

Hakim Vs. State of U.P. and ors.

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Court : Allahabad

Decided On : Dec-22-2010

Judge : Amar Saran; Naheed Ara Moonis, J.

Appeal No. : CRIMINAL MISC. WRIT PETITION No. - 18939 of 2008

Appellant : Hakim

Respondent : State of U.P. and ors.

Advocate for Def. : Govt. Advocate; G.S. Hajela, Advs

Advocate for Pet/Ap. : S.V. Goswami, Adv

Judgement :

1. The present writ petition has been filed seeking a direction to Central Bureau of Investigation/C.B.C.I.D. to investigate the case in Case Crime No. 241 of 2008, under Sections 302, 218, 219, 118,119, 220, 364, 120-B I.P.C., P.S. Shergarh, district Mathura relating to the abduction and fake encounter of the petitioner's brother Pappu.

2. Heard Sri S.V. Goswami, learned counsel for the petitioner, learned A.G.A. on behalf of the State and have gone through the entire record.

3. It is contended by the learned counsel for the petitioner that the petitioner's brother Pappu was picked up by two police constables of Police Station Shergarh,

district Mathura on 15.5.2006 from his house and thereafter he did not return back home. Later on the petitioner received an information that Pappu and one Akbar who belonged to State of Haryana was shot dead in a police encounter thereafter the petitioner sent a complaint to the higher officials on 16.5.2006 but the Police Station Farah in whose custody the petitioner's brother was detained has given a false report about an encounter. The said case was registered on 16.5.2006 under Section 307 I.P.C. by R.P. Singh, Station Officer of Police Station Farah, district Mathura disclosing therein that Pappu, Akbar and two other persons who had fired upon the police party had been shot dead in self-defence by the police and from their possession illegal arms, cartridges and Indica Car were recovered. A magisterial enquiry was also set up under the direction of the District Magistrate in which the petitioner has filed affidavit of himself and other witnesses that the police officials are trying to create pressure upon them in spite of it no action was taken by the Magistrate, hence a writ petition was filed by the petitioner, which was numbered as Writ Petition No.13855 of 2006 (Hakim v. State of U.P. and others) with a prayer to quash the first information report dated 16.5.2006 and further made a prayer that the matter be investigated by Central Bureau of Investigation against the respondents adding further to pay compensation for the murder of the innocent brother but the said writ petition was dismissed by order dated 17.12.2007 by the Division Bench of this court with a direction that the petitioner can move before the Chief Judicial Magistrate in case his first information report is not registered. The petitioner moved an application under Section 156 (3) Cr.P.C. before the Chief Judicial Magistrate and after conducting an enquiry and on the basis of the magisterial enquiry report dismissed the application under Section 156 (3) Cr.P.C. on 10.4.2008. Thereafter the petitioner preferred a revision against the said order. The revisional court allowed the revision and remanded the case to Additional Chief Judicial Magistrate to reconsider the grievance of the petitioner. After the remand the case was registered under Sections 302, 218, 219, 118,119, 220, 364, 120-B I.P.C. as Case Crime No. 241 of 2008 at Police Station Shergarh, district Mathura.

4. During investigation the petitioner moved an application to get his statement recorded under Section 164 Cr.P.C. as the police was not doing impartial investigation in the case and was trying to protect their own officials, the petitioner

and his witnesses are being harassed and are facing great hardship on account of the constant threat by the police officials. But the Chief Judicial Magistrate, Mathura rejected the aforesaid application on 25.9.2008. The petitioner has no hope that the investigation would be carried out in a fair and impartial manner, therefore, under these circumstances the investigation of the case is necessary to be enquired into and investigated by the independent agency. In this regard the learned counsel for the petitioner has relied upon the decisions of the Apex Court reported in A.I.R. 1994 SC 38 (R. S. Sodhi v. State of U.P. and others) and (2010) 2 SCC 200 (Rababbuddin Sheikh v. State of Gujrat and others) and on the strength of the twin decisions it was vehemently argued that the investigation be done by an independent agency as in the above said cases also there were fake police encounters and the high police officials were involved and the investigation had not been conducted properly by the State police, therefore, to ensure fair investigation it was transferred to Central Bureau of Investigation by the Apex Court.

5. In reply to the submission of the learned counsel for the petitioner it was vehemently opposed by the learned A.G.A. appearing on the behalf of the State and has contended that this is the second writ petition praying for the same relief about transfer of investigation as in the earlier writ petition also the same prayer was made and the Hon'ble court had not granted any indulgence and rejected the petition and while rejecting the petition it was directed that the petitioner has a remedy to approach the court below by filing a complaint. Thereafter in respect of the same relief the petitioner has filed the present petition. It is also pointed out that the case, which has been registered, after investigation final report was submitted, which was forwarded to the court of Chief Judicial Magistrate, Mathura and the notice was also issued to the petitioner. The petitioner has not appeared before the court nor he has filed any protest petition against the submission of the final report, therefore, the report so submitted by the police and accepted by the Magistrate has not been challenged in any court of law and has become final, therefore, the allegations that unfair investigation has been done by the police officials and the petitioner has greatly been prejudiced is absolutely misconceived and the petition has no merit and as such it is liable to be dismissed.

6. It is urged by the learned counsel for the petitioner that the petitioner's brother was first abducted and thereafter made a false story of killing him in a fake encounter and police submitted final report hurriedly itself shows that the investigation was done in a very partial manner to save their own officials and therefore under these circumstances the investigation should be handed over to the Central Bureau of Investigation for fair and proper investigation and the Apex Court had also interfered in such cases where the cases have been transferred to Central Bureau of Investigation.

7. Having gone through the submissions of the learned counsel for the parties we have to see whether the investigation can be transferred to Central Bureau of Investigation when once the writ petition was filed in respect of the same relief earlier and was rejected by the another Bench of this court. Moreover, from the pleadings of the parties it is also clear that the investigation has already been completed in which the final report was submitted which was forwarded to the court of Chief Judicial Magistrate, Mathura, therefore, the petitioner has not approached the court below challenging the final report and filed the present writ petition for the relief, which has earlier been rejected by the another Division Bench. We are not in agreement with the submissions of the learned counsel for the petitioner for transferring the investigation to Central Bureau of Investigation as it has been held in number of cases that in case the petitioner or aggrieved person has equal efficacious remedy for the redressal of his grievance the same cannot be agitated under Article 226 of the Constitution of India. There is no dispute with regard to the decisions as cited by the learned counsel for the petitioner about the transfer of investigation to an independent agency in fake police encounter case but the Apex Court has categorically held in *Aleque Padamsee and others v. Union of India and others*, 2007 (59) ACC 247 that in case of inaction on the part of the police remedy is by filing a complaint before the Magistrate is open to the aggrieved person. In paragraph 5 of the aforesaid case it has been observed that when the information is laid with the police but no action in that behalf is taken, the complainant can under Section 190 read with Section 200 of the Code 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 the evidence finds

a prima facie case, instead of issuing process to the accused, he is empowered to direct the police concerned to investigate 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 the complaint/evidence recorded prima facie discloses an offence, he is empowered to take cognizance of the offence and could issue process to the accused. These aspects have highlighted in the case of All India Institute of Medical Sciences Employees Union (Registered) through its President v. Union of India and others, 1996 (11) SC 582 it was specifically observed that a writ petition in such cases is not to be entertained. The another decision in this regard is reported in 2008 (60) ACC 689 (Sakiri Vasu v. State of U.P. and others) wherein it has been specifically observed that an aggrieved person can only claim that an offence he alleges be investigated properly but he has no right to claim that investigation be carried out by any agency of his choice. From the record itself it is very much evident that the investigation was done by the police in which the final report was submitted and in case it is found that the investigation has not been done in proper manner the Magistrate can order for re-investigation of the case even after the police submits the final report. It has been held in the aforesaid decision that "It is well settled when a power is given to an authority to do so 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 to its execution".

8. The petitioner has remedy to approach before the court concerned to challenge the final report by means of protest petition, therefore, when an alternative remedy is available to the petitioner this court would refrain to interfere in writ jurisdiction, as any interference should be done in rare and exceptional cases, therefore, in our opinion it is not at all justified to direct the Central Bureau of Investigation to enquire into or to investigate the case. The petitioner may approach the court below who shall pass appropriate order and the Magistrate can monitor and direct

further investigation to ensure the proper investigation.

9. With these observations the writ petition stands dismissed.

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