

GAHC010150912021



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

Case No. : WP(C)/4985/2021

BINDITA SEN
W/O- LT. DOLAN CHANDRA SEN, PERMANENT ADDRESS-
SUBHASNAGAR, BASUGAON TOWN, WARD NO.1, P.S. BASUGAON, P.O.
BASUGAON, DIST.- CHIRANG, (BTR), ASSAM, PIN- 783382, PRESENT
ADDRESS- C/O SRI BIJAN DAS, NATUN PARA, COLLEGE ROAD, BEHIND
AMBEDKAR HALL, WARD NO. 10, BONGAIGAON, DIST.- BONGAIGAON,
ASSAM PIN- 783380

VERSUS

THE STATE OF ASSAM AND 4 ORS
REP. BY THE COMM. AND SECY., DEPTT. OF HOME, DISPUR, GHY-06

2:THE INSPECTOR GENERAL OF POLICE
BODOLAND TERRITORIAL REGION
KOKRAJHAR
PIN- 783370

3:THE SUPERINTENDENT OF POLICE
CHIRANG
DIST.- CHIRANG
(BTR)
ASSAM
PIN- 783385

4:THE OFFICER-IN-CHARGE
BASUGAON P.S.
BASUGAON
DIST.- CHIRANG
(BTR)
ASSAM
PIN- 783380

5:ANOWAR HUSSAIN
SUB INSPECTOR OF POLICE
BASUGAON P.S.
BASUGAON
DIST.- CHIRANG
(BTR)
ASSAM
PIN- 78338

Advocate for the Petitioner : MR. K N CHOUDHURY

Advocate for the Respondent : GA, ASSAM

BEFORE

HON'BLE MR. JUSTICE MANASH RANJAN PATHAK

04.05.2023

1) Heard Mr. K. N. Choudhury, learned Senior counsel assisted by Mr. T. Deuri, learned counsel for the petitioner and Mr. K. Gogoi, learned Additional Senior Government Advocate, Assam for the official respondent Nos. 1 to 4.

2) It is stated by the petitioner that her husband, Dolan Chandra Nath opened a shop, namely, "Maa Sarada Dashakarma Bhabdar", located in front of the Assam Gramin Bikash Bank, Basugaon in the district of Chirang, taking the said shop on rent. Her husband expired due to an unfortunate accident that took place on 2nd May, 2019, leaving behind her and their minor son. After the death of her husband, her elder brother-in-law, i.e., her husband's elder brother, namely, Nabin Sen @ Bulu told her that he wants to run the said shop of her husband for a few days and started sitting in the said shop and thereby, illegally took its possession, though he does not have any right over it. In spite of her approach for amicable settlement, said elder brother-in-law, Nabin Sen @ Bulu did not give any heed to her request and claim nor paid her or shared any amount from the profit that he earned from the said shop of her late husband and also did not pay her any amount to maintain herself as well as her minor son.

3) Petitioner also stated that on her application, the Inspector of Shops and Establishments, Kokrajhar on 11th February, 2020 issued a Certificate of Registration in her name pertaining to the

said shop stating as Grocery and "Dashakarma" shop. In that regard, the Basugaon Town Committee on 9th September, 2019 issued a license in her name under Sections 229, 330 and 236 of the Assam Municipal Act, 1956 and Bye-Laws Nos. 302/154/321 of the Basugaon Town Committee to carry out the trade of Grocery and Stationary shop.

4) Petitioner further stated that at the time of death of her husband Dolan Chandra Nath, goods worth of Rs. 19,00,000/- were available in a shop. Because of such harassment in illegally taking over the said shop of her late husband by said elder brother-in-law, Nabin Sen @ Bulu, depriving her from the share of profit of business that earned from her said shop, not making any payment towards her maintenance and also for her minor son, her said elder brother-in-law, compelled her to leave her in-laws' house, the house where she lived with her husband and their minor child and now she is residing with her minor son of 11 years old in her parental home at Bongaigaon.

5) The petitioner on 5th May, 2021 lodged a First Information Report before the Officer-in-Charge of Basugaon Police Station, Basugaon, District Chirang (BTR), Assam against her said elder brother-in-law, Nabin Sen @ Bulu, stating all the above, which was accordingly registered as Basugaon Police Station Case No. 27/2021 under Sections 406/420/386 IPC. It is stated that though the Officer-in-Charge of Basugaon Police Station, respondent No. 3 entrusted the said case to the respondent No. 5, Sub-Inspector of Police of said Basugaon Police Station, as no proper investigation was carried out by the concerned Investigating Officer, the petitioner on 19.05.2021 submitted an application before the Superintendent of Police (S.P.) of Chirang District, respondent No. 3, to expedite the investigation of the said police case filed by her, on which the said S.P., Chirang directed the Officer-in-Charge of Basugaon Police Station for taking necessary action as per law.

6) The petitioner also stated that on the very next day of her lodging the FIR, the said brother-in-law, the named accused in her case, also filed an FIR in Basugaon Police Station on 6th May, 2021 against her and some other persons alleging false complaint that was registered as Basugaon Police Station Case No. 28/2021 under Sections 448/294/352/387 IPC.

7) As no proper action was taken with regard to her said Police Case, the petitioner on 05.06.2021 submitted a petition before the learned Chief Judicial Magistrate, Chirang praying to call for the status report of the said Basugaon Police Station Case No. 27/2021. Accordingly, the

learned CJM, Chirang called for the status report of the said Basugaon P.S. Case No. 27/2021. On perusal of the status report of said Basugaon P.S. Case No. 27/2021, as the learned Magistrate found evident that the investigation of the said case being in progress, the learned CJM, Chirang by his order dated 06.07.2021 disposed of said petition of the petitioner filed in Basugaon P.S. Case No. 27/2021 that was filed before the said Magistrate on 05.06.2021.

8) The petitioner submitted that the investigation of said Basugaon P.S. Case No. 27/2021 wherein she is the informant has been carried out by the concerned Investigating Officer as well as the Officer in-charge with their willful negligence without arresting the accused of the case with arbitrary, unfair and illegal manner and mechanically as well as on extraneous consideration with colorable exercise of power for co-lateral purpose, failing to do their statutory duty in accordance with law.

9) Hence, this writ petition by the petitioner praying amongst others for a direction to the Superintendent of Police, District-Chirang, respondent No. 3 either to change or to remove the Investigating Officer of said Basugaon P.S. Case No. 27/2021 with a new Investigating Officer and further, to direct the said Judicial Magistrate, Chirang to monitor the investigation of said Basugaon P.S. Case No. 27/2021 to ensure proper investigation of the case.

10) In the case of *All India Institute of Medical Sciences Employees' Union (Regd.) -Vs- Union of India*, reported in (1996) 11 SCC 582, where the High Court under Article 226 of the Constitution of India refused to issue mandamus to the police to investigate into the allegations made against the accused of a criminal case and also refused to entertain the said writ petition, the Hon'ble Supreme Court found that the stand taken by the petitioner/appellant is not correct in law and held as follows:

“3. *The Code of Criminal Procedure, 1973 (for short 'the Code') prescribes the procedure to investigate into the cognizable offences defined under the Code. In respect of cognizable offence, Chapter XII of the Code prescribes the procedure: information to the police and their powers to investigate the cognizable offence. Sub-section (1) of Section 154 envisages that:*

“Every information relating to the commission of a cognizable offence, if given orally to an officer in charge of a police station, shall be reduced to writing by him or under his direction, and be read over to the informant; and every such information, whether given in writing or reduced to writing as aforesaid, shall be signed by the person giving it, and the substance thereof shall be entered in a book to be kept by such officer in such form as the State

Government may prescribe in this behalf."

On such information being received and reduced to writing, the officer in charge of the police station has been empowered under Section 156 to investigate into the cognizable cases. The procedure for investigation has been given under Section 157 of the Code, the details of which are not material. After conducting the investigation prescribed in the manner envisaged in Chapter XII, charge-sheet shall be submitted to the court having jurisdiction to take cognizance of the offence. Section 173 envisages that:

(1) Every investigation under this Chapter shall be completed without unnecessary delay.

(2) As soon as it is completed, the officer in charge of the police station shall forward to a Magistrate empowered to take cognizance of the offence on a police report, a report in the form prescribed by the State Government giving details therein. Upon receipt of the report, the Court under Section 190 is empowered to take cognizance of the offence. Under Section 173(8), the investigating officer has power to make further investigation into the offence.

4. *When the information is laid with the police but no action in that behalf is taken, the complainant is given power under Section 190 read with Section 200 of the Code to lay the complaint before the Magistrate having jurisdiction to take cognizance of the offence and the Magistrate is required to enquire into the complaint as provided in Chapter XV of the Code. In case the Magistrate after recording evidence finds a prima facie case, instead of issuing process to the accused, he is empowered to direct the police concerned to investigate into the offence under Chapter XII of the Code and to submit a report. If he finds that the complaint does not disclose any offence to take further action, he is empowered to dismiss the complaint under Section 203 of the Code. In case he finds that the complaint/evidence recorded prima facie discloses an offence, he is empowered to take cognizance of the offence and would issue process to the accused.*

5. *In this case, the petitioner had not adopted either of the procedure provided under the Code. As a consequence, without availing of the above procedure, the petitioner is not entitled to approach the High Court by filing a writ petition and seeking a direction to conduct an investigation by the CBI which is not required to investigate into all or every offence. The High Court, therefore, though for different reasons, was justified in refusing to grant the relief as sought for.*

6. *The special leave petition is accordingly dismissed. It, however, does not preclude the petitioner from following either of the procedures as indicated above, if so advised and deemed appropriate."*

11) In the case of *Gangadhar Janardan Mhatre -Vs- State of Maharashtra*, reported in (2004) 7 SCC 768, where the High Court dismissed the writ petition filed under Article 226 of the Constitution of India, in the appeal there was a plea for change of the investigating agency for

further and better investigation as well as on account of laxity of the investigation agency, the Hon'ble Supreme Court, while dismissing the appeal, laid down as follows:

“13. When the information is laid with the police, but no action in that behalf is taken, the complainant is given power under Section 190 read with Section 200 of the Code to lay the complaint before the Magistrate having jurisdiction to take cognizance of the offence and the Magistrate is required to enquire into the complaint as provided in Chapter XV of the Code. In case the Magistrate after recording evidence finds a prima facie case, instead of issuing process to the accused, he is empowered to direct the police concerned to investigate into offence under Chapter XII of the Code and to submit a report. If he finds that the complaint does not disclose any offence to take further action, he is empowered to dismiss the complaint under Section 203 of the Code. In case he finds that the complaint/evidence recorded prima facie discloses an offence, he is empowered to take cognizance of the offence and would issue process to the accused. These aspects have been highlighted by this Court in All India Institute of Medical Sciences Employees' Union (Regd.) v. Union of India. It was specifically observed that a writ petition in such cases is not to be entertained.

14. The inevitable conclusion is that the High Court's order does not suffer from any infirmity. The writ application was not the proper remedy, and without availing the remedy available under the Code, the appellant could not have approached the High Court by filing a writ application.

15. Appeal is dismissed.”

12) The Hon'ble Supreme Court in the case of *Sakiri Vasu -Vs- State of U.P.*, reported in (2008) 2 SCC 409 have held as follows:

“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 CrPC, then he can approach the Superintendent of Police under Section 154(3) CrPC 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) CrPC 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.

13. 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(s) as he thinks necessary for ensuring a proper investigation. All these powers a Magistrate enjoys under Section 156(3) CrPC.

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 reopening of the investigation even after the police submits the final report, vide State of Bihar v. J.A.C. Saldanha.*

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.*

18. *It is well settled that when a power is given to an authority to do something it includes such incidental or implied powers which would ensure the proper doing of that thing. In other words, when any power is expressly granted by the statute, there is impliedly included in the grant, even without special mention, every power and every control the denial of which would render the grant itself ineffective. Thus where an Act confers jurisdiction it impliedly also grants the power of doing all such acts or employ such means as are essentially necessary for its execution.*

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 police station concerned 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, first under Section 154(3) and Section 36 CrPC before the police officers concerned, and if that is of no avail, by approaching the Magistrate concerned 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 police officers concerned, 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.*

13) In the case in hand, it is seen that the petitioner lodged the FIR, which has been registered as Basugaon P.S. Case No. 27/2021. Petitioner is aggrieved because the Investigating Officer of said Basugaon P.S. Case No. 27/2021 is not investigating the said case properly, stating that the accused of the case has not been arrested. So her prayer in this writ petition is to direct the SP of the district concerned to change the Investigating Officer of the case by another and also to direct the concerned Magistrate to monitor the investigation of the case.

14) It is seen that the petitioner earlier approached the SP concerned who directed the OC of Basugaon Police Station to take necessary action as per law. The petitioner approached the CJM, Chirang for the status of the case only and the said Magistrate on finding that investigation of the

said case being in progress, disposed of her petition.

15) If the petitioner is aggrieved with the investigation of said Basugaon P.S. Case No. 27/2021, as held by the Hon'ble Supreme Court, noted above, she has the proper remedy by approaching the Magistrate having jurisdiction under the Code of Criminal Procedure, which the petitioner has not yet complied with.

16) Considering the entire aspect of the matter, the Court is of the view that to change the Investigating Officer of the case and for monitoring of the investigation of the said case by the Magistrate, the petitioner is not entitled to approach the High Court by preferring the writ petition, without availing the remedy and procedure available to her under the Code of Criminal Procedure. Moreover, there is no such allegation of mala-fide or bias against the investigating authority. It is also not a pleaded case that the investigating authority is having any vindictive or bias attitude towards the petitioner. The case in hand is also not the rarest of the rare case where power under Article 226 of the Constitution of India needs to be exercised.

17) For the reasons above, the Court is not inclined to exercise its power under Article 226 of the Constitution of India with regard to the prayers of the petitioner made in this petition, being not maintainable.

18) However, the petitioner may approach the appropriate forum for redressal of her grievances.

19) With the above observation and direction, this writ petition stands disposed of.

JUDGE

Comparing Assistant