IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
WRIT PETITION NO. 2517 OF 2022

Arun P. Gidh ...Petitioner

Versus

Chandraprakash Singh and ors. …Respondents

WITH
WRIT PETITION (ST) NO. 10232 OF 2023

Satish Shivaji Khandge ...Petitioner

Versus

State of Maharashtra & ors. …Respondents

WITH
INTERIM APPLICATION NO.2950 OF 2023
IN
WRIT PETITION (ST) NO.10232 OF 2023

Prosenjit Gupta ...Applicant

and

Satish Shivaji Khandge ...Petitioner

Versus

State of Maharashtra & ors. …Respondents

WITH
INTERIM APPLICATION NO. 2951 OF 2023
IN
WRIT PETITION (ST) NO.10232 OF 2023

Mafatlal Industries Ltd. ...Applicant

and

Satish Shivaji Khandge ...Petitioner

Versus

State of Maharashtra & ors. …Respondents

WITH
WRIT PETITION NO. 2518 OF 2022

Arun P. Gidh ...Petitioner

Versus

Govind Jemla Rathod & Ors. …Respondents

WITH
WRIT PETITION NO. 2519 OF 2022

Arun P. Gidh ...Petitioner

Versus

Harakchand Nenmal Jain and anr. …Respondents

WITH

WRIT PETITION NO. 2520 OF 2022

Arun P. Gidh ...Petitioner

Versus

Govind Maruti Bokde and ors. …Respondents

Mr. Aabad Ponda, Senior Advocate, a/w Mr. Juggal Kanani, Priya Pervi, Pradeep Rane and Mahadeo Sherekar, i/b Akshay Kapadia, for the Petitioner in WP/2517/2022, WP/2518/2022, WP/2519/2022 and WP/2520/2022.

Dr. Nilesh Pawaskar, a/w Mr. Neeschey Dixit, Ms. Sudha Dwivedi, Mr. Prashant Trivedi, Mr. Aditya Sharma, Mr. Irfan Khan, Ms. Khushboo Jain, i/b Sudha Dwivedi and Asso., for the Petitioner in WP(St)/10232/2023.

Mr. Amit Desai, Senior Advocate, a/w Gopal Shenoy, M. S. Federal, Mr. Veer Ashar and Mr. Aaroha Kulkarni, for the Intervenor/Applicants in IA 2951/2023 in WP(St)/10232/2023.

Dr. Abhinav Chandrachud, i/b Pavan Patil, Mr. Pranit Kulkarni Namitkumar Pansare, for Respondent No.1 in WP/2519/2022.

Mr. Aabad Ponda, Senior Advocate, a/w Ekta Tyagi, Mr. Vikrant Singh Negi, Pratik Thakkar and Anjali Shah, i/b DSK Legal for Respondent No.3 in WP(St)/10232/2023.

Mr. A. S. Rao with Mr. R. V. Dighe, for Respondent Nos.11 to 13 in WP/2517/2022, for Respondent Nos.3 to 5 in WP/2518/2022 and for Respondent Nos.4 to 6 in WP/2520/2022.

Mr. Drupad Patil with Mr. Suyash Sule for Respondent Nos.1, 3 to 5, 7 to 9 and 15 to 18 in WP/2517/2022, Respondent Nos.6, 8 to 12 and 14 in WP/2518/2022

Mr. Karan Kadam with Mr. Ishwar Nankani, Mr. Jagdish Choudhary, Ms. Rhea Sinkar, Ms. Prajakta Sawardekar i/by M/s. Nankani and Associates for Intervener/Applicant In IA 2950 in WP(St)/10232/2023.

Mr. Abhay Ostwal i/by Mr. Drupad S. Patil with Mr. Suyash Sule for Respondent Nos.2, 7 to 12, 14 to 16 and 18 in WP 2520 of 2022.

Mr. A. R. Patil, APP for the Respondent/State.

CORAM: REVATI MOHITE DERE,
N. J. JAMADAR AND
SHARMILA U. DESHMUKH, JJ.
RESERVED ON: 19th AUGUST 2023
PRONOUNCED ON: 10th APRIL 2024

JUDGMENT :- (Per: N. J. JAMADAR, J.)

1. A question of general importance is posed for consideration in these matters on a reference made by a learned Single Judge of this Court, (R. G. Avachat J.), by a referral order dated 14th February, 2023.

2. In order to appreciate the context in which reference came to be made to a Larger Bench, it may be apposite to note the facts in Criminal WP/2517/2022 as a representative case.

[A] The Reference :

Facts:

3. The petitioner, a former Municipal Councilor of Kalyan Dombivali Municipal Corporation, lodged a complaint purportedly espousing the cause of the tenants of Manek Colony, which was under re-development. In the complaint, the petitioner alleged that during the period 2004 – 2021, accused Nos.1 to 5/Respondent Nos.1 to 5 were the Municipal Commissioners, accused Nos.6 to 8 were the Assistant Directors, Town Planning and accused Nos.9 to 16 were the then Assistant Town Planners and Engineers and accused No.17 was the developer of the said Manek Colony Re-development Project. The substance of the accusation was that the officers of the Municipal Corporation in connivance with the developer committed various acts of omission and commission resulting in grave prejudice to the eligible occupants of the Manek Colony and wrongful gain to the developer. In the process, the accused

committed various offences of cheating, preparation of false documents and forgery in pursuance of a criminal conspiracy. The complainant thus alleged that the accused persons committed offences punishable under Sections 120B, 420, 418, 415, 467, 448 read with Section 34 of the Indian Penal Code, 1860 ("the Penal Code") and Sections 9 and 13 of the Prevention of Corruption Act, 1988. The complainant further alleged that he had approached the Competent Authority as well as jurisdictional police and superior police officers, and yet the police did not register the FIR. Hence, the complainant sought a direction of the learned Magistrate under Section 156(3) of the Code of Criminal Procedure, 1973 ("the Code").

4. By an order dated 18th January, 2022, the learned Judicial Magistrate, First Class, Kalyan, ("JMFC") directed the Bazargate Police Station to conduct investigation under Section 156(3) of the Code. Pursuant to the aforesaid direction, Bazargate Police registered FIR bearing CR No.11 of 2022 for the offences punishable under Sections 120B, 420, 418, 415, 467, 448 read with Section 34 of the Penal Code and Sections 9 and 13 of the Prevention of Corruption Act, 1988, on 27th January, 2022.

5. Being aggrieved, the respondents-accused preferred Criminal Revision Application No.10 of 2022. Initially, the learned Additional Sessions Judge by an order dated 24th February, 2022 stayed the operation of the order passed by the learned JMFC. Eventually, by the judgment and order dated 21st May, 2022, the learned Additional Sessions Judge was persuaded to allow the

revision application and set aside the order dated 18th January, 2022 passed by the learned JMFC, Kalyan, under Section 156(3) and the complaint filed by the complainant stood dismissed.

6. When WP/2517/2022 to WP/2520/2022 assailing the aforesaid order passed by the Court of Session in revision were taken up for hearing by the learned Single Judge, the maintainability of the revision application before the Court of Session against the order passed by the learned Magistrate, pursuant to the said direction under Section 156(3) of the Code, after the FIR came to be registered, was assailed.

7. The learned Single Judge upon consideration of the submissions canvassed on behalf of the parties noted that there were three Division Bench judgments of this Court, namely, **B. S. Khatri vs. State of Maharashtra**[1], **Narayandas S/o Hiralalji Sarda vs. State of Maharashtra**[2] and **Avinash s/o Trimbakrao Dhondage vs. The State of Maharashtra and another**[3], which had taken the view that revision was maintainable against an order under Section 156(3) of the Code. In contrast, another Division Bench of this Court in the case of **Kailash Dattatraya Jadhav vs. State of Maharashtra**[4] had taken a view that once FIR is registered the remedy available under the Code to challenge the order under sub-section (3) of Section 156 would not be an

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1 (2004) 1 Mh.L.J. 747

2 (2009) 2 Mh.L.J. 426

3 (2015) SCC Online Bom 5197

4 (2016) SCC Online Bom 5030

efficacious remedy at all. The learned Single Judge was of the view that though the judgment in the case of **Kailash Dattatraya Jadhav (supra)** might appeal to reason, with a view to resolve the conflict of views in the judgments of coordinate Benches of equal strength recourse to Rule 8 of Chapter I of Bombay High Court Appellate Side Rules, 1960 was warranted. The learned Single Judge thus found that these matters could be more advantageously heard by a Bench of two or more Judges of this Court.

8. Pursuant to the order of the Hon'ble the Chief Justice, this Larger Bench is constituted.

9. In paragraph 10 of the referral order the learned Single Judge framed the following question, which arose for consideration in these petitions.

> "Whether remedy of revision under Section 397 of the Cr.P.C., is available to the person aggrieved by an order directing investigation, to be made pursuant to an order passed under Section 156(3) of Cr.P.C.?

10. We have heard Mr. Ponda, the learned Senior Advocate for the petitioner in WP/2517/2022, WP/2518/2022, WP/2519/2022 and WP/2520/2022 and for Respondent No.3 in WP(St)/10232/2023, Dr. Chandrachud, the learned Counsel for Respondent No.1 in WP/2519/2022, Mr. Dighe, the learned Counsel for Respondent Nos.11 to 13 in WP/2517/2022, for Respondent Nos.3 to 5 in WP/2518/2022 and for

Respondent Nos.4 to 6 in WP/2520/2022, Mr. Desai, the learned Counsel for the applicant – intervener in IA(St)/12417/2023 in WP(St)/10232/2023, which also came to be tagged alongwith WP/2517/2022, WP/2518/2022, WP/2519/2022 and WP/2520/2022, Mr. Ostwal, the learned Counsel for the Petitioner in WP/2550/2022, Dr. Pawaskar, the learned Counsel for the petitioner in WP(St)/10232/2023, Mr. Karan Kadam, the learned Counsel for the intervener in IA(St)/13266/2023 in WP(St)/10232/2023 and Mr. Patil, the learned APP for the State, who addressed the Court on the questions of law that arise in this matter.

11. Before considering the questions of law that arise for consideration in this reference, it is necessary to note two preliminary aspects. One, the issue of revisibility of an order passed by the Magistrate under Section 156(3) of the Code. Two, whether there is indeed a divergence of views in the Division Bench judgments i.e. **B. S. Khatri (supra), Narayandas (supra)** and **Avinash Dhondage (supra)**, on one part, and **Kailash Dattatraya Jadhav (supra),** on the other part.

[B] Revisability of an Order under Section 156(3) of the Code :

12. Dr. Pawaskar, the learned Counsel made an endeavour to persuade the Court to delve into the issue of maintainability of revision against an order passed by the Magistrate under Section 156(3) of the Code. It was submitted that the question of maintainability of revision against an order under Section

156(3) has yet not been conclusively determined. Amplifying this submission, Dr. Pawaskar would urge that an order under Section 156(3), which is essentially a direction to the Investigating Agency to perform its task, is but an interlocutory order. Therefore, such an order is not amenable to revision under Section 397 of the Code. In substance, the interdict contained in sub-section (2) of Section 397 comes into play and the High Court or the Court of Session would be precluded from exercising its revisional power in relation to an order passed under Section 156(3) of the Code.

13. A reference was made to a large number of judgments to draw home the point that the order directing investigation under Section 156(3) is not revisible.

14. The learned Counsel, who appear for the original accused countered the submissions of Dr. Pawaskar. It was urged that the revisability, as such, of an order passed under Section 156(3) of the Code was not at all an issue before the learned Single Judge. Therefore, the scope of reference cannot be enlarged by this Court to delve into the larger issue as to whether an order directing investigation under Section 156(3) of the Code is revisable or not. In any event, there is a plethora of judgments of this Court which have consistently held that an order under Section 156(3) directing investigation is amenable to revision including the judgments of the Division Benches in the cases of **B. S. Khatri (supra), Narayandas (supra)** and **Avinash Dhondage (supra)** and **Kailash Dattatraya Jadhav (supra)** adverted to in the referal order.

15. Dr. Chandrachud, the learned Counsel for Respondent No.1 in WP/2519/2022, submitted that there is a cleavage of judicial opinion among the different High Courts. The High Courts of Bombay, Delhi and Kerala have taken the view that an order directing investigation under Section 156(3) of the Code is a final order and, therefore, amenable to revision. On the other hand, the High Courts of Allahabad, Chhattisgarh, Madhya Pradesh, Madras, Jammu and Kashmir, Orissa and Andhra Pradesh have held that such an order is an interlocutory order and thus not amenable to revision. Dr.Chandrachud submitted that the view taken by this Court is correct as an order under Section 156(3) satisfies the test enunciated for determining whether an order is final or interlocutory order.

16. We are not persuaded to delve into the larger question sought to be raised on behalf of the petitioner in WP(ST)/10232/2023 regarding the order under Section 156(3) being or not being amenable to revision for reasons more than one. Firstly, it is trite law that the reference Court/larger bench cannot delve into matters which strictly do not arise out of the reference. Since this issue was not in controversy before the Court, which made the reference, it cannot be delved into by the larger Bench.

17. This position in law is well settled. In the case of **Kerala State Science & Technology Museum V/s. Rambal Co. and Ors.**[5] the Supreme Court elucidated the scope of decision on reference, as under :

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5 (2006) 6 SCC 258

> "8. It is fairly well settled that when reference is made on a specific issue either by a learned Single Judge or Division Bench to a larger Bench i.e. Division Bench or Full Bench or Constitution Bench, as the case may be, the larger Bench cannot adjudicate upon an issue which is not the question referred to. (*see Kesho Nath Khurana V/s. Union of India*[6], *Samaresh Chandra Bose V/s. District Magistrate, Burdwan*[7] and *K.C.P. Ltd. V/s. State Trading Corpn. Of India*[8].)

18. The aforesaid pronouncement has been followed with approval by the Supreme Court in the cases of **T.A.Hameed V/s. M. Viswanathan**[9], **State of Punjab V/s. Salil Sabhlok**[10] and **Aneesh Kumar V.S. and Ors. V/s. State of Kerala and Ors.**[11]

19. Secondly, there is a long line of decisions of this Court including the judgments in the cases of **B. S. Khatri** (supra) **Narayandas** (supra) and **Avinash Dhondage** (supra) and **Kailash Dattatraya Jadhav** (supra), (import of which we are called upon to examine) that an order under Section 156(3) is revisable. It is well recognized that the Court should not disturb a long line of precedents lightly. In the facts of the case and the questions that, in our view, arise for consideration, we do not find any justifiable or compelling reason to delve into the correctness of the view that a revision is maintainable against an order under Section 156(3) of the Code.

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6 1981 Supp. SCC 38
7 (1972) 2 SCC 476
8 1995 Supp(3) SC 466
9 (2008) 3 SCC 243
10 (2013) 5 SCC 1
11 (2020) 7 SCC 301

20. Even otherwise, it is equally well settled that an interlocutory order cannot be considered in contradistinction to a final order. It is not the law that what is not a final order must be an interlocutory order. As enunciated by the Supreme Court in the case of **Madhu Limaye vs. State of Maharashtra**[12], the real intention of the legislature was not to equate the expression, "interlocutory order" as invariably being converse of the words "final order". There may be an order passed during the course of a proceeding which may not be final, yet, it may not be an interlocutory order – pure and simple. Some kinds of order may fall in between the two. Thus, the bar in sub-section (2) of Section 397 is not meant to attract such kinds of intermediate orders.

21. A more surer test which has been forged by judicial pronouncements is whether by upholding an objection raised by a party, such order would result in terminating the proceedings. If so, any order passed on such objection would not be merely interlocutory in nature as envisaged in Section 397(2) of the Code. If the objection raised by the accused to an order under Section 156(3) is upheld by the revisional court, the proceedings before the Magistrate may terminate. Thus, such an order under Section 156(3) may not be construed as purely "interlocutory". Such an order can also be said to be conclusive as to the stage of proceedings qua the Court of Magistrate as once the order under Section 156(3) is passed directing the investigating agency to conduct the investigation, the Magistrate does not retain any seisin over that proceedings.

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12 (1977) 4 SCC 551.

22. We are thus not inclined to accede to the invitation of Dr. Pawaskar to embark upon the consideration of the larger issue of revisibility of an order under Section 156(3) of the Code.

[C] Is there divergence in the views of Division Benches:

23. Dr. Chandrachud, the learned Counsel for the respondent, submitted that there is, in fact, no divergence in views of the Division Benches of this Court in the judgments in the cases of **B. S. Khatri** (supra) ***Narayandas (supra)*** and **Avinash Dhondage** (supra), on one part, and the decision in **Kailash Dattatraya Jadhav** (supra), on the other part, as remarked by the learned Single Judge. It was submitted that all these Division Bench judgments are in unison on the point that a revision application is maintainable against an order under Section 156(3) of the Code. The question which arose for consideration in **B. S. Khatri (supra)** and **Avinash Dhondage (supra)** did not arise for consideration in the case of **Kailash Dattatraya Jadhav (supra).** In the case of **Kailash Dattatraya Jadhav (supra)** the Division Bench adverted to the efficacy of the revisional remedy. Dr. Chandrachud would urge that there is a difference between maintainability and efficacy and, in a given case, a proceeding may be maintainable and yet not efficacious. Therefore, there is no conflict between the aforesaid decisions.

24. In the alternative, Dr. Chandrachud submitted that since in the case of **Kailash Dattatraya Jadhav (supra),** the Division Bench had not considered

the earlier decision in the case of **Narayandas (supra)**, in the event it is held that there is indeed a conflict between the judgments in the case of **Narayandas (supra)** and **Kailash Jadhav (supra),** the decision in the case of **Kailash Dattatraya Jadhav (supra)** can be stated to be *per incuriam* to the extent it holds that revision against an order under Section 156(3) is not an efficacious remedy, once a FIR is registered pursuant to such an order.

25. In opposition to this, Mr. Ponda would submit that the core question involved in this reference is the efficacy of the remedy of revision after an order passed under Section 156(3) culminates into registration of FIR and, still further, leads to lodging of a charge-sheet post completion of investigation. Can the revisional court be considered to have been empowered to quash and set aside the FIR, or for that matter the charge-sheet lodged, pursuant to investigation directed under Section 156(3) is at the heart of the controversy, urged Mr. Ponda.

26. Mr. Ponda submitted that the decision in the case of **Kailash Dattatraya Jadhav (supra)** cannot be said to be *per incuriam* by any stretch of imagination as in the case of **B. S. Khatri (supra)** and **Narayandas (supra)** the question as to whether the revisional court would be empowered to quash the FIR in exercise of revisional jurisdiction was not at all adverted to, much less, determined. That not being the ratio of the decisions in the cases of **B. S. Khatri (supra)** and **Narayadas (supra)**, the rule of *per incuriam* is not at all attracted. To bolster up this submission, Mr. Ponda placed reliance on the

decisions of the Supreme Court in the cases of **Sundeep Kumar Bafna vs. State of Maharashtra**[13] and **Dr. Shah Faesal and others vs. Union of India and others**[14].

27. Mr. Desai, the learned Counsel for the interverner in IA(St)/12417/2023, would also submit that the efficacy of revisional remedy, after FIR has been registered post the direction for investigation under Section 156(3) of the Code, is the only question that arises for consideration before the Larger Bench and not the aspect of maintainability, pre or post registration of the FIR.

28. As the controversy revolves around the correct construct of the Division Bench judgments of this Court and, resultantly, resolution of the possible conflicts in their views, it is necessary to note the enunciation in each of the aforesaid four decisions and the background facts in which those decisions were rendered.

29. **B. S. Khatri (supra)** arose out of an order passed by the learned Metropolitan Magistrate under Section 156(3) of the Code directing an investigation on a complaint. The order was *inter alia* assailed on the ground that the bar under Section 195 of the code squarely applied for taking cognizance of the complaint filed by the respondents and, therefore, the

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13 (2014) 16 SCC 623.

14 (2020) 4 SCC 1.

Magistrate could not have directed investigation under Section 156(3) of the Code. In that context, the Division Bench *inter alia* observed as under;

> "13. All that has been done in the present case is an order under Section 156(3) of the Code requiring investigation by a particular wing of the police of the State of Maharashtra is passed and it is at this stage the petitioners have moved this court for exercise of its extra ordinary jurisdiction under Article 226. Factually an order under Section 156(3) of the code can be revised by a Sessions Judge or by this court under Section 397 read with 401 of the Code. Even for that purpose therefore alternate remedy is available to the petitioners. Apart from that mere order directing investigation does not cause any injury of irreparable nature, which requires quashing of even the investigation. All that has been ordered is investigation into the complaint."
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> (emphasis supplied)

30. In **Narayandas (supra)**, upon a private complaint lodged for the offences punishable under Sections 406, 420, 468, 506(B) read with 34 of the Penal Code, the learned JMFC had passed an order under Section 156(3) and directed the Investigating Officer to register the offence. The said order was challenged by invoking the writ jurisdiction of the High Court. Tenability of the petition was assailed on the ground that an alternate remedy was available to the petitioner and, therefore, extraordinary writ jurisdiction cannot be invoked. It was further pointed out that the impugned order had already been given effect to in as much as the crime was registered pursuant to the direction of the learned Magistrate. Following the decision in the case of ***B. S. Khatri***

(supra) the Division Bench held that the writ petition was not tenable. It was observed as under:

> "15. As regards tenability of the writ petition challenging the direction of the learned Magistrate to investigate under Section 156(3) of the Code of Criminal Procedure, it was submitted by Mr. Dewani that such a writ petition cannot be entertained in exercise of the extraordinary jurisdiction of the High Court under Articles 226 and 227 of the Constitution of India. Mr. Dewani pointed out that the said order is revisable and thus an effective alternate remedy is available. As such filing of writ petition is not appropriate remedy. In support of this submission, Mr. Dewani relied on B.S. Khatri vs. State of Maharashtra and another, 2004 (1) Mh.L.J. 747 (Bombay), wherein the Court dealt with the Writ Petition challenging the order passed by the learned Magistrate directing the investigation under Section 156(3) of the Code of Criminal Procedure. In the said case, it was held by the Division Bench as under :
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> *"We have also noted above that several efficacious alternate statutory remedies under the Criminal Procedure Code are available to section 156(3). The petitioners to challenge the order under without availing them the petitioners have rushed before this Court, claiming exercise of its extraordinary jurisdiction under Article 226. In our opinion, therefore, there is no need to exercise this jurisdiction to quash merely the complaint and order under section 156, Criminal Procedure Code requiring investigation into complaint by the police. The petitions are therefore liable to be dismissed".*
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> In our view, the above case directly hits the tenability of the present writ petition." (emphasis supplied)

31. Evidently, in the case of **Narayandas (supra)** the Division Bench was apprised that the order directing investigation under Section 156(3) of the

Code was given effect to in the sense that FIR came to be registered pursuant to the said direction and yet, the Division Bench held that, the petitioners therein had an effective alternate remedy. It must, however, be noted that the Division Bench also observed that the petition was liable to be dismissed on merits as well.

32. In the case of **Avinash Dhondage (supra)**, the Division Bench posed unto itself the following question :

> "Whether the order made by the Magistrate u/s 156(3) of the Code of Criminal Procedure, 1973, directing Police to make investigation would be an interlocutory order? If no, whether remedy of revision u/s 397 or Section 401 of the Code of Criminal Procedure, 1973, would lie?

33. The aforesaid question arose for consideration before the Division Bench in the context of the petitions under Article 226 and 227 of the Constitution of India and applications under Section 482 of the Code on the premise that there was no remedy of revision against an order under Section 156(3) of the Code since such an order was in the nature of an interlocutory order. Adverting to the pronouncements of the Supreme Court and this Court including the Division Bench judgment in the case of **B. S. Khatri (supra),** the Division Bench answered the question as under :

> "15. Insofar as the question framed by us is concerned, we find that there is a passing reference in paragraph no.31 made by the Division Bench about availability of several efficacious alternative statutory remedies under the Criminal Procedure Code to challenge the order u/s 156(3). We think though it is *obiter dicta*, nevertheless

> the same is binding on us as we respectively agree with the said view, for the above reasons that the order u/s 156(3) of the Code not being an interlocutory order, but being a final order in a proceeding u/s 156(3) of the Code would certainly be revisable under the revisional powers of the Sessions Court or the High Court. The Division Bench in the case of *B.S. Khatri v. State of Maharashtra & another* (supra), however, clearly held that the exercise of extraordinary jurisdiction under Article 226 of the Constitution should not be made for considering the challenge to order u/s 156(3) of the Code with which again we respectfully agree. We, however, state that the bar to exercise extraordinary jurisdiction under Article 226 of the Constitution is the one of self-imposed rule. We, however, hold that the order u/s 156(3) of the Code not being an interlocutory order, would obviously be revisable. We thus hold that the order u/s 156(3) of the Code of Criminal Procedure, 1973, is not an interlocutory order, but is a final order terminating the proceeding u/s 156(3) of the Code and that the revision u/s 397 or Section 401 of the Code would lie."

34. In the case of **Kailash Dattatraya Jadhav (supra),** the challenge was to an order passed by the learned Magistrate under Section 156(3) of the Code leading to registration of the FIR. The tenability of an application for quashing such FIR under Section 482 of the Code was questioned with reference to the decision in the case of **Avinash Dhondage (supra)**. In response thereto, a submission was canvassed on behalf of the applicants that the remedy under Section 397 of the Code was not at all an efficacious remedy as the revisional court had no power to quash the FIR. It was submitted that even if it was assumed that the remedy under Section 397 of the Code was available to challenge an order under sub-section (3) of Section 156, the

remedy cannot be said to be efficacious one as the revisional court cannot quash the FIR.

35. In the light of the aforesaid submissions, the Division Bench analysed the legal position in the light of the judgments of the Supreme Court in the cases of **Madhu Bala vs. Suresh Kumar**[15] and **Sureshchand Jain vs. State of MP**[16].

36. The Division Bench in the case of **Kailash Dattatraya Jadhav (supra)** held as under :

> "12. As held by the Apex Court, once an order is made by learned Magistrate under sub Section 3 of Section 156 of the Code directing investigation to be made, it is the legal obligation of the police officer to register FIR under sub Section 1 of Section 154 of the Code, inasmuch as registration of FIR in terms of sub Section 1 of Section 154 is a condition precedent for commencing investigation into the commission of cognizable offence. As is clear from sub-Section 1 of Section 156 of Code, the power under sub-Section 3 of Section 156 of the Code can be exercised only in cognizable cases.
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> 13. We may make now a reference to Section 397 and Section 401 of the Code. The power of revision under Section 397 will have to be read with Section 398 of the Code. Firstly, we may note here that power of the High Court or the Sessions Court under sub Section 3 of Section 397 is of calling for the record of proceedings before any subordinate Criminal Court for the purposes of satisfying itself about correctness, legality or propriety of any finding, sentence or order recorded or passed in any proceeding before such subordinate Court. Thus, the power under Section 397 is confined to testing the legality, validity and

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15 (1997) 8 SCC 476.

16 (2001) 2 SCC 628.

> propriety of the orders passed by the Courts which are subordinate to the High Court or the Sessions Court, as the case may be. Secondly, on conjoint reading of Sections 398, 399 and 401, it follows that there is no power conferred on the Revisional Court to quash FIR registered by the Police in accordance with sub-section (1) of Section 154 of the Code and the investigation carried out on the basis of that and to quash the criminal proceedings on the basis of charge sheet, which may be eventually filed. Therefore, in a case where an order made under sub-Section 3 of Section 156 culminates into registration of FIR, the Revisional Court is powerless to pass an order of quashing the FIR and quashing a charge sheet filed on the basis of the FIR. Therefore, in a case where on the basis of an order under sub Section 3 of Section 156 of the Code , FIR is registered, the remedy of revision under the Code for challenging the order under sub Section 3 of Section 156 will not be an efficacious remedy at all. For the reasons which we have recorded above, even in a case where a revision application is entertained against an order under sub Section 3 of Section 156 where FIR on the basis of the said order is already registered, in exercise of revisional jurisdiction, neither this Court nor Sessions Court can quash the FIR and proceedings subsequent to the FIR, as what can be gone into by the Court in revisional jurisdiction is the issue of legality, validity and propriety of the orders passed by a subordinate Criminal Court.
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> 14. Therefore, we accept the submission made by the learned counsel for the Applicants that a revision under Section 397 of the Code is not at all an efficacious remedy in view of registration of FIR on the basis of an order under sub-Section (3) of Section 156 of the Code."
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> (emphasis supplied)

37. It is true in the case of **Kailash Dattatraya Jadhav (supra),** the Division Bench did not refer to the decision in the case of **Narayandas (supra).** The submission on behalf of the respondents that as **Kailash Dattatraya Jadhav (supra)** did not refer to **Narayandas (supra)**, a decision of a coordinate bench of equal strength and, therefore, **Kailash Dattatraya**

Jadhav (supra) is *per-incurrium* **Narayandas (supra)**, cannot be acceded to unreservedly. We have referred to the factual backdrop in which the four Division Bench decisions have been rendered, on purpose.

38. Indeed, in the case of **Narayandas (supra),** the Division Bench had specifically noted that tenability of the writ petition was also assailed on the ground that the order impugned therein was given effect to as it had resulted in registration of the FIR. Furthermore, the Division Bench found that the earlier decision in the case of **B. S. Khatri (supra)** on the aspect of tenability of the petition applied with full force. However, the Division Bench in the case of **Narayandas (supra)** cannot be said to have delved into the question of efficacy of the revisional remedy under Section 397 of the Code, after the registration of the FIR pursuant to the directions of the Magistrate. As noted above, instead the Division Bench in **Narayandas (supra)** found the petition to be devoid of substance even on the merits of the matter.

39. A correct reading of the judgment of the Division Bench in the case of ***Narayandas*** (supra), in our view, would indicate that ***Narayandas*** (supra) delved into the aspect of revision under Section 397 of the Code being an alternate remedy and, on that count, did not consider it appropriate to entertain the challenge to an order under Section 156(3) in exercise of writ jurisdiction. But it did not analyse and consider the aspect of efficaciousness of the said remedy in the context of a submission that even if a revision is entertained, the revisional court would not be empowered to quash the FIR

and the resultant proceedings, if any. That aspect was considered only by the Division Bench in the case of **Kailash Dattatraya Jadhav (supra).**

40. We find substance in the submission of Mr. Ponda that the efficaciousness of the remedy where an order under Section 156(3) of the Code catapults into registration of a FIR and perhaps might even result in filing of the charge-sheet in a given case, did not arise for consideration in the cases of **Narayandas (supra)** and **B. S. Khatri (supra)**. That not being the ratio decidendi of **Narayadas (supra)**, the decision in **Kailash Dattatraya Jadhav (supra),** cannot be said to be *per incuriam*.

41. Rule of *per incuriam* arises if a decision is rendered in ignorance of an earlier pronouncement of a co-equal or Larger Bench. It is equally well settled that the decision is an authority for what it decides and not what logically flows from the decision. Rule of *per incuriam* will have no application, if it could be shown that the pronouncement which is stated to be *per incurriam* is reconcilable with a previous binding pronouncement.

42. In the case of **Sundeep Kumar Bafna (supra),** it was enunciated that a decision or a judgment can also be *per incuriam* if it is not possible to reconcile its ratio with that of a previous pronounced judgment of a co-equal or Larger Bench, or if the decision of a High Court is not in consonance with the views of the Supreme Court. The rule of *per incuriam was* elucidated as under :

> "19…… A decision or judgment can be *per incuriam* any provision in a statute, rule or regulation, which was not brought to the notice of the

> Court. A decision or judgment can also be *per incuriam* if it is not possible to reconcile its ratio with that of a previously pronounced judgment of a Co-equal or Larger Bench; or if the decision of a High Court is not in consonance with the views of this Court. It must immediately be clarified that the *per incuriam* rule is strictly and correctly applicable to the ratio decidendi and not to *obiter dicta*. It is often encountered in High Courts that two or more mutually irreconcilable decisions of the Supreme Court are cited at the Bar. We think that the inviolable recourse is to apply the earliest view as the succeeding ones would fall in the category of *per incuriam.*"
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> (emphasis supplied)

43. In the case of **Dr. Shah Faesal (supra)**, the Constitution Bench, after referring to the aforesaid judgment in the case of **Sundeep Bafna (supra)**, enunciated that the subsequent decision would be declared *per incurriam* only if there is conflict between the *ratio decidendi* of the pertinent judgments. The Constitution Bench observed as under :

> "32. The view that the subsequent decision shall be declared per incuriam only if there exists a conflict in the ratio decidendi of the partinent judgments was also taken by a five-Judge Bench decision of this Court in*Punjab Land Development & Reclamation Corpn. Ltd. vs. Labour Court (1990) 3 SCC 682. (SCC pp.706-07, para 43) :*
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> *"43. As regards the judgments of the Supreme Court allegedly rendered in ignorance of a relevant constitutional provision or other statutory provisions on the subjects covered by them, it is true that the Supreme Court may not be said to "declare the law" on those subjects if the relevant provisions were not really present to its mind. But in this case Sections 25-G and 25-H were not directly attracted and even if they could be said to have been attracted in laying down the major premise, they were to be interpreted consistently with the subject or context. The problem of*

> *judgment per incuriam when actually arises, should present no difficulty as this Court can lay down the law afresh, if two or more of its earlier judgments cannot stand together."*

44. In the light of the aforesaid enunciation of law, we find it difficult to accede to the submission that the decision in **Kailash Dattatraya Jadhav (supra)** is *per incurriam* the pronouncement in **Narayandas (supra)**. At the same time, we are of the view that the submission that there is no divergence at all between the views recorded by this Court in the cases of **B. S. Khatri (supra)**, **Narayandas (supra)** and **Avinash Dhondage (supra)**, on the one part, and **Kailash Dattatraya Jadhav (supra)**, on the other part, of whatsoever nature does not merit acceptance. **Kailash Dattatraya Jadhav (supra)** went on to test the efficaciousness of the remedy under Section 397 of the Code after such order culminates into registration of FIR. In our view, the conflict arises when the writ petitions and applications under Section 482 are declined to be entertained on the ground that a revision under Section 397 of the Code is an efficacious alternate remedy against an order under Section 156(3), even where that order results in registration of FIR and further proceedings pursuant to the directions for investigation. To this extent the conflict needs to be resolved.

[D] Questions :

45. The pivotal questions that thus warrant consideration by the Larger Bench are as under :

(i) Whether a revision under Section 397 of the Code is an efficacious remedy against an order directing investigation under Section 156(3) of the Code passed by the Magistrate even after it results in registration of the FIR and further proceedings pursuant to such investigation ?

(ii) To what extent the revisional court can interfere with the subsequent actions and proceedings in the investigation after registration of the FIR pursuant to a direction under Section 156(3) of the Code ?

[E] Submissions:

46. Mr. Ponda submitted that the issue of efficaciousness of revisional remedy against an order under Section 156(3) deserves consideration in a pragmatic perspective. Since the revisional powers under Section 397 of the Code are concurrent in nature and propriety demands that a person aggrieved by an order under Section 156(3) ought to first approach the Court of Session to invoke the revisional powers, the limitations on the power of the Court of Session to pass the order under Code are required to be kept in view. A Court of Session does not possess inherent jurisdiction. What the Court of Session can examine, in exercise of revisional powers, is the legality, propriety and correctness of the order under Section 156(3). Till the time, the FIR is not registered, Mr. Ponda would urge, the Court of Session may be justified in staying the effect, operation and implementation of the order under Section 156(3) and restrain the police from registering the FIR in the interregnum. However, once the FIR is registered and the Investigating Officer enters into

the investigation, the Court of Session has no power to interdict the investigation, much less, quash the FIR and the charge-sheet, if eventually the investigation leads to filing of a report under Section 173 of the Code. Those extraordinary powers are designedly vested in the High Court under Article 226 of the Constitution of India or Section 482 of the Code.

47. Elaborating the submission, Mr. Ponda would urge, in a given case, the Court of Session may set aside the order under Section 156(3) of the Code on the ground that the complaint seeking a direction under Section 156(3) was not supported by an affidavit as mandated by the Supreme Court by its judgment in the case of **Priyanaka Srivastava vs. State of U.P.**[17] It is quite possible that, in the interregnum, the investigating agency might have completed the investigation and lodged the charge-sheet forming an opinion that complicity of the accused for the offences charged has been made out. In such a situation, according to Mr. Ponda, even the High Court may not be persuaded to quash the FIR where the commission of offences is *prima facie* made out. To hold that the Court of Session would be empowered to quash the FIR and subsequent proceedings, according to Mr. Ponda, would lead to absurd consequences.

48. It was further submitted that, in a given case, against an order under Section 156(3) one accused may approach the High Court seeking quashment of the FIR, and the High Court may not be persuaded to quash the FIR. At the

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17 (2015) 6 SCC 287.

same time, another co-accused may invoke the revisional jurisdiction under Section 397, and the Court of Session may find that the order passed by the learned Magistrate was infirm. In this scenario also, if the Court of Session is construed to have power to quash the FIR, consequent to the setting aside of the order passed by the learned Magistrate, anomalous consequences would ensue as there will be two conflicting orders. To bolster up the submission that the Court of Session cannot quash the FIR and the resultant proceedings as it is not vested with the inherent powers and the powers of the revisional court are circumscribed by the provisions contained in Sections 397 and 401 of the Code, Mr. Ponda placed a strong reliance on the decisions of the Supreme Court in the cases of **Imtiyaz Ahmad vs. State of UP**[18], **Asian Resurfacing of Road Agency Pvt. Ltd. vs. CBI**[19], **Bindeshwari Prasad Singh vs. Kali Singh**[20] and **State of Haryana v/s. Bhajan Lal**[21].

49. In the case of **Imtiyaz Ahmad (supra)**, while considering the issues of pendency and delay in disposal of criminal cases, on account of grant of stay by the High Court the Supreme Court observed as under :

> "55……The authority of the High Court to order stay of investigation pursuant to lodging of FIR, or trial in deserving cases in unquestionable. But this court is of the view that the exercise of this authority carries with it the responsibility to expeditiously dispose of the case. The power to grant stay of investigation and trial is a very

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18 (2012) 2 SCC 688.

19 (2018) 16 SCC 299.

20 (1977) 1 SCC 57.

21 AIR 1992 SC 604.

> extraordinary power given to the High Court and the same power is to be exercised sparingly only to prevent an abuse of the process and to promote ends of justice."

50. The aforesaid pronouncement was followed in the case of **Asian Resurfacing of Road Agency (supra).** It was, *inter alia,* observed as under :

> "54. It is thus clear that the inherent power of a Court set up by the Constitution is a power that inheres in such Court because it is a superior court of record, and not because it is conferred by the Code of Criminal Procedure. This is a power vested by the Constitution itself, inter alia, under Article 215 as aforestated. Also, as such High Courts have the power, nay, the duty to protect the fundamental rights of citizens under Article 226 of the Constitution, the inherent power to do justice in cases involving the liberty of the citizen would also sound in Article 21 of the Constitution……."

51. In the case of **Bhajan Lal (supra)**, the Supreme Court cited with approval the following observations in the case of **S. N. Sharma vs. Bipen Kumar Tiwari**[22] :

> "11…..It appears to us that, though the Code of Criminal Procedure gives to the police unfettered power to investigate all cases where they suspect that a cognizable offence has been committed, in appropriate cases an aggrieved person can always seek a remedy by invoking the power of the High Court under Article 226 of the Constitution under which, if the High Court could be convinced that the power of investigation has been exercised by a police office *mala fide* the High Court can always issue a writ of mandamus restraining the police officer from misusing his legal powers. The fact that the Code does not contain any other provision giving power to a Magistrate to stop

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22 (1970) 1 SCC 653

> investigation by the police cannot be a ground for holding that such a power must be read in Section 159 of the Code. (para 57, [para 11 of S. N. Sharma])".

52. Mr. Ponda further submitted that even if an investigation bears a mark of illegality, such illegality would not impact the competence and jurisdiction of the trial court when cognizance has been taken, and case has proceeded to trial. On the touchstone of this principle, according to Mr. Ponda, even where an order under Section 156(3) is set aside by the Court of Session, and if, in the interregnum, investigation has been completed and charge-sheet has been lodged and the Magistrate has taken cognizance of the offences, the Court of Session would be incompetent to quash the proceedings as the illegality or impropriety in the initial orders under Section 156(3) does not efface the subsequent proceedings culminating in filing of the charge-sheet.

53. A strong reliance was placed on a decision of the Supreme Court in the case of **Pooran Mal vs. Director of Inspection**[23], wherein it was enunciated that the Indian Evidence Act does not exclude as "inadmissible" evidence that is procured as a result of an illegal search and/or seizure.

54. Mr. Ponda thus submitted that a more pragmatic approach in a situation where the revisional court sets aside an order under Section 156(3) of the Code after the FIR has been registered, would be to allow the aggrieved person to approach the High Court in exercise of extraordinary or inherent jurisdiction to

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23 (1974) 1 SCC 345

get the FIR and/or consequent proceedings quashed, armed with the order of the revisional court. Any other view, according to Mr. Ponda, would lead to anomalous consequences.

55. Mr. Ponda further urged that what is required to be considered is whether the Court of Session is vested with a particular power and not whether there is no prohibition in the Code. To this end, Mr. Ponda placed reliance on the judgment of the Supreme Court in the case of **Maj. Genl. A. S. Gauraya and another vs. S. N. Thakur and another**[24].

56. In the case of ***A. S. Gauraya* (supra),** the Magistrate had reviewed an order to dismiss a complaint. The High Court had held that the Magistrate could revive the dismissed complaint since the order dismissing the complaint was not a judgment or a final order. The Supreme court enunciated that the approach of the High Court was wrong. What the Court has to see is not whether the Code of Criminal Procedure contains any provision prohibiting a Magistrate from entertaining an application to restore a dismissed complaint, but the task should be to find out whether the said Code contains any provision enabling a Magistrate to exercise an inherent jurisdiction which he otherwise does not have.

57. Dr. Chandrachud submitted that efficacy and maintainability are two distinct attributes of a legal remedy. A reference was made to the decision of the Gauhati High Court in the case of **Abdul Samad vs. Executive**

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24 (1986) 2 SCC 709

Committee[25] and the Allahabad High Court in the case of **Mahamood Ilahi vs. Daya Wati**[26] and the judgment of the Supreme Court in the case of **Anju Choudhary vs. State of UP**[27] to demonstrate as to what, "efficacious remedy" connotes in legal parlance. Dr. Chandrachud submitted that despite registration of FIR pursuant to an order under Section 156(3), a revision under Section 397 of the Code would be maintainable, however, even if the revisional Court sets aside the order under Section 156(3), the accused would be required to invoke the extraordinary writ jurisdiction or inherent powers of the High Court to have the FIR quashed.

58. Mr. Ostwal submitted that the efficaciousness of revisional remedy cannot be construed in the abstract. Supplementing the submissions of Dr. Chandrachud, Mr. Ostwal urged that a revision would be maintainable against an order under Section 156(3) even where it has culminated into registration of FIR. Remedy of revision before the Court of Session cannot be taken away on the premise that the order under Section 156(3) has been given effect to by registering the FIR. A two-pronged approach, according to Mr. Ostwal, is required to be adopted. In this regard, ordinarily, where an order under Section 156(3) is set aside by the Court of Session in exercise of revisional jurisdiction, it would be necessary for the accused/aggrieved party to approach the High Court for quashment of the resultant FIR, if already registered.

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25 1980 SCC Online Gau 1

26 (1988) SCC Online All 695

27 2013(6) SCC 384.

However, if the order under Section 156(3) suffers from illegality, rendering it without jurisdiction then everything done pursuant to such an order must be set at naught.

59. Mr. Desai, the learned Senior Advocate for the Intervener, stoutly submitted that the revisional powers as envisaged by the Code must be given the meaning and content as borne out by the provisions of the Code. The contention that there is no express provision in the Code which empowers the Court of Session to pass consequential orders, where the Court of Session sets aside an order under Section 156(3) was stated to be fallacious. Mr. Desai would urge that a conjoint reading of the provisions contained in Sections 397(1), 399(1), 401(1) and 386(e) of the Code would indicate that the revisional court is vested with the powers of the Appellate Court. The revisional court is thus empowered to make an order that may be just and proper. Laying emphasis on clause (e) of Section 386, Mr. Desai submitted that the revisional court would be empowered to make any amendment or any consequential or incidental order that may be just or proper. The aforesaid clause (e) of Section 386 if read in juxtaposition with Section 397 which empowers the revisional court to direct that the execution of any sentence or order may be suspended, and if the accused is in confinement, he be released on bail pending the revision application, indicates that the powers of the revisional court are of wide amplitude.

60. Mr.Desai submitted that Courts of Session are manned by experienced and competent judicial officers. The Code has conferred concurrent revisional jurisdiction on the High Court and the Court of Session. To hold that the Court of Session would not be competent to quash the FIR and the consequential proceedings would amount to divesting it of the statutory power conferred by the Code. According to Mr. Desai, if it is held that the Court of Session does not have the power to quash the underlying FIR and the consequential proceedings despite interfering with the order of Magistrate under Section 156(3), it would effectively amount to holding that the revision application is not maintainable after FIR is registered. Once it is conceded that a revision against an order under Section 156(3) is maintainable before the Court of Session, the power must extend to do the thing without which the said power cannot exist, urged Mr. Desai.

61. Mr. Desai would further urge that an accused would get no relief if it is held that despite the order under Section 156(3) having been set aside the underlying proceedings would continue to operate to the prejudice of such person. It is no solace to him that the revisional court merely pronounces upon the legality and validity of the order passed by the learned Magistrate under Section 156(3) without quashing the FIR which has been registered pursuant to the said order. As a corollary, Mr. Desai submitted that if the accused/aggrieved person is made to approach the High Court for quashing of the proceedings despite a favourable order by the revisional court, it would

impede the access to justice. Mr. Desai thus submitted that the Court of Session must be held to have the power to quash the FIR and the consequent proceedings if it comes to the conclusion that the order under Section 156(3) was required to be interfered with.

62. In support of aforesaid submissions, Mr. Desai placed reliance on the decisions of the Supreme Court in the cases of **Jayram Vithoba vs. State of Bombay**[28], **Kantilal Chandulal Mehta vs. State of Maharashtra**[29], **Bidi Leaves and Tobacco Merchants Association vs. State of Bombay**[30], **State of Punjab vs Davinder Pal Singh Bhullar**[31], **Badrinath vs. Government of T.N.**[32] and **Coal India Ltd. Vs. Ananta Saha**[33].

63. Mr. Karan Kadam, the learned Counsel for the intervener in IA(St)/13266/2023 in WP(St)/10232/2023, urged that the answer to the question posed can be found in the text of Section 397 of the Code. Section 397 uses expression, "execution of any sentence or order". The term, "any" implies that the power is of wide amplitude and plenary in nature. Moreover, the term "execution" cannot be construed in a restricted manner to mean execution of the order under Section 156(3) in the sense of registration of the FIR but also the further steps in investigation post the registration of the FIR. It would be contradiction in terms that an order passed under Section 156(3)

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28 (1955) 2 SCR 1049
29 (1969) 3 SCC 166
30 1962 Supp (1) SCR 381
31 (2011) 14 SCC 770
32 (2000) 8 SCC 395
33 (2011) 5 SCC 142

can be challenged in revision but the revisional court would be denuded of the power to quash the resultant FIR, submitted Mr. Kadam. An endeavour was made to urge that with mere registration of FIR an order under Section 156(3) cannot be said to have been "executed" within the meaning of Section 397. Such stage would be reached only when charge-sheet/closure report is filed. Support was sought to be drawn from the judgments of the Supreme Court in the cases of **Priyanka Srivastava and Anr. V/s. State of Uttar Pradesh and Ors.**[34] and **Abdul Samad (supra)** to draw home the point that if an order under Section 156(3) is passed in flagrant violation of the mandatory requirements, not only the impugned order but the consequential action must be set at naught. Reliance was also placed on the decision of the Supreme Court in the case of **State of UP vs. Singhara Singh**[35] to buttress the submission that the action must be done in the manner ordained by law and in no other.

64. Mr. Patil, the learned APP, submitted that if the order under Section 156(3) of the Code has culminated into a FIR, revision is not an efficacious remedy and the aggrieved person must approach the High Court. Mr. Patil appeared to be in unison with Mr. Ponda and Dr. Chandrachud that the power to quash the FIR or charge-sheet being of extraordinary nature the same would not be available to the Court of Session under the Code.

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34 (2015) 6 SCC 287

35 AIR 1964 SC 358

65. Mr. Rao submitted that the respondents being the public servants were entitled to protection envisaged by the Maharashtra Amendment to Section 156(3) of the Code. In the absence thereof, the learned Magistrate could not have ordered investigation under Section 156(3). Such jurisdictional bars, according to Mr. Rao, must entail the consequence of setting aside of all the proceedings consequential to an order which suffers from grave jurisdictional defect.

[F] CONSIDERATION :

66. The aforesaid submissions now fall for consideration.

Statutory Scheme :

67. Section 156 of the Code which is subsumed under Chapter XII of the Code titled "Information to the Police and their powers to investigate" reads as under :

> **"156. Police Officer's power to investigate cognizable case. -** (1) Any Officer in charge of a police station may, without the order of a Magistrate, investigate any cognizable case which a Court having jurisdiction over the local area within the limits of such station would have power to inquire into or try under the provisions of Chapter XIII.
>
> (2) No proceeding of a Police Officer in any such case shall at any stage be called in question on the ground that the case was one which such officer was not empowered under this section to investigate.
>
> (3)Any Magistrate empowered under Section 190 may

order such an investigation as above-mentioned."

68. Under Section 2(h) of the Code, investigation includes all the proceedings under the Code for collection of evidence conducted by a police officer or by any person (other than a Magistrate) who is authorized in this behalf. Investigation is for the purpose of collecting evidence and pertains to a stage before the "inquiry" and "trial". The provisions contained in Chapter XII deal with the commencement, conduct and completion of investigation. Section 154 provides, inter alia, that the officer in charge of a police station shall reduce into writing every information relating to the commission of a cognizable offence given to him orally and every such information, if given in writing, shall be signed by the person giving it and substance thereof shall be entered into in a book to be kept by such officer in such form as the State Government may prescribe in this behalf. If the person is aggrieved by the inaction on the part of the police to register FIR under Section 154(1) of the Code, such person can approach the Superintendent of Police under Section 154(3) of the Code by an application in writing.

69. Ordinarily, where even the said recourse to the superior police officer does not yield the desired result of registration of the FIR or in a given case, despite registration of the FIR, effective or proper investigation is not conducted, the aggrieved person can approach a Magistrate under Section 156(3) of the Code.

70. The expression "as above-mentioned" used in sub-section (3) of

Section 156, refers to Section 156(1) which contemplates investigation by the officer in charge of the police station. In effect, sub-section (3) of Section 156 confers a supervisory power on the Magistrate over the investigating agency where it is found that the investigating agency has not registered the FIR, even though a cognizable offence is disclosed or despite having registered the FIR, has not conducted proper and effective investigation.

[G] Nature of the Power under Section 156(3)

71. The nature of the power exercised by the Magistrate under Section 156(3) is of material significance. In a sense, the Magistrate directs the investigating agency to perform its statutory duty under sub-section (1) of Section 156 of the Code. A direction for registration of the FIR and conduct of investigation partakes the character of enforcing the statutory duty to register the FIR and carry out investigation which is a plain duty of the police under Section 154 read with Section 156(1) of the Code.

72. The nature of the power exercised by a Magistrate under Section 156(3) of the Code came up for consideration before a three bench Judge of the Supreme Court in the case of **Devarapalli Lakshminarayana Reddy and Ors. V/s. V. Narayana Reddy and Ors.**[36] The Supreme Court enunciated that an order made under Section 156(3) is in the nature of a peremptory reminder or intimation to the police to exercise their plenary powers of investigation under Section 156(1). Such an investigation embraces the entire continuous process which begins with the collection of evidence under Section

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36(1976) 3 SCC 252

156 and ends with a report or chargesheet under Section 173. (We are mindful of the fact that the decision in the case of **Devarapalli Lakshminarayana Reddy and Ors. (supra)**, was commented upon and deviated from by another three Judge Bench of the Supreme Court in the case of **Vinubhai Haribhai Malaviya and Ors. V/s. State of Gujarat and Anr.**[37], to which we will advert a little later.)

73. In the case of **Madhu Bala V/s. Suresh Kumar and Ors. (supra)** an order passed by the learned Magistrate under Section 156(3) directing registration of a case was assailed on the ground, inter alia, that the Magistrate could only direct investigation by police but had no power to direct registration of a case. Elucidating the nature of the power exercised by the Magistrate under Section 156(3), the Supreme Court enunciated that even if the Magistrate does not pass a direction to register a case, still in view of the provisions of Section 156(1) of the Code which empowers the police to investigate into a cognizable case and the Rules framed under the Indian Police Act, 1861, the police is duty bound to formally register a case and then investigate into the same. The Supreme Court ruled that where an order for investigation under Section 156(3) of the Code is to be made the proper direction to the police would be "to register a case at the police station treating the complaint as the first information report and investigate into the same."

74. In the case of **Mohd. Yusuf V/s. Afaq Jahan**[38] the Supreme Court

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37(2019) 17 SCC 1

38(2006) 1 SCC 627

expounded the nature of the jurisdiction exercised by the Magistrate under Section 156(3) of the Code in clear and explicit terms as under :

> "11. The clear position therefore is that any Judicial Magistrate, before taking cognizance of the offence, can order investigation under Section 156(3) of the Code. If he does so, he is not to examine the complainant on oath because he was not taking cognizance of any offence therein. For the purpose of enabling the police to start investigation it is open to the Magistrate to direct the police to register an FIR. There is nothing illegal in doing so. After all registration of an FIR involves only the process of entering the substance of the information relating to the commission of the cognizable offence in a book kept by the officer in charge of the police station as indicated in Section 154 of the Code. Even if a Magistrate does not say in so many words while directing investigation under Section 156(3) of the Code that an FIR should be registered, it is the duty of the officer in charge of the police station to register the FIR regarding the cognizable offence disclosed by the complainant because that police officer could take further steps contemplated in Chapter XII of the Code only thereafter." (emphasis supplied)

75. Referring to the aforesaid pronouncement, in the case of **Sakiri Vasu V/s. State of Uttar Pradesh and Ors.**[39] the Supreme Court culled out the legal position as under :

> "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

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39(2008) 2 SCC 409

> 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." (emphasis supplied)

76. **Vinubhai Haribhai Malaviya and Ors. (supra)**, referred with approval the aforesaid pronouncements in the cases of **Mohd. Yusuf V/s. Afaq Jahan (supra)** and **Sakiri Vasu V/s. State of Uttar Pradesh and Ors. (supra)** and further clarified that the decision in the case of **Devarapalli Lakshminarayana Reddy and Ors. (supra)** did not lay down the correct law in restricting the scope of exercise of power under Section 156(3) at a pre-cognizance stage as the definition of 'investigation' under Section 2(h) was not noticed. With regard to the power of the Magistrate under Section 156(3), in **Vinubhai Haribhai Malaviya and Ors. (supra)**, the Supreme Court observed as under :

> "25. It is thus clear that the Magistrate's power under Section 156(3) of the CrPC is very wide, for it is this judicial authority that must be satisfied that a proper investigation by the police takes place. To ensure that a "proper investigation" takes place in the sense of a fair and just investigation by the police - which such Magistrate is to supervise – Article 21 of the Constitution of India mandates that all powers necessary, which may also be incidental or implied, are available to the Magistrate to ensure a proper investigation which, without doubt, would include the ordering of further investigation after a report is received by him under Section 173(2); and which power would continue to enure in such Magistrate at all stages of the criminal proceedings until the trial itself commences. Indeed, even textually, the "investigation" referred to in Section 156(1) of the CrPC would, as per the definition of "investigation" under Section 2(h), include all proceedings for collection of evidence conducted by a police

officer; which would undoubtedly include proceedings by way of further investigation under Section 173(8) of the CrPC."

(emphasis supplied)

[H] Judicious Exercise of the power :

77. The power to order investigation under Section 156(3) though wide, is required to be exercised upon a careful consideration of the complaint. A direction for investigation cannot be issued as a matter of course. An order for investigation under Section 156(3) has serious consequences. Such a direction for investigation has the potentiality to affect the rights and personal liberty of the persons named in the complaint or who are subsequently arraigned as the suspects. Though Section 156(3) is briefly worded, yet necessity of application of mind is implicit in it as is the case with exercise of any judicial authority. By a catena of judgments, it has been, thus, emphasised that while exercising the power under Section 156(3), a Magistrate cannot act in a mechanical or casual manner.

78. In the case of **Anil Kumar and Ors. V/s. M.K.Aiyappa and Anr.,**[40] wherein an order for investigation under Section 156(3) was passed without considering the aspect of necessity of sanction, the Supreme Court adverted to the consideration required to be bestowed while exercising the power under Section 156(3) of the Code. The observations in paragraph 11 are instructive and, hence, extracted below :

"11. The scope of Section 156(3) CrPC came up for

40(2013) 10 SCC 705

> consideration before this Court in several cases. This Court in Maksud Saiyed Case[41] examined the requirement of the application of mind by the Magistrate before exercising jurisdiction under Section 156(3) and held that where a jurisdiction is exercised on a complaint filed in terms of Section 156(3) or Section 200 Cr.P.C., the Magistrate is required to apply his mind, in such a case, the Special Judge/Magistrate cannot refer the matter under Section 156(3) against a public servant without a valid sanction order. The application of mind by the Magistrate should be reflected in the order. The mere statement that he has gone through the complaint, documents and heard the complainant, as such, as reflected in the order, will not be sufficient. After going through the complaint, documents and hearing the complainant, what weighed with the Magistrate to order investigation under Section 156(3) Cr.P.C., should be reflected in the order, though a detailed expression of his views is neither required nor warranted. We have already extracted the order passed by the learned Special Judge which, in our view, has stated no reasons for ordering investigation."

79. In the case of **Priyanka Srivastava and Anr. (supra),** the Supreme Court, after a survey of the previous pronouncements, with a view to arrest the indiscriminate direction for investigation under Section 156(3) observed that, a stage has come where Section 156(3) CrPC applications are to be supported by an affidavit duly sworn by the applicant who seeks the invocation of the jurisdiction of the Magistrate. The Supreme Court, thus, gave the following directions :

> "30. In our considered opinion, a stage has come in this country where Section 156(3) CrPC applications are to be supported by an affidavit duly sworn by the applicant who seeks the invocation of the jurisdiction of the Magistrate. That apart, in an

41(2008) 5 SCC 668

appropriate case, the learned Magistrate would be well advised to verify the truth and also can verify the veracity of the allegations. This affidavit can make the applicant more responsible. We are compelled to say so as such kind of applications are being filed in a routine manner without taking any responsibility whatsoever only to harass certain persons. That apart, it becomes more disturbing and alarming when one tries to pick up people who are passing orders under a statutory provision which can be challenged under the framework of the said Act or under Article 226 of the Constitution of India. But it cannot be done to take undue advantage in a criminal court as if somebody is determined to settle the scores.

31. We have already indicated that there has to be prior applications under Sections 154(1) and 154(3) while filing a petition under Section 156(3). Both the aspects should be clearly spelt out in the application and necessary documents to that effect shall be filed. The warrant for giving a direction that an application under Section 156(3) be supported by an affidavit is so that the person making the application should be conscious and also endeavour to see that no false affidavit is made. It is because once an affidavit is found to be false, he will be liable for prosecution in accordance with law. This will deter him to casually invoke the authority of the Magistrate under Section 156(3). That apart, we have already stated that the veracity of the same can also be verified by the learned Magistrate, regard being had to the nature of allegations of the case. We are compelled to say so as a number of cases pertaining to fiscal sphere, matrimonial dispute/family disputes, commercial offences, medical negligence cases, corruption cases and the cases where there is abnormal delay/laches in initiating criminal prosecution, as are illustrated in Lalita Kumari[42] are being filed. That apart, the learned Magistrate would also be aware of the delay in lodging of the FIR." (emphasis supplied)

80. A Division Bench of this Court in the case of **Sayed Anwar**

42(2014) 2 SCC 1

Ahmed and Anr. V/s. The State of Maharashtra and Anr.[43] referred to the decisions in the cases of **Anil Kumar and Ors. (supra)** and **Priyanka Srivastava and Anr. (supra),** and emphasised that only because the complaint seeking an action under sub-section (3) of Section 156 discloses commission of a cognizable offence, the learned Magistrate should not mechanically exercise the power without application of judicial mind. The Division Bench referred to the provisions in the Criminal Manual regarding the nature of the affidavit to be filed in support of the complaint/application under Section 156(3) and issued the following directions :

> "25. To summarise,
>
> (a) While dealing with a Complaint seeking an action under Sub-Section (3) of Section 156 of Cr.P.C, the learned Magistrate cannot act mechanically. He is required to apply his mind to the contents of the Complaint and the documents produced along with the Complaint;
>
> (b) An Order passed on the said Complaint must record reasons in brief which should indicate application of mind by the Magistrate. However, it not necessary to record detailed reasons;
>
> (c) The power under Sub-Section (3) of Section 156 is discretionary. Only because on plain reading of the Complaint, a case of commission of cognizable offence is made out, an Order of investigation should not be mechanically passed. In a given case, the learned Magistrate can go in to the issue of the veracity of the allegations made in the Complaint. The learned Magistrate must also consider the other relevant aspects such as the inordinate delay on the part of the Complainant. The nature of the transaction and pendency of civil proceedings on the subject are also relevant considerations;
>
> (d) When a Complaint seeking an action under Sub-Section (3) of

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43Cri. WP No.924 of 2016

> Section 156 is brought before the learned Metropolitan Magistrate or the learned Judicial Magistrate, it must be accompanied by an affidavit in support as contemplated by the decision of the Apex Court in Priyanka Srivastava. The affidavit must substantially comply with the requirements set out in Chapter VII of the Criminal Manual and especially paragraphs 5 and 8 which are quoted above; and
>
> (e) Necessary averments recording compliance with Sub-Sections (1) and (3) of Section 154 of the CrPC should be incorporated with material particulars. Moreover, the documents in support of the said averments must filed on record."

81. The position in law which thus emerges is that the Magistrate is enjoined to examine the complaint / application seeking a direction for investigation under Section 156(3) from the point of view of the disclosure of a cognizable offence as well as the justifiability of a direction under Section 156(3). The Magistrate is expected to exercise judicious discretion. The order for investigation cannot passed in a mechanical or routine manner. The compliance of pre-requisite under Section 154(1) and 154(3) is required to be examined. In addition, in accordance with the direction of the Supreme Court in the case of **Priyanka Srivastava and Anr. (supra)**, such complaint/applicant must be supported by an affidavit which is in conformity with the legal requirements.

82. We have referred to aforesaid precedents and position in law, as the thrust of the submission on behalf of the accused in which WP Nos.2517 to 2520 of 2022 was that where an order under Section 156(3) is passed in violation of the aforesaid mandatory requirements, that order being illegal with

the setting aside of such order by the revisional Court, the subsequent steps in investigation must also go.

[I] Revisional Power :

83. Section 397 of the Code confers concurrent revisional jurisdiction on the High Court and Sessions Judge so as to satisfy itself or himself as to the correctness or legality or propriety of any finding, sentence or order recorded or passed or as to the regularity of any proceeding of any inferior Criminal Court. While calling for the record, the High Court or Sessions Judge is empowered to direct that the execution of any sentence or order be suspended and if the accused is in confinement, that he be released on bail and on his own bond pending the examination of the record.

84. Section 399 of the Code provides that in the case of any revision, the Sessions Judge may exercise all or any of the powers which may be exercised by the High Court under sub-Section (1) of Section 401. Section 401(1), in turn, provides that the High Court may in its discretion exercise any of the powers conferred on the Court of Appeal by Sections 386, 389, 390 and 391 or on a Court of Session by Section 307. Few restrictions on the exercise of the power are to be found in sub-sections (2) to (4) of Section 401. The High Court shall not convert a finding of acquittal into one of conviction. Where the appeal lies and no appeal is brought, no proceeding by way of revision shall be entertained at the instance of the party who could have appealed. Likewise, no order under Section 401 shall be made to the prejudice of the accused or other person unless he has had an opportunity of being heard either personally or by pleader

in his own defence.

85. From a plain reading of Sections 397, 398, 401(1) and 403 of the Code, it becomes evident that the exercise of revisional power is discretionary. These provisions do not confer any right on the litigant. The avowed purpose of conferring revisional power is preserving the power in the superior court to ensure that injustice is corrected. The enumeration of power with reference to Sections, in sub-Section (1) of Section 401, is not exhaustive of revisional power as it appears to be of wide amplitude. It cannot be controverted that the revisional power is, in the least, co-extensive with that of appellate power under Section 386 of the Code. Save and except the limitation prescribed in Sections 397 and 401 of the Code, the revisional court is empowered to exercise all the powers which are vested in it as a court of Appeal.

86. As considerable submissions were canvassed on the 'consequential' and 'incidental' orders which the revisional court may pass while setting aside the order under Section 156(3), it may be expedient to extract the relevant provisions contained in Section 386. It reads as under :

> "386. Powers of the Appellate Court – After perusing such record and hearing the appellant or his pleader, if he appears, and the Public Prosecutor, if he appears, and in the case of an appeal under S 377 or s 378, the accused, if he appears, the Appellate Court may, if it considers that there is no sufficient ground for interfering, dismiss the appeal, or may
>
> (a)……
>
> (b)……
>
> (c)…….
>
> (d)……..

(e) make any amendment or any consequential or incidental order that may be just or proper;"

87. Strenuous effort was made on behalf of the Interveners, especially Mr. Amit Desai, learned Senior Advocate, to persuade the Court to hold that an order of setting aside the underlying FIR and the consequent proceedings, after the revisional court sets aside the order under Section 156(3), pursuant to which such FIR was lodged, properly falls within the ambit of the orders to be passed by the revisional court under Section 401(1) read with Section 386(e), extracted above.

88. In contrast, Mr. Ponda, learned Senior Advocate would urge that the resort to the provisions contained in Section 386 to hold that the revisional court, especially the court of Session, is empowered to quash the underlying FIR and the consequent proceedings during the course of investigation would do violence to the scheme envisaged by the Code.

89. The submission that while exercising the revisional jurisdiction, the Court can only examine the legality, propriety and correctness of an order passed by the Magistrate under Section 156(3) and does not possess any inherent power to quash the FIR and the consequent investigation, was sought to be met on behalf of the Interveners by resorting to the principle of 'implied power' to do all that is necessary to give effect to the order passed by the revisional Court. Support was sought to be drawn from the afore-extracted provision contained in clause (e) of Section 386.

90. Investigation under the Code is the prerogative of the police. Courts cannot interfere with the investigation, save and except where the provisions of the Code permit exercise of supervisory power during the currency of investigation. The functions of the police and judiciary are considered complimentary. Often the observations of the Privy Council in the case of **The King Emperor V/s. Khawaja Nazir Ahmad**[44] are alluded to, to underscore the distinct spheres of authority of the police and the judiciary in the administration of criminal justice system.

91. In **the King Emperor V/s. Khawaja Nazir Ahmad (supra),** the Privy Council had observed that the functions of the judiciary and the police are complimentary, not overlapping and the combination of individual liberty with a due observance of law and order is only to be obtained by leaving each to exercise its own function, always, of course, subject to the right of the court to intervene in an appropriate case when moved under S. 491 of the Old Code to give directions in the nature of *habeas corpus*. The court's functions begin when a charge is preferred before it, and not until then. The Privy Council also emphasised that the inherent powers preserved under Section 561A of the old Code were not the one conferred by the Code, but inherent in the Court.

92. In the earliest pronouncement on the exercise of the power to quash the investigation, by resorting to the provisions contained in Section 439 of the old Code – the precursor to Section 397 of the Code, 1973, and Section 561A of the old Code- the precursor to Section 482 of the Code, 1973, in the

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44AIR 1945 PC 18 (Vol. 32)

case of **State of West Bengal V/s. S.N.Basak**[45] a three Judge Bench of the Supreme Court, after referring to the aforesaid observations in **the King Emperor V/s. Khawaja Nazir Ahmad (supra),** enunciated that police has the statutory right to investigate into the circumstances of any alleged cognizable offence without authority from a Magistrate and this statutory power of the police to investigate cannot be interfered with by the exercise of power under S. 439 or under the inherent power of the court under S. 561A of the old Code.

93. We hasten to clarify that we have referred to this judgment only for the purpose of appreciating the submission that an investigation can also be quashed in exercise of the revisional power. There is no qualm over the power of the High Court to quash FIR and/or investigation in deserving cases in exercise of extra ordinary writ jurisdiction or inherent power under Section 482 of the Code.

94. The submission on behalf of the accused that once an order under Section 156(3) passed by the Magistrate is interfered with in exercise of the revisional jurisdiction, then the underlying FIR and the consequent investigation and/or proceedings pursuant thereto, would also fall to the ground, appears attractive at first blush. However, this submission is required to be subjected to scrutiny in light of the scheme of the Code and the consequences which, the logical corollary sought to be urged on behalf of the accused, entail.

[J] Can the power to stay investigation and/or quash FIR and

45AIR 1963 SC 447

consequent proceedings be traced to statutory provisions ?

95. First, we will deal with the submission that such course of action finds legislative support in the provisions contained in Section 397 read with Section 401(1) and Section 386(e), extracted above. Whether the text of Section 397, especially the expression "direct that the execution of any sentence or order be suspended" supports an inference that since the revisional court would be empowered to stay the order directing the investigation under Section 156(3), as a necessary corollary, the revisional court would be justified in quashing FIR and the consequent proceedings once an order under Section 156(3) is set aside ?

96. We have noted above that, revisional jurisdiction is essentially discretionary. The latter part of sub-Section (1) of Section 397 of the Code, which empowers the revisional court while calling for the record to direct that the execution of any sentence or order be suspended and to release the accused on bail pending the examination of the record, is enabling in nature. Such power is a necessary concomitant of the revisional power to call for the record so as to examine the correctness, legality or propriety of any finding, sentence or order. By its very nature, the said power to grant an appropriate interim relief is conditioned by the circumstances in which the court is called upon to exercise its revisional jurisdiction. In a case where no appeal lies, the revisional court ought to have the jurisdiction to stay the execution and operation of the order impugned in the revision, lest the revision proceedings would become infructuous by sheer passage of time.

97. For instance, if the Court of Session upholds the order of conviction and sentence passed by a Magistrate, the revision under Section 397 is the only remedy. In that event, the revisional Court is empowered to suspend the sentence and release the accused/convict on bail during the pendency of the revision application. It would be superfluous to multiply such illustrations. The crux of the postulate is that the exercise of power to grant interim relief by invoking the latter part of Section 397 of the Code, hinges upon the nature of the order impugned in the revision, and cannot be construed as a residuary power supplanting other provisions of the Code.

98. If the submission on behalf of the accused is taken to its logical culmination, it could be urged that when an order under Section 156(3) is assailed in revision and, in the meanwhile, pursuant to the said order, the FIR is registered and the accused is arrested, the revisional Court would then be empowered to release the accused on bail, if the order of the Magistrate directing investigation under Section 156(3) is stayed.

99. On the one hand, such course would supplant the other provisions of the Code empowering the courts to direct the release of an arrested person on bail. On the other hand, it must be noted that the accused in such a case, cannot be said to be in confinement pursuant to the order of the Magistrate directing investigation under Section 156(3). Arrest of an accused would be in exercise of the power of arrest conferred on the police by the Code. Therefore, we find it rather difficult to accede to the submission on behalf of the accused, especially that of Mr. Karan Kadam, that the word "any" in the

expression "direct that the execution of any sentence or order be suspended" expands the scope of the revisional court so as to quash and set aside all the subsequent proceedings, in the event the order under Section 156(3) is interfered with.

[K] Resort to power to make consequential or incidental order :

100. This propels us to the consideration of the submissions based on the text of Section 386(e), which empowers the appellate Court to make any amendment or any consequential or incidental order, assiduously canvassed by Mr. Desai. The pivotal question that crops up for consideration is, can the expression "any consequential or incidental order" subsume in its fold the order of quashing the FIR or the resultant prosecution ?

101. In our view, the residuary clause (e) of Section 386, extracted above, vests the Appellate Court with the power to pass such orders as are essentially necessary or consequential to give effect to the orders that may be passed under clauses (a) to (d).

102. If in exercise of revisional jurisdiction, the accused who was convicted by the court below is acquitted, the order for cancellation of bail bond and discharge of sureties, or refund of fine deposited or return of the property can be said to be the orders which are consequential or incidental to the main order of acquittal. Similarly, in a case where the learned Magistrate had found the accused guilty on two counts, but imposed sentence on the first count and, in an appeal, the Appellate Court reverses the conviction on the first count and maintains the conviction on the second, the order of imposition

of the sentence on the second count, though the Magistrate had not imposed any sentence on the second count, would be necessary and consequential to give effect to the order of affirmance of conviction on the second count. The decisions of the Supreme Court in the case of **Jayaram Vithoba and Anr. V/s. State of Bombay**[46] and **Kantilal Chandulal Mehta V/s. State of Maharashtra and Anr.**[47] on which strong reliance was placed by Mr. Amit Desai, relate to the exercise of the power by the Appellate Court in the latter situation.

103. In the case of **Jayaram Vithoba and Anr. (supra)**, the Supreme Court observed that when a conviction is affirmed in appeal but no sentence had been awarded by the trial Magistrate., the award of a sentence is consequential on and incidental to the affirmance of the conviction, and it is a just and proper order to be passed under the law. Such power is preserved to the appellate court expressly by section 423(1)(d) of the old Code (precursor to clause (e) of Section 386) which enacts that it can "make any amendment or any consequential or incidental order that may be just or proper".

104. In the case of **Kantilal Chandulal Mehta (supra)**, the High Court had permitted amendment of the charge and directed the trial Court to render a finding on the altered charge while keeping the appeal against the conviction pending before the High Court. Upholding the said order, the Supreme Court held, the power of Appellate Court is set out in Section 423

46AIR 1956 SC 146

47(1969) 3 SCC 166

CrPC and invests it with very wide powers. A particular reference may be made to clause (d) of sub-Section (1) as empowering it even to make any amendment or any consequential or incidental order that may be just or proper.

105. We have seen that the direction to register FIR and carry out investigation to be made by the Magistrate is in the nature of reminder to the police to perform their statutory duty. The remit of direction for registration of the FIR and investigation, or for that matter, a proper and effective investigation under Section 156(3), is to enforce the statutory duty of the police under Section 156(1) of the Code. Thus, an order under Section 156(3) does nothing more than to call upon the investigating agency to perform its duty to register the FIR upon the disclosure of a cognizable offence and carry out the investigation in the manner ordained by law. This nature of the order passed under Section 156(3) is required to be kept in view while appreciating as to what flows from this express power and can be construed as "implied authority".

106. The fact that the police have statutory power to register the FIR and investigate into the matter cannot be lost sight of. In case of a cognizable offence, the police is enjoined by law to register the FIR and carry out an investigation without any authorization or warrant from the Magistrate. This power to register the FIR and carry out investigation does not owe the existence, source and sustenance to the order of Magistrate under Section 156(3). It is, therefore, necessary to examine whether the implied power, pressed into service on behalf of the Interveners impinges upon this statutory

authority of the police.

107. Mr. Desai, learned Senior Advocate would urge that the doctrine of implied power is well recognized. The doctrine is based on the principle contained in the legal maxim "*Quando lex aliquid concedit concedere videtur et illud sine quo res ipsa ease non potest",* which means that whoever grants a thing is deemed also to grant that without which the grant itself would be of no effect.

108. To bolster up this submission, Mr. Desai invited the attention of the Court to the decisions of the Supreme Court in the cases of **Bidi Leaves and Tobacco Merchants' Association, Gondia and Ors. V/s. State of Bombay and Ors.**[48] and **Savitri w/o Govind Singh Rawat V/s. Govind Singh Rawat**[49]. In the case of **Bidi Leaves and Tobacco Merchants' Association (supra),** the Supreme Court observed as under :

> "20…….In other words, the doctrine of implied powers can be legitimately invoked when it is found that a duty has been imposed or a power conferred on an authority by a statute and it is further found that the duty cannot be discharged or the power cannot be exercised at all unless some auxiliary or incidental power is assumed to exist. In such a case, in the absence of an implied power the statute itself would become impossible of compliance. The impossibility in question must be of a general nature so that the performance of duty or the exercise of power is rendered impossible in all cases. It really means that the statutory provision would become a dead-letter and cannot be enforced unless a subsidiary power is implied. This position in regard to the scope and effect of the doctrine of implied powers is not seriously in dispute before us.

48AIR 1962 SC 486

49(1985) 4 SCC 337

> The parties are at issue, however, on the question as to whether the doctrine of implied powers can help to validate the impugned clauses in the notification." (emphasis supplied)

109. In **Savitri w/o Govind Singh Rawat (Supra)**, the Supreme Court sustained the power of the Magistrate to award interim maintenance under Chapter IX of the Code by resorting to the doctrine of implied power, as such construction would advance the object of the legislation. The Supreme Court, inter alia, observed as under :

> "6……. In order to enjoy the fruits of the proceedings under Section 125, the applicant should be alive till the date of the final order and that the applicant can do in a large number of cases only if an order for payment of interim maintenance is passed by the Court. Every Court must be deemed to possess by necessary intendment all such powers as are necessary to make its orders effective. This principle is embodied in the maxim *"ubi aliquid concediture, conceditur et id sine quo res ipsa esse non potest"* (where anything is conceded, there is conceded also anything without which the thing itself cannot exist). [Vide Earl Jowitt's Dictionary of English Law, 1959 Edn. p. 1797]. Whenever anything is required to be done by law and it is found impossible to do that thing unless something not authorized in express terms be also done then that something else will be supplied by necessary intendment. Such a construction though it may not always be admissible in the present case however would advance the object of the legislation under consideration."
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> (emphasis supplied)

110. We are afraid the aforesaid pronouncements may not advance the cause of the submissions sought to be canvassed on behalf of the Interveners to the extent desired by Mr. Desai. As noted above, the power conferred on a Magistrate to direct investigation under Section 156(3) is not the only source

through which the investigating agency derives authority to investigate. On the contrary, the said direction is in the nature of a reminder to the investigating agency to perform its duty. That being the position in law, the scope of consequential or incidental order may not be so wide as to interdict the investigation or prosecution, which the revisional court otherwise does not possess.

[L] Analogy of consequential action / order :

111. As a second limb of the submission, Mr. Desai would urge that if the foundational premise of the FIR and the consequent investigation is dismantled by setting aside the order under Section 156(3), the consequent action must also fall to the ground. A very strong reliance was placed by Mr. Desai on the decision of the Supreme Court in the case of **State of Punjab V/s. Davinder Pal Singh Bhullar and Ors.**[50]. We must note that the facts in the said case were quite peculiar and unique. In the said case, the question of law before the Supreme Court was whether the High Court can pass an order on an application entertained after final disposal of the criminal appeal or even *suo motu* particularly, in view of the provisions of Section 362 of the Code and as to whether in exercise of its inherent jurisdiction under Section 482 of the Code, the High Court can ask a particular investigating agency to investigate a case following a particular procedure through an exceptionally unusual method which is not in consonance with the statutory provisions of CrPC.

112. The Supreme Court found that the order impugned therein was

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50(2011) 14 SCC 770

challenged to be a nullity on the grounds of judicial bias, want of jurisdiction in view of Section 362 of the Code, coupled with principle of constructive *res judicata* and the bench had not been assigned to entertain the Petition under Section 482 of the Code, and the entire judicial process appeared to have been drowned to achieve a motivated result. It is in the context of these peculiar facts, the Supreme Court held that the FIR was an inseparable corollary to the impugned orders which were a nullity. It is a settled legal proposition that if initial action is not in consonance with law, all subsequent and consequential proceedings would fall through for the reason that illegality strikes at the root of the order.

113. Mr. Desai also relied upon the decisions in the cases of **Badrinath V/s. Government of Tamil Nadu and Ors.**[51], **Chairman-cum-Managing Director, Coal India Ltd. and Ors. V/s. Ananta Saha and Ors.**[52] and **Devendra Kumar V/s. State of Uttaranchal and Ors.**[53] wherein, in the context of service matters, a principle was expounded that once the basis of a proceeding is gone, may be at a later point of time, by order of a superior authority, any intermediate action taken in the meantime, would also fall to the ground. This principle of consequential order which is applicable to judicial and quasi-judicial proceedings is equally applicable to administrative orders.

114. Can this analogy be extended to registration of FIR and the resultant prosecution, if any, where an order under Section 156(3) is set aside ?

51(2000) 8 SCC 395
52(2011) 5 SCC 142
53(2013) 9 SCC 363

While exploring an answer to the aforesaid question, the nature of the order under Section 156(3) assumes critical salience. We have noted that the registration of the FIR is not inexorably consequential to the order passed by the Magistrate under Section 156(3) of the Code. At the cost of repetition, it must be noted that the registration of the FIR by the police, upon a cognizable offence having been reported, is the statutory duty of the police. As a principle, therefore, we find it difficult to agree with the submission of Mr. Desai that once the order directing investigation under Section 156(3) is set aside, everything which follows must fall through.

115. If the wide spectrum of actions that may follow an order under Section 156(3) is kept in view, the aforesaid submission based on "consequential action" does not carry much conviction. A direction for investigation under Section 156(3) must lead to registration of the FIR. The police may enter into investigation, which, in turn, as we have noted above, comprises a wide array of activities primarily for the purpose of collection of evidence. Police may even arrest a suspect. The accused may then be remanded to police or judicial custody. In a given case, post completion of investigation, the chargesheet may be filed, and even the jurisdictional court might have taken cognizance of the offences before the revisional court could decide the legality, propriety and correctness of the order passed by the Magistrate directing investigation under Section 156(3) of the Code. Can all this be brought to a naught once the order passed by the Magistrate setting the criminal law in motion is set aside ?

116. The submission is required to be appreciated in the light of the fact that invariably there would an interval of time between the order directing investigation under Section 156(3) and the revisional Court taking up the revision application for hearing even on the aspect of interim reliefs. In view of the pronouncement of the Constitution Bench in the case of **Lalita Kumari V/s. Government of Uttar Pradesh and Ors.**[54], the SHO of the concerned Police Station is enjoined to register the FIR within 7 days, unless the case is one in which preliminary enquiry is permissible. By the time the revisional court takes up the matter, a multitude of actions might have taken place.

117. The aforesaid actions, it must be noted, would be in exercise of the statutory powers vested in the police or Magistrate. Consistent with the aforesaid consideration and reasoning, in our view, the power to quash the investigation and/or the resultant prosecution, if any, would be a repository of exercise of plenary writ jurisdiction under the Constitution of India or inherent power under Section 482 of the Code with a view to prevent abuse of the process of court or to secure the ends of justice. We are, therefore, of the considered view that the analogy of consequential order/action cannot be imported to the situation of the present nature.

[M] Nature of Illegality in the order under Section 156(3) :

118. This takes us to the submission of Mr. Ostwal premised on the distinction between the grounds on which an order passed under Section 156(3) can be interfered with by the revisional Court. Mr. Ostwal made an

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54 (2014) 2 SCC 1

effort to draw home the point that if the order under Section 156(3) is passed in breach of the statutory mandate or peremptory direction of the Supreme Court prescribing a particular course of action to be taken, before such an order could be passed or the cognizance is taken, then the order being ex-facie illegal, the revisional Court would be justified in quashing not only the order passed by the Magistrate, but also all the consequential actions. However, where the revisional court sets aside the order after entering into the merits of the matter, then to get the FIR and/or prosecution quashed, recourse to writ and/or inherent jurisdiction would be necessary.

119. The distinction propounded by Mr. Ostwal cannot be said to be inconceivable. The illegality in the order passed by the Magistrate may manifest in the form of procedural breach or want of compliance of the pre-requisite under the statute or a law declared by the Supreme Court. For instance, if the Magistrate passes an order under Section 156(3) without an affidavit having been filed in the manner ordained by **Priyanka Srivastava (supra),** the procedural irregularity would be writ large. Likewise, if an order is passed in respect of an act done by a public servant while acting in official capacity or in discharge of his official duties without the previous sanction envisaged under Section 197 of the Code, where the proviso to Section 156(3) introduced by the Maharashtra Amendment operates, the legality of the order under Section 156(3) can be questioned on that ground.

120. In the case of **Jacob Mathew V/s. State of Punjab and Anr.**[55]

55(2005) 6 SCC 1

the Supreme Court directed that a private complaint of medical negligence may not be entertained, unless the complainant has produced *prima facie* evidence before the Court in the form of a credible opinion given by another competent doctor to support a charge of rashness or negligence, on the part of the accused doctor. The investigating officer should, before proceeding against the doctor accused of rash or negligent act or omission, obtain an independent and competent medical opinion preferably from a doctor in government service qualified in that branch of medical practice. If a direction for registration of FIR without adhering to the aforesaid mandate is given, it may be assailed as being illegal for being in violation of the law declared by the Supreme Court. It can be conceivably urged that, in the aforesaid cases, when the order of the Magistrate is set aside, all the actions which have been taken, in the interregnum, must be declared illegal and non-est.

121. Mr. Ponda joined the issue by canvassing a submission that it is well settled principle of criminal jurisprudence that the illegality committed during the course of investigation does not affect the competence and jurisdiction of the Court. A strong reliance was placed on the observations of the Supreme Court in the case of **State of Haryana and Ors. V/s. Bhajan Lal and Ors.**[56] to lend support to the submission that the invalidity of the preceding investigation does not vitiate the resultant prosecution, unless miscarriage of justice has been caused thereby. In the case of **Bhajan Lal (Supra)**, in the context of the investigation having been carried out by an

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561992 Supp.(1) SCC 335

officer, who was not empowered under Section 5A of the Prevention of Corruption Act, 1947, the Supreme Court enunciated the position in law as under :

> "119. It has been ruled by this Court in several decisions that Section 5-A of the Act is mandatory and not directory and the investigation conducted in violation thereof bears the stamp of illegality but that illegality committed in the course of an investigation does not affect the competence and jurisdiction of the court for trial and where the cognizance of the case has in fact been taken and the case is proceeded to termination, the invalidity of the preceding investigation does not vitiate the result unless miscarriage of justice has been caused thereby See (1) H.N.Rishbud and Inder Singh V/s. State of Delhi[57]; (2) Major E.G.Barsay v/s. State of Bombay[58]; (3) Munna Lal V/s. State of Uttar Pradesh[59]; (4) S.N.Bose V/s. State of Bihar[60]; (5) Muni Lal V/s. Delhi Administration[61]; (6) Khandu Sonu Dhobi V/s. State of Maharashtra[62]. However, in Rishbud Case, and Muni Lal Case, it has been ruled that if any breach of the said mandatory proviso relating to investigation is brought to the notice of the court at an early stage of the trial, the court will have to consider the nature and extent of the violation and pass appropriate orders as may be called for to rectify the illegality and cure the defects in the investigation."
>
> (emphasis supplied)

122. The submission of Mr. Ponda, based on the prosecution not being completely vitiated by an illegality in investigation does not afford a

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57(1955) 1 SCR 1150
58(1962) 2 SCR 195
59(1964) 3 SCR 88
60(1968) 3 SCR 563
61 (1971) 2 SCC 48
62 (1972) 3 SCC 786

complete answer to the issue raised by Mr. Ostwal. The patent illegality in the order of the Magistrate passed under Section 156(3) of the Code, as is evident, relates to at a stage anterior to investigation. In a sense, the order passed by the Magistrate, in the circumstances, highlighted above, takes the colour of an order passed in breach of a jurisdictional condition, either prescribed by the statute or postulated by a precedent. Thus, we are afraid to accede to the submission that such an illegality in the order can be equated with an illegality committed during the course of investigation.

[N] Extent of interference by the Revisional Court :

123. To what extent, can the revisional court intervene in an order passed under Section 156(3) of the Code, which suffers from such an illegality, is the moot question ? In such a scenario, the submission that since the initial order passed by the Magistrate suffers from a patent illegality, every thing which has been done pursuant to such order must go, appears alluring. However, the instances of illegalities, which we have adverted to, by way of illustration, may not be susceptible for determination in black and white. Cases may arise which are conditioned by the peculiar facts. For instance, it could be urged that though an affidavit is filed in conformity with the mandate of **Priyanka Srivastava (supra)**, yet the affidavit does not conform to the necessary requirements. Such a contention would bring in an element of factual determination. Likewise, whether there was necessity of sanction, as envisaged by the proviso to Section 156(3) of the Code, introduced by the Maharashtra Amendment, would again be rooted in thickets of facts of the

given case. Therefore, it may not be advisable to lay down an absolute proposition that when revisional court interferes with the order passed under Section 156(3) on the ground of patent illegalities, as illustrated above, all the subsequent actions must fall through.

124. In our view, the stage at which the revisional Court interferes with the order under Section 156(3) assumes critical salience and the correct approach would be the one that allows the revisional court to exercise the discretionary jurisdiction in such manner as is warranted by the facts of the case even where the order suffers from a jurisdictional error.

125. To equip the revisional court to exercise the discretion in a correct manner, it may be advantageous for the revisional court to ascertain whether, pursuant to the direction of the Magistrate, FIR has, in fact, been registered. Two situations are conceivable : pre and post-registration of FIR pursuant to the order by the Magistrate.

126.

(a) If the FIR is yet not registered, an interim order passed by the revisional court, staying effect and operation of the impugned order under Section 156(3), will have full play and the investigating agency cannot proceed to register the FIR and enter into investigation lest the order passed by the revisional court would be denuded of the meaning and content.

(b) Such an interim order before the registration of the FIR will operate with full force and vigor, irrespective of the nature of the infirmity in the impugned order which weighed with the revisional court to stay such an

order.

(c) On the other hand, if the FIR has already been registered, before the revisional court passes an interim order, then the nature of the infirmity in the impugned order may become relevant.

(d) If the revisional court finds that the impugned order suffers from jurisdictional error, (of the nature referred to in Para Nos.119, 120 and 122 above), in our considered view, the revisional court must be construed to have the power to stay further proceedings pursuant to the registration of the FIR if the matter is still at the stage of investigation.

(e) We hasten to add that while passing such an order of stay of the proceedings at the stage of investigation, the revisional Court ought to record reasons which weighed with the court to hold that there appears a jurisdictional error in passing an order under Section 156(3) of the Code and thereupon, in terms, direct that the further proceedings be stayed.

(f) However, where the investigation culminates into lodging of the chargesheet and/or cognizance has been taken by the jurisdictional court, the interim order or final order passed by the revisional court setting aside the order passed by the Magistrate under Section 156(3), will not have the effect of quashing the resultant prosecution.

127. We are unable to persuade ourselves to agree with the submission of Mr. Desai that the view that after FIR is registered revision is not an efficacious remedy, would render the statutory remedy of revision redundant. The order passed by the revisional Court setting aside a direction for

investigation, even after registration of the FIR, cannot be said to be bereft of any utility. If such an order is passed before the completion of investigation, the investigating agency may take the same into account in determining the course the investigation shall culminate into. If such an order is passed, post lodging of the chargesheet, the jurisdictional Magistrate may have the benefit of the said order at the stage of taking cognizance or during the course of the inquiry, as envisaged by the Code. The High Court may also have due regard to the order of the revisional Court while considering the prayer for quashing the FIR and/or prosecution in exercise of writ or inherent jurisdiction.

128. The conspectus of aforesaid discussion is that in our view, the decision of the Division Bench in the case of **Kailash Dattatraya Jadhav (supra)**, that in a case where on the basis of an order under sub-Section (3) of Section 156 of the Code, FIR is registered, the remedy of revision under the Code, is not an efficacious remedy, lays down the correct position in law.

[O] ANSWERS

129. We are, therefore, inclined to answer question (i) in the negative.

As regards question (ii), in our view, the revisional Court can interfere with an order under Section 156(3) at the stage and to the extent indicated in paragraph 126 above.

The Reference is answered accordingly.

130. Before parting with the judgment, we place our appreciation for the invaluable assistance rendered by the learned Senior Advocates and the learned Counsel for the parties.

131. The Petitions be now placed before the respective Benches for decision in accordance with law.

(Revati Mohite Dere, J.)

(N.J.Jamadar, J.)

(Sharmila U. Deshmukh, J.)