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Permission of Magistrate – A Sine Qua Non under Section 173(8) of the Cr.P.C

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ABSTRACT

Investigating intensely, leading fairly without unduly favouring anyone, analysing and acting, constitute justice

-Thiruvalluvar, a renowned Tamil philosopher

A charge-sheet is ordinarily filed as a final report after the investigation is over. However, this was creating problems as the police often found further evidence after the filing of charge-sheet, but the courts were reluctant to accept the same once they took cognizance of the matter. Therefore, the need for amendment was felt and Section 173 (8) was introduced, which enabled the investigating agency to file further investigation. The Article explores the four significant aspects of Sec.173 (8) of C.r.P.C. First segment elucidates the procedure which is to be followed by the Magistrate on submission of Charge sheet, Second deals with the scepticism between “further investigation” and “Reinvestigation” under the said provision. Next part clarifies the issue relating to the prior permission of Magistrate by the investigating officer before proceeding with “further investigation”. And last part contains the recent developments formulated under Sec. 173(8) through the landmark judgement of Vinubhai Haribhai Malaviya.

I. INTRODUCTION

The erstwhile Code of Criminal Procedure, 1898 did not embrace a provision for the police with respect to further investigate in respect of an offence after a charge sheet under Section 173 (2) has been sent to the Magistrate. So, the Forty-First Law Commission Report³ recommended the insertion of sub-section (7) to Section 173 of the code, 1898 for the reasons that even after filing a police report, the police officer may come across new evidences with respect to the guilt or the innocence of the accused and that courts have often construed that once a charge sheet has been sent, the police cannot further proceed with the investigation. Therefore, to overcome such obstacles this provision was enacted empowering the police

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³ Ministry of Law, 41st Law Commission Report, vol.1, Sept. 1969.

officer to further investigate and submit the additional evidence in order to further the ends of justice. Further, the Article explores the four significant aspects of Sec.173 (8) of C.r.PC. First segment elucidates the procedure which is to be followed by the Magistrate on submission of Charge sheet, Second deals with the scepticism between “further investigation” and “Reinvestigation” under the said provision. Next part clarifies the issue relating to the prior permission of Magistrate by the investigating officer before proceeding with “further investigation”. And last part contains the recent developments formulated under Sec. 173(8) through the landmark judgement of **Vinubhai Haribhai Malaviya**.

II. PROCEDURE TO BE FOLLOWED BY LEARNED MAGISTRATE ON SUBMISSION OF CHARGE-SHEET

The Hon’ble Apex Court in the celebrated judgment of *Bhagwant Singh v. Commissioner of Police*⁴ highlighted three alternatives available to the Magistrate once the charge-sheet has been filed by the investigating officer before him.

- Either he may accept the report and drop the proceeding, or
- He may disagree with the report believing that there is sufficient ground for proceeding further through taking cognizance of the offence and issue process, or
- He can order further investigation to be made by the police under Section 156(3) of the code.

Further, in the case of *State of Bihar v. J.A.C. Saldanha*⁵, the court had discussed about the power of magistrate by taking the view that sec 156 (3) of the code which deals with the power of the Magistrate to direct further investigation is clearly a sovereign power and does not stand in conflict with the power of the State Government under Section 3 of the Indian Police Act which empowers the state government to direct further investigation into the case on the ground that the Power to direct further investigation is completely different from the procedure of investigation and matter related to the competency.

Therefore, it is clear that the power conferred upon the Magistrate under Section 156(3) of the code can be exercised by the Magistrate even after submission of a report by the investigating officer and it does not in any way affect the power of the investigating officer to further investigate even if the report has been submitted as provided in Section 173(8) of the code.

⁴ Bhagwant Singh v. Commr. of Police, (1985) 2 S.C.C. 537.

⁵ State of Bihar v. J.A.C. Saldanha, (1980) 1 S.C.C. 554.

III. “FURTHER INVESTIGATION” WITHIN SEC.173 (8)

Section 173(8) Cr.P.C deals with two important aspects: firstly, further investigation can be concluded in an offence wherein charge sheet under Section 173(2) has been sent to the Magistrate, and secondly, the officer in charge has power to obtain further evidence, oral or documentary, to forward to the Magistrate. In the ordinary sense, it is crystal clear that the police has the right to further investigate but not reinvestigate under sub-section (8) of Section 173 of the Code after filing the charge sheet under sub-section (2)⁶.

In view of the misconception that whether further investigation can be interpreted as reinvestigation or fresh investigation, it is necessary to differentiate between the two terminologies. ‘Further’ means additional to what already exists or has already taken place, been done, whereas on the other front reinvestigation means a repeat of an earlier investigation. Moreover, “Further investigation” is interpreted as a power vested with the executive through which an investigating officer obtains further evidence after the charge sheet has been filed⁷. Therefore, “Further investigation” is the extension of the primary investigation and not a reinvestigation to be started ab initio destroying the earlier investigation altogether⁸.

Furthermore, The reliance can also be placed upon the judgment of *Mithabhai Pashabhai Patel v. State of Gujarat*⁹ wherein the Hon’ble Apex Court observed that a superior court in exercise of its constitutional power under Articles 226 and 32 of the Constitution of India could order a “State” to get an offence investigated and/or further investigated by a different agency. However, Direction of a reinvestigation, being forbidden in law, no superior court would ordinarily issue such a direction. Thus it is clear that a distinction exists between a reinvestigation and further investigation.

IV. EARLIER POSITION OF LAW

- **PRIOR PERMISSION OF MAGISTRATE NOT A PREREQUISITE FOR FURTHER INVESTIGATION**

In the year 1989, the Hon’ble Apex court in the *State of Bihar and others vs. A.C Saldhana and others*¹⁰ settled the controversy relating to the prior permission of Judicial Magistrate under Sec.173 (8) by observing that there is separation of powers between the executive and

⁶ Ramachandran v. R. Udhayakumar, (2008) 5 S.C.C. 413.

⁷ Vinay Tyagi v. Irshad Ali, (2013) 5 S.C.C. 762.

⁸ Id. at 4.

⁹ Mithabhai Pashabhai Patel v. State of Gujarat, (2009) 6 S.C.C. 332.

¹⁰ Id. at 2.

judiciary and it is a statutory right of the police to further investigate without acquiring the permission from the judicial authorities. Further this principle was followed in the case of *State of A.P vs. A S Peter*¹¹ wherein the court has taken the view that the right of the police to further investigate is not exhausted and he can exercise such right as necessary when new evidences comes into light. Therefore, it is clear that prior permission of the magistrate is not essential for the reason being that even if the power is misused by the police officer, the Magistrate has the final discretion concerning the further action.

V. THE CHANGES BROUGHT THROUGH VINUBHAI'S CASE

- **PRIOR APPROVAL OF MAGISTRATE/COURT IS SINE QUA NON FOR FURTHER INVESTIGATION**

Recently, the Hon'ble Supreme court in the landmark judgement of *Vinubhai Haribhai Malaviya & Ors. v. State of Gujarat and Anr*¹² has overruled plethora of judgements & affirmed the judgement in *Vinay Tyagi v. Irshad Ali*¹³, on three important grounds:

- Firstly, Article 21 authorizes the Magistrate with all the powers necessary or implied, to ensure a fair investigation, which ultimately would include the ordering of further investigation even after the submission of report under Section 173(2) of the code until the trial commences.
- Secondly, The “investigation” stated in Section 156(1) of the code would in accordance with the definition of “investigation” under Section 2(h), contains all proceedings for gathering of evidence supervised by a police officer including proceedings by way of further investigation under Section 173(8) of the Code. Therefore, the Magistrate vested under Section 156 (3) of the code to order investigation, shall also be authorized to order further investigation under Section 173(8) of the code.
- Lastly, pertaining to the “*Doctrine of contemporanea exposition*” (Practice developed under a statute is indicative of the meaning ascribed to its words by contemporary opinion) and the “*Doctrine of precedent*” (Judges while deciding cases, must pay proper respect to past judicial decisions) the court held that the prior leave of the court to conclude “further investigation” or to file a “supplementary report” is a prerequisite under Section 173(8) of the Code.

¹¹ State of A.P. v. A.S. Peter, (2008) 2 S.C.C. 383.

¹² Vinubhai Haribhai Malaviya & Ors. vs. State of Gujarat and Anr, (2019) S.C.C. 1346.

¹³Id. at 4.

Also in the case of ***Bikash Ranjan Rout v. State (NCT of Delhi)***¹⁴, the court provided further clarity by stating that the investigating officer should submit a suitable application before the learned Magistrate for further investigation in exercise of powers under Section 173(8) of the code.

VI. CONCLUSION

It is evident that though there is no explicit mention in the provisions of Section 173(8) of the Code to conduct “further investigation” with the leave of the court, the investigating agencies assumed it as a legal practice to seek prior approval of the courts to conduct “further investigation” and file “supplementary report” with the leave of the court. Further, in the words of Thiruvalluvar, a renowned Tamil philosopher ***“Investigating intensely, leading fairly without unduly favouring anyone, analysing and acting, constitute justice”***. Thus, pertaining to his wisdom, it can be concluded that to provide fair investigation which is free from extraneous or political influences, it is the duty of the investigating agency and the court to exercise such power with utmost care to attain the ends of justice. Further, the power of the Magistrate to direct “further investigation” is a momentous power which has to be exercised sparingly, in exceptional cases.

¹⁴ *Bikash Ranjan Rout v. State (NCT of Delhi)*, (2019) 5 S.C.C. 542.