

**MAGISTERIAL POWERS TO DIRECT FURTHER INVESTIGATION UNDER
SECTION 173(8) OF THE CR.P.C.**

This Article explores the ambit and scope of the powers of a Magistrate to direct further and/or fresh investigation into cognizable offences after submission of the final report by the officer-in-charge of a police station. The classification of offences into cognizable and non-cognizable under the Code of Criminal procedure, 1973 (hereinafter referred to as the “Cr.P.C.”) has a significant connection with the investigative process, but herein we limit ourselves only to the ‘Cognizable Offences’. The nature of the police report, which propels Section 173 of the Code of Criminal Procedure, 1973 (hereinafter referred to as Cr.P.C.) into action, is well elucidated under Section 173(2)¹, and as such, requires no further simplification and elaboration. However, it is Section 173(8)² of Cr.P.C. which forms the cornerstone and the nucleus of this article.

Section 173(8) came to be introduced in the Cr.P.C. by the 41st Law Commission Report to fill in the lacunae felt in the Old Code of 1898. In the 1898 Code, there was no provision prescribing the procedure to be followed by the police for fresh investigation, when fresh facts came to light, upon the submission of the police report and subsequent to

¹ Section 173 - Report of police officer on completion of investigation:-

(2)(i) 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, stating-

- (a) the names of the parties;*
- (b) the nature of the information;*
- (c) the names of the persons who appear to be acquainted with the circumstances of the case;*
- (d) whether any offence appears to have been committed and, if so, by whom;*
- (e) whether the accused has been arrested;*
- (f) whether he has been released on his bond and, if so, whether with or without sureties;*
- (g) whether he has been forwarded in custody under section 170.*
- (h) whether the report of medical examination of the woman has been attached where investigation relates to an offence under Section 376, 376A, 376B, 376C 376D or section 376E of the Indian Penal Code] (45 of 1860).]*

(ii) The officer shall also communicate, in such manner as may be prescribed by the State Government, the action taken by him, to the person, if any whom the information relating to the commission of the offence was first given.

² Section 173(8)- *Nothing in this section shall be deemed to preclude further investigation in respect of an offence after a report under sub-section (2) has been forwarded to the Magistrate and, where upon such investigation, the officer in charge of the police station obtains further evidence, oral or documentary, he shall forward to the Magistrate a further report or reports regarding, such evidence in the form prescribed; and the provisions of sub-sections (2) to (6) shall, as far as may be, apply in relation to such report or reports as they apply in relation to a report forwarded under sub-section (2).*

taking cognizance by the Magistrate. There was, also, no express provision prohibiting further investigation by the police. The said omission was sought to be supplied for the first time by a 2-judge bench of the Madras High Court as early as in 1919 in **Divakar Singh v. A. Ramamurthi Naidu**³, where it was observed that:

"Another contention is put forward that when a report of investigation has been sent in under Section 173, Criminal P.C., the police has no further powers of investigation, but this argument may be briefly met by the remark that the number of investigations into a crime is not limited by law and that when one has been completed another may be begun on further information received".

After recognition of the right of the police to make repeated investigations under the old Code in the *Diwakar Case*(supra), a 3-judge bench of the Hon'ble Supreme Court in **H.N. Rishbud v. State of Delhi**⁴, held that:-

"It does not follow, however, that the invalidity of the investigation is to be completely ignored by the Court during trial. When the breach of such a mandatory provision is brought to the knowledge of the Court at a sufficiently early stage, the Court, while not declining cognizance, will have to take the necessary steps to get the illegality cured and the defect rectified, by ordering such reinvestigation as the circumstances of an individual case may call for. Such a course is not altogether outside the contemplation of the scheme of the Code as appears from Section 202 under which a Magistrate taking cognizance on a complaint can order investigation by the police. Nor can it be said that the adoption of such a course is outside the scope of the inherent powers of the Special Judge, who for purposes of procedure at the trial is virtually in the position of a Magistrate trying a warrant case."

This decision relies upon Section 202 of the Cr.P.C., which in substance deals with the Complaint Cases only, and confers inherent powers upon the Special Judge in the nature of such powers bestowed upon the High Court by the virtue of Section 482 of the Cr.P.C. It is pertinent to mention here that such inherent powers to the Special Judge are not envisaged by the Cr.P.C. and go beyond the letter of law.

It was also held by a 2-judge bench of the Hon'ble Supreme Court in **R.N. Chatterji v. Havildar Kuer Singh**⁵, that a Magistrate is empowered to direct further investigation

³ AIR 1919 Mad 751

⁴ AIR 1955 SC 196

under Section 156(3) of the Cr.P.C., in the absence of any mandatory provision existing to this effect. Some High Courts were also of the view that with the submission of a charge-sheet under Section 173, the power of the police to investigate into an offence comes to an end and the Magistrate's cognizance of the offence started. For instance, in **State v. Mehar Singh & Ors.**⁶, a Full Bench of the High Court of Punjab and Haryana held that the police became *functus officio* once the Court took cognizance of an offence on the filing of a charge-sheet by the police and thereafter further investigation by the police was not permissible. It was, however, observed that in light of the decision in *H.N. Rishbud*(supra), it would be open to the Magistrate to 'suspend cognizance' and direct the police to make further investigation into the case and submit a report.

The said inconsistency and incongruity in the judicial decisions was recognized by the Law Commission in its 41st Report (**under Clause 14.23**)⁷ and it was recommended that the right of the police to make further investigation should be statutorily affirmed.

Accordingly, in the Criminal Procedure Code of 1973, Section 173(8), came to be introduced, which statutorily accoutered the police to undertake further investigation after submission of the final report under Section 173(2) of the Cr.P.C. Conspicuously, it still did not confer such powers on the Magistrate to direct further and/or fresh investigation after submission of the final report by the Police.

Since Section 173(8) only envisages a *further investigation*, and not *fresh investigation*, it becomes essential to distinguish between the two expressions. Taking a cue from the dictionary meaning, it is explicit that 'further' (when used as an adjective) is "additional; more; supplemental". "Further" investigation, therefore, is the continuation of the earlier investigation and not a fresh investigation or reinvestigation to be started *ab initio* wiping

⁵ (1970) 1 SCC 496; *The provisions of the Criminal Procedure Code do not empower the Magistrate to ask the police to submit a charge-sheet. If, however, the Magistrate is of opinion that the report submitted by the police requires further investigation, the Magistrate may order investigation under Section 156(3) of the Criminal Procedure Code. Directing a further investigation is entirely different from asking the police to submit a charge-sheet. Furthermore, Section 190(1)(c) of the Criminal Procedure Code empowers the Magistrate to take cognizance of an offence notwithstanding a contrary opinion of the police.*

⁶ 1974 Cri LJ 970

⁷ 14.23. *Reopening of Investigation- A report under Section 173 is normally the end of the investigation. Sometimes, however, the police officer after submitting, the report under Section 173 comes upon evidence bearing on the guilt or innocence of the accused. We should have thought that the police officer can collect that evidence and send it to the Magistrate concerned. It appears, however, that Courts have sometimes taken the narrow view that once a final report under Section 173 has been sent, the police cannot touch the case again and cannot re- open the investigation. This view places a hindrance in the way of the investigating agency, which can be very unfair to the prosecution and, for that matter, even to the accused. It should be made clear in Section 173 that the competent police officer can examine such evidence and send a report to the Magistrate. Copies concerning the fresh material must of course be furnished to the accused*

out the earlier investigation altogether. This distinction is demystified and elaborated by the Hon'ble Supreme Court in **Vinay Tyagi v. Irshad Alis**, wherein it has been held that "further investigation" is a power vested with the executive where the investigating officer obtains further oral or documentary evidence after the final report has been filed before the court in terms of Section 173(8). The expression is to be understood in complete contradistinction to a "reinvestigation", "fresh" or "de novo" investigation, wherein there has to be a definite order of the court.

The initial investigation, which is undertaken by the police pursuant to filing and registration of the First Information Report (FIR)⁹, or orders of the Magistrate¹⁰ directing investigation, ultimately leads to filing of the final report under Section 173(2), which may conclude either commission or non-commission of an offence by a particular person(s). In either of these two situations, three courses of action would be open to the Magistrate, as explained by a 3-judge bench of the Hon'ble Supreme Court in **Bhagwant Singh vs. Commissioner of Police and Anr.**¹¹

"The report may conclude that an offence appears to have been committed by a particular person or persons and in such a case, the Magistrate may do one of three things: (1) he may accept the report and take cognizance of the offence and issue process or (2) he may disagree with the report and drop the proceeding or (3) he may direct further investigation under sub-section (3) of Section 156 and require the police to make a further report. The report may on the other hand state that, in the opinion of the police, no offence appears to have been committed and where such a report has been made, the Magistrate again has an option to adopt one of three courses: (1) he may accept the report and drop the proceeding or (2) he may disagree with the report and taking the view that there is sufficient ground for proceeding further, take cognizance of the offence and issue process or (3) he may direct further investigation to be made by the police under sub-section (3) of Section 156."

This decision, in effect, holds that even after the submission of the police report, it is open to the Magistrate to direct further investigation to be made by the police under Section 156(3) of the Cr.P.C. Strikingly, the judgment does not deal with the issue as to

⁸ (2013) 5 SCC 762

⁹ Section 154(1) of the Cr.P.C.

¹⁰ Section 173(2) of the Cr.P.C

¹¹ (1985) 2 SCC 537

when the said power of the Magistrate to direct further investigation is exercised, pre-cognizance or post-cognizance, and whether the Magistrate is empowered to direct further investigation under Section 173(8) of the Cr.P.C.

As far as the investigative powers of the police is concerned, it is a settled legal position that the police is empowered to undertake further investigation after submission of the final report (**in view of Section 173(8) of the Cr.P.C. and *Ram Lal Narang vs. State(Delhi Administration)***¹²). The only rider, as provided in *Ram Lal Narang*(supra), is that it is desirable that the police inform the court and seek its formal permission before making such further investigation. However, in so far as the power of the Magistrate to direct such further investigation under Section 173(8) of the Cr.P.C. is concerned, conflicting judicial decisions emerge and a consistent stand on the issue eludes us.

While in ***Randhir Singh Rana v. State (Delhi Admn.)***¹³ and ***Reeta Nag v. State of W.B.***¹⁴, the Hon'ble Supreme Court, placing reliance upon the past decisions of the Court, had held that a Magistrate cannot *suo moto* direct further investigation or a reinvestigation into a case, however, in ***State of Punjab v. CBI***¹⁵, the Hon'ble Court, conferring an over-arching character to the Cr.P.C., had stated that the investigating agency may undertake further investigation and/or the subordinate court may direct further investigation into a case where the charge-sheet has been filed, but such further investigation would not mean fresh investigation or reinvestigation.

In this context, the ***Vinay Tyagi Case***¹⁶(supra) deserves a special mention, wherein the Hon'ble Supreme Court drew sustenance and support from the pronouncement in *Bhagwant Singh*(supra), to hold that a Magistrate before whom a report under Section

¹² (1979) 2 SCC 322

¹³ (1997) 1 SCC 361

¹⁴ (2009) 9 SCC 129

¹⁵ (2011) 9 SCC 182

¹⁶ 40. Having analysed the provisions of the Code and the various judgments as aforeindicated, we would state the following conclusions in regard to the powers of a Magistrate in terms of Section 173(2) read with Section 173(8) and Section 156(3) of the Code:

40.1. The Magistrate has no power to direct 'reinvestigation' or 'fresh investigation' (de novo) in the case initiated on the basis of a police report.

40.2. A Magistrate has the power to direct 'further investigation' after filing of a police report in terms of Section 173(8) of the Code.

40.3. The view expressed in sub-para 40.2 above is in conformity with the principle of law stated in *Bhagwant Singh case* [(1985) 2 SCC 537: 1985 SCC (Cri) 267] by a three-Judge Bench and thus in conformity with the doctrine of precedent.

40.4. Neither the scheme of the Code nor any specific provision therein bars exercise of such jurisdiction by the Magistrate. The language of Section 173(2) cannot be construed so restrictively as to deprive the Magistrate of such powers particularly in face of the provisions of Section 156(3) and the language of Section 173(8) itself. In fact, such power would have to be read into the language of Section 173(8).

173(2) of the Code had been filed, was empowered in law to direct further investigation and require the police to submit a further or a supplementary report. To recall, in *Bhagwant Singh*(supra), this Court had in particular dealt with the courses open to a Magistrate, once a charge-sheet or a closure report is submitted on the completion of investigation under Section 173(2) and thus did essentially concentrate on the pre-cognizance stage of the proceedings. Therefore, it was essentially confined to a pre-cognizance stage and did not delve into the post-cognizance scenario, where the Magistrate seeks a further report after taking cognizance of the case. More so, it is well settled by a catena of judicial decisions and specifically, a 3-judge bench decision of the Hon'ble Supreme Court of India in **R.R.Chari Vs. State of U.P.**¹⁷, that when the magistrate applies his mind not for the purpose of proceeding under the subsequent sections in Chapter XVI, but for taking action of some other kind, e.g. ordering investigation under Section 156(3), or issuing a search warrant for the purpose of the investigation, he cannot be said to have taken cognizance of the offence.

The Apex Court in **Amrutbhai Shambhubhai Patel vs. Sumanbhai Kantibhai Patel**¹⁸, upon an analysis and survey of a plethora of judicial pronouncements on the scope and purport of Section 173(8) of Cr.P.C., had resolved that *albeit* at the pre-cognizance stage, the Magistrate is empowered to direct investigation or further investigation under Section 156(3) of the Cr.P.C., but once the cognizance is taken by the Magistrate and the accused person appears pursuant thereto, he is not competent to direct further investigation either *suo motu* or on the request or prayer of the complainant/informant. Such a course is only open on the request of the investigating agency, and that too, only in the circumstances warranting further investigation.

However, in *Amrutbhai Patel*(supra), the Court omits to take into consideration its earlier decision in **Kishan Lal vs. Dharmendra Bafna**¹⁹, wherein it was categorically held that, “*An order of further investigation can be made at various stages including the stage of the trial, that is, after taking cognizance of the offence.*”, and notably, both *Kishan Lal* (supra) and *Amrutbhai Patel*(supra) are delivered by an equal bench strength.

¹⁷ AIR 1951 SC 207

¹⁸ (2017) 4 SCC 177; “*though the investigating agency concerned has been invested with the power to undertake further investigation desirably after informing the Court thereof, before which it had submitted its report and obtaining its approval, no such power is available therefor to the learned Magistrate after cognizance has been taken on the basis of the earlier report, process has been issued and accused has entered appearance in response thereto.*”

¹⁹ (2009) 7 SCC 685

Now, with its latest pronouncement in **Vinubhai Haribhai Malaviya & Ors. vs. State of Gujarat and Anr.**²⁰; a 3-Judge Bench of the Supreme Court has endeavoured to lay rest to the controversy enveloping the evasive issue of further investigation directed by the Magistrate. The Supreme Court, speaking through Justice R.F. Nariman, has laid down at para 38 that, *“To say that a fair and just investigation would lead to the conclusion that the police retain the power, subject, of course, to the Magistrate’s nod under Section 173(8) to further investigate an offence till charges are framed, but that the supervisory jurisdiction of the Magistrate suddenly ceases mid-way through the pre-trial proceedings, would amount to a travesty of justice, as certain cases may cry out for further investigation so that an innocent person is not wrongly arraigned as an accused or that a prima facie guilty person is not so left out. There is no warrant for such a narrow and restrictive view of the powers of the Magistrate, particularly when such powers are traceable to Section 156(3) read with Section 156(1), Section 2(h), and Section 173(8) of the CrPC, as has been noticed hereinabove, and would be available at all stages of the progress of a criminal case before the trial actually commences. It would also be in the interest of justice that this power be exercised suo motu by the Magistrate himself, depending on the facts of each case. Whether further investigation should or should not be ordered is within the discretion of the learned Magistrate who will exercise such discretion on the facts of each case and in accordance with law.”* It was also clarified that, *“the investigation spoken of in Section 156(3) would embrace the entire process, which begins with the collection of evidence and continues until charges are framed by the Court, at which stage the trial can be said to have begun.”*

Therefore, the Supreme Court, in conclusion, observed that, *“when Section 156(3) states that a Magistrate empowered under Section 190 may order such an investigation, such Magistrate may also order further investigation under Section 173(8), regard being had to the definition of investigation contained in Section 2(h).”*. The Hon’ble Supreme Court has proceeded on the basis that a criminal trial does not begin after cognizance is taken, but only after charges are framed.

It still remains to be seen whether the *Vinubhai Haribhai* ratio would be followed by the Courts consistently. It can only be said, *hitherto*, that the line of reasoning and exposition

adopted by the Supreme Court in *Vinubhai Haribhai* appears to be in consonance the legislative intent of the Code. It does not stand to reason that the legislature provided power of further investigation to the police even after filing a report, but intended to curtail the power of the court to the extent that even where the facts of the case and the ends of justice demand, the court can still not direct the investigating agency to conduct further investigation which it could do on its own.²¹

As far as fresh or *de novo* investigation is concerned, the law is lucid on the point and settled by *Vinay Tyagi*(supra) that neither the investigating agency nor the Magistrate has any power to order or conduct fresh or *de novo* investigation, since their jurisdiction and powers are exercisable only within the four corners of the Cr.P.C. However, the provisions of the Cr.P.C. do not curtail or control the inherent powers of the High Court available under Section 482 of the Cr.P.C., or the plenary powers of the Supreme Court available under Article 142 of the Constitution of India, or the writ jurisdiction of the Supreme Court and High Court under Article 32 and 226 of the Constitution respectively²², and they are competent to direct reinvestigation to secure the ends of justice or to prevent the abuse of any process of the Court. However, even an order of “fresh”/“de novo” investigation passed by the higher judiciary should be coupled with a specific direction as to the fate of the investigation already conducted and must be exercised sparingly.

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²¹ *Vinay Tyagi v. Irshad Ali*; (2013) 5 SCC 762

²² *State of Punjab vs. CBI & Ors.*; (2011) 9 SCC 182