(2006) 10 AHC CK 0209

Allahabad High Court

Case No: None

Chandan		APPELLANT
	Vs	
State of Uttar Pradesh and Manoj Kumar		RESPONDENT

Date of Decision: Oct. 17, 2006

Acts Referred:

- Constitution of India, 1950 - Article 14, 141, 19, 21, 226
- Criminal Procedure Code, 1973 (CrPC) - Section 154, 156, 157, 173, 190
- Penal Code, 1860 (IPC) - Section 406, 420
- Probation of Offenders Act, 1958 - Section 18, 5

Citation: (2007) 2 ACR 2326

Hon'ble Judges: Vinod Prasad, J

Bench: Single Bench

Final Decision: Dismissed

Judgement

Vinod Prasad, J.

This revision has been filed by Chandan who is aggrieved by the order dated 31.8.2006 passed by Civil Judge (Junior Division) Judicial Magistrate, Chakia, Chandauli in Miscellaneous Case No. Nil of 2006, Manoj Kumar v. Chandan and Anr. u/s 156(3) Cr.P.C, P.S. Chakia, district Chandauli. By the impugned order the Magistrate concerned has ordered for registration of the F.I.R. and investigation in pursuance thereof in the crime by the police, on the application u/s 156(3) Cr.P.C. filed by Manoj Kumar (respondent No. 2).

2. The facts giving rise to this revision are that on 5.9.2006 an application u/s 156(3) Cr.P.C. was filed by Manoj Kumar with the allegations that his wife Smt. Usha Devi was enticed away by Chandan (present revisionist) and after exerting undue influence on her got himself photographed with her in objectionable poses. His wife Smt. Usha Devi because of shame could not inform the said fact to the family

members. On 12.8.2006 Chandan, (revisionist) sent those photographs to the applicant Manoj Kumar (respondent No. 2) and started blackmailing him for Rs. 10000/-on the pretext that in case the said amount is not paid he will defame the couple by publishing the said photographs in the village. When the applicant Manoj Kumar objected to the said conduct, revisionist Chandan and his maternal uncle Ram Ji, who is said to be a police constable, threatened him with life and also abused him filthily. Manoj Kumar wanted to lodge the repot of extortion and threatening but his report was not taken down by the Officer-in-charge of the police station. His application to the Superintendent of Police, Chandauli, sent through registered post on 17.8.2006 did not yield any result, consequently, on 19.8.2006, Manoj Kumar, respondent No. 2 filed an application u/s 156(3) Cr.P.C. before the concerned Magistrate. Magistrate initially called for a report from police and fixed 21.8.2006. Subsequently, he again fixed 22.8.2006 and 25.8.2006. Ultimately on 31.8.2006 the Magistrate ordered that the application filed by the applicant discloses commission of a cognizable offence and therefore, it should be investigated as no FIR. was already registered at the police station. With the aforesaid observation, he directed the police to register the F.I.R. and investigate the case and sent a copy of the F.I.R. to12 him within seven days which order is under challenge in this revision.

3. I have heard Sri C.K. Parikh, learned Counsel for the revisionist in support of this revision and the learned AGA in opposition.

4. At the very out set the question of maintainability of this revision at the instance of the revisionist, against whom an order u/s 156(3) Cr. P.C. was passed, came up for consideration, as the learned AGA raised the preliminary objection that this revision by the revisionist who is a proposed accused is not maintainable.

5. Learned Counsel for the revisionist submitted that since the application u/s 156(3) Cr P.C. had been filed against him and the order will definitely affect him prejudicially he has got a right to maintain the revision. He further contended that after an order u/s 156(3) is passed the police has got no option but to register the FIR against him, therefore, the revisionist have got a right to challenge the said order passed by the. learned Magistrate in as much as his fundamental right is jeopardized. He further contended that the Magistrate must hear the accused at the stage of 156(3) Cr. P.C. and therefore also the impugned order deserves to be set aside. He relied upon a reported judgment in Ajai Malviya v. State of U.P. IV 2000 ACC 435.

6. Learned AGA on the other hand contended that the Magistrate was not obliged to hear the accused at the stage of 156(3) Cr. P.C. as he was exercising the administrative power of control over the police by passing a judicial order. He submitted that the contentions raised by the learned Counsel for the revisionists are against the basic principles of criminal law and Section 156(3) Cr. P.C He further submitted that Supreme Court had laid down in many judgments that the accused has no right of hearing before being summoned. He further submitted that passing

of an order u/s 156(3) Cr.P.C. the Magistrate had only directed the registration of the case and its investigation and the accused has got no right to challenge the aforesaid order of registration of F.I.R. He can challenge the FIR if it does not discloses commission of a cognizable offence in a writ petition. He further submitted that Section 397 and 401 Cr. P.C. is not at all applicable against such an interlocutory order of registration and investigation and this revision is not maintainable and deserves to be dismissed. He also submitted that Ajai Malviya''s case (Supra) does not laid down good law and is per-incurium being contrary to Section 397(1) and(2) Cr.P.C. and the law laid down by Apex Court that order u/s 156(3) Cr.P.C. is a pre-cognizance order.

7. I have considered the submissions raised by both the parties. The bone of contention in this revision no longer remains res-integra. It has come up before me in criminal Miscellaneous Application No. 4670 of 2006, Rakesh Puri and Anr. v. State of U.P. and Anr. In that decision it has been held as follows:

Section 156(3) Cr. P.C. falls under Chapter XII, which deals with the power of police to register and investigate a cognizable offence u/s 154(1) and 156(1) Cr. P.C. The law has mandated the police to register all the informations whether oral or in writing if it discloses the commission of a cognizable offence in the form and in the manner prescribed by the respective State Government and to obtain the signature of the informant after its registration. Sub-clause (3) of Section 154 Cr. P.C. provides that if the Officer Incharge of the Police Station refuses to register such an information which discloses the commission of a cognizable offence the aggrieved person may send, through post, the substance of such information in writing to the concerned Superintendent of Police who will either investigate into the matter himself or get it investigated through some officer if it discloses the commission of a cognizable offence. It further provides that deputed officer after such entrustment of investigation by the Superintendent of Police will have all the powers of the Officer Incharge of Police Station as is provided to him under the law. Thus Section 154(3) Cr.P.C. is the power conferred on Superintendent of Police to get the FIR registered in case the same is refused by the officer in charge of the concerned police station when cognizable offence is disclosed by such information. Section 156(1) in conjunction with Section 157(1) Cr.P.C. provides that every cognizable offence must be investigated if the officer in charge of police station has got "reason to suspect" that cognizable offence is disclosed after registration of the FIR. Thus the scheme of the Code from Section 154 to Section 157 Cr.P.C. makes is clear that all information disclosing commission of cognizable offence must be registered as a FIR at the police station and the officer in charge of a police station has got no right to refuse it''s registration. In case of refusal to register such an information as FIR the officer in charge of police station is guilty of flouting the mandate of law. Subsequently after it''s registration if the officer in charge of the police station has "reason to suspect" that cognizable offence is disclosed by the said registered FIR he must investigate it. This aspect of the matter has been dealt, exhaustively, by the

Apex Court in the case of State of Haryana and Ors. v. Bhajan Lal and Ors. 1992 SCC 426. In paras 30,31 and 33 the apex court has laid down that:

30. The legal mandate enshrined in Section 154(1) is that every information relating to the commission of a "cognizable offence" (as defined u/s 2(c) of the code) if given orally (in which case it is to be reduced into writing) or in writing to "an officer in charge of a police station" (within the meaning of Section 2(o) of the code) and signed by the informant should be entered in a book to be kept by such officer in such form as the state government may prescribe which form is commonly called as "First Information report" and which act of entering the information in the said form is known as registration of a crime or a case.

31. At the stage of registration of a crime or a case on the basis of the information disclosing a cognizable offence in compliance with the mandate of Section 154(1) of the code the concerned police officer can not embark upon an enquiry as to whether the information, laid by the informant is reliable and genuine Or otherwise and refuse to register a case on the ground that the information is not reliable or credible. On the other hand the officer in charge of a police station is statutorily obliged to register a case and then to proceed with the investigation if he has reason to suspect the commission of an offence which he is empowered u/s 156 of the code to investigate subject to the proviso to Section 157... In case, an officer in charge of a police station refuses to exercise the jurisdiction vested in him and to register a case on the information of a cognizable offence reported and thereby violates the statutory duty cast upon him, the person aggrieved by such refusal can send the substance of the information in writing and by post to the superintendent of police concerned who if satisfied that the information forwarded to him discloses a cognizable offence, should either investigate the case himself or direct an investigation to be made by any police officer subordinate to him in the manner provided by Sub-section (3) of Section 154 of the Code.

....

....

33. It is. therefore, manifestly clear that if any information disclosing a cognizable offence is laid before an officer-in-charge of a police station satisfying the requirements of Section 154(1) of the code. the said police officer has no other option except to enter the substance thereof in the prescribed form, that is to say, to register a case on the basis of such information.

(Under line Emphasis Supplied).

8. Further it has been held in the aforesaid judgment (Rakesh Puri) that:

Section 156(3) provides that the Magistrate "may order such an investigation as mentioned above". These words clearly indicate and are relatable to an investigation which is to be conducted by the police u/s 156(1) Cr.P.C. The purview of the power of

the Magistrate conferred u/s 156(3) Cr.P.C. does not travel beyond the said scope. It is limited in nature and the Magistrate under that Sub-section is empowered only to look to the application or complaint only to find out as to whether a cognizable offence is disclosed or not? Let me make it clear that registration of a FIR is quite different than the investigation of the same. It has been so held in the case of Bhajan Lal (Supra) by the apex court. In para 41 of the said judgment the apex court has held:

We shall now examine as to what are the requirements to be satisfied by an officer in charge of a police station before he enters into the realm of investigation of a cognizable offence after the stage of registration of the offence u/s 154(1). We have already found that the police have u/s 154(1) of the code a statutory duty to register a cognizable offence and thereafter u/s 156(1) a statutory right to investigate any cognizable case without requiring sanction of a Magistrate. However. the said statutory right to investigate a cognizable offence is subject to the fulfillment of pre-requisite condition. contemplated in Section 157(1). The condition is that the officer in charge of the police station before proceeding to investigate the facts and circumstances of the case should have "reason to suspect" the commission of an offence which he is empowered u/s 156 to investigate.

(Under line emphasis supplied).

9. In para 48 and 49 of the same judgment the apex court has reiterated the same view and has concluded the (this) aspect thus:

Resultantly, the condition precedent to the commencement of the investigation u/s 157(1) Cr.P.C. of the code is the existence of the reason to suspect the commission of a cognizable offence which has to be, prima fecie, disclosed by the allegations made in the first information report laid before the police officer u/s 154(1).

10. In the case of Madhu Bala v. Suresh Kumar and Ors. 1998 SCC 111 it has been held by the Supreme Court in para 10 thereof:

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".

(emphasis supplied).

It has been held by the apex court in the case of Central Bureau Of Investigation through S.P. Jaipur v. State of Raiasthan and Anr.2001 SCC 524 as follows:

What is contained in Sub-section (3) of Section 156.is the power to order the investigation referred to in Sub-section (1). because the words " order such an

investigation as above mentioned " in Sub-section (3) are inmistakably clear as referring to the other Sub-section. Thus the power is to order an "officer in charge of a police station" to conduct investigation

(Emphasis mine and Supplied)

It has further been laid down in the said case Rakesh Puri (supra) that:

The primary responsibility for conducting investigation into offences in cognizable cases vests with such police officer. Section 156(3) of the code empowers a Magistrate to direct such officer in charge of the police station to investigate any cognizable case over which such Magistrate has jurisdiction.

(Emphasis mine and Supplied)

In para 16 thereof the apex court has laid down the law, in respect of the power of Magistrate u/s 156(3) Cr.P.C. as follows:

We, therefore reiterate that the magisterial power can not be stretched under the said sub-section beyond directing the officer in charge of a police station to conduct the investigation.

(Emphasis mine and supplied)

11. The above quoted passages unequivocally brings out the ambit of power of Magistrate u/s 156(3) Cr.P.C. Under the said section the Magistrate does not take the cognizance of the offence himself and the power is wielded by him at the pre cognizance stage falling under chapter XII relating to the power of the police to investigate into the cognizable offence. Thus at the stage of Section 156(3) Cr.P.C. a person against whom an application under the said section is filed does not come into the picture at all to participate in the proceedings. It is preposterous even to cogitate that a person has a right to appear before the Magistrate to oppose an application seeking a direction from him for registration and investigation of the offence when he has got no right to participate in the said ex-parte proceeding. If permitted this will amount to killing of foetus of investigation in the womb when it was not there at all. Such a power has not been conferred under the law on the prospective accused. See Hari Raj Singh v. State of U.P. XLVI 2000 ACC 1180: Brijesh v. State of U.P. and Ors. XXXIV 1997 ACC 687: Father Thomas v. State of U.P. and Ors. XLIV 2002 ACC 143. Further at the stage of Section 156(3) Cr.P.C. which is a pre cognizance stage accused will be implanted on a person only by registration of the FIR by the police or by taking cognizance by the Magistrate of the offence and summoning of the person as an accused u/s 204 Cr.P.C. Thus no person can be bestowed with a right to challenge an order for registration and investigation of offence passed u/s 156(3) Cr.P.C. when he is not even an accused.
It has further been held that in that judgment:

Cr.P.C. does not permit the accused to challenge any order at every stage of proceedings. There are certain stages in which even though judicial orders are passed but the person aggrieved has no right to challenge the order even on the pretext that his Fundamental Rights are being infringed. As exemplars, I refer, that an accused does not have a right to challenge the registration of a complaint and taking cognizance on it by the Magistrate, recording of statements u/s 200 and 202 Cr.P.C., issuing of bailable and non-bailable warrants, registration of charge sheet after investigation u/s 173 Cr.P.C., granting of adjournments, exemption of accused, fixing dates for evidences, recording of statement u/s 313 Cr.P.C., directing for further investigation by the police u/s 173(8) Cr.P.C. etc. etc. All these types of orders and many such other orders are all judicial orders passed in a judicial proceeding but they are not subjected to the revisional powers of the courts u/s 397(1) Cr.P.C. at the instance of the accused. If an accused does not have a right to participate in a proceeding at the stage of Section 156(3) Cr.P.C. it is incomprehensible that he has power to challenge order passed under that section more so order for registration of FIR which is different from investigating the offences, if any, disclosed by the said FIR, In the case of Bhajan Lai (Supra) while laying down the guidelines for quashing of the FIR the apex court has not conferred the power on the accused to challenge the registration of FIR against him. This matter has come up before the apex court in the case of Janta Dal v. H.S. Chowdhary and Ors. 1993 SCC 36 (Known as Bofor''s case) where the apex court denounced the practice of lower court in issuing of notice on the registration of FIR u/s 397(1) or 482 Cr.P.C. In the said case the revisional court because of various illegalities had taken suo motu cognizance and had issued notice to C.B.I. to show cause as to why the FIR and the proceeding subsequent thereto be not quashed. The apex court in the concluding part of it''s judgment quashed the order of revisional court u/s 397 and 401 read with Section 482 Cr.P.C. taking suo motu cognizance. In the same case (the) Apex Court has approved the judgment of Kekoo J. Maneckji Vs. Union of India (UOI) and Others, thereof in which it has been held as follows:

This is admittedly a stage where the prosecuting agency is still investigating the offence and collecting evidence against the accused. The petitioner, who is the accused, has therefore, no locus standi as this stage to question the manner in which the evidence should be collected. The law of this country does not give any right to the accused to control, or interfere with, the collection of evidence.

12. It has been further held in the said case Rakesh Puri (Supra) that Ajai Malviya v. State of U.P. XLI 2000 ACC 435 does not lay down correct law in the following words:

I have gone through the said judgment. With profound respect to the Hon''ble Judges in the said case and with utmost humility and humbleness at my command I find myself unable to agree with said judgment in so far as the maintainability of revision at the instance of the accused against the order passed u/s 156(3) Cr.P.C. is concerned in as much as the said judgment is not only against the statutory

provision of Section 397(1) and (2) Cr.P.C. which escaped the notice of the aforesaid Division Bench but also because it is against the very spirit of the provision of 156(3) Cr.P.C. and law laid down by the apex court referred to above which is binding under Article 141 of The Constitution Of India and is the law declared. Let me list the reasons for my disagreement. Firstly, Ajai Malviya''s case (Supra) was decided in a writ jurisdiction under Article 226 of The Constitution Of India where the infringement of Fundamental Rights was alleged on the ground that no offence is disclosed in the FIR already registered.

(Emphasis Mine).

The prayer made in the said writ petition is mentioned in the opening part of the said judgment as follows:

The first information report dated 6.8.1998 on the basis of which case crime No. 743 of 1998 u/s 406/420 IPC has been registered at police station Chakeri, district Kanpur Nagar is sought to be quashed by means of this writ petition under Article 226 of the Constitution. A direction not to arrest the petitioner in the case aforestated during the course of investigation has also been sought besides the relief of certiorari.

13. Thus the petitioner in that case was seeking an extra ordinary Constitutional remedy conferred on him under Article 226 of The Constitution Of India. He was not seeking a legal remedy provided under Cr.P.C. To avail (of) a legal remedy it has to be specifically provided for by the concerned Statute and such a remedy is governed by the provisions contained therein. If a statute prohibits the claimed legal remedy then the aggrieved person cannot avail of it. Secondly, the Division Bench in that case completely over looked the provisions of Section 397(1)and (2) Cr.P.C especially Sub-section (2) thereof which prohibits maintainability of a revision in cases of interlocutory orders. The aforesaid Division bench did not at all considered the said section before recording a finding that the revision is maintainable against the order passed u/s 156(3) Cr.P.C. It concentrated only on one aspect of the matter and that was that the order passed u/s 156(3) Cr.P.C. is a judicial order and hence amenable to revisional jurisdiction. This view by the said Division Bench, with profound respect, is in direct conflict with Section 397(2) Cr.P.C. in as much as all interlocutory orders are judicial orders passed in a judicial proceeding but they all are not subjected to revisional powers of the courts u/s 397(1) Cr.P.C. Registration of a complaint, Ordering for further investigation u/s 173(8) Cr.P.C by a Magistrate after receiving a report from the police u/s 173(1), registration of charge sheet submitted by the police u/s 173(2), issuance of non bailable warrant, issuance of process u/s 82-83 Cr.P.C., recalling a witness, granting bail and cancellation thereof, asking the complainant to produce evidence under Sections 200 and 202 Cr.P.C. granting of adjournments, exemptions of accused,giving dates in the cases, order for framing of charge, recording of statement u/s 313 Cr.P.C. fixing dates for evidences, order for committal of cases to the court of Session''s and many more

such orders are all judicial orders passed in a judicial proceeding but they are not subjected to revisional powers u/s 397/401 Cr.P.C. and in fact are barred by Section 397(2) Cr.P.C. This very important aspect of the matter which was sine qua non for deciding the question of maintainability of a revision at the instance of accused against the order passed u/s 156(3) Cr.P.C. and was relevant and germane to the controversy was not considered at all by the said Division Bench. Let me point out here that u/s 156(3) Cr.P.C. there was no proceeding between the litigating parties and no such proceeding was finalised. No inquiry or trial was held between two parties. Under that section it is only an administrative power which is being exercised by the Magistrate ex parte being superior authority to direct the police to register and investigate the offence. Such an order is pure and simple interlocutory order barred u/s 397(2) Cr.P.C. from being revised. Thirdly, the said Division Bench also failed to notice that the word "Proceeding" mentioned u/s 397(1) Cr.P.C. does not embraces within it''s purview all proceedings even exparte proceeding in which the other side even does not have the right to participate and to be heard. At the stage of Section 156(3) Cr.P.C. the prospective accused cannot be heard at all and once he cannot be heard how can he challenge the said order. The word "Proceeding" u/s 397(1) Cr.P.C. means the "Proceedings" which is final in nature and in which both the sides had got a right to be heard whether they have in fact been heard or not. It is because of this reason that recently the Apex court in the case of Subarmanivam Sethauraman v. State of Maharastra 2005 SCC 242 has held that even an order of summoning of an accused is not amenable to revisional jurisdiction. The same view was expressed by this Court in the case of Atul Kumar Mathur and Ors. v. State of UP and Ors. 1994 ACC 535. Thus the accused who does not have a legal right to participate in the proceeding u/s 156(3) Cr.P.C. certainly can not be conferred with the right to challenge the order passed under that section. The Apex Court has held that the accused has got such a right of challenge only after he has been summoned as an accused in the case by the trial court to face the charge after the charge sheet is submitted against him. See Janta Dal v. H.S. Chowdhary(Supra). The apex court has held in many other decisions that the accused has no right to be heard before he is summoned. In Nagawwa v. V.S. Konialgi XIII 1976 ACC 225 The apex court has observed thus:

in proceeding u/s 202 the accused has got absolutely no locus standi and is not entitled to be heard on the question whether the process should be issued against him or not.

14. In The State of Bombay Vs. Parshottam Kanaiyalal, it was also held by the apex court that:

The section does not say that a regular trial of adjudging the truth or otherwise of the person complained against should take place at that stage, for such a person can be called upon to answer the allegation made against him only when a process has been issued.

(Emphasis Mine)

15. In the case ofChandra Deo Singh v. Prakash Chandra Bose AIR (1963) SC 202 it was observed by the apex court:

Permitting the accused person to intervene during the inquiry would frustrate its very object and that is why legislature has made no specific provision permitting an accused person to take part in the inquiry

16. In the case of Superintendent Of Police. C.B.I. And Ors. v. Tapan Kumar Singh 2003 SCC 1305 dealing with registration of FIR by the police it has been held by the apex court:

The true test is whether the information furnished provides a reason to suspect the commission of an offence, which the police officer concerned is empowered u/s 156 of the Code to investigate. If it does, he has no option but to record the information and proceed to investigate the case either himself or depute any other competent officer to conduct the investigation. The question as to whether the report is true, whether it discloses full details regarding the manner of occurrence. whether the accused is named and whether there is sufficient evidence to support the allegation are all matters which are alien to the consideration of the question whether the report discloses the commission of cognizable offence. Even if the information does not give full details regarding these matters the investigating officer is not absolved of his duty to investigate the case and discover the true facts if he can.

(Emphasis Mine)

17. It is under such power of police that the order u/s 156(3) is to be passed by the Magistrate when he is approached by the aggrieved person. It is the duty of the Magistrate to get the mandate of law observed by the police and not to get it flouted by it. Therefore the natural corollary is that if an application or a complaint disclosing commission of a cognizable offence is filed and the Magistrate is prayed for a direction to order for an investigation he has to order for such an investigation and he does not have any other option. Reference is to be made to the following judgments of this Court:

Bahadur Singh v. State of U.P. LI 2005 ACC 901 and M. Durga Prasad, Spl. Assistant, Syndicate Bank and Vs. The State of A.P.,

18. In the case of Sri Bhagwan Samardha Sreepada Vallabha Venkata Vishwandadha Maharaj Vs. State of Andhra Pradesh and Others, it has been held by the apex court:

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 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.

19. In the case of Pratap v. State of UP XXVIII 1991 ACC 422 it was held by Hon''ble G.P. Mathur J. as his lordship then was as follows:

Neither under the code of Criminal Procedure nor under any principle of natural justice the Magistrate is required to issue, notice or afford an opportunity of hearing to an accused in a case where the police has submitted final report but on consideration of material on record the Magistrate cognizance of the offence in exercise of his power u/s 190(1)(b) and direct issue of process to the accused. The code does not contemplate holding of two trials one before issue of process and the other after the process is issued.

(emphasis Mine)

20. The said observations in Pratap''s case has been quoted with approval in the case of Karan Singh v. State XXXIV 1997 ACC 163 where in it has been observed by this Court as follows:

Where an order is made u/s 156(3) Cr.P.C. directing the police to register FIR and investigate the same, the Code no where provides that the Magistrate shall hear the accused before issuing such a direction, nor any person can be supposed to be having a right asking the court of law for issuing a direction that an FIR should not be registered against him. Where a person has no right of hearing at the stage of making an order u/s 156(3) or during the stage of investigation until courts takes cognizance and issues process, he can not be clothed also with a right to challenge the order of the Magistrate by preferring a revision under the Code. He can not be termed as an "aggrieved person " for the purpose of Section 397 of the Code

21. Thus at the stage of Section 156(3) any order made by the Magistrate does not adversely affect the right of any person since he has got ample remedy to seek relief at the appropriate stage by raising his objections. Further the observations of the apex court in case of Bhajan Lal (Supra) quoted above applies with full force in negation of the right of a prospective accused to challenge an order u/s 156(3) Cr.P.C. It is incomprehensible that the accused can not challenge the registration of FIR by the police directly but can challenge the order made by the Magistrate for the registration of the same with the same consequences. Thus from the discussions made above it is clear that an accused does not have any right to be heard before he is summoned by the court under the code and that he has got no right to raise any objection till the stage of summoning and resultantly he can not be conferred with a right to challenge order passed prior to his summoning ignoring the provisions of Code. Further if the accused does not have a right to install the investigation, but for the limited grounds available to him under the law, it surpasses all suppositions to comprehend that he posses a right to resist recording of the FIR.

22. To sum up the discussions made above it is clear that the alleged accused has no right to challenge an order passed u/s 156(3) Cr.P.C. at pre cognizance stage by a Magistrate and no revision lay against such an order at the instance of the alleged

accused u/s 397(1) Cr.P.C. being barred by Section 397(2) Gr.P.C. nor at his instance an application u/s 482 Cr.P.C. is maintainable for the simple reason that to secure the ends of justice it is a must that if cognizable offence is disclosed in an application filed by the aggrieved person then his such an application must be investigated to bring culprits to books and not to thwart his attempt to get the FIR registered by rejecting such an application which will not amount to securing the ends of justice but will amount to travesty of it. It is out side the purview of scope of Section 397(1) Cr.P.C. to embrace any proceeding which is not final in nature and in which the other side has no right to be heard. Proceeding u/s 156(3) Cr.P.C. is not such a proceeding and it is conducted only for a limited purpose of ordering for an investigation by the police, ex- parte, if cognizable offence is disclosed through such an application. The Magistrate under that section is required to scan the application or the complaint only to find out as to whether any cognizable offence is disclosed or not and no further. No doubt, as has been held by me herein before, that the order u/s 156(3) Cr.P.C. is a judicial order but it is administrative in nature because of it''s placement under chapter XII Cr.P.C. relating to power of the police to investigate a matter. The Division Bench in Ajai Malviya''s case (Supra) did not at all addressed itself to the said aspect of the matter in conjunction with the scope of Section 154(1) and 156(1) Cr.P.C. and the law laid down by the apex court in the case of State of Haryana v. Bhajan Lal 1992 SCC (Cr) 347(Supra) and also in the case of Central Bureau of Investigation. Through S.P. Jaipur v. State of Rajasthan and Anr. 2001 SCC 524. (Supra) Fourthly, the accused can not be allowed to challenge each and every order at every stage of judicial proceedings as has been discussed by me in this judgment herein before.. Fifthly, the order u/s 156(3) Cr.P.C. is a pre cognizance stage order as has been held by the Apex court in the case of Devarapalli Lakshaminarayana Reddy and Ors. v. V. Narayana Reddy and Ors. 1976 ACC 230 and recently in the case of Suresh Chand Jain v. State of Madhya Pradesh and Anr. JT 2001(2) SC 81. In the case of Devarapalli (Supra) the Apex Court has gone to the extent in observing that the nature of order u/s 156(3) Cr.P.C. is:

Peremptory reminder or intimation to the police to exercise their plenary powers of investigation u/s 156(1)

23. Such a nature of order is not revisable u/s 397(1) Cr.P.C. and is barred u/s 397(2) Cr.P.C. Sixthly, because Section 156(3) Cr.P.C. embraces into it''s purview those cases also where the police on it''s own has registered the FIR and had investigated the matter and after investigation has submitted a report to the concerned Magistrate. Magistrate in such cases enjoins the same power which the police enjoins u/s 173(8) Cr.P.C. to direct for further investigation even though the police had already investigated the matter and had submitted it''s report to the Magistrate. It has been held by the Supreme Court in the case of State of Bihar and Anr. v. J.A.C. Saldanha and Ors. 1980 SCC 272 as follows-

The power of the Magistrate u/s 156(3) to direct further investigation is clearly an independent power and does not stand in conflict with the power of the State Government as spelt out herein before. The power conferred upon the Magistrate u/s 156(3) can be exercised by the Magistrate even after submission of a report by the investigating officer which would mean that it would be open to the Magistrate not to accept the conclusion of the investigating officer and direct further investigation. This provision does not in any way affect the power of the investigating officer to further investigate the case even after the submission of the report as provided in Section 173(8).

(Emphasis Mine).

24. The Supreme Court has spelt out the same law earlier also in the case of Abhinandan Jha and Others Vs. Dinesh Mishra, in the following terms:

But there may be instances when the Magistrate may take the view, on a consideration of a final report,that the opinion formed by the police is not based on full and complete investigation, in which case, in our opinion, the Magistrate will have ample jurisdiction to give direction to the police, u/s 156(3), to make a further investigation

(Emphasis Mine).

25. It has further been held Rakesh Puri''s case (Supra):

Thus it is clear the u/s 156(3) Cr.P.C. the Magistrate can only direct registration and investigation of the offences by the police. (Is) can such an order revisable u/s 397 Cr.P.C? The answer is emphatic No. The accused no where comes into picture at that stage. Such a nature of order if allowed to be subjected to the revisional powers of the court u/s 397 Cr.P.C. then it will defeat the very purpose of Section 156(3) Cr.P.C. for which it has been enacted in the Code and will open ''Tsunamis'' for the revisional courts and no investigation will be allowed to proceed. This was never the intention of the Legislature and framers of law. The aggrieved accused has been conferred the right to be heard at the appropriate stage by the Cr.P.C. and that certainly does not include the stage of Section 156(3) Cr.P.C. Resultantly an order u/s 156(3) is not revisable u/s 397(1) Cr.P.C. The Division Bench in Ajai Malviya''s case (Supra) even though took a note of the observations made by the Apex Court in the case of Devarapalli Lakshaminarayana Reddy and Ors. but went contrary to it in holding that the revision lay against an order u/s 156(3) Cr.P.C. at the instance of an accused, which view is the very ante thesis of the observation made by the Apex Court in the said Judgment. With due respect to the Judges of the said division bench case they have made a casual observation, even with out looking to Section 397 Cr.P.C. which deals with revisional powers of the High Court as well as of the Session''s Court, that the revision lay against the order passed u/s 156(3) Cr.P.C. The Division Bench, with profound respect did not examine the scope of revisional powers of the courts at all. In the case of Suresh Chand Jain (Supra) has been held by

the Apex court that:

But the significant point to be noticed is when a Magistrate orders investigation under chapter XII he does so before he takes cognizance.

(Emphasis Mine)

Thus there was no opinion formed by the Magistrate against any body and hence no body was an accused and hence there does not arise any question of infringment of any "Fundamental Right" or "legal right" of any person.

26. From the discussions made above it is clear that no revision is maintainable at the instance of the accused against an order passed u/s 156(3) Cr.P.C.

27. In that decision (Rakesh Puri''s Case) another aspect of the matter of maintainability of writ petition of the instance of accused when the F.I.R. has been registered under order of Magistrate u/s 156(3) Cr.P.C. has also been dealt with as follows:

Now coming to the last submission, which has been argued during the course of the argument that a writ petition is not maintainable for quashing of a FIR unless and until an order u/s 156(3) is challenged by the aggrieved person In this respect I am of the view that the said aspect of the matter should not vex the mind at all. ''Legal rights'' are different from ''Constitutional Rights''. The code of criminal procedure confers a ''Legal Right'' where as Article 32 and 226 of The Constitution Of India confers a ''Fundamental'' and a ''Constitutional Right''. Article 32 by itself is a ''Fundamental Right''. Because a person does not possess a legal right does not divest him from wielding his constitutional rights. More over prior to the lodging of the FIR a person against whom an application or complaint u/s 156(3) Cr.P.C. has been filed is not entitled to be heard nor he can challenge any order passed on the said application but as soon as the FIR is registered he gets a constitutional right to challenge the same as he is anointed as an accused and hence can always show that his Fundamental Rights conferred under Article 14, 19 and 21 of The Constitution Of India are jeopardized as no offence is disclosed through the said FIR and registration of the same by the police is illegal. Since the aggrieved person does not have any right to challenge and raise his grievance before the court of law prior to the registration of FIR his said disability vanishes with registration of the same against him. Merely because the Magistrate has ordered for registration and investigation of the case that does not takes away or abridges and /or divest the aggrieved person to approached the High Court in it''s extra ordinary constitutional writ Jurisdiction to show that the FIR does not discloses commission of any cognizable offence and therefore it deserves to be quashed or that proceedings are tainted with malafides and is vexatious. The passing of an order u/s 156(3) Cr.P.C. by a Magistrate does not in any way even slightly takes away extra- ordinary powers of this Court under Article 226 of the constitution to examine the contentions of the petitioner accused within the periphery of the guide lines laid down by the apex

court in Bhajan Lal''s case (Supra). It will be dichotomical even to ponder that a FIR registered by the police u/s 156(3) of the code or on it''s own is amenable to the writ jurisdiction of this Court but this Court will have no such constitutional power if the FIR is registered under the order passed by the Magistrate in an administrative capacity under chapter XII Cr.P.C. though the power u/s 154(3) and 156(3) are, in essence, similar to each other having the same result. The writ power of this Court under Article 226 of The Constitution is not dependant upon the power or authority of the subordinate courts. Further an alternative remedy is no bar to entertain a petition under Article 226 of The Constitution as has been held in voluminous judgments both by this Court as well as by the Apex Court. Reference may be had to Whirlpool Corporation Vs. Registrar of Trade Marks, Mumbai and Others, Committee Of Management, S. P. G. Inter College, Eka, Forozabad And Anr. v. Regional Joint director of Education And Ors. 2004 (5) AWC 4956, State of U.P. v. Mohd. Moon AIR 1958 SC 86, Canon India Pvt Ltd. v. State of U.P. 2003 UPTC 10, Hidustan Aluminium Corporation Ltd. v. State of U.P. 1977 UPTC 81 Union of India (UOI) and Another Vs. State of Haryana and Another, Sophia Girls School, Meerut, Cantt v. Cantonment Board, Meerut And Anr. 2003 (6) AWC 4986.

28. Further maintainability of a writ petition is not dependant upon an order passed by the Magistrate u/s 156(3) Cr.P.C. because even administrative action are subject to writ jurisdiction of this Court. Exercise of Constitutional power under Article 226 Of The Constitution in the context of present controversy depends more upon factual aspect of the matter - discloser of offence by the FIR and not on the fact that the FIR was registered under Magistrate''s direction. The order passed by the Magistrate u/s 156(3) Cr.P.C. does not diminishes the Fundamental Rights under Chapter III of the Constitution conferred on it''s citizens. It is to be noted that while dealing with power to quash the FIR by High Court the Supreme Court in Bhaian Lal''s case (Supra) as well as in B.R. Baiai v. State of Punjab 1995 SCC 1059 has not said that the prospective accused has got no right to challenge the FIR. It had laid down various criterions for quashing of the FIR and one of such ground is that the FIR does not discloses commission of cognizable offence of any kind. The Magistrate u/s 156(3) Cr.P.C. is concerned only with this guide lines and not with other guide lines enumerated by the apex court in those cases whereas a writ for quashing of the FIR is also maintainable on other grounds as well which include legal bar from prosecution, malafide, no legal evidence, lack of admissible evidences etc. Thus the writ petitioner can not be thrown out of the court merely because the FIR is registered under the orders of the Magistrate passed u/s 156(3) Cr.P.C. It has been held by the apex court in the case of S.N. Sharma Vs. Bipen Kumar Tiwari and Others, as follows:

It appears to us that the, though the code of Criminal Procedure gives to the police unfettered power to investigate all cases where they suspect that cognizable offence has been committed in appropriate cases an aggrieved person can always seek a remedy by invoking the power of the high court under Article 226 of the

Constitution under which if the high could be convinced that the power of investigation has been exercised by a police officer malafide. the High Court can always issue a writ of mandamus restraining the police from misusing his legal powers.

29. The above quoted passage of S.N. Shartna''s case (Supra) has been quoted with approval in Bhajan Lal''s case (Supra) by the apex court and it has been observed thus:

But if a police officer transgresses the circumscribed limits and improperly and illegally exercises his investigatory powers in breach of any statutory provision causing serious prejudice to the pesonal liberty and also property of a citizen then the court on being approached by the person aggrieved for the redress of any grievance, has to consider the nature and extent of the breach and pass appropriate orders as may be called for without leaving the citizens to the mercy of police echelons since human dignity is a dear value of our Constitution.

Moreover, the Apex Court has taken a good care in the cases of arbitrary exercise of power by the police in the law laid down in Joginder Kumar Vs. State of U.P. and others, D.K. Basu Vs. State of West Bengal, State of Maharashtra Vs. Christian Community Welfare Council of India and Another, and in Smt. Nilabati Behera alieas Lalita Behera Vs. State of Orissa and others,

30. Thus the residue of the discussion made above is that a writ petition under Article 226 of The Constitution Of India, is maintainable at the instance of the accused challenging the FIR within the periphery of guide lines laid down by the apex court in Bahaian Lal''s case (Supra) S.N. Sharma''s case (Supra) as well as in other binding judicial pronouncements by it and also by this Court whether the FIR has been registered by the police itself or under the orders of the Superintendent Of Police(Section 154(3) or Under orders of Magistrate, u/s 156(3) Cr.P.C.

31. Summing up the discussion the judgment of the division bench in Ajay Malviya''s case (Supra) does not lay down the correct law and it''s opinion is contrary to the law laid down by the apex court as well as against the statutory provision u/s 397(1)&(2) Cr.P.C. and hence it does not have any binding effect. The alleged accused has no right to challenge an order passed u/s 156(3) Cr.P.C. at a pre cognizance stage by a Magistrate and no revision u/s 397/401 Cr.P.C. or petition u/s 482 Cr.P.C. lay against such an order at his instance being barred by Section 397(2) Cr.P.C. and on the simple reason that to secure the ends of justice it is a must that if cognizable offence is disclosed in an application or complaint filed by a victim then his such an application must be ordered to be investigated by the Magistrate to bring the culprits to books and not to thwart his attempt to get the FIR registered against prospective malefactors by rejecting his such an application which will not amount to securing the ends of justice but will result in travesty of it."

32. Resultantly, from the discussions made above it is clear that Ajai Malvia''s case is contrarily to Section 397(1) and (2) Cr.P.C. which deals with the revisional powers of this Court. In the aforesaid judgment the Division Bench has not at all taken into consideration the aforesaid Section which deals with revisional power of this Court as well as Sessions Judge. Consequently, it does not lay down a binding precedent and is declared per incurium. In holding so I am fortified by the following judgments in the Apex Court:

State through State through S.P., New Delhi Vs. Ratan Lal Arora, ; State of U.P. and Another Vs. Synthetics and Chemicals Ltd. and Another, ; Nirmal Jeet Kaur Vs. The State of Madhya Pradesh and Another, ; N. Bhargavan Pillai (Dead) by Lrs. and Another Vs. State of Kerala,

33. It has been held by the Apex Court in 2006 in the case of Mayuram Subramnian Srinivasan v. C.B.I. as follows;

The effect of Order XXI Rule 13A of the Rules does not appear to have been brought to the notice of the Court while dealing with the application for stay of the judgment of the High Court in orders on which reliance is placed by learned Counsel for the appellants. The consequences which flow from such non reference to applicable provisions have been highlighted by this Court in many cases. In State through S.P., New Delhi Vs. Ratan Lal Arora, it was held that where in a case the decision has been rendered without reference to statutory bars, the same Cannot have any precedent value and shall have to be treated as having been rendered per incuriam. The present case stands at par, if not, on a better footing. The provisions of Section 439 do not appear to have been taken note of.

"Incuria" literally means "carelessness". In practice per incuriam is taken to mean per ignoratium. English Courts have developed this principle in relaxation of the rule of stare decisis. The "quotable in law", as held in Young v. Bristol Aeroplane Co. Ltd. (1944) 2 All E.R. 293 , is avoided and ignored if it is rendered, "in ignoratium of a statute or other binding authority". Same has been accepted, approved and adopted by this Court while interpreting Article 141 of the Constitution of India, 1950 (in short the ''Constitution) which embodies the doctrine of precedents as a matter of law. The above position was highlighted in State of U.P. and Another Vs. Synthetics and Chemicals Ltd. and Another, . To perpetuate an error is no heroism. To rectify it is the compulsion of the judicial conscience. The position was highlighted in Nirmal Jeet Kaur Vs. The State of Madhya Pradesh and Another, . The question was again examined in N. Bhargavan Pillai (Dead) by Lrs. and Another Vs. State of Kerala,

It was observed in para 14 of the said judgment as follows: "14- Coming to the plea relating to benefits under the Probation Act, it is to be noted that Section 18 of the said Act clearly rules out application of the Probation Act to a case covered u/s 5(2) of the Act. Therefore, there is no substance in the accused-appellant''s plea relating to grant of benefit under the Probation Act. The decision in Bore Gowda''s case

(supra) does not even indicate that Section 18 of the Probation Act was taken note of. In view of the specific statutory bar the view, if any, expressed without analysing the statutory provision cannot in our view be treated as a binding precedent and at the most is to be considered as having been rendered per incuriam. Looked at from any angle, the appeal is sans merit and deserves dismissal which we direct.

(underline emphasis supplied)

34. Thus, the residue from the discussion made above brings out that the accused does not have any right to challenge an order passed u/s 156(3) Cr.P.C and therefore, the present revision at the instance of Chnadan, who is a prospective accused in an application u/s 156(3) Cr.P.C. is not maintainable and therefore, this revision is dismissed as being not maintainable.

35. Since, this Court is burdened with a spate of such revisions every day, therefore, I consider it appropriate to direct the Registrar General of this Court to circulate a copy of this order to all the Judicial Officers in the State for their information and follow up action.

36. This revision stands dismissed.