

Arun

REPORTABLE

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 3379 OF 2021
WITH
INTERIM APPLICATION NO. 1915 OF 2021**

Rajkumar Bhujangrao Dhakane

...Petitioner

Versus

Sanjay Saxsena & Anr

...Respondents

**Mr Rajiv Chavan, Senior Advocate, with Dinesh Adsule, for the
Petitioner.**

**Mr VA Thorat, Senior Advocate, with RP Kadam, AGP, for the
State.**

**CORAM: G.S. Patel &
Madhav J. Jamdar, JJ.**

DATED: 15th November 2021

ORAL JUDGMENT (per G.S. Patel, J.)

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1. Heard.

2. The Petitioner invokes our extraordinary writ jurisdiction under Article 226 of the Constitution of India inter alia to set aside a Notification dated 5th July 2021 removing the Petitioner from the post of “Member (Person of eminence from the Civil Society) State

Police Complaints Authority”. Then there is a prayer for a stay of this notification.

3. To begin with, the prayer is inappropriately worded in that it seeks that the notification be quashed by means of issuance of Mandamus rather than a Certiorari. This is not possible.

4. We also note that contrary to a long line of settled decisions of the Supreme Court, this Court and of other High Courts, there is not even an averment that the Petitioner has demanded justice and that justice has been denied. These decisions, some of which are noted below, have held that a failure to do so is fatal to a prayer for Mandamus. The reasoning is clear. A public authority charged with a legal duty must be given an opportunity by the petitioner claiming a legal right to perform that public authority’s legal duty. It is only a refusal or denial to do so that gives the petitioner a right to seek a writ of mandamus.

5. In *Saraswati Industrial Syndicate Ltd & Ors v Union of India*,¹ a three-Judge bench of the Supreme Court inter alia held that it is a well recognized rule that no writ or order in the nature of mandamus would issue when there is no failure to perform a mandatory duty.² The English practice in this regard applies in India as well. There are certain exceptions,³ but the salutary general rule when a

1 (1974) 2 SCC 630; paragraph 24.

2 See, in this context, i.e. the need to show that there exists a public duty, paragraph 11 of *State of Haryana v Subash Chander Marwaha & Ors*, (1974) 3 SCC 220.

3 When there is no opportunity or means to demand justice, for instance; or conceivably when a demand is an empty formality.

mandamus is sought is governed by settled legal principles. Citing Halsbury's Laws of England, 3rd ed:

“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.”

6. In *Amrit Lal Berry v Collector of Central Excise, New Delhi & Ors*,⁴ a three-Judge bench of the Supreme Court (per MH Beg J) said that the rule recognized by the Supreme Court⁵ was that *a demand for justice and its refusal must precede the filing of a petition seeking a writ of mandamus*. The absence of such a demand was held to be fatal to the case before the Supreme Court.

7. An emphatic re-statement of the principle is found in paragraph 49 of the Supreme Court decision in *State of Haryana & Anr v Chanan Mal & Ors*:⁶

49. (3) Any petitioner who applies for a writ or order in the nature of a mandamus should, in compliance with a well known rule of practice, ordinarily, first call upon the authority concerned to discharge its legal obligation and show that it has refused or neglected to carry it out within a reasonable time before applying to a court for such an order even where the alleged obligation is established.

4 (1975) 4 SCC 714.

5 In *Kamini Kumar Das Choudhary v State of WB*, (1972) 2 SCC 420.

6 (1977) 1 SCC 340.

8. The decision of Dr Justice GF Couto of this Court (Panaji Seat) in *RXA de Monte Furtado v Administrator, Goa, Daman & Diu & Ors*⁷ puts the discussion neatly summarizes the legal position:

10. Petitioner prays, inter alia, for a writ of mandamus or a writ in nature of mandamus, commanding the respondents to deem that he still continues to hold a grade II post, that the impugned notification and orders shall not affect his services in any manner and that he be paid all the arrears of his salary from the date of the cancellation of his appointment to grade II post. **It appears, however, that petitioner did not make, as he ought to have made, a demand for justice and that such a demand had been refused. Not even an assertion exists in the petition that a representation against the alleged violation of rights has been made and hence, petitioner having failed to make such a demand is not entitled to any writ of mandamus.** In fact as observed by the Karnataka High Court in *A. Prabahacora Reddy v. State*:

“as a matter of rule, no High Court will issue a writ of mandamus unless the aggrieved person has made a written demand on the authorities concerned to enforce what he claims to be his legal right”

the position having been made clear by the Supreme Court in the case of *Amrit Lal v. Collector* [(1975) 4 SCC 714 : A.I.R. 1975 S.C. 538] wherein their Lordships, once again, affirmed the rule, recognized by them in *Kamini Kumar v. State of West Bengal* [(1972) 2 SCC 420 : A.I.R. 1972 S.C. 2060], **that a demand for justice and its refusal must precede the filing of a petition asking for a direction or writ of mandamus.**

7 1982 SCC OnLine Bom 316 : 1983 II LLN 523.

(Emphasis added)

9. A Division Bench of this Court in *Sesa Shipping Ltd & Anr v Board of Trustees of the Port of Mormugao & Anr*⁸ held that absent a demand for justice, no mandamus can even be asked for. As a general rule, no order will be made unless the party complained against knows what it was he was required to do so that he had a means of considering whether or not he should comply with the demand. The party seeking a mandamus must clearly show that there was a distinct demand and that it was refused. The Division Bench cited *Chanan Mal, supra*.

10. In *DN Jeevaraj v Chief Secretary, Government of Karnataka & Ors*,⁹ the Supreme Court restated the position thus:

37. In such cases, that might not strictly fall in the category of public interest litigation and for which other remedies are available, insofar as the issuance of a writ of mandamus is concerned, this Court held in *Union of India v. S.B. Vohra* [(2004) 2 SCC 150 : 2004 SCC (L&S) 363] that: (SCC p. 160, paras 12-13)

“12. Mandamus literally means a command. The essence of mandamus in England was that it was a royal command issued by the King's Bench (now Queen's Bench) directing performance of a public legal duty.

13. A writ of mandamus is issued in favour of a person who establishes a legal right in himself. A writ of mandamus is issued against

8 2002 SCC OnLine Bom 1320 : (2003) 105 (1) Bom LR 61.
9 (2016) 2 SCC 653.

a person who has a legal duty to perform but has failed and/or neglected to do so. Such a legal duty emanates from either in discharge of a public duty or by operation of law. The writ of mandamus is of a most extensive remedial nature. The object of mandamus is to prevent disorder from a failure of justice and is required to be granted in all cases where law has established no specific remedy and whether justice despite demanded has not been granted.”

38. A salutary principle or a well-recognised rule that needs to be kept in mind before issuing a writ of mandamus was stated in *Saraswati Industrial Syndicate Ltd. v. Union of India* [(1974) 2 SCC 630] in the following words: (SCC pp. 641-42, paras 24-25)

“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. Even 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 a writ of mandamus is asked for, could be stated as we find it set out in Halsbury's Laws of England (3rd Edn.), Vol. 11, p. 106:

‘198. Demand for performance must precede application.— 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.'

25. In the cases before us there was no such demand or refusal. Thus, no ground whatsoever is shown here for the issue of any writ, order, or direction under Article 226 of the Constitution."

11. There are innumerable other authorities all to the same effect.

12. In our system of jurisprudence and particularly in cases of judicial review of administrative action, this principle can also, we believe, be linked to a reading of Article 14 of the Constitution of India. The 'demand for justice' must be that the authority in question should conduct itself and act according to law, and in a non-arbitrary, reasonable and rational manner, one that is not ultra vires the Constitution or a statute. Absent any such demand, a prayer for a writ of mandamus cannot and will not lie.

13. Ordinarily, we would have given a party leave to amend to include such an averment provided it is shown as our Division Bench said in *Sesa Shipping*, that such a demand was in fact made.

However, since we are not satisfied that the petition has any merits, we do not think it is necessary to grant such relief.

14. We turn now to the case at hand. Following a directive of the Supreme Court, to the State Government to establish a State Police Complaints Authority, the State Government set up such an authority by a Notification of 29th September 2017. A copy of that notification is annexed. The Maharashtra Police (Amendment and Continuance) Act 2014 from Sections 22(O) onwards establishes the State Police Complaints Authority. Conditions of service of the members of the SPCA are prescribed pursuant to Rule 10 of the Maharashtra State Police Complaints Authority Conditions of Service Rules 2016.

15. The Authority consists of a retired High Court Judge as the chairperson. The other members are: a police officer superannuated in the rank not below the Inspector of General of Police as a member; a person of eminence from civil society as a member; a retired officer not below the rank of Secretary or Commissioner to the State Government; and an officer not below the rank of a Director General of Police. The authority is to look into complaints against police officers of the rank of Superintendent/Deputy Superintendent of police and above in regard to allegations of serious misconduct such as custodial deaths, grievous hurts, rape, extortion etc.

16. Some of the posts in question were vacant for a while. A chairperson was appointed on 3rd March 2020. The State

Government invited applications for the post of ‘person of eminence from civil society’ by issuing advertisements for that post. The Petitioner applied. There is no specific educational or experience criteria prescribed. The Petitioner was appointed by notification dated 14th July 2020. The Petitioner says that this appointment was preceded by a police verification report. According to the Petitioner, he took charge on 15th July 2020 and started regularly attending the agency’s office at Cooperage, Mumbai.

17. It seems that the 2nd Respondent, the Director General of Police submitted a report to the State Government saying that against the Petitioner there were several criminal complaints and that he was not a fit and proper person to serve in this position.

18. The Affidavit in Reply filed on behalf of the State Government sets out the background to the establishment of the Authority. It then says in paragraph 6.4 at page 17 that there was a newspaper report in the *Loksatta* newspaper on 11th August 2020 saying that there were criminal complaints against the Petitioner. The Home Department called for a report from the 2nd Respondent, the Director General of Police. He submitted report on 26th August 2020. A copy of that report is annexed as Exhibit “IX” to the Affidavit in Reply. Then, in paragraph 6.6, the Affidavit in Reply says that there are as many as three CRs registered against the Petitioner. One is CR No. 4 of 2014 registered in Pune inter alia Section 143, 147, 506 of the Indian Penal Code (“IPC”) read with certain Sections of the Bombay Police Act. Another is CR No. 37 of 2015 registered at Koregaon Park Police Station, Pune, under Sections 307, 323 and 504 read with Section 34 of the IPC. The

third is another CR No. 38 of 2015 also registered at Koregaon Park Police Station, Pune, under Section 224 of the IPC. These offences, the Director General of Police's report says, were not of a political nature and the appointment of such a person would undermine the position of authority and would damage the Government.

19. On considering this report, the Home Department by its order of 5th July 2021 removed the Petitioner from the post.

20. The submission by Mr Chavan, one that does not appeal to us in the slightest, is that the Petitioner's appointment is for a period of three years and therefore, under Section 22P this is a tenured post. Mr Chavan does not contest the proposition that the State Government does have the power to remove a member. He however says that this cannot be for the reasons now alleged, because the Petitioner had disclosed the factum of these offences having been registered on an Affidavit prior to his appointment. The State Government had satisfied itself about the Petitioner's suitability before appointing him. He further submits that the mere filing of a criminal complaint cannot ever be a disqualification in a matter such as this.

21. We are not inclined to agree. The very nature of the post makes it difficult for us to accept this argument. The members of the authority are required to look into complaints about excesses by police officers above a certain rank. It seems to us wholly incongruous that member charged with looking into alleged police excesses himself has numerous complaints against him. It is also not

as if these criminal complaints were made against the Petitioner after he was nominated and appointed to the post so as to be able to say that the allegations against him were politically motivated. The power to appoint, as the Affidavit in Reply correctly points out, includes the power to suspend or dismiss if there is sufficient cause.

22. Mr Chavan's argument that, by this measure, half the Legislative Council and Legislative Assembly, and large parts of Parliament and other elected bodies will all fall vacant is a submission that is only to be stated to be rejected. The post in question here is filled not by a franchised electorate but by a selection or nomination following an application, itself following an invitation by advertisement. Obviously, any such nomination or selection requires that the candidate meets certain criteria. In a post such as this, it is reasonable to expect — even demand — the highest standards of integrity and lawfulness. The fact that the Petitioner had disclosed the factum of these CRs having been filed carries the matter no further. The State must be responsive to public demands for transparency and accountability. Even if it had appointed the Petitioner after he made a disclosure, this will not prevent the State Government for taking remedial action at a later stage. There is no estoppel that can run against the State Government in a matter like this; and none is even pleaded.

23. Mr Chavan's attempts to show us corresponding provisions regarding the State Security Commission are to no avail. These are provisions under Chapter II-A and Section 22B. We are dealing with a distinct authority. It may be that for the State Security Commission, a person can be removed only after a finding is

returned by a court, etc. But the fact that there is no such restriction in regard to the SPCA is a factor against the Petitioner, not in his favour.

24. Beyond this, we are unable to see what is the legal right, let alone the fundamental right, of the Petitioner that can be said to have been infringed. We do not see how a person can claim to be entitled to continue in a post such as this and simultaneously say that the State Government must wholly ignore all criminal complaints that have been previously made against him. This is nothing but saying that the complaints against the Petitioner should effectively be ignored and that he should nonetheless be considered “a person of eminence”. That argument does not appeal to us.

25. We find no merit in the Petition. It is rejected. The Interim Application is accordingly infructuous and is disposed of as such.

26. There will be no order as to costs.

27. All concerned will act on production of a digitally signed copy of this order.

(Madhav J. Jamdar, J)

(G. S. Patel, J)