

**HON'BLE SRI JUSTICE C. PRAVEEN KUMAR**

**WRIT PETITION No.22349 of 2017**

**ORDER:**

Heard learned counsel for the petitioner and learned Government Pleader for Home for respondents. Though no counter has been filed by the learned Government Pleader, with the consent of both the counsel, the Writ Petition is disposed of at the stage of admission.

Challenging the order dated 01.07.2017 passed by the Rent Control Court-cum-IV Junior Civil Judge FAC Principal Junior Civil Judge, Visakhapatnam in Crime No.326 of 2017 of P.M.Palem Police Station, Visakhapatnam, the present Writ Petition is filed.

The petitioner herein was arrayed as an accused in the said crime, which was registered on 29.06.2017 at 11.30 p.m., for the offences punishable under Sections 420, 468, 471 read with Section 120-B IPC and Sections 3 and 4 of the A.P. Land Grabbing (Prohibition) Act. The said crime was registered in Visakhapatnam and the petitioner was arrested in Hyderabad on 30.06.2017 at 4.30 p.m. These facts are not in dispute. On 01.07.2017 the petitioner was produced before the court and after hearing the counsel appearing for the petitioner, the impugned order came to be passed remanding the accused to custody.

The main ground urged by the learned counsel for the petitioner is that since the offences alleged against the petitioner are punishable with imprisonment of 7 years or less, the reasoning given by the learned Magistrate while remanding the accused is contrary to the ratio laid down in *Arnesh Kumar v. State of Bihar*. In other words, he would submit that the reasons given by the learned Magistrate for not applying the ratio laid down in *Arnesh Kumar* are per se illegal and improper.

Learned counsel for the petitioner took me through the judgments of the Apex Court in *Arnesh Kumar v. State of Bihar*<sup>1</sup> and *Rini Johar and another v. State of Madhya Pradesh and others*<sup>2</sup> to substantiate that when a right of individual guaranteed under Article 21 of the Constitution of India is violated, the petitioner has every right to question the same under Article 226 of the Constitution of India. In substance his argument is that since the remand itself is illegal, the fundamental right guaranteed to the petitioner under Article 21 of the Constitution has been violated, thereby putting the petitioner to face a lot of humiliation.

Per contra, learned Government Pleader for Home on instructions would submit that it is not necessary that one has to follow 41-A Cr.P.C., in every case. According to her, since the petitioner is involved in 11 other crimes, which are referred to in the

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<sup>1</sup> (2014)8 SCC 273

<sup>2</sup> (2016)11 SCC 703

remand report and having regard to the fact that there is every likelihood of evading the process of law if released on bail or likelihood of the intimidating the witnesses thereby tampering with the evidence, the Magistrate was justified in remanding the accused in terms of Section 41(1)((b)(ii) Cr.P.C. According to her, since the scope of the application of Section 41 and 41-A Cr.P.C., are distinct, and having regard to the apprehension expressed, there is every reason for the Court below to remand the accused without giving a notice. In other words her argument is that in the present case there is no need to follow the ratio laid down in Arnesh Kumar.

The exercise of power by the police to arrest an accused by invoking Section 41 and 41-A Cr.P.C. are distinct. Section 41-A Cr.P.C., can be invoked by a Police Officer in all cases where the arrest of a person is not required under sub-section (1) of Section 41. He has to issue a notice directing the accused to appear before him and if the accused complies with the terms of the notice, he shall not be arrested unless for the reasons to be recorded, the Police Officer is of the opinion that arrest is necessary. At the same time, a duty is cast upon him to follow the conditions precedent for arrest as envisaged under Section 41 Cr.P.C., which shall be subject to the scrutiny by the Magistrate. Section 41 postulates arrest of a person without any order from the Magistrate and without a warrant. An arrest under Section 41 cannot be made to the satisfaction of the

Police Officer. He cannot arrest the accused on the ground that offences committed are punishable with imprisonment of 7 years or less. The arrest under Section 41 Cr.P.C., can be made, if the officer is satisfied that the case of the accused falls within any of the parameters laid down in Section 41-B(i)&(ii) Cr.P.C. The law also mandates that the Police Officer has to state the facts and record reasons in writing which led him to come to a conclusion covered by Section 41(i)(b) Cr.P.C., while making such arrest.

In the instant case the learned Government Pleader for Home justifies the arrest and remand of the accused as the case falls squarely within the condition stipulated in Section 41(1)(b)(ii) Cr.P.C. In support of the plea, she took me through the remand report, to show that as the petitioner is involved in number of cases and as there is likelihood of he evading the process of law, following or issuing notice under Section 41-A Cr.P.C., would not arise.

The learned Senior Counsel appearing for the petitioner would contend that though the remand report discloses registration of 11 crimes against the petitioners, but out of the 11 crimes, two cases were referred as civil in nature, one crime was quashed pursuant to a compromise arrived at between the parties and in 7 cases the petitioner is not even shown as an accused in the F.I.Rs.

Insofar as the present incident is concerned, he submits that though the crime is registered in the month of June 2017, but the

incident referred to in the said crime relates to a transaction between the parties which took place in the year 2010, wherein the petitioner is said to have cheated the informant by conspiring with the other accused, by stating that he has got land from Vizianagaram Maharajas situated at S.No.124 of Chinagadhili Mandal, Visakhapatnam rural to the extent of Ac.24.05 cents; he has documents with regard to that land and would sell the land at a cheaper rate. Believing the words of the petitioner, the informant and others gave Rs.5 crores and after receipt of the amount the petitioner took the informant and other investors to the S.R.O., Visakhapatnam in the year 2010; obtained their signatures; told them that the registration process was complete and that the registered document will be released after a week. But no document was released and demanded for more money stating that the registration is kept pending, for payment of stamp duty. On demand for return of the amount already paid by the informant and others, the petitioner stated that he cannot give back the money and instead of that, he offered land at Rushikonda which would be registered in the name of Dasarada Maharaju. For which the informant and others accepted but the investors asked the petitioner to register the land in the name of the informant. The petitioner created stories and documents which ultimately lead to lodging of a report in 2017.

Keeping the arguments, advanced aside for a moment, it would be useful to refer to the impugned order. The relevant portion of the impugned order is as under:-

"Perused the record the accused is arrested in Crime No.326/17 of PM Palem P.S. u/sec.420, 468, 471 read with 120-B of IPC and Sec.3 & 4 of A.P. land Grabbing (Proh) Act, 1982. The offence under Section 420 IPC, 468 IPC is punishable with imprisonment for 7 years & fine. I go through the judgment of Arnesh Kumar v. State of Bihar. All the state Govt. to instruct its police officer not to automatically arrest when a case u/sec.498-A IPC. This is not a case of 498-A IPC.

Sec.41-A notice is applicable for the offence punishable with 7 years. More over its depend upon the gravity of the offences. If the case is proved accused will be punished 20 years for all the offence under this crime. The reasons given by the police for non issuance of 41-A notice satisfied with.

As prima facie material attracted the offence punishable upto 7 years. Several reasons given by the police for the arrest of the accused satisfied with and it is fit case for remand. Hence accused is remanded till 14.7.2017."

A reading of the impugned order shows that the learned Magistrate refused to accept the applicability of the ratio laid down in Arnesh Kumar case for the reason that it was directed only against an offence punishable under Section 498-A IPC and if the case is proved against the accused he can be convicted beyond 20 years for all the offences referred to. (if the sentences for the alleged offences in the crime are directed to run consecutively). The order further says that the reasons given by the Police for the arrest of the accused is satisfactory and that it is a fit case for remand. It appears that the learned Magistrate has not properly understood the

judgment of Arnesh Kumar. Paragraph 12 of the said judgment categorically states that the directions given in the said judgment apply not only to an offence punishable under Section 498-A IPC or Section 4 of the Dowry Prohibition Act, but also to all the cases where the offences are punishable with imprisonment for a term which may be less than 7 years or which may extend to 7 years whether with fine or without fine. Therefore, the reason given by the learned Magistrate that the judgment of the Apex Court is applicable only to the offence under Section 498-A IPC is incorrect.

Secondly, the learned Magistrate in his order states that if the case is proved, the accused would be punished for 20 years for all the offences under the crime. Meaning thereby that if the sentences were directed to be run consecutively, the petitioner can be convicted beyond 20 years and hence the limitation of 7 years prescribed under Section 41-A Cr.P.C., is not applicable. That does not appear to be the purport of the judgment. Infact, in **Rini Johar's case**, the court dealt with a situation where the petitioner was charged for the offence punishable under Section 420 IPC and Section 66-D of the Information Technology Act, 2000. It is urged that if the punishment under both the counts are put together, it would be beyond 7 years but still the Apex Court granted the relief on the ground that the agency ought to have followed Arnesh Kumar case. Therefore, the reasoning given by the Magistrate in refusing to invoke the provisions

of Arnesh Kumar on the ground that cumulative effect of sentence would be beyond 20 years cannot be accepted.

It is to be noted here, that the argument advanced by the learned Government Pleader for Home is that the judgment of Arnesh Kumar is not applicable to the facts in issue. But, in my view that was not the circumstance, which made the learned Magistrate to order remand. If that was so, the learned Magistrate ought to have given reasons, as contemplated by the Apex Court in paragraph 8.2 and 8.3 of the Arnesh Kumar case. It would be relevant to extract the relevant paragraphs, which are as under:-

"8.2. Before a Magistrate authorises detention under [Section 167, Cr.PC](#), he has to be first satisfied that the arrest made is legal and in accordance with law and all the constitutional rights of the person arrested is satisfied. If the arrest effected by the police officer does not satisfy the requirements of [Section 41](#) of the Code, Magistrate is duty bound not to authorise his further detention and release the accused. In other words, when an accused is produced before the Magistrate, the police officer effecting the arrest is required to furnish to the Magistrate, the facts, reasons and its conclusions for arrest and the Magistrate in turn is to be satisfied that condition precedent for arrest under [Section 41 Cr.PC](#) has been satisfied and it is only thereafter that he will authorise the detention of an accused.

8.3. The Magistrate before authorising detention will record its own satisfaction, may be in brief but the said satisfaction must reflect from its order. It shall never be based upon the ipse dixit of the police officer, for example, in case the police officer considers the arrest necessary to prevent such person from committing any further offence or for proper investigation of the case or for preventing an accused from tampering with evidence or making inducement etc., the police officer shall furnish to the Magistrate the facts, the reasons and materials on the basis of which the police officer had reached its conclusion. Those shall be perused by the Magistrate while authorising the detention and only after recording

its satisfaction in writing that the Magistrate will authorise the detention of the accused."

Except stating that "several reasons given by the police for arrest of the accused are satisfactory and that it is a fit case for remand", the order is silent as to the reasons which led the court in ordering remand. As observed earlier, the Apex Court categorically held that the Police Officer effecting the arrest is required to furnish to the Magistrate, the facts, reasons and its conclusions for arrest and the Magistrate in turn is to be satisfied that the condition precedent for arrest under Section 41 Cr.P.C. has been satisfied and it is only thereafter that he can authorize the detention of an accused. It was further held that before authorizing detention, the Magistrate shall record his own satisfaction in brief but the said satisfaction must reflect from his order. In the instant case, except a sentence saying that he is satisfied with the reasons given by the police for arrest, the impugned order is silent as to the circumstances which warranted him to accept the arrest, made under Section 41 Cr.P.C.

Since the order is bereft of reasons and having regard to the plea taken by the Government Pleader, the order under challenge is set-aside, directing the Magistrate to forthwith pass an order, after hearing the petitioner, as to whether the case falls within the parameters of Section 41-A or 41 of Cr.P.C. and give reasons thereof by taking into consideration the entire text of the judgment of the

Apex Court in Arnesh Kumar, more particularly the paragraphs referred to above.

With the above direction, the Writ Petition is disposed of. No costs. Miscellaneous Petitions pending if any, in this Writ Petition, shall stand closed.

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**JUSTICE C. PRAVEEN KUMAR**

Dt:11.07.2017

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