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ARNESH KUMAR

v.

STATE OF BIHAR & ANR.

(Criminal Appeal No. 1277 of 2014)

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JULY 2, 2014

**[CHANDRAMAULI KR. PRASAD AND PINAKI
CHANDRA GHOSE, JJ.]**

CODE OF CRIMINAL PROCEDURE, 1973:

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s.41 and 167 — Arrest by police without warrant — Of persons accused of offences punishable with imprisonment upto seven years - Held: Section 41 makes it evident that a person accused of offence punishable with imprisonment for a term which may be less than seven years or which may extend to seven years with or without fine, cannot be arrested by the police officer only on its satisfaction that such person had committed the offence — Before arrest police officer to record his satisfaction with regard to factors enumerated in clauses (a) to (e) of s.41(1) — Arrest brings humiliation, curtails freedom and casts scars forever — The need for caution in exercising the drastic power of arrest has been emphasized time and again by courts but has not yielded desired result - The attitude to arrest first and then proceed with rest is despicable - It has become a handy tool to police officers who lack sensitivity or act with oblique motive — No arrest should be made only because the offence is non-bailable and cognizable and therefore, lawful for police officers to do so — No arrest can be made in a routine manner on a mere allegation of commission of an offence made against a person — Directions given in order to ensure that police officers do not arrest accused unnecessarily and Magistrate do not authorise detention casually and mechanically — Penal Code, 1860 - s.498-A - Dowry Prohibition Act, 1961 — s.4.

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s. 41-A - Notice of appearance before police officer - **A**
Held: Where the arrest of a person is not required u/s 41(1), police officer is required to issue notice directing the accused to appear before him at a specified place and time - Law obliges such an accused to appear before police officer and it further mandates that if such an accused complies with the terms of notice he shall not be arrested, unless for reasons to be recorded, police officer is of the opinion that arrest is necessary - At this stage also, condition precedent for arrest as envisaged u/s 41 has to be complied and shall be subject to scrutiny by Magistrate. **B**
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s.167 r/w s. 57- Judicial Magistrate authorising accused to police remand - **D**
Held: The power u/s 167 to authorise detention is a very solemn function - It affects the liberty and freedom of citizens and needs to be exercised with great care and caution - Before a Magistrate authorises detention u/s 167, 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 -- The police officer effecting the arrest is required to furnish to the Magistrate, the facts, reasons and its conclusions for arrest and Magistrate in turn is to be satisfied that condition precedent for arrest u/s 41 has been satisfied and it is only thereafter that he will authorise detention of an accused - Constitution on India, 1950 - Art. 22. **E**

BAIL: **F**

Application of appellant for anticipatory bail - In a case involving offences u/s 498-A, IPC and s.4 of Dowry Prohibition Act - Declined by High Court - Provisional bail granted by Supreme Court on certain conditions - Held: Order granting bail made absolute - Penal Code, 1860 - s.498-A - Dowry Prohibition Act, 1961 - s.4. **G**

The appellant-husband apprehending his arrest in a case of offences u/s 498-A IPC and s.4 of the Dowry **H**

A Prohibition Act, 1961, having failed to secure anticipatory bail, filed the instant appeal. During the pendency of the appeal, the Supreme Court, by order dated 31.10.2013, granted provisional bail to the appellant.

B Allowing the appeal, the Court

HELD: 1.1. There is phenomenal increase in matrimonial disputes in recent years. Arrest brings humiliation, curtails freedom and casts scars forever. The need for caution in exercising the drastic power of arrest has been emphasized time and again by courts but has not yielded desired result. The attitude to arrest first and then proceed with the rest is despicable. It has become a handy tool to the police officers who lack sensitivity or act with oblique motive. No arrest should be made only because the offence is non-bailable and cognizable and therefore, lawful for the police officers to do so. The existence of the power to arrest is one thing, the justification for the exercise of it is quite another. Apart from power to arrest, the police officers must be able to justify the reasons thereof. No arrest can be made in a routine manner on a mere allegation of commission of an offence made against a person. [para 6- 8] [134-D; 135-B, D, E; 136-A]

1.2. Section 41 makes it evident that a person accused of offence punishable with imprisonment for a term which may be less than seven years or which may extend to seven years with or without fine, cannot be arrested by the police officer only on its satisfaction that such person had committed the offence. Apart from this, the police officer has to be satisfied further that the arrest is necessary for one or the more purposes envisaged by sub-clauses (a) to (e) of clause (1) of s. 41 of Cr.PC. Police officer before arrest, in such cases has to be satisfied that such arrest is necessary to prevent such person from committing any further offence; or for proper

investigation of the case; or to prevent the accused from causing the evidence of the offence to disappear; or tampering with such evidence in any manner; or to prevent such person from making any inducement, threat or promise to a witness so as to dissuade him from disclosing such facts to the Court or the police officer; or-unless such accused person is arrested, his presence in the court whenever required cannot be ensured. Law mandates the police officer to state the facts and record the reasons in writing which led him to come to a conclusion while making such arrest. Law further requires the police officers to record the reasons in writing for not making the arrest. [para 9] [137-G-H; 138-A-C]

1.3. This Court is of the opinion that if the provisions of s.41, Cr.PC which authorises the police officer to arrest an accused without an order from a Magistrate and without a warrant, are scrupulously enforced, the wrong committed by the police officers intentionally or unwittingly would be reversed and the number of cases which come to the Court for grant of anticipatory bail will substantially reduce. It is emphasised that the practice of mechanically reproducing in the case diary all or most of the reasons contained in s.41 Cr.PC for effecting arrest be discouraged and discontinued. [para 13] [141-B-D]

2. An accused arrested without warrant by the police has the right under Art. 22(2) of the Constitution of India and s.57, Cr.PC to be produced before the Magistrate without unnecessary delay and in no circumstances beyond 24 hours excluding the time necessary for the journey. The power u/s 167 CrPC to authorise detention is a very solemn function. It affects the liberty and freedom of citizens and needs to be exercised with great care and caution. The experience shows that it is not exercised with the seriousness it deserves. In many of the cases. detention is authorised in a routine, casual and

A cavalier manner. Before a Magistrate authorises detention
 u/s 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.
 The police officer effecting the arrest is required to furnish
 B 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 u/s 41 Cr.PC has been
 satisfied and it is only thereafter that he will authorise the
 detention of an accused. The Magistrate before
 C authorising detention will record his own satisfaction,
 may be in brief but the said satisfaction must reflect from
 his order. The Magistrate has to address the question
 whether specific reasons have been recorded for arrest
 and if so, prima facie those reasons are relevant and
 D secondly a reasonable conclusion could at all be reached
 by the police officer that one or the other conditions
 stated are attracted. To this limited extent the Magistrate
 will make judicial scrutiny. [para 10] [138-F-H; 139-A, D,
 G, H]

E 3.1. Further, s.41-A CrPC makes it clear that in all
 cases where the arrest of a person is not required u/s
 41(1) Cr.PC, the police officer is required to issue notice
 directing the accused to appear before him at a specified
 place and time. Law obliges such an accused to appear
 F before the police officer and it further mandates that if
 such an accused complies with the terms of notice he
 shall not be arrested, unless for reasons to be recorded,
 the police officer is of the opinion that the arrest is
 necessary. At this stage also, the condition precedent for
 G arrest as envisaged u/s 41 Cr.PC has to be complied and
 shall be subject to the scrutiny by the Magistrate. [para
 12] [140-G-H; 141-A-B]

3.2. Directions are given in order to ensure that police
 officers do not arrest accused unnecessarily and
 H Magistrate do not authorise detention casually and

mechanically. The directions issued shall not only apply to the cases u/s 498-A of the I.P.C. or s.4 of the Dowry Prohibition Act, the case in hand, but also to 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. [para 15] [142-G-H; 143-A]

4. The order dated 31.10.2013 granting provisional bail to the appellant on certain conditions, is made absolute. [para 17] [143-B, C]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1277 of 2014.

From the Judgment and Order dated 08.10.2013 in CRLM No. 30041/2013 of the High Court of Patna.

Rakesh Kumar, Kaushal Yadav for the Appellant.

Rudreshwar Singh, Samir Ali Khan, Aparna Jha, Braj K. Mishra, Abhishek Yadav for the Respondents.

The Judgment of the Court was delivered by

CHANDRAMAULI KR. PRASAD, J. 1. The petitioner apprehends his arrest in a case under Section 498-A of the Indian Penal Code, 1860 (hereinafter called as IPC) and Section 4 of the Dowry Prohibition Act, 1961. The maximum sentence provided under Section 498-A IPC is imprisonment for a term which may extend to three years and fine whereas the maximum sentence provided under Section 4 of the Dowry Prohibition Act is two years and with fine.

2. Petitioner happens to be the husband of respondent no.2 Sweta Kiran. The marriage between them was solemnized on 1st July, 2007. His attempt to secure anticipatory bail has failed and hence he has knocked the door of this Court by way of this Special Leave Petition.

A 3. Leave granted.

B 4. In sum and substance, allegation levelled by the wife against the appellant is that demand of Rupees eight lacs, a maruti car, an air-conditioner, television set etc. was made by her mother-in-law and father-in-law and when this fact was brought to the appellant's notice, he supported his mother and threatened to marry another woman. It has been alleged that she was driven out of the matrimonial home due to non-fulfilment of the demand of dowry.

C 5. Denying these allegations, the appellant preferred an application for anticipatory bail which was earlier rejected by the learned Sessions Judge and thereafter by the High Court.

D 6. There is phenomenal increase in matrimonial disputes in recent years. The institution of marriage is greatly revered in this country. Section 498-A of the IPC was introduced with avowed object to combat the menace of harassment to a woman at the hands of her husband and his relatives. The fact that Section 498-A is a cognizable and non-bailable offence has lent it a dubious place of pride amongst the provisions that are used as weapons rather than shield by disgruntled wives. The simplest way to harass is to get the husband and his relatives arrested under this provision. In a quite number of cases, bed-ridden grand-fathers and grand-mothers of the husbands, their sisters living abroad for decades are arrested.

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F "Crime in India 2012 Statistics" published by National Crime Records Bureau, Ministry of Home Affairs shows arrest of 1,97,762 persons all over India during the year 2012 for offence under Section 498-A of the IPC, 9.4% more than the year 2011. Nearly a quarter of those arrested under this provision in 2012 were women i.e. 47,951 which depicts that mothers and sisters of the husbands were liberally included in their arrest net. Its share is 6% out of the total persons arrested under the crimes committed under Indian Penal Code. It accounts for 4.5% of total crimes committed under different sections of penal code,

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more than any other crimes excepting theft and hurt. The rate of charge-sheeting in cases under Section 498A, IPC is as high as 93.6%, while the conviction rate is only 15%, which is lowest across all heads. As many as 3,72,706 cases are pending trial of which on current estimate, nearly 3,17,000 are likely to result in acquittal.

7. Arrest brings humiliation, curtails freedom and casts scars forever. Law makers know it so also the police. There is a battle between the law makers and the police and it seems that police has not learnt its lesson; the lesson implicit and embodied in the Cr.PC. It has not come out of its colonial image despite six decades of independence, it is largely considered as a tool of harassment, oppression and surely not considered a friend of public. The need for caution in exercising the drastic power of arrest has been emphasized time and again by Courts but has not yielded desired result. Power to arrest greatly contributes to its arrogance so also the failure of the Magistracy to check it. Not only this, the power of arrest is one of the lucrative sources of police corruption. The attitude to arrest first and then proceed with the rest is despicable. It has become a handy tool to the police officers who lack sensitivity or act with oblique motive.

8. Law Commissions, Police Commissions and this Court in a large number of judgments emphasized the need to maintain a balance between individual liberty and societal order while exercising the power of arrest. Police officers make arrest as they believe that they possess the power to do so. As the arrest curtails freedom, brings humiliation and casts scars forever, we feel differently. We believe that no arrest should be made only because the offence is non-bailable and cognizable and therefore, lawful for the police officers to do so. The existence of the power to arrest is one thing, the justification for the exercise of it is quite another. Apart from power to arrest, the police officers must be able to justify the reasons thereof. No arrest can be made in a routine manner on a mere

- A allegation of commission of an offence made against a person. It would be prudent and wise for a police officer that no arrest is made without a reasonable satisfaction reached after some investigation as to the genuineness of the allegation. Despite this legal position, the Legislature did not find any improvement.
- B Numbers of arrest have not decreased. Ultimately, the Parliament had to intervene and on the recommendation of the 177th Report of the Law Commission submitted in the year 2001, Section 41 of the Code of Criminal Procedure (for short 'Cr.PC), in the present form came to be enacted. It is interesting
- C to note that such a recommendation was made by the Law Commission in its 152nd and 154th Report submitted as back in the year 1994. The value of the proportionality permeates the amendment relating to arrest. As the offence with which we are concerned in the present appeal, provides for a maximum punishment of imprisonment which may extend to seven years and fine, Section 41(1)(b), Cr.PC which is relevant for the purpose reads as follows:
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"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

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(a) x x x x x x x x

- F (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
- G extend to seven years whether with or without fine, if the following conditions are satisfied, namely :-

(i) x x x x x

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- (ii) the police officer is satisfied that such arrest is necessary – A
- (a) to prevent such person from committing any further offence; or
- (b) for proper investigation of the offence; or B
- (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 C
- (e) as unless such person is arrested, his presence in the Court whenever required cannot be ensured, D

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

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. F

X x x x x x

9. From a plain reading of the aforesaid provision, it is evident that a person accused of offence punishable with imprisonment for a term which may be less than seven years or which may extend to seven years with or without fine, cannot be arrested by the police officer only on its satisfaction that such person had committed the offence punishable as aforesaid. Police officer before arrest, in such cases has to be further satisfied that such arrest is necessary to prevent such person H

A from committing any further offence; or for proper investigation of the case; or to prevent the accused from causing the evidence of the offence to disappear; or tampering with such evidence in any manner; or to prevent such person from making any inducement, threat or promise to a witness so as to
B dissuade him from disclosing such facts to the Court or the police officer; or unless such accused person is arrested, his presence in the court whenever required cannot be ensured. These are the conclusions, which one may reach based on
C facts. Law mandates the police officer to state the facts and record the reasons in writing which led him to come to a conclusion covered by any of the provisions aforesaid, while making such arrest. Law further requires the police officers to record the reasons in writing for not making the arrest. In pith and core, the police office before arrest must put a question to
D himself, why arrest? Is it really required? What purpose it will serve? What object it will achieve? It is only after these questions are addressed and one or the other conditions as enumerated above is satisfied, the power of arrest needs to be exercised. In fine, before arrest first the police officers
E should have reason to believe on the basis of information and material that the accused has committed the offence. Apart from this, the police officer has to be satisfied further that the arrest is necessary for one or the more purposes envisaged by sub-clauses (a) to (e) of clause (1) of Section 41 of Cr.PC.

F 10. An accused arrested without warrant by the police has the constitutional right under Article 22(2) of the Constitution of India and Section 57, Cr.PC to be produced before the Magistrate without unnecessary delay and in no circumstances beyond 24 hours excluding the time necessary for the journey.
G During the course of investigation of a case, an accused can be kept in detention beyond a period of 24 hours only when it is authorised by the Magistrate in exercise of power under Section 167 Cr.PC. The power to authorise detention is a very solemn function. It affects the liberty and freedom of citizens and
H needs to be exercised with great care and caution. Our

experience tells us that it is not exercised with the seriousness it deserves. In many of the cases, detention is authorised in a routine, casual and cavalier manner. 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. 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. In fine, when a suspect is arrested and produced before a Magistrate for authorising detention, the Magistrate has to address the question whether specific reasons have been recorded for arrest and if so, prima facie those reasons are relevant and secondly a reasonable conclusion could at all be reached by the police officer that one or the other conditions stated above are attracted. To this limited extent the Magistrate will make judicial scrutiny.

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A 11. Another provision i.e. Section 41A Cr.PC aimed to
avoid unnecessary arrest or threat of arrest looming large on
accused requires to be vitalised. Section 41A as inserted by
Section 6 of the Code of Criminal Procedure (Amendment) Act,
2008(Act 5 of 2009), which is relevant in the context reads as
B follows:

“41A. Notice of appearance before police officer.-(1) The
police officer shall, 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
C 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.

D (2) 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.

E (3) 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.

F (4) 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.”

G 12. Aforesaid provision makes it clear that in all cases
where the arrest of a person is not required under Section 41(1),
Cr.PC, the police officer is required to issue notice directing
the accused to appear before him at a specified place and
time. Law obliges such an accused to appear before the police
officer and it further mandates that if such an accused complies

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with the terms of notice he shall not be arrested, unless for reasons to be recorded, the police officer is of the opinion that the arrest is necessary. At this stage also, the condition precedent for arrest as envisaged under Section 41 Cr.PC has to be complied and shall be subject to the same scrutiny by the Magistrate as aforesaid.

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13. We are of the opinion that if the provisions of Section 41, Cr.PC which authorises the police officer to arrest an accused without an order from a Magistrate and without a warrant are scrupulously enforced, the wrong committed by the police officers intentionally or unwittingly would be reversed and the number of cases which come to the Court for grant of anticipatory bail will substantially reduce. We would like to emphasise that the practice of mechanically reproducing in the case diary all or most of the reasons contained in Section 41 Cr.PC for effecting arrest be discouraged and discontinued.

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14. Our endeavour in this judgment is to ensure that police officers do not arrest accused unnecessarily and Magistrate do not authorise detention casually and mechanically. In order to ensure what we have observed above, we give the following direction:

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- (1) All the State Governments to instruct its police officers not to automatically arrest when a case under Section 498-A of the IPC is registered but to satisfy themselves about the necessity for arrest under the parameters laid down above flowing from Section 41, Cr.PC;
- (2) All police officers be provided with a check list containing specified sub-clauses under Section 41(1)(b)(ii);
- (3) The police officer shall forward the check list duly filed and furnish the reasons and materials which necessitated the arrest, while forwarding/producing

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- A the accused before the Magistrate for further detention;
- (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;
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- (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;
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- (6) Notice of appearance in terms of Section 41A of Cr.PC 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;
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- (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 High Court having territorial jurisdiction.
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- (8) Authorising detention without recording reasons as aforesaid by the judicial Magistrate concerned shall be liable for departmental action by the appropriate High Court.
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15. We hasten to add that the directions aforesaid shall not only apply to the cases under Section 498-A of the I.P.C. 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

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or which may extend to seven years; whether with or without fine. A

16. We direct that a copy of this judgment be forwarded to the Chief Secretaries as also the Director Generals of Police of all the State Governments and the Union Territories and the Registrar General of all the High Courts for onward transmission and ensuring its compliance. B

17. By order dated 31st of October, 2013, this Court had granted provisional bail to the appellant on certain conditions. We make this order absolute. C

18. In the result, we allow this appeal, making our aforesaid order dated 31st October, 2013 absolute; with the directions aforesaid.

Rajendra Prasad

Appeal allowed. D