

DIFFERENT ASPECTS OF SECTION 173(8) Cr.P.C

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Introduction

Section 173(8) of CrPC deals with further investigation and supplementary report. In the old Code of Criminal Procedure, there was no identical provision to that of Section 173(8) of the Code of Criminal Procedure, 1973. The same is a newly added provision in the Code of Criminal Procedure, 1973. It was added on the recommendation of the Law Commission in its 41st Report that the right of the police to make further investigation should be statutorily affirmed.

In the 1898 Code, there was no provision prescribing the procedure to be followed by the police for fresh investigation, when fresh facts came to light, upon the submission of the police report and subsequent to taking cognizance by the Magistrate. There was, also, no express provision prohibiting further investigation by the police.

The said omission was sought to be supplied for the first time by a 2-Judge bench of the Madras High Court as early as in 1919 in '**Divakar Singh v. A. Ramamurthi Naidu AIR 1919 Mad 751**', where it was observed that: *"Another contention is put forward that when a report of investigation has been sent in under Section 173, Criminal P.C., the police has no further powers of investigation, but this argument may be briefly met by the remark that the number of investigations into a crime is not limited by law and that when one has been completed another may be begun on further information received"*.

After recognition of the right of the police to make repeated investigations under the old Code in the Diwakar Case (supra), a 3-judge bench of the Hon'ble Supreme Court in '**H.N. Rishbud v. State of Delhi AIR 1955 SC 196**', held that:- *"It does not follow, however, that the invalidity of the investigation is to be completely ignored by the Court during trial. When the breach of such a mandatory provision is brought to the knowledge of the Court at a sufficiently early stage, the Court, while not declining cognizance, will have to take the necessary steps to get the illegality cured and the defect rectified, by ordering*

such reinvestigation as the circumstances of an individual case may call for. Such a course is not altogether outside the contemplation of the scheme of the Code as appears from Section 202 under which a Magistrate taking cognizance on a complaint can order investigation by the police. Nor can it be said that the adoption of such a course is outside the scope of the inherent powers of the Special Judge, who for purposes of procedure at the trial is virtually in the position of a Magistrate trying a warrant case."

Some High Courts were also of the view that with the submission of a charge-sheet under Section 173, the power of the police to investigate into an offence comes to an end and the Magistrate's cognizance of the offence started. For instance, in '**State Vs. Mehar Singh & Ors.1974 CrI LJ 970**', a Full Bench of the High Court of Punjab and Haryana held that the police became functus officio once the Court took cognizance of an offence on the filing of a charge-sheet by the police and thereafter further investigation by the police was not permissible.

It was, however, observed that in light of the decision in H.N. Rishbud (supra), it would be open to the Magistrate to 'suspend cognizance' and direct the police to make further investigation into the case and submit a report.

The said inconsistency and incongruity in the judicial decisions was recognized by the Law Commission in its 41st Report (under Clause 14.23) and it was recommended that the right of the police to make further investigation should be statutorily affirmed. Accordingly, in the Criminal Procedure Code of 1973, Section 173(8), came to be introduced, which statutorily accoutered the police to undertake further investigation after submission of the final report under Section 173(2) of the Cr.P.C. Conspicuously, it still did not confer such powers on the Magistrate to direct further and/or fresh investigation after submission of the final report by the Police.

Scope

Section 173(8) of the Code of Criminal Procedure, 1973 provides:-

Nothing in this section shall be deemed to preclude further investigation in respect of an offence after a report under sub-section (2) has been forwarded to

the Magistrate and, where upon such investigation, the officer in charge of the police station obtains further evidence, oral or documentary, he shall forward to the Magistrate a further report or reports regarding such evidence in the form prescribed and the provisions of sub-sections (2) to (6) shall, as far as may be, apply in relation to such report or reports as they apply in relation to a report forwarded under sub-section (2).

Breaking the said provision it can be jolted down as under:

- (1) Further investigation can be done in respect of an offence wherein report under Section 173(2) has been forwarded to the Magistrate; and
- (2) During further investigation, the officer-in-charge has power
 - (a) to obtain further evidence, oral or documentary,
 - (b) to forward to the Magistrate, a further report or reports regarding such evidence in the form prescribed,
- (3) The provisions of sub-sections (2) to (6) shall, as far as may be, apply in relation to such further report or reports.

Sub-section (1) of Section 173 of CrPC provides that every investigation by the police shall be completed without unnecessary delay and sub-section (2) of Section 173 CrPC provides that as soon as such investigation is completed, the officer in charge of the police station shall forward to a Magistrate empowered to take cognizance of the offence on a police report, a report in the form prescribed by the State Government.

Under sub-section (2) of Section 173, a police report (Charge-sheet or Challan) is filed by the police after investigation is complete.

Sub-section (8) of Section 173, states that nothing in the section shall be deemed to preclude any further investigation in respect of an offence after a report under sub-section (2) has been forwarded to the Magistrate.

Thus, even where charge-sheet or Challan has been filed by the police under sub-section (2) of Section 173, the police can undertake further investigation in respect of an offence under sub-section (8) of Section 173 CrPC.

What is the meaning of word 'further investigation'

In '**Rama Chaudhary Vs. State of Bihar (2009) 6 SCC 346**', the Hon'ble Apex Court held '*further investigation within the meaning of provision of Section 173(8) CrPC is additional; more; or supplemental. "Further investigation", therefore, is the continuation of the earlier investigation and not a fresh investigation or reinvestigation to be started ab initio wiping out the earlier investigation altogether.*'

What are the alternatives before a Magistrate when a final report filed

Wherever a final report forwarded by case investigating police to a Magistrate under Section 173(2)(i) is placed before him, several situations may arise. The report may conclude that an offence appears to have been committed by a particular person and persons, and in such a case Magistrate may either:

- (1) accept the report and take cognizance of offence and issue process,
- (2) may disagree with the report and drop the proceeding or to take cognizance on the basis of report/material submitted by the investigation officer,
- (3) may direct further investigation under Section 156(3) and require police to make a report as per Section 173(8) of the Code.
- (4) may treat the protest complaint as a complaint, and proceed under Sections 200 and 202 CrPC.

What is the prime consideration for further investigation

As observed in '**Hasanbhai Valibhai Qureshi Vs. State of Gujarat (2004) 5 SCC 347**', the prime consideration for further investigation is to arrive at the truth and do real and substantial justice. The hands of investigating agency for further investigation should not be tied down on the ground of mere delay. In other words, the mere fact that there may be further delay in concluding the trial should not stand in the way of further investigation if that would help the court in arriving at the truth and do real and substantial and effective justice.

Whether further investigation can be ordered during or after trial?

On this question the pertinent case is '**J. Prabhavathiamma v. State of Kerala, (2008) 1 KLJ9**', wherein even though the trial had reached its fag end, it was held that further investigation under Section 173(8) CrPC can be conducted even at the post cognizance stage. So if further investigation can be conducted even after cognizance has been taken, there is no reason why it cannot be ordered during or after trial.

In '**Gudalure M.J. Cherian Vs. Union of India (1992) 1 SCC 397**', the Supreme Court directed CBI to take up the investigation of the case in Gajraula Nun's rape case. There the investigation was conducted by the State Police which had filed a charge-sheet also. In order to do justice between parties and to instill confidence in the public mind, the Supreme Court directed CBI to conduct the investigation.

In '**Kashmeri Devi Vs. Delhi Admn. 1988 Supp SCC 482**', on being convinced that the investigation by the Delhi Police against the accused police officers on a charge of murder by torture in police custody was partisan and was to shield the guilty policemen, the Supreme Court directed the trial court before which the charge-sheet had already been submitted, to exercise his powers under Section 173(8) CrPC to direct CBI to conduct a proper investigation in the matter.

In '**CBI Vs. Rajesh Gandhi (1996) 11 SCC 253**', even though a final report was filed before the Chief Judicial Magistrate, Dhanbad, the Central Government issued a notification under Section 5(1) read with Section 6 of the DSPE Act enabling CBI to conduct the investigation in the case. Though the action of the Central Government was successfully challenged before the Patna High Court, the Supreme Court taking note of the fact that the investigation by the local police was not satisfactory directed CBI to further investigate the offences in accordance with law.

In '**Gobardhan Das Vs. State of Orissa 2000 CrI LJ 1641**', it was also held that after the Magistrate has taken cognizance, reinvestigation by the police is not barred.

Moreover the trial court can order further investigation under Section 173(8) of CrPC on the basis of application preferred in this regard by the de facto complainant at any stage irrespective of the stage of pre-cognizance or post-cognizance stage, even after the commencement of the trial. Therefore, the contention raised by the respondents against the powers of the learned Magistrate in ordering further investigation after framing of charge is not sustainable.

In '**Sri Bhagwan Samardha Sreepada Vallabha Venkata Vishwanandha Maharaj Vs. State of A.P. (1999) 5 SCC 740**', the Hon'ble Supreme Court held that even after the court took cognizance of any offence on the strength of the police report first submitted, it is open to the police to conduct further investigation.

Whether further investigation can be done on the prayer of de-facto complainant in his/her protest petition?

In this connection, the ratio of the Hon'ble Kolkata High Court in the leading case of '**Sumanta Sinha v. State of W.B. SCC Online Cal 23010**', should be mentioned. In the abovementioned case, the Hon'ble High Court, Kolkata relying on the three-Judge Bench decision of the Hon'ble Supreme Court in '**Bhagwant Singh Vs. Commissioner of Police (1985) 2 SCC 537**' observed that:

"7. ... no illegality has been committed by the learned Magistrate in passing a direction for further investigation on the protest petition filed by the de-facto complainant, since there is no bar in entertaining protest petition to pass order for further investigation."

By which agency further investigation be done ?

In this connection, the decision of the Hon'ble Supreme Court in **'K. Chandrasekhar Vs. State of Kerala (1998) 5 SCC 223'** is relied upon which corresponds to **'Mariam Rasheeda Vs. State of Kerala'**. In that case the Hon'ble Supreme Court was disposing of a batch of appeals by the six accused persons, namely, Mariam Rasheeda and Fausia Hasan (two Mali Nationals), Nambi Narayanan and Sasi Kumar (two senior scientists working with the Indian Space Research Organisation), S.K. Sharma (a labour contractor) and K. Chandrasekhar (an authorised representative of a Russian firm in India). **That case is popularly known as "ISRO Espionage case"**. A close reading of the judgment of the Supreme Court in ISRO Espionage case will show that the Government of Kerala which had given consent under Section 6 of the Delhi Special Police Establishment Act, 1944 ("the DSPE Act", for short) resulting in CBI investigating the case and filing the final report, thereafter withdrew the consent and ordered reinvestigation by issuing a notification. Subsequently, the explanatory note to the said notification was amended to substitute the word "reinvestigation" with "further investigation". It was in that context that the Supreme Court in Para 25 of the decision considered the scope and ambit of "further investigation" occurring in Section 173(8) of CrPC. It was accordingly held that further investigation was a continuation of the earlier investigation and not a "fresh investigation" or "reinvestigation" or "de-novo investigation" to be started ab-initio wiping out the earlier investigation altogether. The Supreme Court also held that once the consent is granted under Section 6 of the DSPE Act, an investigation undertaken by CBI pursuant to such consent is to be completed notwithstanding the withdrawal of the consent and that withdrawal of such consent by the State Government would not entitle the State Police to further investigate the case.

In other words, what the Supreme Court held was that such further investigation could be conducted only by CBI which alone was granted consent

under Section 6 of the DSPE Act. The following observation in Para 24 of the Judgment makes the position very clear:

'24. ... Once it is accepted—and it has got to be accepted in view of the judgment in '**Kazi Lhendup Dorgi Vs. CBI 1994 Supp (2) SCC 116**'—that an investigation undertaken by CBI pursuant to a consent granted under Section 6 of the Act is to be completed, notwithstanding withdrawal of the consent, and that “further investigation” is a continuation of such investigation which culminates in a further police report under sub-section (8) of Section 173, it necessarily means that withdrawal of consent in the instant case would not entitle the State police, to further investigate into the case. To put it differently, if any further investigation is to be made it is CBI alone which can do so, for it was entrusted to investigate into the case by the State Government. (emphasis supplied)”.

There is nothing in Section 173(8) of CrPC to indicate that further investigation can be conducted only by the same agency which conducted the earlier investigation. There is no observation by the Supreme Court in ISRO Espionage case also to the effect that the very same agency which conducted the earlier investigation should conduct the further investigation. Accordingly, there is no warrant for taking the view that further investigation under Section 173(8) of CrPC has to be conducted by the very same agency which conducted the earlier investigation.

Use of word “evidence” in Section 173(8) of the Code

The word “evidence” in Section 173(8) of the Code has been used in generic sense of additional material into the crime regarding which charge-sheet has already been filed in the Court and not as evidence recorded before the Court as held in '**Suresh Vs. State of U.P. 2006 CrI LJ 4814 at P.4815**'.

Difference between “further investigation” and “reinvestigation”

It is, however, beyond any cavil that “further investigation” and “reinvestigation” stand on different footing. Direction of a reinvestigation, however, being forbidden in law, no superior court like the Hon'ble Supreme Court and/or the High Court could/would ordinarily issue such a direction.

Pasayat, J. in '**Ramachandran Vs. R. Udhayakumar (2008) 5 SCC 413**', opined as under: 7. At this juncture it would be necessary to take note of Section 173 of the Code. From a plain reading of the above section it is evident that even after completion of investigation under sub-section (2) of Section 173 of the Code, the police has right to further investigate under sub-section (8), but not fresh investigation or reinvestigation. A distinction, therefore, exists between a reinvestigation and further investigation and same is observed in '**Mithabhai Pashabhai Patel Vs. State of Gujarat (2009) 6 SCC 332**'. The Hon'ble Supreme Court in Para 24 of the decision considered the scope and ambit of "further investigation" occurring in Section 173(8) of CrPC. It was accordingly held that further investigation was a continuation of the earlier investigation and not a "fresh investigation" or "reinvestigation" or "de-novo investigation" to be started ab-initio wiping out the earlier investigation altogether.

Whether the Public Prosecutor himself has the right or authority to file a petition under Section 173(8) CrPC seeking further investigation, on the basis of the materials on record without the request of the investigating officer?

There is nothing wrong on the part of the Public Prosecutor to file a petition under Section 173(8) of CrPC before the Court, seeking an order directing the investigating officer to conduct further investigation under Section 173(8) of CrPC. The Court can exercise the power to order further investigation under Section 173(8) of CrPC and such petition filed by the Public Prosecutor can only be treated as an application seeking to invite the attention of the Court regarding the necessity to invoke the power of the Court under Section 173(8) of CrPC. If any such petition is filed by the Public Prosecutor under Section 173(8) of CrPC, the Court has to apply its mind on it and to satisfy itself with regard to the necessity, if any, to invoke the power of the Court under Section 173(8) of CrPC.

On a satisfaction that such power has to be invoked, the Court has to do it, and if it feels that there is no such necessity, the Court can ignore such petition filed by the Public Prosecutor, and to reject the same.

Can the Court on its own motion trigger a further investigation under Section 173(8) CrPC to be done by the investigating officer?

In '**Randhir Singh Rana Vs. State (Delhi Admn.) (1997) 1 SCC 361**', the Hon'ble Supreme Court, posed a question that "if for further investigation, the police should ordinarily take the formal permission of the Court, can the Court on its own not ask for further investigation, if the same be thought necessary to arrive at a just decision of the case?"

In that case, the Supreme Court held that within the gray area to which their Lordships have referred, the Magistrate on his own cannot order for further investigation.

In '**Sri Bhagwan Samardha Sreepada Vallabha Venkata Vishwanandha Maharaj Vs. State of A.P. (1999) 5 SCC 740**', it was held in paras 10 and 11:

10. Power of the police to conduct further investigation, after laying final report, is recognised under Section 173(8) of the Code of Criminal Procedure. Even after the Court took cognizance of any offence on the strength of the police report first submitted, it is open to the police to conduct further investigation. This has been so stated by this Court in '**Ram Lal Narang v. State (Delhi Admn.) (1979) 2 SCC 322**'. The only rider provided by the aforesaid decision is that it would be desirable that the police should inform the Court and seek formal permission to make further investigation.

11. In such a situation the power of the Court to direct the police to conduct further investigation cannot have any inhibition. There is nothing in Section 173(8) to suggest that the Court is obliged to hear the accused before any such direction is made. Casting of any such obligation on the Court would only result in encumbering the Court with the burden of searching for all the potential accused to be afforded with the opportunity of being heard. As the law does not require it, we would not burden the Magistrate with such an obligation.(emphasis supplied)'.

There, it was held that the Court has power to direct the police to conduct further investigation and such power cannot have any inhibition at all. In ordering

such a further investigation under Section 173(8) of CrPC, the Court is not obliged to hear the accused before any such direction is made.

In '**Hemant Dhasmana v. CBI (2001) 7 SCC 536**', it was held: 15. *When the report is filed under sub-section 173(2) of the Code the Magistrate (in this case the Special Judge) has to deal with it by bestowing his judicial consideration. If the report is to the effect that the allegations in the original complaint were found true in the investigation, or that some other accused and/or some other offences were also detected, the Court has to decide whether cognizance of the offences should be taken or not on the strength of that report. We do not think that it is necessary for us to vex our mind, in this case, regarding that aspect when the report points to the offences committed by some persons. But when the report is against the allegations contained in the complaint and concluded that no offence has been committed by any person, it is open to the Court to accept the report after hearing the complainant at whose behest the investigation had commenced. If the Court feels, on a perusal of such a report that the alleged offences have in fact been committed by some persons the Court has the power to ignore the contrary conclusions made by the investigating officer in the final report.*

Then it is open to the Court to independently apply its mind to the facts emerging there from and can even take cognizance of the offences which appear to it to have been committed, in exercise of its power under Section 190(1)(b) of the Code. The third option is the one adumbrated in Section 173(8) of the Code. Although the said sub-section does not, in specific terms, mention about the powers of the Court to order further investigation, the power of the police to conduct further investigation envisaged therein can be triggered into motion at the instance of the Court. When any such order is passed by a Court which has the jurisdiction to do so, it would not be a proper exercise of Revisional powers to interfere therewith because the further investigation would only be for the ends of justice.(emphasis supplied).'

Therefore, the Court, on its own motion also, can trigger a further investigation for the ends of justice, by assuming the power under Section 173(8) of CrPC.

In '**UPSC Vs. S. Papaiah (1997) 7 SCC 614**', it was held in Para 13: *The Magistrate could, thus in exercise of the powers under Section 173(8) of CrPC direct CBI to "further investigate" the case and collect further evidence keeping in view the objection raised by the appellant to the investigation and the "new" report to be submitted by the investigating officer would be governed by sub-sections (2) to (6) of Section 173 CrPC.*

In '**Vinay Tyagi Vs. Irshad Ali (2013) 5 SCC 762**', it was held that "*further investigation*" in terms of Section 173(8) of CrPC can be made in a situation where the investigating officer obtains further oral or documentary evidence after the final report has been filed before the Court. The report on such further investigation under Section 173(8) of CrPC can be termed as a supplementary report. The Supreme Court has relied on the decision in **Hemant Dhasmana**. In **Vinay Tyagi**, it was held:

40.2. A Magistrate has the power to direct "further investigation" after filing of a police report in terms of Section 173(6) of the Code.

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

40.5. The Code is a procedural document, thus, it must receive a construction which would advance the cause of justice and legislative object sought to be achieved. It does not stand to reason that the legislature provided power of further investigation to the police even after filing a report, but intended

to curtail the power of the Court to the extent that even where the facts of the case and the ends of justice demand, the Court can still not direct the investigating agency to conduct further investigation which it could do on its own.

40.6. It has been a procedure of propriety that the police have to seek permission of the Court to continue “further investigation” and file supplementary charge-sheet.

From all the above, it is evident that when a final report has been filed under Section 173(2) of CrPC by the investigating officer, if the Court on applying its mind is satisfied that there is lapse or defects in the investigation or if it is satisfied that a further investigation has to be conducted, the Court on its own motion can trigger a further investigation under Section 173(8) of CrPC to be done by the investigating officer.

Power to take suo motu cases by superior courts

In '**State of Punjab Vs. CBI (2011) 9 SCC 182**', the Hon'ble Supreme Court held, where charge-sheet has been filed, and the High Court held that the same cannot limit or affect the inherent power of the High Court to pass an order under Section 482 CrPC for fresh investigation or reinvestigation is necessary to serve the ends of justice. This was a case where senior functionaries of the State Police and political leaders were involved, and justice would not be done if local police investigated, and thereby the High Court given direction under Section 482 CrPC for fresh investigation by CBI.

Conclusion

Now, with its latest pronouncement in '**Vinubhai Haribhai Malaviya & Others Vs. State of Gujarat and Another 2019 SCC Online SC 1346**'; a 3-Judge Bench of the Hon'ble Supreme Court has endeavoured to lay rest to the controversy enveloping the evasive issue of further investigation directed by the Magistrate. The Hon'ble Supreme Court, speaking through **Hon'ble Justice Sri R.F. Nariman**, has laid down at Para 38 that, *“To say that a fair and just investigation would lead to the conclusion that the police retain the power, subject, of course, to the Magistrate's nod under Section 173(8) to further*

investigate an offence till charges are framed, but that the supervisory jurisdiction of the Magistrate suddenly ceases mid-way through the pre-trial proceedings, would amount to a travesty of justice, as certain cases may cry out for further investigation so that an innocent person is not wrongly arraigned as an accused or that a prima facie guilty person is not so left out. There is no warrant for such a narrow and restrictive view of the powers of the Magistrate, particularly when such powers are traceable to Section 156(3) read with Section 156(1), Section 2(h), and Section 173(8) of the CrPC, as has been noticed hereinabove, and would be available at all stages of the progress of a criminal case before the trial actually commences. It would also be in the interest of justice that this power be exercised suo motu by the Magistrate himself, depending on the facts of each case. Whether further investigation should or should not be ordered is within the discretion of the learned Magistrate who will exercise such discretion on the facts of each case and in accordance with law.” It was also clarified that, “the investigation spoken of in Section 156(3) would embrace the entire process, which begins with the collection of evidence and continues until charges are framed by the Court, at which stage the trial can be said to have begun.”.

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

It still remains to be seen whether the Vinubhai Haribhai ratio would be followed by the Courts consistently. It can only be said, hitherto, that the line of reasoning and exposition adopted by the Hon'ble Supreme Court in Vinubhai Haribhai appears to be in consonance with the legislative intent of the Code.

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