

**IN THE HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT SRINAGAR**

CJ Court

CRREF No.1/2016

Farooq Ahmad Wani

...Petitioner(s).

Through: Mr. Aijaz Ahmad, Advocate.

Vs.

Abdul Khaliq

....Respondent(s)

Through: Ms. Asifa Padroo, AAG.

**CORAM:
HON'BLE THE CHIEF JUSTICE**

ORDER
17.05.2022

1. Heard Mr. Aijaz Ahmad, learned counsel for the petitioner and Ms. Asifa Padroo, learned AAG for the respondents.
2. It appears that a criminal complaint, *Farooq Ahmad Wani v. Abdul Khaliq and another*, File No. 1200M/3Criminal, pertaining to the incident of death dated 31.01.2010 of one Wamiq Farooq, was pending consideration before the Second Additional Sessions Judge, Srinagar. On account of the threat perception, the 2nd Additional Sessions Judge, Srinagar, referred the matter to the Principal District & Sessions Judge, Srinagar, with the request that the case may be transferred to some other court.
3. The Principal Sessions Judge, Srinagar, vide order dated 31.12.2015 has referred the matter to this Court probably as a reference in

exercise of powers under Section 432 Cr.P.C. (Old) / 395 Cr.P.C. (New).

The Principal Sessions Judge, Srinagar, in the reference order has mentioned that the accused orally submitted that the counsel engaged by him has been threatened and he is not having any legal assistance.

4. It is in the aforesaid facts and circumstances that a reference has been made soliciting opinion of this Court.

5. The argument of learned counsel for the petitioner is that provisions of Section 432 Cr.P.C. (old) and Section 395 Cr.P.C. (New) are verbatim the same and that the reference does not fall within the ambit of aforesaid provision and, as such, is not maintainable.

6. Accepting that the provisions of Section 432 Cr.P.C. (old) and Section 395 Cr. P. C. (new) are identical, I refer to Section 395 Cr. P. C. which reads as under:

“395. Reference to High Court.—(1) Where any Court is satisfied that a case pending before it involves a question as to the validity of any Act, Ordinance or Regulation or of any provision contained in an Act, Ordinance or Regulation, the determination of which is necessary for the disposal of the case, and is of opinion that such Act, Ordinance, Regulation or provision is invalid or inoperative, but has not been so declared by the High Court to which that Court is subordinate or by the Supreme Court, the Court shall state a case setting out its opinion and the reasons therefor, and refer the same for the decision of the High Court.

Explanation.—In this section, “Regulation” means any Regulation as defined in the General Clauses Act, 1897 (10 of 1897), or in the General Clauses Act of a State.

(2) A Court of Session or a Metropolitan Magistrate may, if it or he thinks fit in any case pending before it or him to which the provisions of sub-section (1) do not apply, refer for the decision of the High Court any question of law arising in the hearing of such case.

(3) Any Court making a reference to the High Court under sub-section (1) or sub-section (2) may, pending the decision of the High Court thereon, either commit the accused to jail or release him on bail to appear when called upon.”

7. A reading of sub-section (1) of Section 395 Cr. P. C. would reveal that the court can make a reference to the High Court on being satisfied that the matter pending before it involves a question as to the validity of any Act, Ordinance or Regulation or of any provision thereof which may be necessary for disposal of the case before it or any provision of such Act, Ordinance or Regulation is invalid or inoperative but has not been so declared by the High Court to which the said court is subordinate or by the Supreme Court, provided reasons are recorded for making such a reference to the High Court.

8. Sub-section (2) of Section 395 Cr. P. C. provides that the court of Session's may also make a reference to the High Court if it thinks fit that in any case pending before it question of law arises for consideration. In other words, under the aforesaid provision, only on a question of law arising that the matter may be referred to the High Court.

9. A conjoint reading of the aforesaid provisions make it clear that reference can be made to the High Court by the Session Judge only in the following two contingencies:

(a) Where in a pending case before the Session Court a question as to the validity of any provision of any Act, Ordinance or Regulation is involved or if any such provision in the opinion of the court is invalid or inoperative but has not been so declared by the High Court and the Supreme Court; and

(b) Where any question of law arises for consideration.

10. The reference order nowhere mentions that the case at hand involves any question as to the validity of any Act, Ordinance or Regulation or any provision thereof or that in the opinion of the court any such Act, Ordinance, Regulation or any provision thereof is invalid or inoperative or that the matter pending before it involves a question of law which requires a decision by the High Court. In the absence of any such statement, there cannot be a reference to the High Court by the Session's Court.

11. In view of the aforesaid facts and circumstances, no ground as contained in sub-section (1) or sub-section (2) of Section 395 Cr. P. C. exists for making a reference to this Court. The Principal Sessions Judge, Srinagar, has simply made the reference for the reason that the accused is not getting any proper legal assistance and that his counsel has been threatened. The aforesaid two reasons shown for making the reference are not the grounds on which a reference can be made under Section 395 Cr. P. C.

12. In view of the aforesaid facts and circumstances, the reference in question is clearly outside the purview of Section 395 Cr. P. C (new) or Section 432 Cr. P.C. (old) and is not maintainable. Accordingly, the

reference stands disposed of and the record is directed to be returned to the Principal Sessions Judge, Srinagar, to proceed further in the matter in accordance with law.

(PANKAJ MITHAL)
CHIEF JUSTICE

Srinagar

17.05.2022

Abdul Qayoom, Secy.

Whether the order is reportable? Yes/No.

