

(2012) 03 AHC CK 0226

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 8188 of 2009

Mrs. Rita Bahuguna Joshi

APPELLANT

Vs

State of U.P. and Others

RESPONDENT

Date of Decision : 20-03-2012

Acts Referred:

Constitution of India, 1950 — Article 21, 226, 32
Criminal Procedure Code, 1973 (CrPC) — Section 160, 161
Penal Code, 1860 (IPC) — Section 147, 153, 153A, 427, 436
Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 —
Section 3(1)(X)

Citation : (2012) 4 ADJ 571

Hon'ble Judges : Surendra Vikram Singh Rathore, J; Narayan Shukla, J

Bench : Division Bench

Advocate : Ishraq Farooqui, for the Appellant; Bireshwar Nath and Sharad Kumar Srivastava, for the Respondent

Final Decision : Dismissed

Judgement

Hon'ble Surendra Vikram Singh Rathore, J.—Heard Miss. Sandhya Goswami and Shri Hemant Kumar Mishra, learned counsel for the petitioner, Learned Advocate General for respondents No. 1, 2 and 7, Shri Kapil Mishra for respondent No. 3, Shri Vireshwar Nath for C.B.I. (respondent No. 5) and Shri Sharad Srivastava for Union of India (respondent No. 4). This writ petition is filed by Smt. Rita Bahuguna Joshi, President of U.P. Congress Committee (hereinafter referred as petitioner). By this petition, the petitioner seeks writ of mandamus directing the transfer of investigation from C.B., C.I.D., Lucknow to the Central Bureau of Investigation, New Delhi (hereinafter referred as C.B.I.) in the matter relating to First Information Report dated 16.7.2009 registered at Police Station Husainganj, Lucknow in connection with rioting and arsoning at the petitioner's house being case Crime No. 384 of 2009, under Sections 147/436/ 504 /506/ 427 IPC. This petition was filed in the year 2009 which was tied up with another Bench of this Court but due to paucity of time that Bench could not decide this matter,

therefore, a request was made on behalf of the petitioner for release of this matter but the Court directed the petitioner to move before the Chief Justice or the Senior Judge for nomination of another Bench. Thereafter an application was moved on behalf of the petitioner on 18.7.2011 and the Chief Justice vide order dated 20.7.2011 rejected the application. Thereafter the petitioner moved SLP (Crl.) No. 7928/7929 of 2011 before the Hon'ble Apex Court, in which Hon'ble Apex Court vide order dated 8.11.2011 disposed of the SLP with a request to the Hon'ble Chief Justice to the High Court to explore possibility and posting the matter before an appropriate Bench for an early hearing. In compliance of the order of the Hon'ble Apex Court the matter was nominated to this Bench by order of the Chief Justice dated 7.12.2011. Thereafter the arguments of both the parties were heard on different dates. The arguments finally concluded on 29.2.2012 and the judgment was reserved.

2. In brief the facts giving rise to the present petition are as under :

On 15.7.2009 the petitioner addressed a public meeting in Majhola District Moradabad, where she criticized the Government policy regarding the paltry sums of money given by the Director General of Police in various districts to S.C./ S.T. rape's victim, and also criticized Susri Mayawati (respondent No. 3), the then Chief Minister of State of U.P. for having given such minor compensation of S.C./ S.T. Women. In this context she allegedly said - "throw that money on the face of Susri Mayawati and tell her that if ever she happens to be a victim of rape then we shall pay rupees one crore." This public meeting was addressed at about 3.00 p.m. and thereafter at 8.15 p.m. one police officer Shri Balbir Singh, Dy. S.P. Moradabad lodged a FIR at P.S. Majhola, District Moradabad, which was registered as case Crime No. 604/2009, under Sections 153/ 153A/504/505(2)/509 IPC, u/s 3(1) (X) SC/ST Act and 7 Criminal Laws Amendment. Soon thereafter on the command of respondent No. 3 the Chief Minister (as alleged) politicians/ MLA belonging to Bahujan Samaj Party along-with anti social elements, under protection of senior police officers committed rioting and arsoning at the petitioner's house situated in High Security Zone at Lucknow causing serious loss to the property of the petitioner. Three motor vehicles were also set at fire in this incident. Part of the house of the petitioner was also set at fire. A FIR was lodged at Police Station Husainganj, Lucknow on 16.7.2009 by Balram Singh, Officer Incharge, Police Station Husainganj, Lucknow. He got information that some miscreants are breaking open the house of the petitioner and also damaging the property. He immediately informed control room and fire service and reached the place of occurrence and arrested four persons from place of occurrence and on his return he registered the FIR. This incident took place at 11.45 p.m. Within one hour thereafter petitioner was arrested when she was traveling to Delhi and was taken back to Moradabad. Respondent No. 3- Sushri Mayawati made a statement before the Electronic Media that she will not forgive the petitioner, she will not withdraw the First Information Report, even though regrets have been expressed and she will see that the petitioner is punished for crime. Soon after this incident one Mr. Subodh

Srivastava, General Secretary of the U.P. Congress Committee gave a typed report of this occurrence to the police of Police Station Husainganj, Lucknow, it is alleged that no FIR on the said report was registered.

3. The grievance of the petitioner is that this entire incident of arsoning and committing riot in the petitioner's residence took place under the dictates of Sushri Mayawati, in the presence of senior police officers and it was done under the well planned strategy, chalked out by the respondent No. 3. The police lodged false FIR and falsely arrested four persons, namely, Guddu Yadav, Shiv Kumar Singh, Indra Singh @ Pappu and Susajjit Kumar Tiwari from the place of occurrence. In the written report given by Subodh Srivastava. The name of M.L.A. Shri Jitendra Singh @ Babloo and one B.S.P. Leader Intezar Abdi @ Bobby were mentioned and it was alleged that they alongwith 150 other unknown miscreants including B.S.P. Party workers have committed the offence under the direction of respondent No. 3. It was also mentioned in the said FIR that these unsocial elements forcibly removed the employees of the Congress Party headquarter and also domestic servants of the petitioner from the said house and their whereabouts could not be traced out till then.

4. A writ petition bearing No. 14381 of 2009 was filed by the petitioner at Allahabad with the same prayer, vide order dated 7.8.2009 the said prayer was turned down on the ground that Lucknow Bench of the High Court has territorial jurisdiction to deal with the matter, hence the present petition was filed. Meanwhile under the orders of the Government the investigation of this case was transferred from the Civil Police to C.B., C.I.D. During the pendency of this writ petition vide order dated 19.2.2010 this Court ordered as under :

"Considered the aforesaid facts, since the adjournment is being sought on behalf of the respondents, it is provided that till the next date of listing no charge-sheet shall be filed by the C.B., C.I.D."

5. The grievance of the petitioner is that the entire episode took place under the direction of the respondent No. 3-Sushri Mayawati and the police and C.B., C.I.D. are under the influence of the Chief Minister, therefore, the petitioner has no hope for a fair investigation. It is admitted case that during the investigation by the C.B., CID Shri Jitendra Singh MLA and Intezar Abdi were arrested and were bailed out by the Court concerned.

6. The petitioner has pleaded that after the arrest of the two named accused persons, two senior Ministers of B.S.P. Government, namely, Nasimuddin Siddiqui and Babu Singh Kushwaha went to meet the said B.S.P. Leader in district jail Lucknow and also that Intezar Abdi @ Bobby was nominated by the respondent No. 3 as President of Lal Bahadur Shastri Ganna Vikas Sansthan, Lucknow with the status of State Minister after this occurrence. Several photographs which were taken during the course of the incident by the Print and Electronic Media persons, have been filed in this case on behalf of the petitioner.

7. In her affidavit respondent No. 3 has categorically denied all the allegations

made against her by the petitioner.

8. The argument of learned counsel for the petitioner is that the chain of the incidents clearly indicate that there was involvement of the respondent No. 3. The entire incident had taken place under her command, therefore, she has no hope of fair investigation at the hands of the C.B., C.I.D., which is under the command of the Chief Minister.

9. Learned Advocate General on behalf of the State of U.P. has argued that in this case the C.B., C.I.D. has conducted a very lengthy investigation, status report of the investigation were filed during pendency of this petition. The petitioner and the other inmates of the house who were alleged to have been removed by the miscreants from the house are not cooperating in the investigation. More than 20 written notices u/s 160 Cr.P.C. were sent to them and apart from it more than 80 efforts were made to contact these persons for recording their statements but neither the petitioner nor the persons who are in service of the petitioner have cooperated in the investigation.

10. It is further submitted that the petitioner in her entire petition or in the supplementary or rejoinder affidavit has nowhere made any allegation regarding the mala fide or dishonesty or incorrect investigation against the Investigating Officer of this case. It is further submitted that even the Investigating Officer as well as the complainant of this case has not been arrayed as a party in this writ petition. The Investigating Officer has recorded the statements of 91 police officers, 6 persons relating to fire service, 8 persons relating to police control room, 31 persons from Media and 148 public witnesses. It is submitted that from the photographs of the occurrence the persons who could be identified have been challaned. It is further submitted that because of non-cooperation of the petitioner the statement of the petitioner and other persons in her employment could not be recorded. Entire investigation has been completed but the charge-sheet could not be filed because of the interim stay order passed¹ by this Court.

11. Learned counsel for the petitioner in support of his case has placed reliance on the pronouncement of Hon''ble Bombay High Court in the case of Farook Mohd. Karim Mapkar v. Commissioner of Police for Greater Mumbai, AIR 2005 Bom (5) 465; In that case 6 persons were murdered and only police authorities were examined during the course of investigation and in this back ground Hon''ble Apex Court directed the transfer of investigation. In that case a commission, headed by Mr. Justice B.N. Mishra had enquired into riot and various incident which occurred during the riots and it was opined that version of the police is wholly unbelievable and has been fabricated to support the unjustified firing of large number of rounds which resulted in killing of six Muslims. But in the facts of the case in hand, statements of different sections of the society including media persons employees of different departments and large number of public witnesses were recorded. It is not a case where statement of only police witnesses were recorded during investigation. Apart from it that was a case in which six persons had lost their lives.

12. Reliance has also been placed on the pronouncement of Punjab and Haryana High Court Bar Association, Chandigarh through its Secretary Vs. State of Punjab and others, ; in that case it was held that even where investigation is complete, to do complete justice, case can be transferred to CBI. Object is to install confidence in public mind. In the facts of that case three persons were murdered the police story was disbelieved. In that case one advocate his wife and his two years daughter were murdered. They were called upon by the police and thereafter they were missing. The story cooked up by the police was not believed by the Court and therefore, the investigation was ordered to be transferred. This case is not of any help to the petitioner as the fact situation is entirely different.

13. Learned counsel for the petitioner has also placed reliance on the pronouncement of Hon''ble Apex Court in the case of State of Punjab v. C.B.I., (2011) 9 SCC 182; In this case Hon''ble Apex Court has held that even after completion of investigation and submission of charge-sheet, case can be handed over to CBI for further investigation and/or reinvestigation. That was a case of rape and in subsequent development false implication due to corruption also came into light.

In the facts of that case High Court while allowing the petition for transfer of the case has observed as under :

"Investigation Officer who is D.S.P. in rank, will not be in a position to investigate the case fairly and truthfully, as senior functionaries of the State in the Police Department and political leaders are being named. By this we are not casting any doubts on the investigating team, but it seems that political and administrative compulsions are making it difficult for the investigating team to go any further to bring home the truth."

14. Learned counsel for the petitioner has emphasized much on this case law and has submitted that in this case also because of the involvement of the Chief Minister the I.O. cannot act independently but it is really strange that in the case in hand there is absolutely no allegation regarding the unfair investigation. It has no where been pleaded/argued that what steps should have been taken by the I.O. for a fair investigation and the same have not been taken by him. Neither it has been argued that the statement of any of the witnesses recorded by the I.O. was incorrectly recorded. It is an admitted fact that the petitioner and the other persons who are alleged to have been removed from her house by the miscreants, have not come forwarded before the police to get recorded their statement u/s 161 Cr.P.C.

15. Therefore, the facts being entirely different the aforementioned case laws does not render any help to the petitioner.

16. Learned counsel for the petitioner has also placed reliance on the pronouncement of this Court in the case of Gulab Singh and another v. State of U.P. and others, 2007(2) ADJ 434 (DB). In this case Division Bench of this Court allowed the petition and directed the transfer of investigation to C.B.I., and while

passing the order the Court observed as under :

"Further an investigation by the CBI was also warranted because the veracity and reliability of a crime about which evidence was available in Allahabad and Delhi, and where the reliability of the investigation conducted by the local police needs to be evaluated can be more effectively conducted by an independent Central Investigating Agency."

In the facts of that case police officers were accused and police witnesses had turned hostile and in that case, the police officers were more interested in protecting the accused in stead of doing justice or conducting proper investigation according to law. That was also case of murder.

17. Reliance has also been placed on the pronouncement of Kerala High Court in the case of J. Prabha Vathiamna v. State of Kerala, 2008 Cri LJ 455. In the said case it was discussed where police personnel are involved, the nature of the case makes it necessary for CBI to investigate as police are bound to protect the accused. That was also a case of manhandling with cruelty and murder in police custody. In the facts of the case in hand the petitioner has alleged that senior police officers were present at the place of occurrence but none of such police officer was named in the written report filed on behalf of the petitioner after the occurrence.

18. Learned counsel for the petitioner has also relied upon the pronouncement of Hon''ble Apex Court in the case of Nirmal Singh Kahlon Vs. State of Punjab and Others, . In that case Hon''ble Apex Court has held that a victim of an offence is entitled to fair investigation as well. Where allegation of political revenge are raised, then fair investigation must be made which is a concomitant of fundamental right under article 21 of the Constitution of India.

19. In that case a big scam in connection with the recruitment of 190 Panchayat Secretaries was involved and in view of the seriousness of the allegations the investigation was transferred to CBI.

20. Learned counsel for the petitioner has also placed reliance on the pronouncement of Hon''ble Apex Court in the case of Narmada Bai v. State of Gujarat and others, (2011) 4 Scale 469. In the facts of that case it was observed by the Hon''ble Apex Court that where investigation is not in proper direction and there are high police authorities involved, Court has power to order for investigation by CBI and where there is a larger conspiracy then CBI can be directed to unearth the same. Where allegations are made against higher level police officers, it would be prudent and advisable to transfer the investigation to independent agency. It was a case of fake encounter.

21. Learned counsel for the petitioner has also placed reliance on the pronouncement of Hon''ble Apex Court in the case of Ashok Kumar Todi Vs. Kishwar Jahan and Others, . In this case a murder of Engineer had taken place due to inter caste marriage by him and since the police officers were involved,

therefore, the order for transfer of investigation to CBI was held to be correct.

22. Reliance has also placed on the pronouncement of Hon"ble Apex Court in the case of Rubabhuddin Sheikh v. State of Gujarat and others, 2010 AIR SCW 722. In that case there were allegation of murder by the police by staging fake encounter and therefore the investigation by independent agency like CBI was found to be justified.

23. Learned counsel for the petitioner has also placed reliance on the pronouncement of the Hon"ble Apex Court in the case of State of West Bengal and Others Vs. The Committee for Protection of Democratic Rights, West Bengal and Others, . In that case Hon"ble Apex Court has held as under :

"46. Before parting with the case, we deem it necessary to emphasize 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. In so far 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 extra-ordinary 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."

24. Legal position which emerges from all the case has been summarized by the Hon"ble Apex Court in the afore-quoted paragraph. Therefore, in view of the aforementioned legal position the claim of the petitioner has to be considered.

25. It is true that in the facts of the case the petitioner has made allegation against the then Chief Minister and it is alleged that this occurrence has taken place under her directions but no material whatsoever had been furnished by the petitioner before the Court or before the investigating agency to justify her such apprehension/ allegation. The petitioner has not even thought it proper to get her statement recorded u/s 161 Cr.P.C. nor she produced other inmates of her house before the I.O. for recording their statements u/s 161 Cr.P.C. It is really strange that no allegation of mala fide or bias against the I.O. has been made by the petitioner in any of her pleadings nor the complainant has been arrayed as a party in this case. If the petitioner is not satisfied by the investigation, then it was only the I.O. who could have answered her apprehension or allegation as the

case may be, but he has also not been arrayed as party, therefore, simply by saying that the petitioner has apprehension that her case shall not be fairly investigated would not be sufficient unless the specific shortcomings, mala fide or bias in the investigation are pointed out before the Court. It is true that a complainant is entitled to a fair investigation but on the contrary it is also true that simply on the wish or apprehension of the petitioner the investigation cannot be transferred. Petitioner is entitled to a fair investigation but not to the investigating agency of her own choice.

26. In the case of State of Bihar and Another Vs. P.P. Sharma, IAS and Another, , the Hon"ble Apex Court in para 55 has held as under :

"55. It is settled law that the person against whom mala fides or bias was imputed should be impleaded co nomine as a party respondent to the proceedings and given an opportunity to meet those allegations. In his/ her absence no enquiry into those allegations would be made. Otherwise it itself is violative of the principles of natural justice as it amounts to condemning a person without an opportunity. Admittedly, both R.K. Singh and G.N. Sharma were not impleaded. On this ground alone the High Court should have stopped enquiry into the allegation of mala fides or bias alleged against them....."

In the facts of the present case there is absolutely no allegation against the I.O. as stated earlier. Therefore, the law as laid down by the Hon"ble Apex Court in the aforementioned case fully applies in the facts of the present case.

27. In the case of Sakiri Vasu Vs. State of U.P. and Others, ; the Hon"ble Apex Court in paras 33 and 34 has held as under :

"33. In Secy. Minor Irrigation and Rural Engg. Services, U.P. v. Sahngoo Ram Arya (SCC 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 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 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 GRP at Mathura, which revealed that it was a case of suicide."

28. It has also been held in the case of CBI v. Rajesh Gandhi, 1997 SCC (CrI) 88, that no one can insist that an offence be investigated by a particular agency. An aggrieved person can only claim that the offence he alleges be investigated properly but he has no right to claim that it be investigated by any particular agency of his choice.

29. The argument of the learned Advocate General is that in this case neither any allegation of mala fide has been imputed against the I.O. nor the I.O. has been made a party and above all the petitioner herself is not cooperating in the investigation, therefore, she does not have any right to allege any bias in the investigation, therefore, her request for transfer of investigation cannot be granted. It is admitted fact that during the investigation by the CB, CID both the named B.S.P. Leaders were arrested and were sent to jail.

30. The argument of learned counsel for the petitioner is that Intezar Abdi was rewarded by giving him the status of State Minister, however, on this point the affidavit of Shri V.K. Tiwari, Joint Secretary, Department of Sugar Industries and Cane Development, U.P. Lucknow was filed to the effect that Bio-data of Intezar Abdi @ Bobby for the post of President, Shri Lal Bahadur Shastri Ganna Vikas Sansthan was received on 20.6.2009 and he was appointed as such on 14.7.2009 i.e. prior to the date of occurrence. An office memorandum dated 15.7.2009 was issued by the Principal Secretary, Sugar Industries and Cane Development, U.P. Lucknow intimating Shri Intezar Abdi as President of Shri Lal Bahadur Shastri Ganna Vikas Sansthan, U.P. Lucknow and he joined on 15.7.2009 before noon.

31. This may be the subject of investigation, but it does not enforce us to change the Investigating Officer, however, it is open for the I.O. to investigate this fact.

32. As observed by the Hon''ble Apex Court in the case of Safari Vasu (supra) the investigation cannot be transferred because the victim so desires. The petitioner in this case is victim of the offence. Her house was set at fire and the property was damaged but she has not lodged the FIR. She herself is not the complainant. Without making specific allegations regarding the bias or unfairness in the investigation and placing material before the Court to indicate the unfair investigation, the investigation cannot be transferred simply because the petitioner has raised certain apprehension against the Chief Minister and high police officers. There must be some material available on record to justify her apprehensions. In the case laws relied upon by the learned counsel for the petitioner, in which the investigation was transferred due to involvement of the police officers, there was material on record to indicate that fair investigation is not possible and also there were circumstances to indicate that investigation was not being correctly and fairly conducted. But in the facts of this case there is no such allegation regarding the fairness of the Investigating Officer. Hon''ble Apex Court has not laid down any rule of law that in all cases where there is allegation of involvement of police officers or high political leaders then as a rule, investigation should be transferred to CBI. Every case has to be looked into and judged in the perspective of fact situation of each case.

33. Hon''ble Apex Court in the case of Disha v. State of Gujrat and others, 2011 (7) Scale 736, has considered the legal position in detail and in para 19 of the said "judgment Hon''ble Apex Court has observed as under :

"19.....No allegation of mala fide or bias has been alleged against any investigating authority nor had it been pleaded that charge-sheet had been filed against the Petitioner without investigating the case or having any vindictive attitude towards the Petitioner. In fact, the petition is based purely on mere apprehension by the Petitioner. None of the grounds taken by the Petitioner for transfer is tenable."

34. When we apply the aforementioned settled principles to the facts of the present case than it is clear that the petitioner has not made any allegation of bias or mala fide against the I.O. nor I.O. was impleaded as party. The party leaders who were named in the FIR, filed on behalf of the petitioner have been challaned. Other persons who could be traced out through photographs have also been challaned. Petitioner herself is not cooperating with the investigation. The petitioner has raised a suspicion on respondent No. 3 but has not indicated any shortcoming in the investigation alleging that it is not going in right direction. Apart from it, in view of changed political scene in the State the ground of transfer for investigation cease to exist.

35. Perusal of the case laws shows that investigation was transferred to CBI in cases in which the death of human being was in question or the matter related to big scams or in cases of fake encounters. Hon"ble Apex Court was also careful, not to over burden the CBI. Hence the Power was exercised sparingly. In view of the discussion made above and keeping in mind the fact of the case and legal position, the petition lacks merits and deserves to be dismissed. Since the filing of the charge-sheet was stayed by this Court and, admittedly, the statement of petitioner and other inmates of the said house as well as other witnesses have not been recorded, therefore, we consider it appropriate to direct the Investigating Officer of this case to issue fresh notices to them u/s 160 Cr.P.C., specifying the date, time and place for recording their statements. In case the petitioner feels any difficulty on that date or time then the date, time and place may be rescheduled. But, in case, the petitioner and her witnesses fails to appear on the said date, time and place as fixed in the notice or as rescheduled, as the case may be, then the I.O. shall be at liberty to file the charge-sheet in Court. In case any new fact comes into light in the statement of these witnesses that fact shall also be investigated fairly by the I.O. Keeping in view the facts of the present case and the legal position discussed above this Court is of the considered view that the petition deserves to be dismissed not only on technical grounds but on merits also. Accordingly it is dismissed.