

IN THE HIGH COURT OF HIMACHAL PRADESH

AT SHIMLA

CR WP no.14 OF 2023

Reserved on:21.12.2023

Pronounced on: 26.12.2023

COURT ON ITS OWN MOTION.

Versus

STATE OF HIMACHAL PRADESH AND OTHERS ...Respondents

Coram:

Hon'ble Mr. Justice M.S. Ramachandra Rao, Chief Justice.

Hon'ble Ms. Justice Jyotsna Rewal Dua, Judge.

Whether approved for reporting?

Amicus curiae : Mr. Neeraj Gupta, Sr. Advocate as Amicus Curiae with Mr. Vedhant Ranta, Advocate.

For the respondents : Mr. Anup Rattan, Advocate General with Mr. Rakesh Dhaulta & Mr. Pranay Pratap Singh, Additional Advocate Generals, and Mr. Sidharth Jalta & Mr. Arsh Rattan, Deputy Advocate Generals, for respondent no.3/State.

M.S. Ramachandra Rao, Chief Justice.

One person by name Nishant Kumar Sharma, a resident of Palampur, Distt.Kangra, State of Himachal Pradesh (for short 'the Complainant') had sent an email to the Registrar General of this Court on 28.10.2023 addressed to one of us (the Chief Justice), on the basis of which this Cr.W.P was directed to be registered.

The email dt.28.10.2023 of the complainant.

In his complaint/email, the complainant alleged that there was a threat to his life from two extremely rich and well connected persons henceforth referred to as X (a former IPS officer) and Y, (a practicing lawyer) (though he named the two individuals, we refrain from referring to them in this order) as the complainant and his father had not yielded to the said persons.

He contended that he belongs to a business family which runs a Hotel in Palampur in Himachal Pradesh, that a relative of one of the above mentioned persons had invested in the complainant's company in various small scale projects in and around Palampur; that Y was in financial difficulties and this had led him to use undue influence by way of force and intimidation through X for extorting money from the complainant and his father. He alleged that X and Y were making continued efforts to force the complainant and his father to sell their Company to them by threatening auditors, not allowing the complainant and his father to file returns and not allowing them to conduct statutory meetings and physically assaulting them through hired criminals.

He alleged that he and his 2 ½ year old baby had earlier escaped a planned attack by certain gangsters at the gate of his parents' house at Gurugram on 25.8.2023. He claimed that he was getting consistent phone calls from the office of the Director General of Police, Himachal Pradesh and also from the DSP, SHO , Palampur. Phone no.s and times of the calls were also mentioned in the email.

The complainant claimed that he got a Whatsapp message from the SHO Palampur stating that the Director General of Police, Himachal Pradesh wanted to talk to him and asking him to call back on a phone number and that when he did so, he was connected to the Director General of Police, Himachal Pradesh who insisted that he come to Shimla and meet him.

The complainant claimed that on 27.10.2023 he was at Bhagsunag in Dharamshala with his wife and infant son.; as he walked from Bhagsunag to Mcleodganj, he was stopped by two men on a Black Pulsar motorcycle; that they came near his wife and infant son and he stopped them; that one of the men hurled abuses at him, that the other recorded the incident on his mobile as in Gurugram incident; the complainant was told that if he did not behave and take back the police complaint made by him at Gurugram, he would make complainant's whole family disappear and the first to disappear would be the child; and then they sped away. According to him the bike did not have a registration plate.

He claimed that he is living in constant fear since allegedly the highest officer of the Police department in Himachal Pradesh is with people who want him killed.

He also claimed that he, his wife and child went to the SSP, Kangra's residence and waited outside but she was not at her place; that he even called her PSO; and then came back to his house in Palampur.

He prayed that this Court intervene and save him and his family from X and Y and their extremely dangerous associates.

It is not in dispute that similar emails were also given on 28.10.2023 by the complainant to the SP, Kangra at Dharamshala (respondent No.2) and to the Secretary (Home) of the State of Himachal Pradesh (respondent no.1).

But no FIR was registered by the Police at Mcleodganj, Dharamshala on the complaint of the complainant.

Even complaints given by the complainant to the Gurugram police had been given Diary No.s 433-CAS dt.25.8.2023 and 990-CAS dt.26.8.2023. But no FIR had been registered there as well till much later.

The registering of the Cr.W.P and it's listing on 10.11.2023

The Cr.W.P was registered 9.11.2023 on the basis of the email referred to supra and listed before this bench on 10.11.2023.

The respondents arrayed were: (1) the State of Himachal Pradesh through the Secretary(Home), (2) the Superintendent of Police, Kangra at Dharamshala and (3) the Superintendent of Police, Shimla.

Hearing on 10.11.2023

This Bench issued notice to respondents and Additional Advocate General accepted notice on their behalf. This Bench directed the respondent No.s 2 and 3 to file status reports on 16.11.2023. This order was communicated to the respondent no.s 2 and 3 through the Registrar General.

Events on 16.11.2023

On 16.11.2023, the respondent No.s 2 and 3 filed status reports.

This court appointed Sri Neeraj Gupta, Sr.Advocate as Amicus Curiae to assist the Court.

Respondent No.s 2 and 3 were directed to provide requisite protection to the complainant.

The Advocate General, on instructions, assured that an FIR would be registered with regard to the complaint made by the complainant to the SSP, Kangra on 28.10.2023 at the earliest.

The matter was directed to be listed on 22.11.2023.

Only thereafter on 16.11.2023 , FIR No.55/2023 was registered by the Mcleodganj Police Station under Sections 341,504,506,34 IPC on the basis of the complaint dt.28.10.2023 made by the complainant against unknown persons.

This was 18 days after the giving of the complaint by the complainant and a week after the Cr.WP was taken up by this Court.

Status report dt.16.11.2023 of the SP, Kangra(respondent no.2)

The status report of the SP, Kangra indicates that complainant sent an email to her on 6.11.2023 that he received a phone call from two persons telling him that an FIR had been registered against the complainant at Shimla. She also stated that there was surveillance by

the Central CID staff on the complainant. We shall not state other aspects mentioned in it .

Status report dt.16.11.2023 of the SP , Shimla (respondent no.2)

The status report of the SP, Shimla reveals that on 4.11.2023, the Director General of Police, Himachal Pradesh had made a complaint to the Station House Officer, Police Station East, District Shimla on which ***FIR.No.98/2023 dt.4.11.2023*** under Sections 299,469,499, 500 and 505 IPC had been registered against the complainant.

He referred to a report prepared by the Dy.SP Police (LR) Annexure R/3-4 and states that the Call Data records and CAFs of phone numbers mentioned by the complainant indicate that *there were telephonic conversations between the complainant and the Shri Sanjay Kundu, the Director General of Police, Himachal Pradesh;* on 27.10.2023, just before the alleged incident at Bhagsunag, Dharamshala *there were 15 missed calls from the office land line numbers of the Director General of Police to the complainant* and that this corroborates the statement of the complainant.

He stated that the complainant had alleged that the Director General of Police, Himachal Pradesh forcefully insisted upon complainant coming to Shimla and that he refused to do so and that this fact needs to be investigated.

He stated that the CCTV footage showed the presence of the complainant at Bhagsunag, Mcleodganj , Dharamshala on 27.10.2023.

He stated that the other allegations made by petitioner about wrongful restraint, threats, extortion require deep and extensive investigation.

He further stated that one cannot ignore the fact that shortly after the complainant had refused to come to Shimla at the insistence of the Director General of Police on telephone on 27.10.2023, the two persons had constrained the complainant to withdraw the complaint at Gurugram.

He also stated that *there is prima facie evidences of extortion and use of criminal force to constrain the complainant to settle property matter as alleged by the complainant*, and the abuse of office of the Director General of Police, HP and nexuses with hired criminal gangs as alleged in the CR.WP to which detailed investigation is needed.

According to the SP, Shimla, the non-registration of the FIR is a fact and involvement of high profile officers and criminal gangs to settle disputes between partners by forcing one partner for the purpose using extortion, criminal design, cannot be ruled out.

He also mentioned that no FIR had been registered even at Gurugram on the complaint given by complainant to Gurugram DCP East and only a Diary entry had been made on 6.9.2023 though the video footage of the said incident provided by the complainant reveals serious attack by use of criminal force.

The intent and motive behind this attack correlates incidents at Mcleodganj and Gurugram; and *the non-registration of the FIRs at both*

places of incidents indicate that purpose to overlook the crime. According to him the modus operandi of attackers/gang at Gurugram and Mcleodganj appear same, and hence *criminal conspiracy* for the alleged purpose deserves deep probe by way of investigation.

Hearing on 22.11.2023

The above two status reports were taken on record on 22.11.2023 and the file relating to the investigation including the statements of the persons recorded by the police in relation to the FIR No.55/2023 registered at Kangra on the complaint of the complainant was directed to be submitted; and the police protection was extended. Matter was directed to be listed on 5.12.2023.

Hearing on 5.12.2023

Fresh status report was filed by respondent no. 2 stating that an Additional Superintendent of Police was placed in charge of the investigation on 24.11.2023 in FIR No.55/2023 filed by the complainant in the place of Dy.SP who had been investigating the same previously. Matter was adjourned to 14.12.2023 and fresh status reports were directed to be filed.

Another Status report of respondent No.2 was also filed on that date which indicated that an FIR No.350/2023 dt.27.11.2023 under Section 323,506,34 of IPC at Police Station, Sector 9-A, Gurugram on the complaint made by complainant dt.25.8.2023; that statements of complainant, his father and their chartered accountant had been recorded in relation thereto.

The case was directed to be listed on 14.12.2023.

Hearing of 14.12.2023

On 14.12.2023, fresh status reports were filed by respondents 2 and 3.

Status report of respondent no.2

In her status report, the respondent no.2 mentioned that there were several calls between X and Y from 27.6.2023 and 9.11.2023, and certain calls had also been made by Y to another mobile number and call data records are being sought of the other number.

Status report of respondent no.3

In his status report, the respondent no.3 reiterated what was stated by him in his previous status report.

He further stated that the SDPO, Palampur and the SHO, Palampur had given statements under Section 161 Cr.P.C that the Director General Police, HP had informed them to put the hotel of the complainant under *surveillance* but no illegal activities were detected there.

He also referred to the statements of Sr.Scale Stenographer and Reader of the Director General of Police office who stated that the complainant did talk to the Director General of Police on 27.10.2023 and CDR records of mobile phone of complainant establishes presence of complainant on 27.10.2023 at Mcleodganj.

He also stated that CDR analysis of mobile phone of Y (the person with whom the complainant and his father had business

disputes) reveals that Y was in touch with the Director General of Police on the latter's mobile and there were 6 such calls in September, October and November and the longest conversation was on 25.10.2023 for 256 seconds. This was 2 days before the Mclodganj incident.

He stated that Director General of Police was constantly probing the complainant but for what purpose and reasons is a matter of investigation; and that the DIRECTOR GENERAL OF POLICE, HP had been in touch with the alleged partners of the complainant.

After orally requesting the Advocate General to go through the said status reports and seek instructions from the respondent No.1 , the matter was posted to 21.12.2023.

Hearing on 21.12.2023.

When the matter was taken up on 21.12.2023, however, the Advocate General merely insisted that the investigation was being done fairly and uninfluenced by the office of the Director General of Police.

No other indication was given by him as to whether the investigation unto the FIR No.55/2023 filed by the complainant would remain fair especially when:

(i) there is material detected in the investigation, as pointed out in the status report of the respondent No.3, which showed that the Director General of Police had also been in continuous contact with Y, the alleged business partner of the complainant (with whom the complainant has disputes);

(ii) the Director General of Police had put the complainant under surveillance;

(iii) that Director General of Police also made missed calls on 27.10.2023 (the date of the incident on Mcleodganj alleged by the complainant) to the complainant's mobile phone and also spoke to him on that day; and

(iv) the Director General of Police had himself got registered an ***FIR.No.98/2023 dt.4.11.2023*** under Sections 299,469,499, 500 and 505 IPC against the complainant.

The learned Amicus Curiae however insisted that the investigation cannot remain fair in the light of the above material collected during investigation by the respondent No.3, that the respondent no.2 has shown very little progress in the investigation after having deliberately delayed the registration of the FIR 55/2023 till 16.11.2023 inspite of having received complaint dt.28.10.2023 through email from the complainant. He also stated that the information collected by respondent No.3 and mentioned in his status reports is not being utilized by the respondent no.2 possibly due to the influence of the office of the Director General of Police; and this indicates that there is no proper investigation by respondent no.2. Such delay on her part will render the said information waste. He also asserted that in FIR No.55/2023, minor offences had been mentioned deliberately i.e., 341,504,506,34 IPC when in fact offences under sections 327,347,323,506, 352 and 120B IPC are attracted. He also stated that there is strong possibility of influence of the Director General of

Police on the investigation and if the present incumbent is retained in that post, justice will not be done.

Our consideration

The failure of respondent no.2 to act on the complaint made on 28.10.2023 immediately, register an FIR and investigate the same is not explained by respondent no.2. The FIR came to be registered belatedly on 16.11.2023 after this Court entertained the CRWP.

There is no explanation offered by respondent no.2 as to why the material mentioned in the status reports of the respondent no.3 is not being utilised to probe deeper into the issues/matter as seems to be warranted.

The material collected by respondent no.3 indicates *prima facie* that the Director General of Police:-

(a) had been in touch with Y, the alleged business partner of the complainant;

(b) had repeatedly attempted to contact the complainant on 27.10.2023 (15 missed calls); and

(c) it is alleged by the complainant that after he spoke to the Director General of Police on 27.10.2023 and refused to come to Shimla to meet him, the incident allegedly took place at Mcleodganj of threats allegedly made to the complainant.

Also the Director General of Police had put the complainant under surveillance and had filed FIR no.98/2023 dt.4.11.2023 against the complainant.

On the basis of this material the possibility of investigation not being carried on in a fair manner, cannot be ruled out.

Since the respondent No.1 had ample opportunity to study the status reports filed by respondent No.s 2 and 3 and take a call on continuance of the present incumbent in the highest post of the Director General of Police and since it has not chosen to move even its little finger in the matter, we are constrained to take the matter into our hands to ensure fair investigation in the FIRs

We have to ensure that Justice must not only be done but must be seen to be done. This is the basic principle of law we cannot lose sight of.

In *Babubhai Jamnadas Patel v. State of Gujarat*¹, the Supreme Court of India has held that normally investigation of offences is the function of the investigating agencies, and the courts do not ordinarily interfere with the same. But, at the same time the High Court is vested with such powers, though the same are invoked only in cases where extraordinary facts are involved, necessitating such monitoring by the courts. It declared:

“41. There is little doubt that normally investigation of offences is the function of the investigating agencies and the courts do not ordinarily interfere with the same. But, at the same time the High Court is vested with such powers, though the same are invoked only in cases where extraordinary facts are involved, necessitating such monitoring by the courts. In the circumstances, we are only required to see whether such an extraordinary fact situation exists in this case which warranted such a course of action to be adopted by the High Court.

¹ (2009) 9 SCC 610 : (2010) 1 SCC (Cri) 79, at page 617 :

42. *Though Mr Nariman has in unequivocal terms denied that such extraordinary circumstances exist in this case, which require monitoring by the High Court, it cannot be denied that the progress of the investigation has been tardy and slow. It is in such circumstances that the investigation had to be handed over to the Assistant Commissioner of Police, C Division, Ahmedabad City, with a further direction upon the said Assistant Commissioner of Police to file a progress report of the investigation undertaken in respect of the first information report dated 24-12-2008.*

43. *Having regard to the factual circumstances in which the incident had occurred, the Court adopted the procedure for keeping a watch over the investigation in order to prevent a miscarriage of justice.*

44. *In cases where it has been brought to the notice of the courts that investigation into an offence was not being carried on in the manner in which it should have been carried on, directions have been given by the courts to the investigating agencies to conduct the investigation according to certain guidelines, as otherwise the very purpose of the investigation could become fruitless. The decisions cited by Mr Nariman do not militate against the concept of the Court's power, where necessary, to direct the authorities to conduct themselves in a particular way.*

... ..

48. *We are unable to agree with Mr Nariman that the High Court in the name of investigation directed both the manner and mode in which the investigation was to be conducted or the direction in which the investigation was to proceed. It is because of the tardy progress of the investigation that the High Court had to step in at the instance of the respondents herein. It was at the instance of the State of Gujarat, which filed Special Criminal Application No. 1061 of 2008 on 2-6-2008, before the High Court, that a direction was issued to the investigating authorities to register the complaint on 11-8-2008, by way of FIR No. 187 of 2008.*

49. *The various decisions cited by Mr Dave endorse the view that when required not only could the High Court or this Court direct the investigating agencies to conduct the investigation in a fair and unbiased manner, but that in exercise of its powers under Article 142 of the Constitution, the Supreme Court could also issue directions for*

enforcement of fundamental rights and to ensure that complete justice was done to the parties.”

In *Violence in Lakhimpur Kheri (U.P.) Leading to Loss of Life,*

In re,² the Supreme Court recently reiterated:

“2. The matter is currently under investigation by the local police, a Special Investigation Team (“SIT”) has been formed, and some arrests have been made. Given the nascent stage of the investigation, we are consciously reluctant to make any observation on the merits of the case, as that would have an impact on the parties involved and influence the prosecuting agency and the courts which would ultimately look into the case.

3. During the course of hearing on 8-11-2021, 12-11-2021 and 15-11-2021, some of the parties questioned the fairness of the ongoing investigation. Hence we proposed to appoint a former Judge of the High Court to monitor the investigation and also to induct new Members in the SIT who may carry out the investigation, uninfluenced by any consideration. Shri Harish Salve, learned Senior Counsel appearing on behalf of the State of Uttar Pradesh sought time to have instructions and thereafter on 15-11-2021, he very fairly stated that the State Government has no objection to the recourse suggested by this Court.

4. This Court is equally concerned about guaranteeing an impartial, fair, just and thorough investigation into the incident which has resulted in such a tragic loss of lives of protesters as well as some other persons.

5. Earlier hereto, we have expressed our disapproval on the slow pace, manner and outcome of the investigation conducted so far, as well as the composition of the SIT charged with investigating the matter.

6. This Court in ***Babubhai Jamnadas Patel v. State of Gujarat***¹ has delineated the purpose of the judiciary in such circumstances, and noted that the Supreme Court and the High Courts are the “sentinels of justice” that ensure that the rule of law and constitutional guarantees of a fair and impartial investigation into alleged criminality, are upheld. On several prior occasions, including in ***Bharati Tamang v. Union of India***² and ***Zahira Habibulla H. Sheikh v. State of***

² (2022) 9 SCC 337 : (2022) 3 SCC (Cri) 576, at page 338 :

Gujarat steps have been taken by courts for monitoring the investigation of alleged criminal offences.

7. While investigating such offences, justice must not only be done, but also be seen and perceived to be done. We thus deem it appropriate to reconstitute the SIT hereinafter to preserve the faith and trust of people in the Criminal Administration of the Justice System. Further, to assure full and complete justice to the victims of crime, we are inclined to order that the ongoing investigation be monitored by a retired High Court Judge, who too may not have his roots in the State of Uttar Pradesh. We, therefore, appoint Justice (Retd.) Rakesh Kumar Jain, a former Judge of the Punjab & Haryana High Court, to monitor the ongoing investigation so as to ensure transparency, fairness and absolute impartiality in the outcome of the investigation in the Lakhimpur Kheri incident which is to be conducted in a time-bound manner.” (emphasis supplied)

In the light of the material available to us in this case till date, we are satisfied that exceptional circumstances do exist for intervening in the matter more particularly when the respondent no.1 had chosen to turn a blind eye to the said material for reasons best known to it.

In the interest of justice and to ensure fairness of investigation and also keeping in mind the principle the “justice must not only be done but must be seen to be done”, we are of the opinion that it would be desirable that present incumbents holding posts of both the Director General of Police, HP and respondent no.2 be moved to other posts to ensure that fair investigation happens in the FIRs registered .

Accordingly, we direct the respondent No.1 to take steps at the earliest to move the present incumbents holding posts of both the Director General of Police, HP and respondent no.2 to other posts where they would not have any opportunity to influence the investigation in the FIRs referred to in this order.

List on **4.1.2024**.

We hasten to add that we are not expressing any opinion on the merits of the claims of the parties since the investigation is still not complete.

(M.S.Ramachandra Rao)
Chief Justice

(Jyotsna Rewal Dua)
Judge

Dt. 26.12.2023