

GAHC010113882023



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

Case No. : WP(C)/3028/2023

HEMANTA CHETIA
S/O- BHUBAN CHETIA,
R/O- HULUNG KETANI,
P.O.- LIGIRI PUKHURI, NAZIRA,
SIVASAGAR, ASSAM.

VERSUS

THE STATE OF ASSAM AND 5 ORS
REPRESENTED BY COMMISSIONER AND SECRETARY,
HOME DEPARTMENT, DISPUR,
GHY-06.

2:INSPECTOR GENERAL OF POLICE (ADMINISTRATION)
ULUBARI
GUWAHATI-07.

3:DEPUTY INSPECTOR GENERAL OF POLICE (ER) UPPER ASSAM DIVISION
JORHAT-

4:SUPERINTENDENT OF POLICE
SIVASAGAR
PIN- 785697.

5:THE OFFICER-IN-CHARGE OF NAZIRA
ADARSHA POLICE STATION

P.O- NAZIRA
SIVASAGAR- 785685.

6:ARIMARDAN KUMAR SINGH
R/O- AMBA BLOCK

KUTUMBA
P.O.- AMBA

PIN- 824111

DIST- AURANGABAD
BIHAR

Advocate for the Petitioner : MR MINTU SAIKIA

Advocate for the Respondent : GA, ASSAM

**BEFORE
HONOURABLE MR. JUSTICE KALYAN RAI SURANA**

ORDER

Date : 29.05.2023

Heard Mr. M. Saikia, learned counsel for the petitioner and Mr. K. Gogoi, learned Govt. advocate appearing for the respondent nos. 1 to 5.

2. The case of the petitioner is that his wife has eloped with respondent no.6 and in the process, the seven years old child of the petitioner has been kidnapped by the respondent no.6. The petitioner had approached the Officer-in-Charge of Nazira Adarsh Police Station, but he refused to register a case. Therefore, the petitioner had filed an application before the Superintendent of Police, Sivasagar on 03.04.2023 for registration of the FIR. However, the Superintendent of Police, Sivasagar by a letter dated 04.05.2023 had informed the petitioner that the matter was enquired into through the SDPO, Nazira and it was found that the wife of the petitioner had eloped with her son and married the respondent no.6. The petitioner was also informed that since the age of his wife was above 18 years and married with the person with her own consent, the

police have no right to register a case and bring her back.

3. Aggrieved by the said communication dated 04.05.2023, the petitioner has submitted a representation dated 12.05.2023 before the Inspector General of Police (Administration) and the Deputy Inspector General of Police, Eastern Range, Jorhat. The learned counsel for the petitioner has submitted that he has come to know that in the meantime, his wife and the respondent no.6 have manufactured a birth certificate of the minor son of the petitioner wherein, the father's name is that of respondent no.6.

4. Accordingly, the petitioner has approached this Court under Article 226 of the Constitution of India, praying for a direction to set aside and quash the communication dated 04.05.2023 issued by the Superintendent of Police, Sivasagar and for directing the respondent nos. 4 and 5 to investigate the matter.

5. The learned Govt. advocate, by referring to the case of *Sakiri Vasu Vs. State of U.P. & Ors., (2008) 2 SCC 409*, has submitted that non-registration of FIR, the petitioner has a right to approach the jurisdictional Magistrate under Section 153(3) CrPC. It is submitted that as the investigation carried out through SDPO, Nazira, which is reflected in the communication dated 04.05.2023 issued by the Superintendent of Police, Sivasagar, discloses that the wife of the petitioner had eloped with respondent no.6 along with her son, *prima facie*, the inter-se dispute between the parties would have to be resolved in an appropriate and competent Court having jurisdiction.

6. The relevant observations made in the case of *Sakiri Vasu (supra)* are quoted below.

“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) Cr.P.C. 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) Cr. P.C., 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 Cr. P.C. 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 Cr.P.C. 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) Cr.P.C. or other police officer referred to in Section 36 Cr.P.C. 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) Cr.P.C. instead of rushing to the High Court by way of a writ petition or a petition under Section 482 Cr.P.C. Moreover he has a further remedy of filing a criminal complaint under Section 200 Cr.P.C. 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 Cr.P.C. 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) Cr.P.C. before the Magistrate or by filing a criminal complaint under Section 200 Cr.P.C. and not by filing a writ petition or a petition under Section 482 Cr.P.C.

28. It is true that alternative remedy is not an absolute bar to a writ petition, but it is equally well settled that if there is an alternative remedy the High Court should not ordinarily interfere.

29. In Union of India v. Prakash P. Hinduja and another¹¹, 2003 (6) scc 195 (vide para 13), it has been observed by this Court that a Magistrate cannot interfere with the investigation by the police. However, in our opinion, the ratio of this decision would only apply when a proper investigation is being done by the police. If the Magistrate on an application under Section 156(3) Cr.P.C. is satisfied that proper investigation has not been done, or is not being done by the officer-in-charge of the concerned police station, he can certainly direct the officer in charge of the police station to make a proper investigation and can further monitor the same (though he should not himself investigate).

30. It may be further mentioned that in view of Section 36 Cr.P.C. if a person is aggrieved that a proper investigation has not been made by the officer-in-charge of the concerned police station, such aggrieved person can approach the Superintendent of Police or other police officer superior in rank to the officer-in-charge of the police station and such superior officer can, if he so wishes, do the investigation vide CBI v. State of Rajasthan and another¹², 2001 (3) scc 333 (vide para 11), R.P. Kapur v. S.P. Singh¹³, AIR 1961 SC 1117 etc. Also, the State Government is competent to direct the Inspector General, Vigilance to take over the investigation of a cognizable offence registered at a police station vide State of Bihar vs. A.C. Saldanna (supra).

31. No doubt the Magistrate cannot order investigation by the CBI vide CBI vs. State of Rajasthan and another (Supra), but this Court or the High Court has power under Article 136 or Article 226 to order investigation by the CBI. That, however should be done only in some rare and exceptional case, otherwise, the CBI would be flooded with a large number cases and would find it impossible to properly investigate all of them.

32. In the present case, there was an investigation by the G.R.P., Mathura and also two Courts of Inquiry held by the Army authorities and they found that it was a case of suicide. Hence, in our opinion, the High Court was justified in rejecting the prayer for a CBI inquiry.

33. In Secretary, Minor Irrigation & Rural Engineering Services U.P. and others v. Sahngoo Ram Arya and another¹⁴, 2002 (5) scc 521 (vide para 6) , this Court observed that although the High Court has power to order a CBI inquiry, that power

should only be exercised if the High Court after considering the material on record comes to a conclusion that such material discloses prima facie a case calling for investigation by the CBI or by any other similar agency. A CBI inquiry cannot be ordered as a matter of routine or merely because the party makes some allegation.

34. In the present case, we are of the opinion that the material on record does not disclose a prima facie case calling for an investigation by the CBI. The mere allegation of the appellant that his son was murdered because he had discovered some corruption cannot, in our opinion, justify a CBI inquiry, particularly when inquiries were held by the Army authorities as well as by the G.R.P. at Mathura, which revealed that it was a case of suicide.

35. It has been stated in the impugned order of the High Court that the G.R.P. at Mathura had investigated the matter and gave a detailed report on 29.8.2003. It is not clear whether this report was accepted by the Magistrate or not. If the report has been accepted by the Magistrate and no appeal/revision was filed against the order of the learned Magistrate accepting the police report, then that is the end of the matter. However, if the Magistrate has not yet passed any order on the police report, he may do so in accordance with law and in the light of the observations made above."

7. In view of the well settled proposition regarding right of the complainant to approach the jurisdictional Magistrate in case the FIR was lodged and not investigated, the appropriate remedy would be under the 156(3) of the CrPC. Moreover, the petitioner also has an alternative remedy of approaching the jurisdictional Court to claim and obtain the custody of his child in accordance with law.

8. Under such circumstances, the Court finds that the writ petition would not be maintainable as the petitioner has two alternative remedies which have not been exhausted.

9. Accordingly, this writ petition stands closed with liberty to the petitioner to

avail any of the remedies available to him in accordance with law.

JUDGE

Comparing Assistant