2016 1 Crimes(HC) 69;

BOMBAY HIGH COURT
A.B. Chaudhari and Indira K. Jain, JJ.
Avinash—Petitioner
versus
State of Maharashtra & Anr.—Respondents
Criminal Writ Petition No.159 of 2014
Decided on 21.10.2015

Criminal Procedure Code, 1973 — Section 156(3) and 202 — Order directing Police to make investigation — Question whether order made by Magistrate u/s 156(3) is an interlocutory order — Investigation pursuant to order u/s 156(3) CrPC is not controlled by Magistrate and Magistrate has further nothing to do and proceedings u/s 156(3) CrPC gets terminated — Order u/s 156(3) CrPC is not interlocutory order but an order in nature of a final order — Such order would be revisable under revisional powers of Sessions Court or High Court.(Parss 11 & 14)

Result: Writ Petitions disposed of.

Dr. Shriram Mukundrao Kalyankar v. State of Maharashtra, (2015 ALL MR (Cri) 2484). (Para 3)
Devarapalli Lakshminarayana Reddy & others v. V. Narayana Reddy & others, (AIR 1976 SC 1672). (Para 7)
Suresh Chand Jain v. State of M.P. & another, (2001) 2 SCC 628: [2001] 1 Supreme 129 / [2001] 1 Crimes (SC) 171 . (Para 8)
Laxminarayan Vishwanath Arya v. State of Maharashtra & others, (2007 (5) Mh.L.J. 7). (Para 9)
M.C. Abraham & others v. State of Maharashtra & others, (2003 Bom.C.R. (Cri), 650 (SC). (Para 9)
Father Thomas v. State of U.P. & another, 2011 Cri.L.J. 2278. (Para 10)
Dharmeshbhai Vasudevbhai & others v. State of Gujarat & others, (2009) 6 SCC 576: [2009] 2 Crimes(SC) 369 / [2009] 3 Supreme 826. (Para 12)
B.S. Khatri v. State of Maharashtra & another, (2004 (1) Mh.L.J. 747). (Para 13)

CRIMINAL PROCEDURE CODE : S.156(3), S.202

IMPORTANT POINT
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.

JUDGMENT

A.B. Chaudhari, J.—The question that falls for consideration before this Court is as under:

"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 ?

2. The question has arisen for consideration as challenge to the order made by the Magistrate u/s 156(3) of the Code of Criminal Procedure, 1973 (hereinafter referred to as the 'Code' for brevity), has been raised in these matters either by way of Criminal Writ Petitions under Articles 226 and 227 of the Constitution of India or u/s 482 of the Code with the submission that there is no remedy of filing revision either before the Sessions Court or this Court since the order u/s 156(3) would be an interlocutory order.

3. The learned counsel for the applicants / petitioners relied on the decision in the case of Dr.Shriram Mukundrao Kalyankar v. State of Maharashtra (2015 ALL MR (Cri) 2484). and it is submitted that it is held by the learned Single Judge of this Court in paragraph nos.4 and 5 of the said decision that revision challenging the order u/s 156(3) of the Code is not maintainable. We have perused the reasoning in paragraph nos.4 and 5 of the said judgment and we find that the reason assigned is that such an order u/s 156(3) of the Code was not an order issuing process but only an order issuing directions for investigation. There is no other reason given for holding that the revision was not maintainable.

4. Section 156 in entirety reads thus:

"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 abovementioned."

5. Section 202 Subsection (1) of the Code reads thus:

"202.Postponement of issue of process :

(1) Any Magistrate, on receipt of a complaint of an offence of which he is authorised to take cognizance or which has been made over to him under section 192, may, if he thinks fit, postpone the issue of process against the accused, and either inquire into the case himself or direct an investigation to be made by a police officer or by such other person as he thinks fit, for the purpose of deciding whether or not there is sufficient ground for proceeding:

Provided that no such direction for investigation shall be made,—

(a) where it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Session; or

(b) where the complaint has not been made by a Court, unless the complainant and the witnesses present (if any) have been examined on oath under section 200."

(emphasis supplied)

6. Section 156(3) of the Code is in Chapter XII while Section 200, including Section 202, falls in Chapter XV.

7. In the case of Devarapalli Lakshminarayana Reddy & others v. V. Narayana Reddy & others (AIR 1976 SC 1672) a three Judges Bench of the Apex Court held thus in paragraph no.17 as under:

"17. Section 156(3) occurs in Chapter XII, under the caption: "Information to the Police and their powers to investigate"; while Section 202 is in Chapter XV which bears the heading "Of complaints to Magistrates". The power to order police investigation under Section 156(3) is different from the power to direct investigation conferred by Section 202(1). The two operate in distinct spheres at different stages. The first is exercisable at the precognizance stage, the second at the postcognizance stage when the Magistrate is in seisin of the case. That is to say in the case of a complaint regarding the commission of a cognizable offence, the power under Section 156(3) can be invoked by the Magistrate before he takes cognizance of the offence under Section 190(1)(a). But if he once takes such cognizance and embarks upon the procedure embodied in Chapter XV, he is not competent to switch back to the precognizance stage and avail of Section 156(3). It may be noted further that an order made under subsection (3) of Section 156, 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 156 and ends with a report or chargesheet under Section 173. On the other hand Section 202 comes in at a stage when some evidence has been collected by the Magistrate in proceedings under Chapter XV, but the same is deemed insufficient to take a decision as to the next step in the prescribed procedure. In such a situation, the Magistrate is empowered under Section 202 to direct within the limits circumscribed by that section, an investigation "for the purpose of deciding whether or not here is sufficient ground for proceeding". Thus the object of an investigation under Section 202 is not to initiate a fresh case on police report but to assist the Magistrate in completing proceedings already instituted upon a complaint before him."

8. The Supreme Court then further clarified the position about the role of the Police Officer upon passing of the order u/s 156(3) of the Code in paragraph nos.8, 9 and 10 of the decision in the case of Suresh Chand Jain v. State of M.P. & another, (2001) 2 SCC 628: [2001] 1 Supreme 129 / [2001] 1 crimes (SC) 171 as under :

"8. The investigation referred to therein is the same investigation the various steps to be adopted for it have been elaborated in Chapter XII of the Code. Such investigation would start with making the entry in a book to be kept by the officer-in-charge of a police station, of the substance of the information relating to the commission of a cognizable offence. The investigation started thereafter can end up only with the report filed by the police as indicated in Section 173 of the Code. The investigation contemplated in that Chapter can be commenced by the police even without the order of a Magistrate. But that does not mean that when a Magistrate orders an investigation under Section 156(3) it would be a different kind of investigation. Such investigation

must also end up only with the report contemplated in Section 173 of the Code. But the significant point to be noticed is, when a Magistrate orders investigation under Chapter XII he does so before he takes cognizance of the offence.

9. But a Magistrate need not order any such investigation if he proposes to take cognizance of the offence. Once he takes cognizance of the offence he has to follow the procedure envisaged in Chapter XV of the Code. A reading of Section 202(1) of the Code would convince that the investigation referred to therein is of a limited nature. The Magistrate can direct such an investigation to be made either by a police officer or by any other person. Such investigation is only for helping the Magistrate to decide whether or not there is sufficient ground for him to proceed further. This can be discerned from the culminating words in Section 202(1) i.e. or direct an investigation to be made by a police officer or by such other persons as he thinks fit, for the purpose of deciding whether or not there is sufficient ground for proceeding. This is because he has already taken cognizance of the offence disclosed in the complaint, and the domain of the case would thereafter vest with him.

10. The position is thus clear. 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 complaint because that police officer could take further steps contemplated in Chapter XII of the Code only thereafter."

9. From the two decisions quoted above, it is clear that after making of the order u/s 156(3) of the Code, it is the duty of the officer-in-charge of the Police Station to register FIR regarding cognizable offence disclosed by the complaint and then to proceed to make investigation, which would end up only with the report contemplated in Section 173 of the Code. It is noteworthy that the Magistrate, after having made an order u/s 156(3) of the Code does not have any control on the manner of investigation, making of arrest of the accused or not etc. However, the investigation after completion would end up only with the report contemplated in Section 173 of the Code and it is on that report thereafter, the procedure contemplated by Section 173 of the Code or rather the power of the Magistrate would come into play. In other words, the order directing investigation made by the Magistrate in the proceeding u/s 156(3) of the Code would be final insofar as the Magistrate is concerned. The Supreme Court clearly made a distinction in relation to the power of the Magistrate u/s 202 (1) of the Code namely to direct an investigation to be made by a Police Officer or by such other person, is only for helping the Magistrate to decide whether or not there is sufficient ground for him to proceed further. Therefore, such a direction for investigation contemplated by Section 202(1) of the Code should not be confused with the direction to investigate u/s 156(3) of the Code and the same is independent having no relationship with the

order of investigation u/s 156(3) of the Code. The Full Bench of this Court in the case of Laxminarayan Vishwanath Arya v. State of Maharashtra & others, (2007 (5) Mh.L.J. 7) on the basis of the decision in the case of M.C. Abraham & others v. State of Maharashtra & others, (2003 Bom.C.R. (Cri), 650 (SC). stated thus in paragraph no.21 as under:

"21. The provisions of Section 41 of the Criminal Procedure Code, 1973, hereinafter referred to as "the Code", provides for arrest by a Police Officer without an order from a Magistrate and without a warrant. A distinct and different power under Section 44 of the Code empowers the Magistrate to arrest or order any person to arrest the offender. Under Section 44 of the Code, that power is vested in the Court of the Magistrate when an offence is committed in his presence. If the Legislature has taken care of providing such specific power under Section 44 of the Code, then there could be no reason for such a power not to be specified under the provisions of Chapter XII of the Code. In terms of Section 41, a police officer may arrest a person without a warrant or order from the Magistrate for any or all of the conditions specified in that provision. Language of this provision clearly suggested that the Police Officer can arrest a person without an order from the Magistrate. Thus, there appears to be no reason why on the strength of Section 156(3) of the Code, any restriction should be read into the powers specifically granted by the legislature to the Police Officer. Of course, freedom of investigation is the essence of these provisions but in order to suppress the mischief it is sufficiently indicated under different provisions of the Code that the arresting officer should exercise his power or discretion judiciously and should be free of motive. Some kind of inbuilt safeguard is available to the accused in the cases where the Magistrate directs investigation under Section 156(3) of the Code by taking recourse to the provisions of Section 438 of the Code by approaching the Court of Session or the High Court for such relief. Thus, during the course of investigation of a criminal case, an accused is not remediless and that would further buttress the above view taken by us."

The Full Bench also stated thus in paragraph nos.12 and 13 as follows:

"12. Another aspect is the case would be dependent on the construction of language under Section 156(3) of the Code. Though this provision does empower the Magistrate to order an investigation, the Legislature in its wisdom had extended no further power to the Magistrate to control or intercheck or stop or give direction to the mode of investigation. The scheme of the investigation thus postulate investigation uncontrolled by the Magistrate. This was also the view taken by the Supreme Court in S.N. Sharma v. Bipen Kumar Tiwari and Ors., 1970 (1) SCC 653 and State of Bihar v. J.A.C. Saldanha and Ors., 1980 (1) SCC 534.

13. Consistent is the view taken by the Court for decades now on this aspect of investigation of offence. These principles had pervaded effect on the mode and control of investigation by the investigating agency. These precepts have been relegated with variance."

10. The learned counsel for the parties have cited before us decision of the Full Bench of Allahabad High Court in the case of Father Thomas v. State of U.P. & another. 2011 Cri.L.J. 2278 We have perused the said decision and we think that the said decision is clearly distinguishable since the Full Bench of Allahabad High Court did not advert to the fact of termination of the proceedings u/s 156(3) of the Code after passing of the order by the Magistrate thereunder and thus the said proceeding ending into final order.

11. It is thus clear from the above that the investigation pursuant to the order u/s 156(3) of the Code is not controlled by the Magistrate and that was what was held by the Supreme Court in the case of S.N. Sharma v. Bipen Kumar Tiwari and State of Bihar v. J.A.C. Saldanha and Ors., as stated in the Full Bench judgment. To repeat, after making of order u/s 156(3) of the Code, the Magistrate has further nothing to do and the proceeding u/s 156(3) of the Code gets terminated. Nothing remains pending before the Magistrate after such order is made. Thus, despite termination of the proceeding u/s 156(3) of the Code of Criminal Procedure, 1973 and in the light of the principle 'ubi jus ibi remedium', the petitioners / applicants cannot be denied the statutory remedy of revision.

12. Learned counsel have further cited decision of the Supreme Court in Dharmeshbhai Vasudevbhai & others v. State of Gujarat & others. (2009) 6 SCC 576: [2009] 2 Crimes(SC) 369/ [2009] 3 Supreme 826. We quote paragraph nos.6 to 8 from this decision as under:

"6. It is well settled that any person may set the criminal law in motion subject of course to the statutory interdicts. When an offence is committed, a first information report can be lodged under Section 154 of the Code of Criminal Procedure (for short, 'the Code'). A complaint petition may also be filed in terms of Section 200 thereof. However, in the event for some reasons or the other, the first information report is not recorded in terms of subsection (1) of Section 156 of the Code, the magistrate is empowered under subsection (3) of Section 156 thereof to order an investigation into the allegations contained in the complaint petition. Thus, power to direct investigation may arise in two different situations (1) when a first information report is refused to be lodged; or (2) when the statutory power of investigation for some reason or the other is not conducted.

7. When an order is passed under subsection (3) of Section 156 of the Code, an investigation must be carried out. Only when the investigating officer arrives at a finding that the alleged offence has not been committed by the accused, he may submit a final form; On the other hand, upon investigation if it is found that a prima facie case has been made out, a chargesheet must be filed.

8. Interference in the exercise of the statutory power of investigation by the Police by the Magistrate far less direction for withdrawal of any investigation which is sought to be carried out is not envisaged under the Code of Criminal Procedure. The Magistrate's power in this regard is limited. Even otherwise, he does not have any inherent power. Ordinarily, he has no power to recall his order. This aspect of the matter has been considered by this Court in S.N. Sharma v. Bipen Kumar Tiwari & Ors. [(1970) 1 SCC 653], wherein the law has been stated as under :

"6. Without the use of the expression "if he thinks fit", the second alternative could have been held to be independent of the first; but the use of this expression, in our opinion, makes it plain that the power conferred by the second clause of this section is only an alternative to the power given by the first clause and can, therefore, be exercised only in those cases in which the first clause is applicable.

7. It may also be further noticed that, even in subsection (3) of Section 156, the only power given to the Magistrate, who can take cognizance of an offence under Section 190, is to order an investigation; there is no mention of any power to stop an investigation by the police. The scheme of these sections, thus, clearly is that the power of the police to investigate any cognizable offence is uncontrolled by the Magistrate, and it is only in cases where the police decide not to investigate the case that the Magistrate can intervene and either direct an investigation, or, in the alternative,

himself proceed or depute a Magistrate subordinate to him to proceed to enquire into the case. The power of the police to investigate has been made independent of any control by the Magistrate."

13. We thus find from the perusal of the scheme contained in the aforesaid two Chapters viz. XII and XV and in the light of above decisions that the order u/s 156(3) of the Code must be held to be not an interlocutory order, but an order in the nature of a final order. In the case of B.S. Khatri v. State of Maharashtra & another, (2004 (1) Mh.L.J. 747). a Division Bench of this Court held thus in paragraph nos.13, 17 and 19 and extracted portion from paragraph no.20 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.

17. The stage of cognizance would arise after the investigation report is filed and bar provided by Section 195 of the Code regarding taking of cognizance would be applicable thereafter. We need not therefore consider any of these decisions as they are on the merits of the case.

19. The Supreme Court has observed in the case of Rashmi Kumar (Smt.) v. Mahesh Kumar Bhada, (1997) 2 SCC 397 that the writ jurisdiction should be sparingly used. We would like to note verbatim what the Supreme Court has to say:

"It is well-settled legal position that the High Court should sparingly and cautiously exercise the power under Section 482 of the Code to prevent miscarriage of justice. In State of H.P. v. Prithi Chand two of us (K. Rama-swamy and S.B. Majmudar, JJ.) composing the Bench and in State of U.P. v. O.P. Sharma a threeJudge Bench of this Court, reviewed the entire caselaw on the exercise of power by the High Court under Section 482 of the Code to quash the complaint or the chargesheet or the first information report and held that the High Court would be loath and circumspect to exercise its extraordinary power under Section 482 of the Code or under Article 226 of the Constitution. The Court would consider whether the exercise of the power would advance the cause of justice or it would tantamount to abuse of the process of the court. Social stability and order require to be regulated by proceeding against the offender as it is an offence against the society as a whole. This cardinal principle should always be kept in mind before embarking upon the exercise of the inherent power vested in the Court."

It will be seen therefore that the writ jurisdiction has to be exercised very circumspectively.

20…..... ….. ….. …..

It will be seen that what is impugned before us is the order passed under Section 156(3) of the Code which directs investigation into the complaint by a particular wing of the police. What is going to be the outcome of that investigation is not known. Everything that can happen thereafter can be scrutinized and rescrutinized by judicial authorities mentioned in the Code and there is therefore no question of miscarriage of justice being caused by not quashing of the complaint and order."

Finally we quote paragraph no.31 as under :

"31. We have also noted above that several efficacious alternate statutory remedies under the Criminal Procedure Code are available to the petitioners to challenge the order under Section 156(3). Without availing them the petitioners have rushed before this court, claiming exercise of its extra ordinary 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."

14. 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 selfimposed 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.

15. The learned counsel for the parties have cited several decisions before this Court, but then we do not think that it is necessary to refer to them in the light of the discussion made by us above.

16. The learned counsel for the appearing parties in all these matters submitted that the power of this Court u/s 482 of the Code ought to be exercised by this Court since the proceedings impugned amount to abuse of process of the Criminal Court. It is in this context, we have heard the learned counsel for the parties and also seen the pleadings in these applications / petitions. We have carefully perused the pleadings and heard the learned counsel with respect to the documents on record and we find that the jurisdiction u/s 482 of the Code is not required to be exercised on the facts of these cases. It is a well settled legal position, as pointed out by us earlier, that the power u/s 482 of the Code is to be exercised sparingly. The facts and the documents in the instant case in all these cases show several disputed questions and the facets which require due investigation in the light of the documents and the other material on record. We have come to the conclusion that these are not the cases fit for exercising the inherent power u/s 482 of the Code and, therefore, we think that the applicants / petitioners can very well address the revisional Court on facts as well as on the questions of law with reference to documents etc. even for seeking intervention of the revisional Court for quashing the impugned orders. That being so, we hold that in none of these cases, the inherent power of this Court deserves to be exercised and,

therefore, keeping all the points open and in view of the fact that we have held that the revision would lie, we decline the request of the applicants / petitioners to exercise our power either u/s 482 of the Code or under Article 226 of the Constitution of India. In the result, we make the following order.

ORDER

a. Criminal Writ Petitions as well as the Criminal Applications are all disposed of holding that the applicants / petitioners in these applications / writ petitions are entitled to file revisions before the revisional Court to set up challenge in the revisions before the revisional Court. All the points raised in these applicatioins / writ petitions on facts as well as in law are kept open.

b. The revisional Court shall consider the issue of limitation in the light of Section 14 of the Indian Limitation Act sympathetically in the matter of condonation of delay in filing the revisions.

c. The applications / writ petitions in which interim orders have been made by this Court shall continue to operate for another four weeks from today.

d. There shall be no order as to costs in these matters.Writ petition disposed of