

GAHC010026342023



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : WP(C)/906/2023

ABDUR RAHIM
S/O- LT. SURUT ZAMAL, R/O- VILL- BEKORDOBA, P.S. MANKACHAR,
DIST.- SOUTH SALMARA MANKACHAR, ASSAM, PIN- 783135

VERSUS

THE STATE OF ASSAM AND 3 ORS
REP. BY THE SECY., TO THE GOVT. OF ASSAM, HOME DEPTT., DISPUR,
GHY-06

2:THE DIRECTOR GENERAL OF POLICE
ASSAM
ULUBARI
GHY-07

3:THE SUPERINTENDENT OF POLICE
SOUTH SALMARA MANKACHAR
HATSINGIMARI
PIN- 783135

4:THE OFFICER-IN-CHARGE
MANKACHAR P.S.
DIST.- SOUTH SALMARA MANKACHAR
PIN- 78313

Advocate for the Petitioner : MR. S C BISWAS

Advocate for the Respondent : GA, ASSAM

**BEFORE
HONOURABLE MR. JUSTICE MANISH CHOUDHURY**

ORDER

Date : 20-02-2023

Heard Mr. S.C. Biswas, learned counsel for the petitioner and Mr. R. Talukdar, learned Junior Government Advocate, Assam for all the respondents.

2. The petitioner has instituted the writ petition under Article 226 of the Constitution of India seeking *inter alia* a writ in the nature of Mandamus and/or any other appropriate Writ, order or direction of like nature to direct the respondent authorities to entrust the investigation of the crime case, Mankachar Police Station Case no. 269/2022 either to the Criminal Investigation Department [CID], Assam or the Central Bureau of Investigation [CBI].

3. The petitioner has *inter alia* projected that three accused persons had kidnapped his minor son, aged about 16 years, on 02.09.2022. In connection with the kidnapping of his minor son, the petitioner had lodged a First Information Report [FIR] before the Officer In-Charge, Mankachar Police Station, District – South Salmara, Mankachar on 06.09.2022. As per the FIR, at around 09-00 a.m. on 02.09.2022, the accused no. 1, named therein, came to the petitioner's house and took the petitioner's son in his motor-cycle for a ride. Thereafter, the accused no. 1 in connivance with the other two accused persons, had kidnapped the petitioner's minor son and confined him at some place. The FIR lodged by the petitioner has been registered as Mankachar Police Station Case no. 269/2022 under Sections 365/34, Indian Penal Code [IPC]. In the FIR, the petitioner had mentioned that some delay had occurred in lodging the FIR as he was busy in searching for his son. In the FIR, the petitioner had named 3 [three] persons as accused.

3.1. On 07.09.2022, the local villagers found a dead body lying in a paddy field at Chengurchar, Village – Gasbari. The finding of the dead body at that place was informed to the Mankachar Police Station and the Investigating Officer [I.O.] of the Mankachar Police Station Case no. 269/2022 visited the place of occurrence and the petitioner was also called to the place where the dead body was found. The petitioner identified the dead body to be of his minor son. Thereafter, the dead body was sent to the Dhubri Civil Hospital for Post-Mortem Examination. According to the petitioner, the dead body was found with the severance of its throat. The belly was found cut from the front side as well as from the backside. There was indication that the kidney was removed. As mentioned above, in the FIR so lodged, the petitioner has named three persons as accused and suspected their involvement in the kidnapping of his minor son. In the course of investigation, one Saiful @ Saidul Islam had been arrested. The I.O. of the case after causing his production before the learned Court, sought for police remand for two days.

3.2. It is the case of the petitioner that there is involvement of a larger criminal network behind the kidnapping and subsequent murder of his minor son. But, the I.O. of the case has not shown the earnestness in investigating the case properly. The I.O. of the case has neither examined any witnesses where the dead body of his minor son was found nor has conducted any investigation, till date, to arrest the other two accused persons, named in the FIR.

3.3. Ventilating his grievances as regards the alleged lackadaisical approach taken by the I.O. of the case, the petitioner stated to have submitted a Representation before the respondent no. 3 on 13.10.2022 with a request to entrust the investigation of Mankachar Police Station Case no. 269/2022 either

to a Deputy Superintendent of Police or to the Circle Inspector. It is the grievance of the petitioner that despite submission of the Representation before the respondent no. 3, no discernible action has been taken wherefrom it can be gathered that the investigation is being conducted in the right direction. The petitioner has also alleged about presence of political influence behind the alleged lackadaisical nature of investigation in Mankachar Police Station Case no. 269/2022. Having found no discernible action from the respondent no. 3, the petitioner stated to have approached the respondent no. 2 by filing a representation before him on 16.11.2022.

4. From the afore-stated projections made in the writ petition, it transpires that after lodging the FIR before the Officer In-Charge, Mankachar Police Station on 06.09.2022, the petitioner had approached the respondent no. 3 seeking his intervention in the investigation purportedly under Section 36, Code of Criminal Procedure, 1973.

5. From the statements and averments made in the writ petition, it transpires that the petitioner has not approached the jurisdictional Magistrate by filing any application under Section 156 [3], Code of Criminal Procedure, 1973 by highlighting his grievances in respect of alleged inaction on the part of the I.O. of the case and as regards the alleged perfunctory nature of investigation carried out by him which have the possibility of wiping out probable evidence.

6. In this connection, it would be apposite to refer to the following observations made by the Hon'ble Supreme Court of India in *Sakiri Vasu vs. State of Uttar Pradesh and others*, reported in [2008] 2 SCC 409 :

“11. In this connection we would like to state that if a person has a grievance that the police station is not registering his FIR under Section 154 Cr.P.C., then he can approach

the Superintendent of Police under Section 154[3] Cr.P.C. by an application in writing. Even if that does not yield any satisfactory result in the sense that either the FIR is still not registered, or that even after registering it no proper investigation is held, it is open to the aggrieved person to file an application under Section 156 [3] Cr.P.C. before the learned Magistrate concerned. If such an application under Section 156 [3] is filed before the Magistrate, the Magistrate can direct the FIR to be registered and also can direct a proper investigation to be made, in a case where, according to the aggrieved person, no proper investigation was made. The Magistrate can also under the same provision monitor the investigation to ensure a proper investigation.

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13. The same view was taken by this Court in *Dilawar Singh vs. State of Delhi* [vide para 17]. We would further clarify that even if an FIR has been registered and even if the police has made the investigation, or is actually making the investigation, which the aggrieved person feels is not proper, such a person can approach the Magistrate under Section 156[3] CrPC, and if the Magistrate is satisfied he can order a proper investigation and take other suitable steps and pass such order order[s] as he thinks necessary for ensuring a proper investigation. All these powers a Magistrate enjoys under Section 156[3] CrPC.

14. Section 156 [3] states :

“156. [3] Any Magistrate empowered under Section 190 may order such an investigation as abovementioned.”

The words “as abovementioned” obviously refer to Section 156 [1], which contemplates investigation by the officer in charge of the Police Station.

15. Section 156[3] provides for a check by the Magistrate on the police performing its duties under Chapter XII CrPC. In cases where the Magistrate finds that the police has not done its duty of investigating the case at all, or has not done it satisfactorily, he can issue a direction to the police to do the investigation properly, and can monitor the same.

16. The power in the Magistrate to order further investigation under Section 156[3] is

an independent power, and does not affect the power of the investigating officer to further investigate the case even after submission of his report vide Section 173[8]. Hence the Magistrate can order re-opening of the investigation even after the police submits the final report, vide *State of Bihar vs. J.A.C. Saldanha* [SSC AIR para 19].

17. In our opinion Section 156[3] CrPC is wide enough to include all such powers in a Magistrate which are necessary for ensuring a proper investigation, and it includes the power to order registration of an FIR and of ordering a proper investigation if the Magistrate is satisfied that a proper investigation has not been done, or is not being done by the police. Section 156[3] CrPC, though briefly worded, in our opinion, is very wide and it will include all such incidental powers as are necessary for ensuring a proper investigation.

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24. In view of the abovementioned legal position, we are of the view that although Section 156[3] is very briefly worded, there is an implied power in the Magistrate under Section 156[3] CrPC to order registration of a criminal offence and/or to direct the officer in charge of the concerned police station to hold a proper investigation and take all such necessary steps that may be necessary for ensuring a proper investigation including monitoring the same. Even though these powers have not been expressly mentioned in Section 156[3] CrPC, we are of the opinion that they are implied in the above provision.

25. We have elaborated on the above matter because we often find that when someone has a grievance that his FIR has not been registered at the police station and/or a proper investigation is not being done by the police, he rushes to the High Court to file a writ petition or a petition under Section 482 CrPC. We are of the opinion that the High Court should not encourage this practice and should ordinarily refuse to interfere in such matters, and relegate the petitioner to his alternating remedy, firstly under Section 154[3] and Section 36 CrPC before the concerned police officers, and if that is of no avail, by approaching the concerned Magistrate under Section 156[3].

26. If a person has a grievance that his FIR has not been registered by the police station his first remedy is to approach the Superintendent of Police under Section

154[3] CrPC or other police officer referred to in Section 36 CrPC. If despite approaching the Superintendent of Police or the officer referred to in Section 36 his grievance still persists, then he can approach a Magistrate under Section 156[3] CrPC instead of rushing to the High Court by way of a writ petition or a petition under Section 482 CrPC. Moreover he has a further remedy of filing a criminal complaint under Section 200 CrPC. Why then should writ petitions or Section 482 petitions be entertained when there are so many alternative remedies?

27. As we have already observed above, the Magistrate has very wide powers to direct registration of an FIR and to ensure a proper investigation, and for this purpose he can monitor the investigation to ensure that the investigation is done properly [though he cannot investigate himself]. The High Court should discourage the practice of filing a writ petition or petition under Section 482 CrPC simply because a person has a grievance that his FIR has not been registered by the police, or after being registered, proper investigation has not been done by the police. For this grievance, the remedy lies under Sections 36 and 154[3] before the concerned police officers, and if that is of no avail, under Section 156[3] CrPC before the Magistrate or by filing a criminal complaint under Section 200 CrPC and not by filing a writ petition or a petition under Section 482 CrPC.”

7. The decision in *Sakiri Vasu* [supra] has been referred to in the subsequent decision of the Hon'ble Supreme Court in *Sudhir Bhaskarrao Tambe vs. Heman Yashwant Dhage and others*, reported in [2016] 6 SCC 277, and it has been observed as under :-

“2. This Court has held in *Sakiri Vasu v. State of U.P. and Ors.*, reported in [2008] 2 SCC 409, that if a person has a grievance that his FIR has not been registered by the police, or having been registered, proper investigation is not being done, then the remedy of the aggrieved person is not to go to the High Court under Article 226 of the Constitution of India, but to approach the concerned Magistrate under Section 156[3], Code of Criminal Procedure. If such an application under Section 156[3], Code of Criminal Procedure is made and the Magistrate is, prima facie, satisfied, he can direct the FIR to be registered, or if it has already been registered, he can direct proper

investigation to be done which includes in his discretion, if he deems it necessary, recommending change of the investigating officer, so that a proper investigation is done in the matter. We have said this in *Sakiri Vasu* [supra] because what we have found in this country is that the High Courts have been flooded with writ petitions praying for registration of the first information report or praying for a proper investigation.

3. We are of the opinion that if the High Courts entertain such writ petitions, then they will be flooded with such writ petitions and will not be able to do any other work except dealing with such writ petitions. Hence, we have held that the complainant must avail of his alternate remedy to approach the concerned Magistrate under Section 156[3], Code of Criminal Procedure, and if he does so, the Magistrate will ensure, if prima facie he is satisfied, registration of the first information report and also ensure a proper investigation in the matter, and he can also monitor the investigation.

4. In view of the settled position in *Sakiri Vasu* [supra], the impugned judgment of the High Court cannot be sustained and is hereby set aside. The concerned Magistrate is directed to ensure proper investigation into the alleged offence under Section 156[3], Code of Criminal Procedure, and if he deems it necessary, he can also recommend to the SSP/SP concerned change of the investigating officer, so that a proper investigation is done. The Magistrate can also monitor the investigation, though he cannot himself investigate [as investigation is the job of the police]. Parties may produce any material they wish before the concerned Magistrate. The learned Magistrate shall be uninfluenced by any observation in the impugned order of the High Court.”

8. From the observations made by the Hon'ble Supreme Court of India, more particularly, in paragraphs 26 and 27 in *Sakiri Vasu* [supra] and paragraph 3 in *Sudhir Bhaskarrao Tambe* [supra], this Court is of the considered view that the petitioner has an adequate and efficacious remedy under the law and the remedy is to approach the learned jurisdictional Magistrate under Section 156[3]

of the CrPC by substantiating the contentions that there have not been proper investigation in the case i.e. Mankachar Police Station Case no. 269/2022 and if the Magistrate is *prima facie* satisfied that the investigation in the case is not being carried out in a proper manner he can ensure proper investigation and also monitor the investigation in the manner, as observed in *Sakiri Vasu* [supra] and *Sudhir Bhaskarrao Tambe* [supra].

9. It may be mentioned that an order for investigation by the Central Bureau of Investigation [CBI] or for transfer of investigation to the Criminal Investigation Department [CID] is not passed as a matter of routine as because a party has alleged that the investigation in a case is not being done properly when efficacious and adequate remedy, as indicated above, is available.

10. In the aforesaid view of the matter, this Court is of the considered view that the present writ petition with the reliefs sought for is not to be entertained as the petitioner has an adequate and efficacious remedy under the law. Consequently, this writ petition is not entertained, but liberty stands granted to the petitioner to approach the jurisdictional Magistrate under Section 156[3] of the CrPC in an expeditious manner, if so advised. If such an approach is made by the petitioner to the jurisdictional Magistrate along with all the supporting materials, it is expected that the jurisdictional Magistrate will consider the matter in accordance with law and as per the procedure. It is, however, made clear that this Court has not made any observation on the merits of the claims of the petitioner. No cost.

JUDGE

Comparing Assistant