

HIGH COURT OF BOMBAY AT GOA

CONTEMPT PETITION (MAIN) NO. 37 OF 2018

- 1 Aleixo Arnolfo Pereira,
s/o. Late Adv. Francisco X. Pereira,
Major in age, Indian National,
Resident of H.No.150, Utorda,
P/O. Majorda, Salcete, Goa
Pin : 403 713
E-mail: aleixo_pereira @yahoo.co.uk
M: 9822121338
party in person

.....
Petitioner

Versus

- 1 Mr. Ninad alias Neenad Deulkar,
Police Inspector, Verna Police Station,
P.O. Verna, Salcete, Goa - 403722
- 2 Ragobha Kamat,
Investigating Officer, Verna Police
Station, P.O. Verna, Salcete, Goa-
403722.
- 3 Verna Police Station,
Through its Investigating Officer
Verna, Salcete, Goa – 403 722
4. The Chief Secretary,
State of Goa,
Secretariat – Porvorim

[Amendment
carried out as per
order dated
23/07/2018]

..... Respondents.

Petitioner in person.

Shri Sagar Dhargalkar, Additional Government Advocate for the
respondents No.3 and 4.

Coram: NUTAN D. SARDESSAI, J.

**Reserved on :- 21st February, 2019.
Pronounced on:- 1st March, 2019.**

JUDGMENT:

1. Heard petitioner in person and Shri Sagar Dhargalkar, learned Additional Government Advocate for the respondents.
2. Rule.
3. Shri Sagar Dhargalkar, learned Additional Government Advocate waives service on behalf of the respondents No.3 and 4.
4. The applicant is seeking the initiation of the contempt proceedings against the respondents No.1 and 2 by the issuance of a notice under Section 2(b) of the Contempt of Court's Act, 1971.
5. Heard Petitioner in person and Shri Sagar Dhargalkar, learned Additional Government Advocate for the respondents No.3 and 4.
6. It was briefly the case of the applicant that the respondents No.1 and 2 had not followed the guidelines laid down by the Hon'ble Apex Court in **Arnesh Kumar v/s. State of Bihar and another** [2014 (8) SCC 273] in the matter of issuance of a notice under Section 41A Cr.P.C. and before placing him under arrest. The act of the respondents No.1 and 2 was in gross violation, in contempt and in deliberate disobedience of the directions of the

Hon'ble Apex Court in the matter of his arrest and therefore they had violated his fundamental rights to personal liberty.

7. Heard the applicant in person who submitted that an FIR No.133/2015 was registered against him on 16/12/2015 under Sections 323, 504, 506 r/w. 34 IPC and Section 8 of the Goa Children's Act, 2003 for which the maximum punishment was less than 7 years. A notice was required to be served on the applicant in accordance with Section 41A Cr.P.C. which was not served within two weeks nor any checklist was furnished. He had approached the police on 14/02/2018 and appraised the police that he was aware of his proposed arrest in FIR No.133/2015. The notice was duly received by the respondent No.1 as the Officer Incharge of the Verna Police Station which was submitted by him through his authorised representative P. Coutinho. It was his contention further that although notices were purportedly issued to him under Section 41A CrPC, none of them were served on him. He was present before the National Green Tribunal, Western Zone Branch Pune on 02/05/2016 and could not have been available to the respondents No.1 and 2. A reference was also made to the order passed by the Children's Court rejecting his anticipatory bail application as also that passed by this Court

dated 12/01/2016 whereby his application for the relief of anticipatory bail was rejected by this Court and the Special Leave Petition filed before the Hon'ble Apex Court too was dismissed. Notices had to be issued to the respondents No.1 and 2 under the said Act. It was also his contention that although the respondents No.1 and 2 claimed that notices were issued to him, no extract of the Station Diary was produced on record to substantiate their case. The respondents No.1 and 2 had therefore to be prosecuted for contempt on issuance of notice to them as required under law.

8. Shri Sagar Dhargalkar, learned Additional Government Advocate on behalf of the respondents No.3 and 4 invited attention to Section 41A CrPC and its predicates and besides adverted to the order passed by the Children's Court pursuant to which the anticipatory bail application of the applicant was dismissed. A reference was also made to the order passed by this Court in Stm. No.4055 of 2015 whereby his anticipatory bail application came to be dismissed. A reference was also made to the remand order drawn by the President of the Children's Court to substantiate his contention that in case the arrest of the applicant was not justified, the Magistrate would not have

remanded him to custody. There was due compliance with the predicates of Section 41A Cr.PC. On his part he adverted to the reply filed on behalf of the respondent No.4, invited attention to the rejoinder filed by the applicant wherein there was a clear admission of the notice pasted on the gate of his house. There was no cooperation of the applicant with the course of investigation from 2016 till his arrest on 12/04/2018. There was no breach of the guidelines laid down by the Hon'ble Apex Court in **Arnesh Kumar**(supra) and therefore no proceedings for contempt could be initiated against the respondents No.1 and 2 and the petition had to be dismissed.

9. i have heard the applicant, Shri Sagar Dhargalkar, learned Additional Government Advocate and otherwise perused the records apart from the directions issued by the Hon'ble Apex Court in **Arnesh Kumar**(supra), as also the provisions of Sections 41 and 41A Cr.P.C. and in that light decide the application appropriately.

10. Admittedly an FIR was registered against the applicant vide No.133/2015 on 16/12/2015 under Sections 323, 504, 506 r/w.34 IPC and Section 8 of the Goa Children's Act, 2003 entailing a maximum punishment upto 7 years. Admittedly the Children's

Court had dismissed the application for anticipatory bail moved by the applicant and similar was the position pursuant to the order of this Court dated 12/01/2016 when a learned Single Judge of this Court was seized of the judgment in **Arnesh Kumar**(supra), who observed that the Police Officer would have to comply with the direction given by the Hon'ble Apex Court before effecting his arrest. Be that as it may, the applicant had moved the Hon'ble Apex Court seeking the relief of bail in anticipation of arrest and which too came to be dismissed vide the order dated 03/02/2016. The applicant came to be placed under arrest only on 12/04/2018 but here again it must be observed that as rightly contended by Shri Dhargalkar, learned Additional Government Advocate on behalf of the respondent No.4 that the applicant kept himself away from the constraints of police custody on medical grounds upon getting himself admitted in the Government hospital during the entire period of remand of 14 days. The records bear out that attempts were made to notify the applicant in terms of Section 41A CrPC on different dates but on every occasion the notices remained unserved and that the whereabouts of the applicant were not made known to the Police by his family members till until a notice was pasted on the gate of the house of

his mother. In that backdrop it would be necessary to advert to the provisions of Sections 41 and 41A CrPC.

11. Section 41 CrPC contained in Chapter V of the Code of Criminal Procedure 1973, Code for short deals with the eventualities where the police may arrest without warrant and reads thus :

“Section 41 - When police may arrest without warrant

(1) Any police officer may without an order from a Magistrate and without a warrant, arrest any person—

4[1[(a) who commits, in the presence of a police officer, a cognizable offence;

(b) against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists that he has committed a cognizable offence punishable with imprisonment for a term which may be less than seven years or which may extend to seven years whether with or without fine, if the following conditions are satisfied, namely:--

(i) the police officer has reason to believe on the basis of such complaint, information, or suspicion that such person has committed the said offence;

(ii) the police officer is satisfied that such arrest is necessary--

(a) to prevent such person from committing any further offence; or

(b) for proper investigation of the offence; or

(c) to prevent such person from causing the evidence of the offence to disappear or tampering with such evidence in any manner; or

(d) to prevent such person from making any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to the police officer; or

(e) as unless such person is arrested, his presence in the Court whenever required cannot be ensured,

and the police officer shall record while making such arrest, his reasons in writing.

3[Provided that a police officer shall, in all cases where the arrest of a person is not required under the provisions of this sub-section, record the reasons in writing for not making the arrest.]

(ba) against whom credible information has been received that he has committed a cognizable offence punishable with imprisonment for a term which may extend to more than seven years whether with or without fine or with death sentence and the police officer has reason to believe on the basis of that information that such person has committed the said offence.]]

(c) who has been proclaimed as an offender either under this Code or by order of the State Government; or

(d) in whose possession anything is found which may reasonably be suspected to be stolen property and who may reasonably be suspected of having committed an offence with reference to such thing; or

(e) who obstructs a police officer while in the execution of his duty, or who has escaped, or attempts to escape, from lawful custody; or

(f) who is reasonable suspected of being a deserter from any of the Armed Forces of the Union; or

(g) who has been concerned in, or against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists, of his having been concerned in, any act committed at any place out of India which, if committed in India, would have been punishable as an offence, and for which he is, under any law relating to extradition, or otherwise, liable to be apprehended or detained in custody in India; or

(h) who, being a released convict, commits a breach of any rule made under subsection (5) of section 356; or

(i) for whose arrest any requisition, whether written or oral, has been received from another police officer, provided that the requisition specifies the person to be arrested and the offence or other cause for which the

arrest is to be made and it appears therefrom that the person might lawfully be arrested without a warrant by the officer who issued the requisition.

4[2[(2) Subject to the provisions of section 42, no person concerned in a non-cognizable offence or against whom a complaint has been made or credible information has been received or reasonable suspicion exists of his having so concerned, shall be arrested except under a warrant or order of a Magistrate.]”

12. Section 41A which has been inserted by the Act of 2009 deals with the issuance of the notice to appear before the Police Officer and reads that a Police Officer may in all cases where the arrest of a person is not required under the provisions of sub-section (1) of section 41, issue a notice directing the person against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists that he has committed a cognizable offence, to appear before him or at such other place as may be specified in the notice. Sub section (2) provides that where such a notice is issued to any person, it shall be the duty of that person to comply with the terms of the notice. Sub clause (3) reads that where such person complies and continues to comply with the notice, he shall not be arrested in respect of the offence referred to in the notice unless,

for reasons to be recorded, the police officer is of the opinion that he ought to be arrested. Sub-section (4) reads that where such person, at any time, fails to comply with the terms of the notice or is unwilling to identify himself, the police officer may, subject to such orders as may have been passed by a competent Court in this behalf, arrest him for the offence mentioned in the notice.

13. In other words a bare reading of Section 41A CrPC indicates in no uncertain terms that the Police Officer may in all cases where the arrest of person is not required under the provisions of Sub-Section 1 of Section 41 issue a notice directing a person against whom a reasonable complaint has been made to appear before him or in such other place as may be specified in the notice and thereupon it is incumbent on the person to whom such a notice is issued to comply with the terms of the notice. When he complies and continues to comply with the notice, he shall not be arrested in respect of the offence referred to in the notice unless the Police Officer is of the opinion that he ought to be arrested for the reasons to be recorded in writing. Sub-section 4 still empowers the Police Officer to arrest such a person where such person at any time fails to comply with the terms of notice or is unwilling to identify himself subject however to such orders

as may have been passed by the Competent Court in that behalf. Therefore on a bare reading of Section 41A CrPC, there is no basis in the contention of the applicant that a notice was not served on him within two weeks when Section 41A is read, threadbare.

14. **Arnesh Kumar**(supra), apprehending his arrest in a case under Section 498-A IPC and Section 4 of the Dowry Prohibition Act, 1961 moved the Hon'ble Apex Court for the relief of bail in anticipation of arrest after two unsuccessful rounds before the learned Sessions Judge and thereafter the High Court. In that context, the Hon'ble Apex Court considered the effect of arrest in the light of the statistical data, that it brings humiliation, curtails freedom and casts scars forever and looking to the reports of the Law Commissions, Police Commissions emphasized the need to maintain a balance between individual liberty and societal order while exercising the power of arrest. It considered Section 41 CrPC, Article 22(2) of the Constitution of India apart from Section 57 CrPC and the powers of the Magistrate to authorise detention in terms of Section 167 CrPC.

15. In **Arnesh Kumar**(supra), the Apex Court also considered Section 41A CrPC which was aimed to avoid unnecessary arrest or threat of arrest looming large on an accused and in that context observed on balancing Section 41 and 41A CrPC that their

endeavour by the judgment was to ensure that the Police Officer do not arrest the accused unnecessarily and a Magistrate did not authorise detention casually and mechanically. In that context the Hon'ble Apex Court issued the directions that all the State Governments to instruct its Police Officers not to automatically arrest when a case under **Section 498-A** IPC is registered but to satisfy themselves about the necessity for arrest under the parameters laid down above flowing from Section 41 CrPC; all police officers be provided with a check list containing specified sub- clauses under Section 41(1)(b)(ii); thirdly the police officer shall forward the check list duly filed and furnish the reasons and materials which necessitated the arrest, while forwarding/producing the accused before the Magistrate for further detention. The Magistrate while authorising detention of the accused shall peruse the report furnished by the police officer in terms aforesaid and only after recording its satisfaction authorise detention. It further directed that the decision not to arrest an accused be forwarded to the Magistrate within two weeks from the date of the institution of the case with a copy to the Magistrate which may be extended by the Superintendent of police of the district for the reasons to be recorded in writing; a

notice of appearance in terms of Section 41A CrPC be served on the accused within two weeks from the date of institution of the case, which may be extended by the Superintendent of Police of the District for the reasons to be recorded in writing and failure to comply with the directions aforesaid shall apart from rendering the police officers concerned liable for departmental action, they shall also be liable to be punished for contempt of court to be instituted before the High Court having territorial jurisdiction.

16. A reading of these directions would indicate that the contention on behalf of the applicant is not correct that the notice under Section 41A CrPC was not served within two weeks. Rather what is contemplated as per the directions contained in the judgment is that the notice of appearance in terms of Section 41A Cr.PC has to be served on the accused within two weeks from the date of institution of the case and which may be extended by the Superintendent of Police for the reasons to be recorded in writing. At the cost of repetition the offence was registered against the applicant on 16/12/2015 for the stated offences and thereafter attempts were made to serve the notice on him in terms of Section 41A CrPC and which all remained unserved on account of his non-availability. The contention of the applicant that the

respondent No.4 ought to have produced the extract of the station diary to substantiate such a plea cannot stand the test of scrutiny when there is an emphatic assertion on oath by the Chief Secretary on behalf of the respondent No.4 and there is no reason to discard or disbelieve such an assertion.

17. Moreover, the applicant was placed under arrest only on 12/04/2018 after much attempts to serve the notice on him under Section 41A CrPC and the Magistrate had on perusal of the records deemed it appropriate to remand him to police custody. If at all his arrest was not justified, the learned Court would not have remanded him to custody. It was also otherwise shown from the statement on oath that the applicant was not cooperative and that the respondents No.1 and 2 were left with no option but to place him under arrest after following the predicates of Section 41A CrPC. i find myself in agreement with the contention of Shri Sagar Dhargalkar, learned Additional Government Advocate that there has been no breach of the guidelines issued by the Hon'ble Apex Court as to necessitate the issuance of a notice to the respondents No.1 and 2 for committing contempt and their prosecution thereafter. In view

thereof, i do not find merit in the application which is hereby dismissed. Rule stands discharged.

NUTAN D. SARDESSAI, J.

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