sole question before the Full Bench has been authoritatively settled by the Supreme Court in

AIR 1975 SC 1906 to which I have made a reference in my judgment in the Full Bench. No certificate can, therefore, be granted to the

petitioners/defendants under Article 132 of the Constitution of India.

30. In view of the above discussion I agree with my learned brother Mufti BahaudDin Farooqi J. that the decision of the Full Bench in question is

not appealable to the Supreme Court either under Article 132 or under Article 133 of the Constitution of India and I would accordingly refuse the grant of the certificate to the petitionersdefendants. The petition, therefore, deserves to be dismissed but without any order as to costs and I hereby do so.

BY FULL COURT

31. In view of the Majority Judgment certificate to file appeal to the Supreme Court cannot be granted. The petition is, therefore, dismissed. There will be, however, no order as to costs.