

**IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
APPELLATE SIDE**

Present:

The Hon'ble Justice Joymalya Bagchi

And

The Hon'ble Justice Gaurang Kanth

C.P.A.N. 303 of 2023

Shweta Sonali

-Vs-

Md. Abdun Nur Chowdhury & Anr.

For the Petitioner : Mr. Souradeep Banerjee, Adv.
Mr. A. Agarwalla, Adv.
Mr. B. N. Joshi, Adv.
Ms. P. Garain, Adv.

**For the alleged
contemnors** : Md. Sabir Ahmed, Adv.
Mr. Tasnim Ahamed, Adv.
Mr. Dhiman Banerjee, Adv.

For the State : Mr. Rudradipta Nandy, Id. A.P.P.

Heard on : 06.09.2024 & 10.09.2024

Judgment on : 10.09.2024

Joymalya Bagchi, J. :-

1. Petitioner has taken out this application praying for initiating contempt proceeding against the respondent viz. Md. Abdun Nur

Chowdhury, Sub-Inspector of Police, Cyber Crime Police Station, Bidhannagar Police Commissionerate, West Bengal for violating the directions of the Apex Court in *Arnesh Kumar vs. State of Bihar & Anr.*¹ in regard to her arrest.

2. Facts giving rise to the arrest of the petitioner are as follows :-

3. On 30.06.2022 one Somnath Basak lodged a written complaint at Bidhannagar Police Station alleging he had deposited a sum of Rs.2,32,85,951/- only in an online trading platform viz. *M/s. Lexa Trade* which had offered to trade in different instruments in foreign markets. The said deposits were made through various banks on different dates. During that period he received communications through electronic mails as well as phone/Skype calls from different electronic mail IDs. Various persons had contacted him on his mobile phone from different phone numbers. But inspite of repeated requests to refund the money, the same has not been refunded.

4. On the basis of the aforesaid allegations, Bidhannagar Cyber Crime Police Station Case No.104 of 2022 dated 30.06.2022 under Sections 420/406/120B of the Indian Penal Code was registered for investigation. During the investigation, petitioner was arrested by respondent no.1 from her residence at Bangalore on 11.01.2023. She was produced before the jurisdictional Magistrate at Bangalore and a transit remand order was obtained. Thereafter, on 15.01.2023 she was produced

¹ (2014) 8 SCC 273

before the Additional Chief Judicial Magistrate, Bidhannagar and remanded to police custody till 20.01.2023. On 20.01.2023 learned Sessions Judge, Barasat enlarged the petitioner on bail, inter alia, holding no notice under Section 41A of the Code of Criminal Procedure had been issued in terms of the directions in *Arnesh Kumar* (Supra).

5. Under such circumstances, petitioner had taken out the present application.

6. Respondent/alleged contemnor no.1 i.e. Arresting Officer has filed affidavits in response to the notice served on him. Specific defence taken in the affidavit is to the effect that all necessary formalities prior to arrest including compliance of requirements of *Arnesh Kumar* (Supra) had been made. Arrest memo and the check list prepared under Section 41 of the Code of Criminal Procedure are annexed to the supplementary affidavit-in-opposition. Order passed by the jurisdictional Magistrate at Bangalore recording the submission of the check list and the satisfaction with regard to compliance of relevant rules regarding arrest have also been annexed.

7. Learned Additional Public Prosecutor has produced the case diary before us.

8. Mr. Souradeep Banerjee for the petitioner contends his client was a lady with a five-year old child. She was not named in the FIR. There was no chance of her abscondence. Without issuing notice under Section 41A of the Code of Criminal Procedure, respondent no.1 in a mechanical manner arrested her from her residence at Bangalore and took her to

Kolkata. The arrest was patently illegal, unwarranted and in violation of the directions in *Arnesh Kumar* (Supra) and *Satender Kumar Antil vs. Central Bureau of Investigation & Anr.*².

9. In response, Mr. Sabir Ahmed for the alleged contemnor no.1-arresting officer submits the allegations in the FIR disclose a cyber fraud with international ramifications. An online trading platform viz. *M/s. Lexa Trade* was floated to induce unsuspecting individuals to invest in different instruments in foreign markets. Being induced the complainant had made deposits through the online trading platform. However, the identity of the proprietor of the online firm was masked. Misappropriated funds could be traced to one *M/s. Tanjore Global Services Private Limited* of which petitioner and her husband (an absconding accused) are Directors. Investigation further revealed the husband of the petitioner was abroad and there was every likelihood that the petitioner would also flee the country. As the petitioner was a flight risk and her interrogation for tracing the ramifications of the crime and recovery of stolen money was necessary, Investigating Agency chose to invoke the powers of arrest instead of resorting to issuance of notice under Section 41A of the Code of Criminal Procedure. Requirements of *Arnesh Kumar* (Supra) were complied with. Check list was prepared and submitted before the jurisdictional Magistrate. Magistrate perused the documents and recorded requisite satisfaction that the arrest was as per rules.

² (2022) 10 SCC 51

10. In rebuttal, Mr. Banerjee contends the check list is a mere reproduction of the provisions of the statute and such lip service cannot justify arrest or compliance with the directions in *Arnesh Kumar* (Supra).

11. Having considered the materials on record and the rival submissions at the Bar, we find the following facts are undisputed :-

- (i) FIR No.104 of 2022 dated 30.06.2022 was registered at Bidhannagar Cyber Crime Police Station under Sections 420/406/120B IPC on the written complaint of one Somnath Basak who alleged misappropriation of funds invested through an online trading platform viz. *M/s. Lexa Trade*.
- (ii) Investigation showed funds deposited through *M/s. Lexa Trade* had been traced to one *M/s. Tanjore Global Services Private Limited* of which the petitioner and her husband are Directors.
- (iii) Husband of the petitioner was abroad and was not available for interrogation.
- (iv) Under such circumstances, Investigating Agency sought to invoke the powers of arrest instead of issuing notice under Section 41A of the Code of Criminal Procedure.
- (v) A check list was prepared under Section 41 of the Code of Criminal Procedure as per the directions in *Arnesh Kumar* (Supra) disclosing the necessity of arrest.

- (vi) Thereafter, the Investigating Officer proceeded to Bangalore and arrested the petitioner on 11.01.2023. She was produced before the jurisdictional Magistrate on 12.01.2023 for transit remand.
- (vii) Jurisdictional Magistrate noted he had perused the copy of the FIR, search list, requisition for arrest, arrest-cum-inspection memo, check list under Section 41 of the Code of Criminal Procedure and medical reports. Upon considering the aforesaid materials, the Magistrate recorded that the Investigating Officer had arrested the petitioner after complying with the relevant rules. Accordingly, he passed the order of transit remand.
- (viii) Pursuant thereto, the petitioner was produced before the Additional Chief Judicial Magistrate, Bidhannagar on 15.01.2023 who remanded her to police custody till 20.01.2023.
- (ix) On 20.01.2023 petitioner moved a bail application before the Sessions Judge.
- (x) Learned Sessions Judge, inter alia, noted no notice under Section 41A of the Code of Criminal Procedure had been issued upon the petitioner. Thereafter considering the nature of the offence and other facts and circumstances of the case,

learned Judge was pleased to enlarge the petitioner on interim bail.

12. In this factual backdrop, we are called upon to decide whether the arrest of the petitioner was in violation of the directions in *Arnesh Kumar* (Supra) which has been reiterated in *Satender Kumar Antil* (Supra).

13. In *Arnesh Kumar* (Supra) the Apex Court, inter alia, laid down the following directions regulating arrest in cases involving offences punishable upto seven years.

“11.1. 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;

11.2. All police officers be provided with a check list containing specified sub-clauses under Section 41(1)(b)(ii);

11.3. The police officer shall forward the check list duly filled and furnish the reasons and materials which necessitated the arrest, while forwarding/producing the accused before the Magistrate for further direction;

11.4. 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, the Magistrate will authorise detention;

11.5. 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;

11.6. Notice of appearance in terms of Section 41-A 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;

11.7. 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.

11.8. Authorising detention without recording reasons as aforesaid lby the Judicial Magistrate concerned shall be liable for departmental action by the appropriate High Court.

12. We hasten to add that the directions aforesaid shall not only apply to the cases under Section 498-A IPC or Section 4 of the

Dowry Prohibition Act, the case in hand, but also such cases where offence is 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.”

14. Ratio in *Arnesh Kumar* (Supra) was reiterated in *Satender Kumar Antil* (Supra) as follows :-

*“b) The investigating agencies and their officers are duty-bound to comply with the mandate of Section 41 and 41A of the Code and the directions issued by this Court in **Arnesh Kumar (supra)**. Any dereliction on their part has to be brought to the notice of the higher authorities by the court followed by appropriate action.*

c) The courts will have to satisfy themselves on the compliance of Section 41 and 41A of the Code. Any non-compliance would entitle the accused for grant of bail.”

15. Reading the directions in *Arnesh Kumar* (Supra) it is clear during investigation of cases involving offences punishable upto seven years, the Investigating Agency is required to issue a notice of appearance in writing under Section 41A of the Code of Criminal Procedure upon an accused within two weeks of institution of the case which may be extended by Superintendent of Police for reasons to be recorded in writing. Arrest shall not be made automatically and the necessity of such arrest is to be stated with reference to the parameters laid down in Section 41 of the Code of Criminal Procedure in a check list containing sub-clauses under Section 41(1)(b)(ii) of the Code of Criminal Procedure.

16. Admittedly, no notice under Section 41A of the Code of Criminal Procedure had been issued upon the petitioner. Without resorting to such course Investigating Agency directly proceeded to arrest her under Section 41 of the Code of Criminal Procedure.

17. A check list stating the necessity for arrest was prepared and placed before the jurisdictional Magistrate which reads as follows :-

<u>Sl. No.</u>	<u>Section</u>	<u>Ground of Arrest</u>	<u>Explain with Reason</u>	<u>Remarks</u>
1.	41(b)	Whether is the Investigation Officer is satisfied that the accused 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 seven years whether with or without fine	On the basis of the complaint lodged by Somnath Basak (55 yrs.) S/o. Late Nitai Chand Basak, resident of AE-789, Sector I, Salt Lake City, PS-Bidhannagar North, Kolkata – 700064, one cognizable case has been started at Bidhannagar Cyber Crime PS Case No.104/22, Dated-30/06/2022, U/S-420/406/120B IPC	
2.	41(b)(ii)(a)	Whether a police officer is satisfied that to prevent a person from committing any further offence, arrest is necessary	The accused and her associate conducting a national and international racket there victimize by her and her associate to innocent people who are wants to trading in genuine process in the name giving false promises. And created fake trading website.	
3.	41(b)(ii)(b)	Whether a police officer is satisfied for proper investigation of the offence, arrest is necessary	The accused after arrest can lead or help us to recover the devices which were used for created fake websites and also recover cheated money which were collected from the complainant.	
4.	41(b)(ii)(c)	Whether a police officer is satisfied that to prevent such person from causing the evidence of the offence to disappear or tampering with such evidence in any manner, arrest is necessary	If not arrested her there are every chances that she can escape from India, where her husband is out of India	
5.	41(b)(ii)(d)	Whether a police officer is satisfied that 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, arrest is necessary	After arrest she led to recovered to bank accounts which the racket were used to received cheated amount.	

6.	41(b)(ii)(e)	Whether a police officer is satisfied as unless such person is arrested, his presence in the Court whenever required cannot be ensured, arrest is necessary	Not applicable	
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18. It has been argued the investigation involves a cyber fraud which had international ramifications. Monies invested through a fictitious online trading firm had been transferred to the firm owned by the petitioner and her husband. Her husband was abroad and had absconded. We are informed even now warrant of arrest is pending against him. Apprehending a notice under Section 41A of the Code of Criminal Procedure would also prompt the petitioner to flee the country, Investigating Officer resorted to the powers of arrest after recording the necessity of arrest in terms of *Arnesh Kumar* (Supra).

19. Right of arrest is a part of investigation and the discretion to invoke such draconian power eclipsing liberty should be resorted to exceptional cases. However, it is the Investigating Officer who has to decide in the first place with regard to the necessity as well as its immediacy in the factual matrix of each case.

20. In the present case, it appears the Investigating Officer was primarily swayed by the fact that the petitioner was a flight risk and would abscond with the assistance of her husband who was already abroad. These and other materials in the check list pertaining to the nature of crime, requirement of custodial interrogation to recover devices through which fake website was created and recover stolen property

prompted the Investigating Officer to arrest the petitioner. Decision of the Investigating Officer was considered by the Magistrate who recorded his satisfaction with regard to compliance of Rules regarding arrest.

21. In such view of the matter it cannot be said power of arrest was exercised by the Investigating Officer in an arbitrary or perverse manner or in derogation of the directions in *Arnesh Kumar* (Supra).

22. It has been argued entries in the check list are mere reproduction of the words of the statute.

23. We are unable to agree with the submission. Relevant Entries describe the nature of the crime which is said to have international ramifications; reason for custodial interrogation namely, recovery of electronic devices through which fake website was created as well as recovery of stolen money and last but not the least apprehension of the officer that the petitioner shall flee the country with the help of her husband who was abroad. This apprehension is further reinforced through subsequent events that the husband had not cooperated with the investigation and warrant of arrest had been issued against him.

24. The last explanation was recorded incorrectly against serial no.4 of the check list instead of serial no.6, obviously an inadvertent error which does affect the meaning and purport of the document.

25. In light of the aforesaid discussion, we are of the opinion the arrest of the petitioner cannot be said to be in violation of the directions in *Arnesh Kumar* (Supra) necessitating invocation of contempt jurisdiction.

26. However, during pendency of the hearing, certain disturbing facts were brought to our notice. As the husband of the petitioner had absconded and could not be arrested, police officer had visited the residence of the petitioner on 21.04.2023 and interrogated her with regard to her husband's whereabouts. While it is within the domain of the Investigating Agency to resort to all lawful means to trace out an absconding accused, it is not within the scope and ambit of law to subject a family member to harassment on such score.

27. Accordingly, while disposing of an application for contempt we direct the petitioner shall not be subjected to any harassment in the name of further investigation relating to apprehension of her husband. This observation however, would not hinder the Investigating Agency to resort to any lawful process to apprehend the absconding accused in accordance with law.

28. With these observations, the contempt application is disposed of.

29. Photostat certified copy of this judgment, if applied for, be given to the parties on compliance of all formalities.

I agree.

(Gaurang Kanth, J.)

(Joymalya Bagchi, J.)

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