

High Court of Judicature at Allahabad
Sitting at Lucknow

AFR

Neutral Citation No. - 2023:AHC-LKO:68013

Court No. - 16

Case :- CRIMINAL MISC. WRIT PETITION No. - 6908 of 2023

Petitioner :- Smt. Rooma

Respondent :- State Of U.P. Thru. Prin. Secy. Home Lko. And 11 Others

Counsel for Petitioner :- Syed Azizul Hasan Rizvi

Counsel for Respondent :- G.A.

Hon'ble Subhash Vidyarthi J.

1. Heard Sri Syed Azizul Hasan Rizvi, the learned counsel for the petitioner and Sri Rao Narendra Singh, learned Additional Government Advocate-I for the State and perused the records.
2. By means of the instant petition filed under Article 226 of the Constitution of India the applicant has prayed for the following reliefs: -

“i. To issue an order or direction to the Opposite Party No. 2 to take cognizance and summon the accused Opposite Party No. 12 under section 376 and 392 I.P.C. considering the material, evidence, statements of witnesses esp. the statements of the petitioner recorded under Sections 161 & 164 Cr.P.C. available on the record submitted by the police and considering the findings of the opposite party no. 2 itself in para no. 2 of its own summoning order dated 21.03.2023 contained at Annexure No. 3 in the interest of justice.

ii. To issue a writ order or direction in the nature of MANDAMUS directing the Opposite Party No. 3 to take stern and effective legal actions against the Opposite Party No. 4 to 11 for openly and flagrantly violating the specific provisions of law contained under section 173 (1) (1A) Cr.P.C and the Circulars Nos. 35/2018 dated 05.07.2018 and 18/2022 dated 06.07.2022 issued by the office of the Opposite Party No. 3 itself in the interest of justice.

iii. Any other order or direction which this Hon'ble court may deem just, fair and appropriate under the facts and circumstances of the case, may, also, be passed in favour of the petitioner.”

3. The Additional Chief Judicial Magistrate-III, Lucknow has been impleaded as the opposite party no. 2.
4. In **Savitri Devi Vs. District Judge, Gorakhpur**, (1999) 2 SCC 577, the Hon'ble Supreme Court deprecated the practice of Courts being impleaded as opposite parties. The relevant portion of the judgment is being reproduced below: -

“14. Before parting with this case it is necessary for us to point out one aspect of the matter which is rather disturbing. In the writ petition filed in the High Court as well as the Special Leave Petition filed in this Court, the District Judge, Gorakhpur and the 4th Additional Civil Judge (Junior Division) Gorakhpur are shown as respondents and in the Special Leave Petition they are shown as contesting respondents. There was no necessity for impleading the judicial officers who disposed of the matter in a civil proceeding when the writ petition was filed in the High Court; nor is there any justification for Impleading them as parties in the Special Leave Petition and describing them as contesting respondents. We do not approve of the course adopted by the petitioner which would cause unnecessary disturbance to the functions of the concerned judicial officers. They cannot be in any way equated to the officials of the Government. It is high time that the practice of impleading judicial officers disposing of civil proceedings as parties to writ petitions under Article 226 of the Constitution of India or Special Leave Petitions under Article 138 of the Constitution of India was stopped. We are strongly deprecating such a practice.”

5. In **Jogendrasinhji Vijaysinghji v. State of Gujarat**, (2015) 9 SCC 1, the Hon'ble Supreme Court again discussed the precedents on this point and explained the same in the following words: -

“43. As we notice, the decisions rendered in Hari Vishnu Kamath [AIR 1955 SC 233 : (1955) 1 SCR 1104] , Udit Narain Singh [AIR 1963 SC 786] and Savitri Devi [Savitri Devi v. District Judge, Gorakhpur, (1999) 2 SCC 577] have to be properly understood. In Hari Vishnu Kamath [AIR 1955 SC 233 : (1955) 1 SCR 1104] , the larger Bench was dealing with a case that arose from Election Tribunal which had ceased to exist and expressed the view how it is a proper party. In Udit Narain Singh [AIR 1963 SC 786] , the Court was really dwelling upon the controversy with regard to the impleadment of parties in whose favour orders had been passed and in that context observed that tribunal is a necessary party. In Savitri Devi [Savitri Devi v. District Judge, Gorakhpur, (1999) 2 SCC 577] , the Court took exception to courts and tribunals being

*made parties. It is apposite to note here that propositions laid down in each case have to be understood in proper perspective. The civil courts, which decide matters, are courts in the strictest sense of the term. Neither the court nor the Presiding Officer defends the order before the superior court it does not contest. If the High Court, in exercise of its writ jurisdiction or revisional jurisdiction, as the case may be, calls for the records, the same can always be called for by the High Court without the Court or the Presiding Officer being impleaded as a party. Similarly, with the passage of time there have been many a tribunal which only adjudicate and they have nothing to do with the lis. We may cite a few examples: the tribunals constituted under the Administrative Tribunals Act, 1985, the Customs, Excise and Service Tax Appellate Tribunal, the Income Tax Appellate Tribunal, the Sales Tax Tribunal and such others. Every adjudicating authority may be nomenclatured as a tribunal but the said authority(ies) are different from that pure and simple adjudicating authorities and that is why they are called the authorities. An Income Tax Commissioner, whatever rank he may be holding, when he adjudicates, he has to be made a party, for he can defend his order. He is entitled to contest. There are many authorities under many a statute. Therefore, **the proposition that can safely be culled out is that the authorities or the tribunals, who in law are entitled to defend the orders passed by them, are necessary parties and if they are not arrayed as parties, the writ petition can be treated to be not maintainable or the court may grant liberty to implead them as parties in exercise of its discretion. There are tribunals which are not at all required to defend their own order, and in that case such tribunals need not be arrayed as parties. To give another example: in certain enactments, the District Judges function as Election Tribunals from whose orders a revision or a writ may lie depending upon the provisions in the Act. In such a situation, the superior court, that is the High Court, even if required to call for the records, the District Judge need not be a party.** Thus, in essence, when a tribunal or authority is required to defend its own order, it is to be made a party failing which the proceeding before the High Court would be regarded as not maintainable.*

(Emphasis supplied)

6. When this Court objected to the trial Court having been made an opposite party to the Writ Petition, the learned counsel for the applicant has submitted that he had impleaded the court even in earlier Writ Petition No.30880 (M/B) of 2021 and the writ petition

was entertained without this objection. However, he did not give any specific reply to the query put by the court regarding having been impleaded as an opposite party to the writ petition. The act of impleading a court as opposite party is highly improper and it is deprecated and the mere fact that this fact had not been noticed in an earlier Writ Petition would not justify the Court being impleaded in this Writ Petition.

7. So far as the relief of issuance of a direction to the learned trial court for taking cognizance of commission of offence under Section 376 I.P.C. is concerned, after investigation the Investigating Officer has found that the allegation of commission of the aforesaid offence could not be established and he submitted a report under Section 173 (2) of Cr.P.C. to the Court stating commission of the offences under Sections 323, 504, 506 I.P.C. only and the commission of offence under Section 376 I.P.C. was not included in the charge sheet.
8. Section 190 of the Criminal Procedure Code, 1973 provides as follows: -

“190. Cognizance of offences by Magistrates.—(1) Subject to the provisions of this Chapter, any Magistrate of the first class, and any Magistrate of the second class specially empowered in this behalf under sub-section (2), may take cognizance of any offence—

- (a) upon receiving a complaint of facts which constitute such offence;*
- (b) upon a police report of such facts;*
- (c) upon information received from any person other than a police officer, or upon his own knowledge, that such offence has been committed.*

(2) The Chief Judicial Magistrate may empower any Magistrate of the second class to take cognizance under sub-section (1) of such offences as are within his competence to inquire into or try.”

9. Therefore, the learned trial court has rightly taken cognizance of the offence mentioned in the police report submitted under Section 173 (2) Cr.P.C., as provided by Section 190 (1) (b) Cr.P.C. Section 216 empowers the trial Court to alter or add any charge, but the

petitioner has not filed any application before the trial Court praying for addition of the charge. In these circumstances, this Court is of the considered view that the trial Court has not committed any illegality in not taking cognizance of offence under Section 376 I.P.C.

10. The petitioner has also sought for issuance of a Writ of Mandamus to the Director General of Police for taking legal action against the opposite parties no. 4 to 11 for the alleged violation of Section 173 (1) and (1A) Cr.P.C. and Circulars dated 05.07.2018 and 06.07.2018 issued by the D.G.P.
11. For issuance of a writ of Mandamus, the existence of a legally enforceable right and denial thereof in spite of a specific demand having been made, are essential pre-requisite conditions.
12. The petitioner claims to have given an application dated 15.03.2023 requesting for issuing a direction for arrest of the accused and submission of a charge sheet. The charge-sheet has already been submitted and arrest of an accused person cannot be made on the mere asking of the complainant. The petitioner has also requested for issuance of a direction to the police authorities to act in accordance with all the orders passed by the competent Courts and the provisions of law. This request is vague. The petitioner has not made any prayer to the D.G.P. for taking any action against any other opposite parties.
13. The petitioner does not have any legally enforceable right for seeking a direction to the D.G.P. for initiating legal action against his subordinate officers for the alleged delay in completion of investigation.
14. There is nothing on record to indicate that the application was actually given or sent to the D.G.P. and was received by or delivered to him.
15. In **Saraswati Industrial Syndicate Ltd. Vs. Union of India:** (1974) 2 SCC 630, the Hon'ble Supreme Court has held as under: -

“24. ... The powers of the high Court under Article 226 are not strictly confined to the limits to which proceedings for prerogative writs are subject in English practice. Nevertheless the well recognised rule that no writ or order in the nature of a Mandamus would issue when there is no failure to perform a mandatory duty applies in this country as well. Evert in cases of alleged breaches of mandatory duties the salutary general rule which is subject to certain exceptions applied by us as it is in England when writ of Mandamus is asked for could be stated as we find it set out in Halsbury’s Taws of England (3rd edition vol. 13 p. 106):

“As a general rule the order will not be granted unless the party complained of has known what it was he was required to do so that he had the means of considering whether or not he should comply and it must be shown by evidence that there was a distinct demand of that which the party seeking the mandamus desires to enforce and that that demand was met by a refusal.”

16. Again, in **Rajasthan State Industrial Development & Investment Corporation Vs. Diamond and Gem Development Corporation. Ltd.**: (2013) 5 SCC 470, the Hon’ble Supreme Court has reiterated the principles in the following words: -

“21. ... The primary purpose of a writ of mandamus, is to protect and establish rights and to impose a corresponding imperative duty existing in law. It is designed to promote justice (ex debito justiceiae). The grant or refusal of the writ is at the discretion of the court. The writ cannot be granted unless it is established that there is an existing legal right of the applicant, or an existing duty of the respondent. Thus, the writ does not lie to create or to establish a legal right, but to enforce one that is already established. While dealing with a writ petition, the court must exercise discretion, taking into consideration a wide variety of circumstances, inter-alia, the facts of the case, the exigency that warrants such exercise of discretion, the consequences of grant or refusal of the writ, and the nature and extent of injury that is likely to ensue by such grant or refusal.

22. Hence, discretion must be exercised by the court on grounds of public policy, public interest and public good. The writ is equitable in nature and thus, its issuance is governed by equitable principles. Refusal of relief must be for reasons which would lead to injustice. The prime consideration for the issuance of the said writ is, whether or not substantial justice will be promoted. Furthermore, while granting such a writ, the

*court must make every effort to ensure from the averments of the writ petition, whether there exist proper pleadings. In order to maintain the writ of mandamus, the first and foremost requirement is that the petition must not be frivolous, and must be filed in good faith. Additionally, **the applicant must make a demand which is clear, plain and unambiguous. It must be made to an officer having the requisite authority to perform the act demanded. Furthermore, the authority against whom mandamus is issued, should have rejected the demand earlier. Therefore, a demand and its subsequent refusal, either by words, or by conduct, are necessary to satisfy the court that the opposite party is determined to ignore the demand of the applicant with respect to the enforcement of his legal right. However, a demand may not be necessary when the same is manifest from the facts of the case, that is, when it is an empty formality, or when it is obvious that the opposite party would not consider the demand.***

(Emphasis supplied)

17. As the petitioner has no legally enforceable right for seeking a direction to the Director General Of Police for initiation of legal proceedings against other officers of Police Department and also because the petitioner has not approached the authority with the aforesaid demand, the instant writ petition in respect of the aforesaid relief cannot be entertained.
18. In view of the aforesaid discussion, the Writ Petition is **dismissed**.

(Subhash Vidyarthi, J.)

Order Date :- 17.10.2023

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