
(2015) 01 UK CK 0068

In the Uttarakhand High Court

Case No : Criminal Writ Petition No. 540 of 2013

Jayanti Prasad Deorari

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 23-01-2015

Acts Referred:

Constitution of India, 1950 — Article 226, 32
Criminal Procedure Code, 1973 (CrPC) — Section 161
Penal Code, 1860 (IPC) — Section 363, 366

Citation : (2015) 3 UC 2259

Hon'ble Judges : V.K. Bist, Actg. C.J.

Bench : Single Bench

Advocate : Piyush Garg, Advocate, for the Appellant

Final Decision : Allowed

Judgement

V.K. Bist, Actg. C.J.

1. By means of this writ petition moved under Article 226 of Constitution of India, the petitioner has sought writ in the nature of mandamus directing the respondent nos. 1 to 3 to transfer the investigation from Civil Police Rishikesh, District Dehradun to Central Bureau of Investigation for further investigation in respect of non-recovery of the daughter of the petitioner till date, who was kidnapped on 12.12.2009. Heard Shri Piyush Garg, learned counsel for the petitioner, Shri Arvind Vashistha learned counsel for CBI and Shri Raman Kumar Sah, learned Deputy Advocate General for State.

2. Brief facts of the case are that Km. Himshikha, daughter of the petitioner, was aged about 24 years. She was teaching on contractual basis in Government Polytechnic, Haridwar as a lecturer. She left the house on 12.12.2009 for some work and did not return back thereafter. The petitioner made search for his daughter at all the expected places but all in vein. The petitioner lodged a missing report in respect of missing of his daughter at P.S. Rishikesh on 22.12.2009. It was found that on the said un-fateful day, one Pawan Raj had

conversation for 58 times from his mobile No. 9634741309 on the mobile No. 9557013074 belonging to his daughter. Petitioner moved a complaint on 18.01.2010 before the police authorities for getting an FIR being lodged against the said Pawan Raj under the relevant sections. The police at the Rishikesh registered an FIR on 19.01.2010 against the said Pawan Raj under section 363 and 366 IPC. Pawan Raj was arrested on 01.04.2010. He was released on bail by learned District and Sessions Judge Dehraun on 30.04.2010. He was examined with a lie detection test on 25.05.2010 conducted by lie detection division Central Forensic Science Laboratory (CBI) Block No. 4 CGO Complex Lodhi Road, New Delhi. During the course of polygraph examination he was asked 8 questions which are as follows:

- i. whether he knows who kidnapped Himshikha.
- ii. whether he kidnapped Himshikha.
- iii. whether he knows the whereabouts of Himshikha.
- iv. whether he met Himshikha on 12.12.2009.
- v. whether he killed Himshikha.
- vi. whether he had any involvement in the disappearance of Himshikha.
- vii. whether he hide Himshikha somewhere..
- viii. whether he disposed off the dead body of Himshikha.

Pawan Raj gave answer "no" to all the above referred questions. The Doctor who conducted said polygraph examination upon Pawan Raj gave the report that the answers to question No. (i) to (vi) were deceptive and that no significant inference could be drawn on the answers to question No. (vii) and (viii). Police, during the course of said investigation recorded in the case diary that the mobile of the petitioner's daughter was placed on surveillance on which it was found switched on with sim card having No. 9680998499 being used by one Balveer Singh. When the phone was taken into possession it revealed that one Himanshu Negi along with his friends on 13.12.2009, found said mobile without sim card, one pair of sandle and ladies purse on the Bank of river. They took over the mobile with them and threw the sandle and purse in the river. The police further recorded in the case diary that the call details of said Pawan Raj revealed that excessive conversation took place between Pawan Raj and the petitioner's daughter and that on 11.12.2009 i.e. just one day before the incident, the said Pawan Raj had telephonic call with the petitioner's daughter for 58 times. It was further recorded that on 11.12.2009 at 22:19:42, 464 pulses of calls were found between Pawan Raj and the petitioner's daughter. The Police further recorded that a SMS was sent by the petitioner's daughter on 12.12.2009. The police further recorded the statement of Pawan Raj who stated in his statement that on 07.12.2009 he and the petitioner's daughter both went to Dhanolti Tehri Garhwal and stayed there in one room in a hotel and came back from Dhanolti to

Rishikesh on 08.12.2009. Pawan Raj is said to have stated that Himshikha was asking for 2-3 thousand rupees and for that she was calling up again and again. Police further recorded in the case diary that on checking the register of hotel Satkar at Dhanolti, it revealed that there is an entry on 07.12.2009 in the name of Pawan Raj and one lady and on recording the statement of the owner of the hotel, - namely Deepak, he is said to have stated that Pawan Raj stayed therein with one lady on 07.12.2009. Police even recorded that the location of the mobile phones of Pawan Raj and Himshikha were traced together on that day. The police further recorded the statement of the maternal aunt of Himshikha and also recorded in the case diary that Pawan Raj is not co-operating in the investigation and recorded its satisfaction for Pawan Raj to be the culprit. The Investigating Officer thereafter recorded in the case diary that the case is pending since long and therefore charge sheet is being filed. The Investigating Officer recorded that in the course of Investigation he found that Pawan Raj and Himshikha were having love relationship with each other and wanted to marry with each other but because of they both belonged to different caste, the mother of Himshikha did not agree on which Pawan Raj married with some other girl on 02.03.2008 but even after marriage they both continued to meet each other. They both went to Dhanolti and stayed there together on 07.12.2009. Just one day before the incident they had talk over mobile for 62 times. On 12.12.2009 Pawan Raj sent SMS to Himshikha at 11:27:25 and 11:27:51 out of 4 phone calls on his mobiles 3 calls have been received from the base phone of his house and one call was made by him on the base phone of his house. This proves that Pawan Raj was not at his home on 12.12.2009. On other dates there have been several phone calls on the mobile phone of Pawan Raj, however on 12.12.2009 there are only 5 calls and 2 SMS in all on his mobile which further creates doubt upon him. Police further recorded the statement of river guard on bank of river, where the articles of Himshikha were recovered. The guard stated that no dead body was recovered, further that the river is being cleaned periodically and all garbage and other things which fall into the river are being trapped in the net exiting in the river. No dead body got trapped into such net. The police recorded in the case diary a satisfaction that the girl has not committed suicide and the articles have been planted by the Pawan Raj to mislead the police and public. The police recorded that the place where the purse, sandle and mobile were recovered is 12 km far from Rishikesh and had she left those articles at that place on 12.12.2009, the same must have been found on the same day and Himshikha would not have removed the SIM from the mobile before keeping the same at that place. It shows that the accused Pawan Raj has done all this to create confusion so that it may appear that Himshikha committed suicide by jumping into the river. The police thereof submitted charge sheet against Pawan Raj under section 363 an 366 IPC before the learned court on 02.07.2010 and mentioned therein that the search for the girl is kept open and pending.

3. It is the case of the petitioner that the police did not conduct the investigation in a fair and proper manner and submitted charge sheet without recovering the

girl to somehow benefit the accused Pawan Raj. Though, the police submitted charge sheet on 02.07.2010 with a rider that search for the girl is not closed and is kept on, yet no step for tracing the girl has been taken by the police till date. The petitioner met all the senior officer of the police for a number of times and placed his grievance before them but all in vein. The petitioner submitted a representation before Senior Superintendent of Police on 08.12.2012 and requested that the investigation in the matter be done by Crime Branch or through CBI. The petitioner thereafter filed the present writ petition seeking transfer of investigation to CBI.

4. On 10.05.2013, Court called upon (sic) Government to file counter affi(sic) matter. No counter affidavit (sic) and again on 28.05.2013 the Court directed the SP Dehradun to file his personal affidavit with explanation as to what steps were taken to trace and recover the girl. On 12.06.2013 a counter affidavit filed by the S.S.P. Dehradun was handed over in the court during the course of hearing in the writ petition. This court perused the affidavit and recorded that the affidavit is vague, ambiguous and misleading. This Court observed and recorded that the location of the mobile phone of the girl and accused were same and identical after 12.12.2009 has not been asserted in the affidavit. This Court directed that S.S.P. Dehradun to file appropriate detailed affidavit specifically mentioning therein as to what steps were taken by the police to trace out the girl after 12.12.2009. Again on 24.06.2013 time was sought by Assistant Government Advocate to file counter affidavit. One more counter affidavit was thereafter filed by the police on 02.07.2013. Even in the said affidavit filed by the police contained no particulars much less the steps taken for recovering the girl or the facts justifying the investigation by the police were given. Again this Court on 04.07.2013 recorded that the affidavit filed by the S.S.P. Dehradun is an eye wash only. Three weeks further time was granted to the police for filing a fresh affidavit giving progress about the recovery of the girl. Thereafter, police filed supplementary counter affidavit on 24.07.2013 which has been sworn by S.S.P. Dehradun. Again on 11.11.2013 the State considering their affidavit dated 24.07.2013 to be not satisfactory sought further two weeks" time to file supplementary affidavit. A counter affidavit was thereafter filed on 07.12.2013 by the police. The petitioner filed his composite rejoinder affidavit to both the counter affidavits dated 24.07.2013 and 07.12.2013 filed by the police. No satisfactory reply was given and net result is that the girl has not been traced.

5. Mr. Piyush Garg learned counsel for the petitioner submitted that police did not conduct the investigation in a fair and proper manner and submitted charge sheet without recovering the girl to benefit the accused Pawan Raj. Though, the police submitted the charge sheet on 02.07.2010 with a rider that search for the girl is not closed and is kept on, yet no steps for tracing the girl has been taken by the police till date. The petitioner submitted representation before the Senior Superintendent of Police on 08.12.2012 and requested that the investigation in the matter directed to be done through Crime Branch or through C.B.I. It is further contended that in the present case the FIR was lodged on 18.01.2010

and police submitted charge sheet on 02.07.2010 but could not recover the girl despite the fact that the accused who abducted the girl was known and police found that the said accused has abducted the girl and therefore submitted charge sheet against him u/s 363 and 366 IPC. It is further submitted that one more glaring fact mentioned in the counter affidavit dated 24.07.2013 is that the police has mentioned in last two lines of para 6 that now only it has to be traced whether she was murder or she has committed suicide. He submitted that on the one hand, police is filing a counter affidavit and stating that they are taking steps for recovering the girl and at the same time such averment has been made in the counter affidavit which gives an impression that the police is sure of the fact that the girl is no more. This has not been claimed by anybody that girl is no more, by making such a statement the police has made its integrity in the present case as most doubtful. He further submitted that in paragraph 12 of the counter affidavit it is stated that there is a missing link between 08.12.2009 to 12.12.2009 which has to be investigated. This is totally against the record. In fact the consistent case of the petitioner is that the girl was at her home till 12.12.2009 and has been abducted on 12.12.2009. There is no missing link between 08.12.2009 to 12.12.2009. He further submitted that from the perusal of the counter affidavit it would reveal that the same has been filed because the police has nothing to say. The police in the counter affidavit has not stated that there is no need of further investigation in the matter rather by stating that they have now started investigation for recovering the girl is required to be looked into. He further submitted that counter affidavit filed on 07.12.2013 is vague as the police could not justify as to why charge sheet was submitted without recovering the girl despite the fact that the accused was bailed out before filing the charge sheet. He submitted that no details of investigations, if any, have been produced by the police after the submission of the charge sheet till filing of the writ petition. Only three parchas of case diary have been produced. Learned counsel for the petitioner further submitted that no sincere efforts have been made by the police to trace the girl and whatever has been mentioned by the counsel for the State has been done on papers. No concrete steps have been taken to investigate the case and to recover the girl. Why the location of mobiles of Himshikha and accused Pawan Raj on 12.12.2009 has not been considered is sufficient to draw a conclusion. Police has recorded that the location of the mobile phone of both Himshikha and Pawan Raj on a previous date i.e. 08.12.2009 was found to be together. The call details of the mobile on 12.12.2009 were available which means that the location of mobile of both the persons would have been available for 12.12.2009. In the entire case diary that has been brought on record it has not been recorded as to what was the location of both the mobiles on 12.12.2009, as to whether both of them was together that day or not. He further contends that the manner in which investigation has been done in the present case leaves no room to make out a specific opinion that the police has been most callous in the present case. No fair investigation has been conducted. He submitted that connivance of the police in the present case cannot be completely ruled out. Specific allegations to that effect have been

leveled against the police by the petitioner and the police cannot justify or prove such allegations to be false. No party has denied that investigation for recovering the girl is not required in the matter. Police says they are investigating but the manner in which they have conducted the investigation in the matter leaves no room to entrust the further investigation with them in the matter.

6. Shri Raman Kumar Sah, Deputy Advocate General for the State submitted that after lodging of missing report of the daughter of the petitioner, investigation was conducted and during investigation, as per the surveillance report, it was found that the girl Himshikha had talked over mobile for 58 times on 11.12.2009 with one Pawan Raj. Thereafter, police had enquired from the children from the river bank from where mobile of Km. Himshikha was found. The Investigating Officer also pasted photographs/pamphlets of the girl in so many places and also made enquiry from the people of locality. The investigation of the case was handed over to the Circle Officer, Rishikesh. The Investigating Officer constituted three teams regarding kidnapping, murder and human trafficking and the said teams started investigation. The statement of Poonam Raturi (maternal aunti/Mami) under section 161 Cr.P.C. was recorded with whom Km. Himshikha was going to Bataji Mandir on 13.12.2009. Mobil phone of daughter of the petitioner was recovered from the possession of one child but identification of hand bag and slippers of the girl is still unknown. Learned Deputy Advocate General submitted that Investigating Officer after investigating the matter found the involvement of Pawan Raj and charge sheeted him under section 363 and 366 IPC. It could not be concluded whether the girl is alive or dead and investigation is still open for the recovery of the girl.

7. Mr. Arvind Vashistha, counsel for the respondent No. 7 submitted that after investigation, local police/State police has filed the charge sheet against accused Pawan Raj under section 363 and 366 IPC, keeping the investigation open for the recovery of the girl. He simply submitted that at this stage it would not be proper to transfer the investigation to the CBI.

8. I have considered the submission of the learned counsel for the parties and considered the material available on record.

9. In paragraph 70 of the judgment reported in State of West Bengal and Others Vs. The Committee for Protection of Democratic Rights, West Bengal and Others, , the Hon"ble Supreme Court has held that extraordinary power should be exercised rarely by the Courts. Paragraph 70 of the judgment is quoted below:

"Before parting with the case, we deem it necessary to emphasise that despite wide powers conferred by Articles 32 and 226 of the Constitution, while passing any order, the Courts must bear in mind certain self-imposed limitations on the exercise of these constitutional powers. The very plenitude of the power under the said articles requires great caution in its exercise. Insofar as the question of issuing a direction to the CBI to conduct investigation in a case is concerned, although no inflexible guidelines can be laid down to decide whether or not such

power should be exercised but time and again it has been reiterated that such an order is not to be passed as a matter of routine or merely because a party has levelled some allegations against the local police. This extraordinary power must be exercised sparingly, cautiously and in exceptional situations where it becomes necessary to provide credibility and instil confidence in investigations or where the incident may have national and international ramifications or where such an order may be necessary for doing complete justice and enforcing the fundamental rights. Otherwise the CBI would be flooded with a large number of cases and with limited resources, may find it difficult to properly investigate even serious cases and in the process lose its credibility and purpose with unsatisfactory investigations."

10. The Hon"ble Supreme Court in the case of Inder Singh Vs. State of Punjab and Others, has held that despite submission of charge sheet by the police, further investigation to be conducted by CBI in view of the fact that the abducted person was not recovered and the police was not found to be worthwhile for entrusting with the investigation. In the case of Rubabbuddin Sheikh Vs. State of Gujarat and Others, the Hon"ble Apex Court after considering the entire existing law on the subject came to a conclusion that after submission of charge sheet also investigation can be handed over to CBI. Paragraph 51,52 and 53 are being reproduced hereinafter:

51. Having heard the learned senior counsel appearing for the parties and after going through the eight action taken reports submitted by the police authorities before this Court and after considering the decisions of this Court cited at the Bar and the materials on record and considering the nature of offence sought to be investigated by the State police authorities who are themselves involved in such crime, we are unable to accept that the investigation at this stage cannot be handed over to the CBI Authorities or any other independent agency. We have already discussed the decisions cited by Mr. Mukul Rohatgi, learned senior counsel appearing for the State of Gujarat and have already distinguished the said cases and came to a conclusion that those decisions were rendered when CBI enquiries have already been made and at that stage this Court held that after the charge sheet is submitted, the CBI authorities would not be able to approach this Court or the High Court to have issuance of directions from this Court.

52. In R.S. Sodhi vs. State of U.P. on which reliance was placed by the learned senior counsel appearing for the writ petitioner, this Court observed:

"2.....We have perused the events that have taken place since the incidents but we are refraining from entering upon the details thereof lest it may prejudice any party but we think that since the accusations are directed against the local police personnel it would be desirable to entrust the investigation to an independent agency like the Central Bureau of Investigation so that all concerned including the relatives of the deceased may feel assured that an independent agency is looking into the matter and that would lend the final outcome of the investigation

credibility.

However, faithfully the local police may carry out the investigation, the same will lack credibility since the allegations are against them. It is only with that in mind that we having thought it both advisable and desirable as well as in the interest of justice, to entrust the investigation to the Central Bureau of Investigation....."

(Emphasis supplied)

This decision clearly helps the writ petitioner for handing over the investigation to the CBI Authorities or any other independent agency.

53. It is an admitted position in the present case that the accusations are directed against the local police personnel in which High Police officials of the State of Gujarat have been made the accused. Therefore, it would be proper for the writ petitioner or even the public to come forward to say that if the investigation carried out by the police personnel of the State of Gujarat is done, the writ petitioner and their family members would be highly prejudiced and the investigation would also not come to an end with proper finding and if investigation is allowed to be carried out by the local police authorities, we feel that all concerned including the relatives of the deceased may feel that investigation was not proper and in that circumstances it would be fit and proper that the writ petitioner and the relatives of the deceased should be assured that an independent agency should took into the matter and that would lend the final outcome of the investigation credibility, however, faithfully the local police may carry out the investigation, particularly when the gross allegations have been made against the high police officials of the State of Gujarat and for which some high police officials have already been taken into custody.

In the case of Inder Singh Vs. State of Punjab and Others, , the Hon"ble Supreme Court despite submission of charge sheet by the police directed further investigation to be conducted by the CBI in view of the fact that the abducted person was not recovered and police was not found to be worthwhile for entrusting with the investigation.

11. In the present case, carefully going through the material available on record, I have no hesitation in reaching to the conclusion that the police failed to conduct the investigation in proper manner. Rather police has acted in most callous manner. Girl went missing on 12.12.2009. Missing report was lodged on 22.12.2009. That time itself, it was found that on 11.12.2009 the girl had conversation on mobile with Pawan Raj for 58 times. Further, on 07.12.2009 the location of the mobile phones of the girl and Pawan Raj was traced together at Dhanolti. FIR was registered on 18.01.2010 but Pawan Raj was arrested by the police on 01.04.2010. In this matter, police could have taken Pawan Raj in custody immediately after 22.12.2009, when police came to know that Pawan Raj was in touch with the girl before her disappearance. But he was arrested on 01.04.2010. Period of 30 days from the date of lodging of missing report was crucial. Police could have kept a watch on the movement of Pawan Raj and also

on those who were in touch with Pawan Raj.

12. Further, charge sheet was filed by the police against Pawan Raj under section 363 and 366 I.P.C., with a rider that search for the girl is not closed and is kept on. But, learned Advocate appearing for the State could not satisfy the Court about further investigation by the police. In such situation, when police is not taking the matter seriously, the court cannot sit idle by closing its eyes and by assuming that girl has died.

13. Net conclusion is that though about five years have passed but State police is unable to reach to a conclusion and in fact is doing nothing in the matter. Investigation should reach to a logical conclusion. When nothing has been done in five years, it is not expected that matter would be taken up seriously by the police. Moreover, allegations have been made by the petitioner against the police. This Court is conscious about the fact that extraordinary powers must be exercised sparingly, and cautiously. But, considering the facts and circumstances of present case, I find it a fit case where investigation should be transferred from State police. Consequently, the writ petition is allowed. Writ in the nature of mandamus is issued to respondent No. 1 to transfer the investigation from Civil Police Rishikesh, District Dehradun to Central Bureau of Investigation for further investigation in respect of non-recovery of Km. Himshikha, daughter of the petitioner in respect of FIR registered as case crime No. 23 of 2010 at Police Station Rishikesh. It is further directed that for the period investigation is completed by the CBI, the proceedings of criminal case pending against the accused under section 363 and 366 IPC shall remain in abeyance. No order as to cost.