

05.07.2023
Item No.11
RP/PG
Ct. No.1

MAT 1180 OF 2023
With
I.A. No. CAN 1 of 2023.

THE STATE OF WEST BENGAL & ORS.
VS
SIRAJUL ISLAM GHARAMI & ORS.

Mr. Amitesh Banerjee, Ld. Sr. Standing Counsel
Ms. Ipsita Banerjee
Mr. Tarak Karan
Ms. Amrita Panja Mallick....for the
State/appellants

Mr. Sourav Chatterjee
Md. Azam Khan
Mr. Soumya Nagfor the respondent no.1/
Writ petitioner

Mr. Billwadal Bhattacharya, Ld. DSGI
Mr. Arun Kumar Maity.....for the Union of India

Mr. Kishore Dutta, Ld. Sr. Adv.
Mr. Subrata Sardar
Mr. Avik Ghatak
Mr. Abhiman Rakshit.....for the respondent
no. 3

Mr. Aneek Pandit
Ms. Sonakshi Mitra
Mr. Ali Rizvi
Ms. Tanistha Jain
Mr. Avijit Kundu
Mr. Rittik Mandal.....for the private
respondents

1. This intra-Court appeal is directed against an order passed by the learned Single Bench, which appears to be an interim order but nevertheless, there have been certain positive directions

granted in the said order. For better appreciation, we refer to paragraph nos.8 and 9 of the order dated 20th June, 2023 impugned in this appeal.

2. The grievance of the respondent/writ petitioner was that the petitioner had lodged a complaint before the Superintendent of Police, Baruipur Police District alleging that certain police officers were involved in firing at the victims including the writ petitioner and no FIR was registered on the said complaint. Further, the petitioner's case is that the complaint lodged by the petitioner should have been treated as a counter complaint and a separate FIR has to be registered and investigated along with FIR No.388 of 2023 dated 14th June, 2023, which was registered based on the *suo motu* complaint for alleged offences under Sections 188 / 143/ 147/149 /323/ 325/ 333/ 353/ 307 of the Indian Penal Code read with Sections 25/27 of the Arms Act read with Sections 3/4 of the Explosive Substances Act read with Section 3/4 of Prevention of Damage to Public Property Act read with Section 9 of West Bengal Maintenance of Public Order Act by the Canning Police Station against 57 persons. As could be seen from paragraphs 8 and 9 of the impugned order, a positive direction has been

issued to the police authorities to register an FIR based on the writ petitioner's complaint forthwith.

3. The question would be whether such a positive direction could have been issued by the learned writ Court in the absence of any specific finding that there has been deliberate failure on the part of the police authorities in taking on file a complaint reporting a cognizable offence bearing in mind the decision of the Hon'ble Supreme Court passed in **Lalita Kumari vs. Government of Uttar Pradesh & Ors.** reported in **(2014) 2 SCC 1**.
4. Learned counsel appearing for the respondent/writ petitioner placed reliance on a decision of the Hon'ble Supreme Court passed in the case of **Upkar Singh vs. Ved Prakash & Ors.** reported in **(2004) 13 SCC 292**. This decision has been cited to buttress his submission that the three Judges Bench of the Hon'ble Supreme Court had clarified the decision of the Hon'ble Supreme Court in the case of **T.T. Antony vs. State of Kerala** reported in **(2001) 6 SCC 181** and it was held that the decision in T.T. Antony (*supra*) has not excluded the registration of a complaint in the nature of a counter case from the purview of the Code (Code of Criminal

Procedure). Further, he has drawn our attention to paragraph nos.16, 17, 20-24 of the decision in *Upkar Singh (supra)*.

5. Before we examine as to the applicability of the decision, we need to point out that the said decision arose out of orders pursuant to an order and direction passed by the Judicial Magistrate, Muzaffarnagar under Section 156(3) of the Code of Criminal Procedure, 1973. Thus, we are of the view that the first question, which has to be considered before a writ petition of such nature is entertained by the learned writ Court is as to whether a writ of mandamus is maintainable when a remedy has been provided in the Criminal Procedure Code, more particularly, under Section 156(3) of the Code.
6. The argument of the learned advocate for the respondent/writ petitioner is that such remedy is not efficacious. We are not persuaded to accept such broad submission stating that in all cases the remedy under Section 156(3) of the Criminal Procedure Code is ineffective. Admittedly, the power conferred on the Judicial Magistrate under Section 156(3) of the Criminal Procedure Code, 1973 is wide enough to order an investigation and the Judicial Magistrate will be in a better position to appreciate the factual matrix, which

will be placed before the Court to consider as to whether the jurisdiction under Section 156(3) of Criminal Procedure Code, 1973 requires to be exercised.

- 7.** In our prima facie view, by way of affidavits, it would be very difficult for a writ Court to come to a definite conclusion that a positive direction needs to be issued under Article 226 of the Constitution of India for registration of an FIR. Of course, we are conscious of the fact that there are exceptional circumstances wherein it has been held that the remedy under Article 226 of the Constitution of India is not fully barred. Nevertheless the Court is required to pose a question to the writ petitioner at the first instance as to why the writ petitioner has bypassed the remedy available under Section 156(3) of the Criminal Procedure Code, 1973 and resorted to filing a writ petition under Article 226 of the Constitution of India. In this regard it is also worthwhile to point out that the procedure, which has been contemplated in Chapter XV of the Criminal Procedure Code, 1973 from Sections 200 to 203 thereof which provide as to how the complaints to the Magistrates are to be dealt with.

- 8.** Mr. Kishore Dutta, learned senior advocate appearing for the private respondents in this appeal submitted that a petition under Section 156(3) of the Criminal Procedure Code, 1973 at the instance of the writ petitioner itself would not be maintainable since there is no complaint lodged to the Officer-in-Charge, as required under Section 154 of the Criminal Procedure Code, 1973 as the complaint is said to have been lodged with the Superintendent of Police.
- 9.** The learned advocate appearing for the respondent/writ petitioner has relied upon Section 36 of the Criminal Procedure Code, 1936, which empowers police officers superior in rank to an officer-in-charge of a police station may exercise the same power, throughout the local area to which they are appointed, as may be exercised by such officer within the limits of his station. This issue would arise at a later point of time whether the police officers superior in the rank to an officer-in-charge of a police station is empowered under the Code to exercise the same power as that of such officer. Therefore, it will be too early for this Court to decide as to the effect of Section 36 in the given facts and circumstances.

- 10.** In the light of all we have said above, we are of the view that the order impugned in the writ petition has to be set aside and the learned writ Court is required to consider the question framed in the preceding paragraphs, hear the parties and thereafter take a decision on merits and in accordance with law.
- 11.** We are informed that the writ petition has been directed to be listed before the learned Single Bench on 24th July, 2023 and the registry is directed to list the matter before the appropriate learned writ Court on the said date. A copy of this order be tagged along with the said writ petition.
- 12.** We make it clear that we have not touched upon the merits of the contention advanced by either side and we leave it open to the writ petitioner as well as the appellants/State and the private respondents in the writ petition to make all submissions both on law and facts before the learned Single bench.
- 13.** The learned advocate appearing for the writ petitioner submitted that in the impugned order certain directions have been issued in paragraphs 12, 13, 14 and 15 and the same may be preserved. Since we have set aside the order, the question of restoring portion of the order

would not arise. Nevertheless to state that it shall be the responsibility of the appellants/State to preserve the CCTV footage and other evidence and ensure that no tampering takes place and in respect of the other directions which have been issued, the learned writ Court will take a decision after hearing the parties.

14. The learned senior standing counsel appearing for the appellants/State submits that the police picket, which has already been extended to the residence of the petitioner will continue till 15th July, 2023.

15. In the light above, the appeal and the application stand disposed of.

16. No costs.

17. Urgent photostat certified copy of this order, if applied for, be furnished to the parties expeditiously upon compliance of all legal formalities.

(T. S. SIVAGNANAM)
CHIEF JUSTICE

(HIRANMAY BHATTACHARYYA, J.)