

(2007) 07 BOM CK 0095

In the Bombay High Court

Case No : Criminal Writ Petition No. 702 of 2007

Laxminarayan Vishwanath Arya

APPELLANT

Vs

The State of Maharashtra and Others

RESPONDENT

Date of Decision : 19-07-2007

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 154, 154(1), 154(3), 156, 156(1)
Penal Code, 1860 (IPC) — Section 34, 406, 409, 420, 467
Prevention of Corruption Act, 1947 — Section 7A
Prevention of Corruption Act, 1988 — Section 22

Citation : (2007) 109 BOMLR 1583 : (2008) CriLJ 1 : (2007) 4 MhLj 7 : (2008) 3 RCR(Criminal) 290

Hon'ble Judges : Swatanter Kumar, C.J;Ranjana Desai, J;D.B. Bhosale, J

Bench : Full Bench

Advocate : K.H. Giri, Hilesh Mishra, Aruradha Shinde and O.D. Goswami, for the Appellant; R.S. Mishra, for Respondent Nos. 2 to 7 and S.R. Borulkar, Public Prosecutor, for the Respondent

Judgement

Swatanter Kumar, C.J.—The legislative scheme behind the Code of Criminal Procedure, 1973 discerningly deciphers distinction of jurisdiction and field covered by the police or investigating agency on the one hand and the powers of the court while conducting inquiry or trial. Exercise of authority or jurisdiction by these two distinct components involved in the administration of criminal justice as provided under Chapter XII (Sections 154 to 176) and Chapter XIII to XV (Sections 177 to 203) is indicative. This legislative object of distribution of power without transgression on the limitation of the other has received judicial approval. With the development of law under criminal jurisprudence there is clear judicial dichotomy of investigative and judicial power. They operate in different fields without conflict and scope for overlapping, unless the provisions of the Code or judicial dictum have provided to the contrary. Despite passage of time such approach has prevailed with tenacity. Such tenets of criminal law have remained un-traumatised and the objectivity of legislative or judge made law has developed towards the common goal without conflict. Pervasive approach of law

relating to interpretation of procedural law can be termed as a reasonable percept of resolving impediment in proper administration of criminal justice. *Est boni juices ampliare jusiciam non jurisdictional* can fairly be applied to such a situation and the judge may amplify or extend his jurisdiction but not his judicial authority, particularly when it is opposed to specific provisions of the Code. Where law casts a duty upon police to take action to prevent an offence, there it also makes it obligatory upon him that moment information relating to the commission of cognizable offence is given to the incharge police station, he must reduce it to writing and proceed to investigate the same in accordance with law. The duties and powers of the investigating agency are spelt out with inbuilt check and balance under the provisions of Sections 154 to 176 of Chapter XII. In contra distinct to these powers, the powers of the courts in relation to the inquiry and trials are stated in the subsequent sections in Chapter XIII.

2. Criminal liability postulates pre-existent of "actus reus". The law however, is not concerned with punishing the people for thinking evil or having evil intention. It must be followed by conduct or act with some physical manifestation of the intention conducive to the process of investigation which would relate to the clarity of analysis of the ingredients of the kind created by the statute. Firm duty to act may result differently in different situations. Where a duty to act and responsibility imposed by the statute arises, its consequence must flow in law. Failure to act in furtherance to the statutory reforms gives rise to accountable wrong and would put in motion the mechanism stated in the statute, may be in the realm of courts or domain of higher investigating authorities. Rule of law requires the authorities to act in conformity with the statutory provisions and not expose the complainant or public at large to compulsive litigation.

3. Section 154 of the Code requires a police officer in charge of police station to reduce in writing every information relating to the communication of cognisable offence. In his default to act, the aggrieved party normally should approach the Superintendent of Police of the concerned area, who, if satisfied that the complaint discloses commission of cognisable offence may direct the police officer, subordinate to him, to investigate the same in accordance with law. This is the administrative remedy to an aggrieved complainant, while he could take recourse to the procedure of requesting the Magistrate empowered to take cognisance u/s 190 of the said offence and pray that a direction be issued for investigation of the complaint as contemplated u/s 156(3) of the Act.

4. One Laxman Vishwanath Arya lodged a complaint with the Dy Commissioner of Police, Zone 8 Bombay and also sent copy to the Senior Inspector of Police Vakola Police Station, Bombay on 23rd November, 2006, which according to the complainant was received by the said authorities but the authorities refused to make record of the complaint in writing in the records of the police station in terms of Section 154(1) and refused to register the FIR in accordance with law. This compelled the complainant to file a criminal case in the court of the Metropolitan Magistrate, Bandra, Mumbai. The complaint was filed on 6th

January 2007 for the offence under Sections 420, 467, 468, 34 of IPC with following prayer:

I state that the case is of a very peculiar nature and it requires a thorough investigation by police, according to the provisions of law and therefore I pray this Hon"ble Court to send this complain to the Senior Inspector of Police, Vakola Police Station, Mumbai with direction to treat the same as FIR and register a crime against the accused persons and investigate the same in accordance with the provisions of law, as required; u/s 156(3) of Cr P.C. In the interest of justice" Vide order dated 14th January 2007 the learned Magistrate passed the following order:

Perused complaint and documents etc. Heard the Ld Advocate for complainant. The complaint discloses cognizable offence as argued and requires to be investigated by the police. Hence Police Station Vakola is ordered and directed for making investigation as per law u/s 156(3) of Cr.P.C. At the same time with reference to directions given by the Hon"ble Bombay High Court in Criminal Writ Petition No. 1254 of 2006, the police authority making investigation shall not arrest accused without permission of the court.

5. Aggrieved by the order dated 24th January 2007 the complainant filed the present writ petition questioning the legality of the order passed by the learned Magistrate to the effect that the investigating officer shall not arrest the accused without permission of the court. When the writ petition came up for hearing before the Division Bench of this Court on 25th April 2007, the Judges were of the opinion that the judgment of the Division Bench in another case of Jagannath Singh Vs. Dr. Shri Ajay Upadhyay and The State of Maharashtra (at the instance of Sr. P.I.), was not in conformity with the principles enunciated by the Supreme Court in the case of M.C. Abraham and Ors. v. State of Maharashtra and Ors. 2003 Bom. C.R. 650 (SC) and formulated certain legal questions and made reference to the larger bench. The order dated 25th April 2007 reads as under:

The petitioner has filed this petition with a prayer that this Court should issue appropriate writ or order or direction and quash, rescind, alter or modify order dated 24/1/2007 passed by the Metropolitan Magistrate, 32nd Court, Bandra, Mumbai, in CC No. 5/M/2007.

2. By the impugned order, the learned Magistrate has directed the police to conduct investigation u/s 156(3) of the Code of Criminal Procedure (for short, "the Code") because cognizable offence is disclosed. However, he has directed the police to seek permission of the court if the police decide to arrest the accused.

3. Mr. Giri, the learned Counsel appearing for the petitioner contended that there is no provision in law which makes it obligatory on the police officer making investigation, to approach the concerned Magistrate for seeking permission to arrest an accused. He submitted that hence, it is necessary for this Court to quash that part of the impugned order which gives a direction that the police

authority making investigation shall not arrest the accused without permission of the court. We find from the impugned order that while passing this order, the learned Magistrate has placed reliance on the judgment delivered by this Court in *Jagannath Singh Vs. Dr. Shri Ajay Upadhyay and The State of Maharashtra* (at the instance of Sr. P.I.), .

4. We have carefully perused the said judgment. Paragraph 16 of the said judgment reads as under:

We repeat here again that we are dealing with the cases initiated before the Magistrate by filing a complaint where Magistrate orders investigation u/s 156(3) of the Code. Therefore, in those cases only where the police register FIR and start investigation, if at all the police desire to arrest the accused they should seek orders from the Magistrate in that regard making out a case for justification of immediate arrest. It may not be necessary for the Magistrate to give notice to the accused because that may frustrate the object of arrest but seeking directions from the Magistrate before arresting the accused, appears to us, the only method of protecting the interest of persons who may have been innocent, who may have no concern with the allegations, who may have no notice of the allegations where the allegations are of either purely civil type or mixed question of civil and criminal liability or where there is inordinate delay in filing complaint though it may be within limitation. We cannot envisage all such circumstances and it is not necessary to do so. Suffice it to say that if in complaint case Magistrate passes order u/s 156(3) and police register a FIR, then before arresting the accused, the police shall approach the Magistrate and take his orders in that regard unless in a given particular case the police apprehend that these steps will frustrate the proceedings, the investigation and the accused is dangerous or is likely to abscond.

5. In our opinion, there are no provisions in the Code which would put fetters on the power of the Investigating Officer to arrest an accused if it is necessary. As a matter of fact once the offence is registered, it is for the police to decide whether to effect arrest or not and at that stage, the court has no role to play. Mr. Borulkar, the learned Public Prosecutor rightly placed reliance on the judgment of the Supreme Court in *M.C. Abraham and Ors. v. State of Maharashtra and Ors.* 2003 Bom. C.R. (Cri.) 650. While dealing with a similar question, the Supreme Court has observed as under:

Tested in the light of the principles aforesaid, the impugned orders dated 10012002 and 1112002 must be held to be orders passed by overstepping the parameters of judicial interference in such matters. In the first place, arrest of an accused is a part of the investigation and is within the discretion of the Investigating Officer. Section 41 of the Code of Criminal Procedure provides for arrest by a Police Officer without an order from a Magistrate and without a warrant. The section gives discretion to the Police Officer who may, without an order from a Magistrate and even without a warrant, arrest any person in the situations enumerated in that section. It is open to him, in the course of

investigation, to arrest any person who has been concerned with any cognizable offence or against whom reasonable complaint has been made or credible information has been received, or a reasonable suspicion exists of his having been so concerned. Obviously, he is not excepted to act in a mechanical manner and in all cases to arrest the accused as soon as the report is lodged. In appropriate cases, after some investigation, the Investigating Officer may make up his mind as to whether it is necessary to arrest the accused person. At that stage the Court has no role to play. Since the power is discretionary, a Police Officer is not always bound to arrest an accused even if the allegation against him is of having committed a cognizable offence. Since an arrest is in the nature of an encroachment on the liberty of the subject and does affect the reputation and status of the citizen, the power has to be cautiously exercised. It depends inter alia upon the nature of the offence alleged and the type of persons who are accused of having committed the cognizable offence. Obviously, the power has to be exercised with caution and circumspection.

6. In view of this authoritative pronouncement of the Supreme Court, we are of the opinion that the following issues need to be referred to the larger bench.

(i) Whether the police have to approach the learned Magistrate and take orders from him before arresting the accused against whom FIR is registered pursuant to the orders issued by the learned Magistrate u/s 156(3) of the Criminal Procedure Code, 1973?

(ii) Whether the police can exercise the powers of arrest u/s 41 of the Criminal Procedure Code, 1973 without intervention of the Court ?

(iii) Whether the judgment of this Court in Jagannath Singh Vs. Dr. Shri Ajay Upadhyay and The State of Maharashtra (at the instance of Sr. P.I.), is required to be reconsidered in view of the judgment of the Supreme Court in M.C. Abraham and Ors. v. State of Maharashtra and Ors. 2003 Bom. C.R. (Cri) 650 (SC)?

7. We, therefore, direct the office to place this matter before the Hon'ble the Chief Justice for appropriate orders in that behalf.

6. This is how the matter has been placed before the Full Bench to answer the questions of law framed by the Division Bench in that order. Commensurate to the expected standard, the investigative skills in conformity with the statutory provisions cannot be ignored in as much as they have a direct effect not only on the legitimate right of a person but also the faith of a common man in the investigating agency. Breach of its duty could lead to erosion of faith and also litigation which could be avoided by timely action. The purpose of identifying the common faith and its spheres for operation of courts and investigation would stand frustrated, if either of them fails to effectively provide relief and; act in accordance with its specified duties. Constitutional mandate of equality before law would require the investigating agency to act in adherence to the provisions of the Code while keeping in mind the purpose of protections stated in the

Constitution. The aforesaid Chapters of the Code are self contained and require cautious approach in exercise of discretionary powers either in the field of investigation or at the stage of inquiry or trial before the courts. This would, to some extent, depend upon the scope and analytical interpretation of the relevant provisions. Constitutional and social goal are the basis of exercise of powers and authority in the respective fields and they must be exercised in a way to prevent arrest of either of them.

7. The limited scope of powers available to a learned Magistrate u/s 156(3) of the Code do not admit any ambiguity. Their scope is limited and is restricted to the extent that wherever a Magistrate is satisfied without taking cognisance ensuring compliance of Section 154(3) the police should investigate the matter, it could pass directions or order in terms of Section 156(3). Further control of investigation or methodology to be adopted during the investigation is beyond the jurisdiction or empowerment of a learned Magistrate under the scheme of these provisions. The observations made by the Bench in the case of Jagannath Singh (supra) do not appear to be in consonance with the statutory provisions and scheme contemplated in the legislation. Under the scheme of the criminal procedure an order of the kind made in the present case may not *stricto sensu* tantamount to interference in the investigation but on bare reading of the statutory provisions it appears to be impermissible. An order which is not in conformity with the provisions of law or is beyond the scope of law would be *per se* in curium as the decision given in ignorance in terms of the statutes or rule having force of statute or being not in conformity with the statutory provisions would not be a binding precedent as it is said to be given through inadvertence. Refer *Municipal Corporation of Delhi Vs. Gurnam Kaur*, . Another legal facet of the stated principle would be that various judgments of the Supreme Court were not brought to the notice of the Division Bench, as such the doctrine of *stare decisis* would also bring the stated proposition beyond the limits of the binding precedent. The principle stated by the Division Bench, with respect, does not appear to be correct exposition of law. To some extent we must hesitate to add here that the police officer while exercising his discretion as contemplated u/s 41 of the Code should act with great caution and responsibility in the case of present kind. Every efforts must be made by the authorities concerned to ensure that there is no abuse of power of investigation amounting to infringement of the freedom and rights of the suspected accused. It cannot be lost sight of that normally and in fact in accordance with law investigation u/s 156(3) of the Code is preceded by approaching the concerned police station and then higher authorities u/s 154(3). Thus these are the cases where the investigating agency- the police has failed to act. It pre-supposes that there has been breach of obligation as contemplated u/s 154(1) of the Code. To illustratively state these are the matters where despite complaint, police did not act or consider it not necessary to act in relation to the allegations made in the complaint. The suspected accused was always free and not the subject matter of investigation or agency. After such breach of duty or wrongful act on the part of the investigating

agency, the court on a petition passes direction u/s 156(3) of the Code directing the police to conduct investigation.

8. In order to appropriately answer the legal issue raised in the Order of Reference, it is necessary for us to examine the relevant sections under the provisions of the Criminal Procedure Code and various judgments having bearing on those issues. Section 154(1) of the Code relates to obligation on the part of the Police Officer to reduce in writing the information in relation to commission of a cognizable offence. In the event he fails to do so, the Complainant or informant has a right to approach the Superintendent of Police u/s 154(3) of the Code who in turn and if satisfied would conduct the investigation himself or require a concerned Police Officer of the police station to conduct the investigation. During the course of investigation the Investigating Officer is in control of the investigation and shall proceed with the investigation in accordance with the law free of intervention. However, a Complainant can take recourse to the provisions of Section 156(3) of the Code and Magistrate actually without taking cognisance of the offence under the provisions of Section 190 may order the Investigating Agency to investigate the offence in accordance with law. This position of law can hardly be disputed. The distinction between pre-cognizance and post-cognizance jurisdiction of the Court falls entirely in different spheres. The Court is in control of the case and/or of action after presentation of a report u/s 173 or in a complaint case after it has taken cognizance, and pass appropriate order in conformity with the provisions of Sections 200 and 204 of the Code. It is not necessary for us to examine the legal provisions and their effect in relation to the court of competent jurisdiction in case of a complaint filed u/s 200 or where the Police report has been presented to the Court in terms of Section 173, as none of these situations arise for consideration in the facts of the present case. Suffice it to note that in a case where the Complainant approaches the competent court under the provisions of Section 156(3) of the Code, whether it is in the domain of the court to pass any further directive besides directing the Investigation of the case in accordance with law or not is the paramount question, which we are called upon to consider. The power of the Magistrate where complaint discloses cognizable offence to register a case and conduct investigation thereof in accordance with law cannot be termed a direction suffering from any jurisdictional error. The Supreme Court in the case of *Madhu Bala Vs. Suresh Kumar and others*, , held as under:

The mode and manner of registration of such cases are laid down in the Rules framed by the different State Governments under the Indian Police Act, 1861. As in the instant case we are concerned with Punjab Police Rules, 1934 (which are applicable to Punjab, Haryana, Himachal Pradesh and Delhi) framed under the said Act. We may now refer to the relevant provisions of those Rules. Chapter XXIV of the said Rules lays down the procedure an officer in charge of a police station has to follow on receipt of information of commission of crime. Under Rule 24.1 appearing in the Chapter every information covered by Section 154 of the Code must be entered in the First Information Report Register and the

substance thereof in the daily diary. Rule 24.5 says that the First Information Report Register shall be printed book in Form 24.5(1) consisting of 200 pages and shall be completely filled before a new one is commenced. It further requires that the cases shall bear an annual serial number in each police station for each calendar year. The other requirements of the said Rules need not be detailed as they have no relevance to the point at issue.

From the foregoing discussion it is evident that whenever a Magistrate directs an investigation on a "complaint" the police has to register a cognizable case on that complaint treating the same as the FIR and comply with the requirements of the above Rules. It, therefore, passes our comprehension as to how the direction of a Magistrate asking the police to "register a case" makes an order of investigation u/s 156(3) legally unsustainable. Indeed, even if a 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, it (the police) is duty bound to formally register a case and then investigate into the same. The provisions of the Code, therefore, do not in any way stand in the way of a Magistrate to direct the police to register a case at the police station and then investigate into the same. In our opinion when an order for investigation u/s 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.

9. In the case of *Tula Ram and Others Vs. Kishore Singh*, , the Supreme Court has stated the principle that a Magistrate can order the Police to investigate the complaint and on analysing the scheme of the Code on the subject in question, it is not necessary for him to take cognisance before passing an order u/s 156(3). The Court stated that the question of the meaning of "taking cognizance" was no longer *res integra* and observed that taking cognizance was no formal action but a *simpliciter* application of mind by the Magistrate to the suspected commission of an offence. This view was also approved by the Supreme Court in *Suresh Chand Jain Vs. State of Madhya Pradesh and Another*, .

10. The power of the Magistrate to order or direct investigation of a cognizable offence is no more questionable and for passing of an order it is not necessary for the learned Magistrate to take cognizance of an offence as contemplated u/s 190. The Court takes cognisance of the offence alleged when the court applies its mind for the purpose of proceeding further in accordance with the various provisions of the Code. Of course, it would depend on the facts of each case. The discretion to send a case for investigation or not is an order to be passed by the Magistrate, which a court is expected to exercise in consonance with the settled principles of law. It is also true that when Court is exercising such power or even in its inherent jurisdiction, it cannot be exercised so as to interfere with the statutory rights of the investigating agency. These are some of the settled principles of law. Reference can be made to *Gopal Das Sindhi v. State of Assam*

11. Another pertinent aspect of investigation of crime in accordance with the Code is that the manner and method of investigation is left entirely to the Police Officer and the Magistrate cannot interfere in the scope of investigation under the provisions of Section 190 of the Code. It may be more true at the stage of pre- cognizance of offence but its scope may differ at post-cognizance stage. For example, where the Magistrate refuses to accept the closure report submitted to him u/s 173 of the Code, such order is not the order interfering with the investigation of the case. Statutory protection available to the Investigating Officer is also indicated by different judicial dictum that error or illegality in investigation would not vitiate the trial unless it amounted to miscarriage of justice. In the case of Union of India (UOI) Vs. Prakash P. Hinduja and Another, , the Supreme Court held as under:

The provisions referred to above occurring in Chapter XII of the Code show that detail and elaborate provisions have been made for securing that an investigation takes place regarding an offence of which information has been given and the same is done in accordance with the provisions of the Code. The manner and method of conducting the investigation are left entirely to the officer-in-charge of the police station or a subordinate officer deputed by him. A Magistrate has no power to interfere with the same. The formation of the opinion whether there is sufficient evidence or reasonable ground of suspicion to justify the forwarding of the case to a Magistrate or not as contemplated by Sections 169 and 170 is to be that of the officer-in-charge of the police station and a Magistrate has absolutely no role to play at this stage. Similarly, after completion of the investigation while making a report to the Magistrate u/s 173 the requisite details have to be submitted by the officer-in-charge of the police station without any kind of interference or direction of a Magistrate and this will include a report regarding the fact whether any offence appears to have been committed and if so, by whom, as provided by Clause (d) of Sub-section (2)(i) of this Section. These provisions will also be applicable in cases under Prevention o corruption Act, 1947, amend by virtue of Section 7-A thereof and Prevention of Corruption Act, 1988 by virtue of Section 22 thereof.

The Magistrate is no doubt bound to accept a final report (sometimes called as closer report) submitted by the police and if he feels that the evidence and material collected during investigation justifies prosecution of the accused, he may not accept the final report and take cognizance of the offence and summon the accused but this does not mean that he would be interfering with the investigation as such. He would be doing so in exercise of powers conferred by Section 190, Cr.P.C. The statutory provisions are, therefore, absolutely clear that the Court cannot interfere with the investigation. Thus the legal position is absolutely clear and also settled by judicial authorities that the Court would not interfere with the investigation which would mean from the time of the lodging of the First Information Report till the submission of the report by the officer-in-

charge of police station in Court u/s 173(2), Cr.P.C., this field being exclusively reserved for the investigating agency.

12. Another aspect is the case would be dependent on the construction of language u/s 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 inter-check 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 Vs. Bipen Kumar Tiwari and Others*, 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.

14. A Division Bench of this Court in the case of *Jagannath Singh* (supra) took the view that keeping in mind the provisions of Sections 41, 156, 157 and 190 of the Criminal Procedure Code wherever the Magistrate ordered investigation u/s 156(3) of the Code, the Police Register the FIR, arrest should depend on the facts and circumstances of the case and invariably the police shall approach the Magistrate and take his order in that regard. It may be useful to reproduce the relevant and operative part of the judgment, which reads as under:

We repeat here again that we are dealing with the cases initiated before the Magistrate by filing a complaint where Magistrate orders investigation u/s 156(3) of the Code. Therefore, in those cases only where the police register FIR and start investigation, if at all the police desire to arrest the accused they should seek orders from the Magistrate in that regard making out a case for justification of immediate arrest. It may not be necessary for the Magistrate to give notice to the accused because that may frustrate the object of arrest but seeking directions from the Magistrate before arresting the accused, appears to us, the only method of protecting the interest of persons who may have been innocent, who may have no concern with the allegations, who may have no notice of the allegations where the allegations are of either purely civil type or mixed question of civil and criminal liability or where there is inordinate delay in filing complaint though it may be within limitation. We cannot envisage all such circumstances and it is not necessary to do so. Suffice it to say that if in complaint case Magistrate passes order u/s 156(3) and police register a FIR, then before arresting the accused, the police shall approach the Magistrate and take his orders in that regard unless in a given particular case the police apprehend that these steps will frustrate the proceedings, the investigation and the accused is dangerous or is likely to abscond.

15. Another Division Bench of this Court took an exception of this statement of law and noticed the reliance placed by the Public Prosecutor upon the judgment

of the Supreme Court in the case of M. C. Abraham and Ors. v. State of Maharashtra and Ors. 2003 Bom. C.R. (Cri.) 650 and relied upon the following dictum of the Supreme Court:

Tested in the light of the principles aforesaid, the impugned orders dated 10-1-2002 and 11-1-2002 must be held to be orders passed by overstepping the parameters of judicial interference in such matters. In the first place, arrest of an accused is a part of the investigation and is within the discretion of the Investigating Officer. Section 41(2) of the Code of Criminal Procedure provides for arrest by a Police Officer without an order from a Magistrate and without a warrant. The section gives discretion to the Police Officer who may, without an order from a Magistrate and even without a warrant, arrest any person in the situations enumerated in that section. It is open to him, in the course of investigation, to arrest any person who has been concerned with any cognizable offence or against whom reasonable complaint has been made or credible information has been received, or a reasonable suspicion exists of having been so concerned. Obviously, he is not excepted(sic) to act in a mechanical manner and in all cases to arrest the accused as soon as the report is lodged. In appropriate cases, after some investigation, the Investigating Officer may make up his mind as to whether it is necessary to arrest the accused person. At that stage the Court has no role to play. Since the power is discretionary, a Police Officer is not always bound to arrest an accused even if the allegation against him is of having committed a cognizable offence. Since an arrest is in the nature of an encroachment on the liberty of the subject and does affect the reputation and status of the citizen, the power has to be cautiously exercised. It depends inter alia upon the nature of the offence alleged and the type of persons who are accused of having committed the cognizable offence. Obviously, the power has to be exercised with caution and circumspection.

16. No doubt, the facts of the present case are somewhat similar to the case of Jagannath Singh's case (Supra) as in that case as well the Magistrate had passed an order in terms of the provisions of Section 156(3) and directed the Police to conduct investigation in accordance with the law and the Court in that case had further directed that the suspect accused should not be arrested without leave of the Court. While passing specific direction, it also stated as a principle of law that normally in such cases the permission of the Magistrate should be sought before arrest unless the accused was dangerous and likely to abscond. The legality or validity of such a direction, we shall shortly proceed to examine. However, in the case of M.C. Abraham (Supra) the facts are somewhat different. A complaint had been lodged by the Provident Fund Commissioner against a Director of the Company alleging offences under Sections 406, 409 read with Section 34 of the Indian Penal Code. The accused moved the High Court for grant of anticipatory bail which was rejected by the High Court vide its order dated 7th September, 2001. However, on 10th January, 2002 on a writ petition requiring the State to act on the basis of the complaint filed by the Provident Fund Commissioner and praying for their arrest, as application for

anticipatory bail had been rejected by the High Court, the High Court vide its order dated 10th January, 2002, besides issuing other directions, in exercise of its power in the writ petition, directed the respondent State to cause arrest of those accused and produce them before the Court. While making reference to the case of AIR 1945 18 (Privy Council) and S.N. Sharma's case (supra), it stated that there is clear cut and well-demarcated sphere of activity in the field of crime detection and crime punishment. Investigation of an offence is the field exclusively reserved by the executive through the police department. It noticed that u/s 41 of the Criminal Procedure Code discretion is vested with the Police Officer to arrest or not, a suspect accused without any order from the Magistrate. The Court further observed that as the appellants had not been arrested and the Investigating Officer had exercised his discretion and in the facts and circumstances of the case chose not to arrest the accused, in such a case where there was no justification for the High Court to direct the State to arrest the appellants against whom the report is lodged. With this view the order of the High Court dated 10th January, 2002 directing arrest of the appellants in that case was set aside. Thus, on fact the Abraham's case (supra) may not have any bearing in law to the case in hand, (and for that matter even to the case of Jagannath Singh (supra)), but as far as observation of the Division Bench in Jagannath Singh's case (supra) stating a general principle of law requiring leave of the Court prior to arresting an accused except to the sections stated therein, may appear to us, not to be a correct statement of law, keeping in view of the provisions of Sections 41, 154, 166 and 167 of the Code. Once the section does not provide any such power to a Magistrate under these provisions to add such power by implication would not be in conformity with the basic rules of interpretation of statutes. Reference can be made to a Division Bench judgment of the Punjab and Haryana High Court in the case of Pardeep etc. v. State of Haryana, Cri. Misc. No. 7268 of 1997, where it was considering another Division Bench view in regard to imposition of a restriction in regard to grant of bail in the case of 302 of the Indian Penal Code. The Bench held as under: "The grounds indicated by the Division Bench in the case of Subhash Chand (supra) in fact are the grounds specifically incorporated by the Legislature under Sections 3 and 4 of the Punjab Good Conduct Prisoners (Temporary Release) Act. This Act is limited in its operation and scope. Thus, to us it appears that these provisions are ancillary to the basic provisions regulating the bail during appeal and consequently cannot circumscribe or limit the scope of the larger provisions. Though they operate in different fields but on some spheres and grounds they indicate the same legislative intent.

17. To impose limitations which are not incorporated in the statute itself the disadvantage of the convict, may result in decimate of valuable right arising out of a stature "express sum facit cessare tacitum" is a well accepted principle of interpretation of statutes. In other words expression precludes implications and to imply what is not provided for by the Legislature is normally not permissible. To our mind reading of such limitations into the provisions of Section 389 is not

necessitated on the principles of necessary implication.

18. The practice and pronouncements of the court for over such a long period clearly indicate that it is neither possible nor permissible to provide any hard and fast rules consisting of limitation or guidelines which would govern and apply universally in determining the fate of every bail application preferred by the convict during the pendency of the appeal.

19. We are of the view that various judgments aforesaid were not brought to the notice of the Hon"ble Bench dealing with the matter. Consequently, we feel that keeping in view the settled principles of stare decisis it appears to us that the observations made by the Hon"ble Bench are per incuriam. In this regard it will be appropriate to make a reference to the judgment of the Supreme court in the case of Asstt. Collector of Estate Duty, Madras Vs. V. Devaki Ammal (Smt), Madras, and Bhagwan Dass Arora Vs. First Additional District Judge, Rampur and Others, . In this regard reference can also be made to the cases of Fitrat Raza Khan Vs. State of Uttar Pradesh and Others, , Bachan Singh Vs. State of Punjab, , and A.R. Antulay Vs. R.S. Nayak and Another, .

20. The observations of the Hon"ble Bench appear to us to introduce into the section some thing what has not been intended or provided by the legislation in the provisions of Section 389 of the Code. At this stage it may also be relevant to make a reference to the judgment of the Supreme Court in the case of Karnal Improvement Trust Karnal v. St. Parkash Banti JT 1995 (5) SCC 151.

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 u/s 44 of the Code empowers the Magistrate to arrest or order any person to arrest the offender. u/s 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 u/s 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 u/s 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.

22. In the case of Directorate of Enforcement Vs. Deepak Mahajan and another, while explaining the terms "person who could arrest" and scope of Section 167 in relation to an accused person, the Court, while referring to the different provisions of the Code, held as under:

The word "arrest" is derived from the French word "and signifies a Arreter" meaning "to stop or stay" restraint of the person. Lexicologically, the meaning of the word "arrest" is given in various dictionaries depending upon the circumstances in which the said expression is used. One of us, (S. Ratnavel Pandian, J. as he then was being the Judge of the High Court of Madras) in Roshan Beevi v. Joint Secretary, Government of T.N. 1984 Cri.L.J. 134 had an occasion to go into the gamut of the meaning of the word "arrest" with reference to various textbooks and dictionaries, the New Encyclopaedia Britannica, Halsbury's Laws of England, a Dictionary of Law by L.B. Curzon, Black's Law Dictionary and Words and Phrases. On the basis of the meaning given in those textbooks and lexicons, it has been held that: "The word "arrest" when used on its ordinary and natural sense, means the apprehension or restraint or the deprivation of one's personal liberty. The question whether the person is under arrest or not, depends not on the legality of the arrest, but on whether he has been deprived of his personal liberty to go where he pleases. When used in the legal sense in the procedure connected with criminal offences, an arrest consists in the taking into custody of another person under authority empowered by law, for the purpose of holding or detaining him to answer a criminal charge or of preventing the commission of a criminal offence. The essential elements to constitute an arrest in the above sense are that there must be an intent to arrest under the authority, accompanied by a seizure or detention of the person in the manner known to law, which is so understood by the person arrested.

47. There are various sections in Chapter V of the Code titled "Arrest of persons" of which Sections 41, 42, 43 and 44 empower different authorities and even private persons to arrest a person in given situation. Section 41 deals with the power of a police officer to arrest any person without an order from a Magistrate and without a warrant. Section 42 deals with the power of a police officer to arrest any person who in the presence of a police officer has committed or has been accused of committing a non-cognizable offence and who refuses on demand "to give his name and residence or gives a name or residence which such officer has reason to believe to be false." Section 43 empowers any private person to arrest any person who in his presence commits a non-cognizable offence, or any proclaimed offender. Section 44 states that when any offence is committed in the presence of a Magistrate whether Executive or Judicial, within his local jurisdiction, he may himself arrest or order any person to arrest the offender and may thereupon subject to the provisions contained in the Code as to bail commit the offender to custody.

48. Thus the Code gives power of arrest not only to a police officer and a Magistrate but also under certain circumstances or given situations to private persons. Further, when an accused person appears before a Magistrate or surrenders voluntarily, the Magistrate is empowered to take that accused person into custody and deal with him according to law. Needless to emphasize that the arrest of a person is a condition precedent for taking him into judicial custody thereof. To put it differently, the taking of the person into judicial custody is followed after the arrest of the person concerned by the Magistrate on appearance or surrender. It will be appropriate, at this stage, to note that in every arrest, there is custody but not vice versa and that both the words "custody" and "arrest" are not synonymous terms. Though "custody" may amount to an arrest in certain circumstances but not under all circumstances. If these two terms are interpreted as synonymous, it is nothing but an ultra legalist interpretation which if under all circumstances accepted and adopted, would lead to a startling anomaly resulting in serious consequences (vide Roshan Beevi).

49. While interpreting the expression "in custody" within the meaning of Section 439 Cr.P.C. Krishna Iyer, J. speaking for the Bench in *Niranjan Singh and Another Vs. Prabhakar Rajaram Kharote and Others*, observed that : SCC p. 563, para 9.

He can be in custody not merely when the police arrests him, produces him before a Magistrate and gets a remand to judicial or other custody. He can be stated to be in judicial custody when he surrenders before the court and submits to its directions.

23. The powers vested in the Court u/s 156(3) are pre-cognizance in contradistinction to powers vested in the Court when the matter comes up before the Court post-cognizance. Even this understanding can alone help in discernibly viewing the distinct field of jurisdiction between investigation by police and the functions of the Court. Passing of such an order as in the present case would not amount to inclusion into the field of investigation as just being a safeguard in the backdrop of the things that the proceedings before the Court u/s 156(3) of the Code were vitiated for default or inaction of the police itself but passing of such order would not be appropriate as an alternative efficacious remedy is available to the suspect accused by way of anticipatory bail. The Investigating Officer would have the power as contemplated u/s 41 of the Code but a word of caution need to be mentioned that in the cases where investigation is being conducted in furtherance to directives of the Court u/s 156(3) of the Code requires the officer concerned to exercise the discretion vested in him with greater sensitivity and in accordance with the settled canon of criminal jurisprudence while keeping the facts and circumstances of each case in mind. Though the case of *Jehan Singh* (supra) does not enunciate the correct principle of law as noticed by us, even then the court had stated that wherever the arresting officer finds a possibility of the accused absconding or was dangerous to arrest him without leave of the Court. The rudiments of criminal jurisprudence to avoid serious ramification in view of the scheme formulated under the provisions of the Code persuade us to

take the above view.

24. In view of our above detailed discussion and settled principles of law, we would proceed to answer the three questions referred to the larger bench as under:

(i) Whether the police have to approach the learned Magistrate and take orders from him before arresting the accused against whom FIR is registered pursuant to the orders issued by the learned Magistrate u/s 156(3) of the Criminal Procedure Code, 1973? Ans. It is neither obligatory nor mandatory for a Police Officer to obtain the leave of the Court before arresting an accused against whom FIR is registered in pursuance of the order passed by the learned Magistrate u/s 156(3) of the Criminal Procedure Code, 1973. Certainly, we would hasten to add that exercise of discretion by the arresting officer should be exercised with greater sensitivity and in accordance with the settled canon of criminal jurisprudence, while keeping the facts and circumstances of each case in mind. It needs to be remembered by the Investigating agencies that order u/s 156(3) may be passed by the Court as a result of failure to perform its duty on the part of the investigating agencies.

(ii) Whether the police can exercise the powers of arrest u/s 41 of the Criminal Procedure Code, 1973, without intervention of the Court? Ans. A Police Officer or a person empowered to arrest may arrest a person without intervention of the Court subject to the limitations specified under the provisions of the Code. In fact, answer to this question is squarely provided in the judgment of the Supreme Court in M.C. Abraham (supra).

(iii) Whether the Judgment of this Court in Jagannath Singh Vs. Dr. Shri Ajay Upadhyay and The State of Maharashtra (at the instance of Sr. P.I.), is required to be reconsidered in view of the judgment of the Supreme Court in M.C. Abraham & Ors. v. State of Maharashtra and Ors. 2003 Bom. C.R. (Cri.) 650 (SC)?. Ans. The judgment of the Division Bench of this Court in the case of Jagannath Singh (supra), with respect, even with the stated exceptions, is not a correct exposition of law.

The Reference is answered accordingly.