

Dispute Resolution Hotline

July 22, 2014

NO AUTOMATIC ARRESTS, DUE PROCESS TO BE FOLLOWED: SC

- No automatic arrests/detentions to be made by the Police/Magistrates even in non-bailable and cognizable offences; conditions precedent to making arrest/authorizing detention under the Code of Criminal Procedure, 1973 must be satisfied first
- Directions for making arrest/authorizing detention issued to all police authorities/ Magistrates
- Another step forward in developing a fair and corruption free environment for India Inc.

INTRODUCTION

The Supreme Court of India ("Supreme Court") in its recent judgment of Arnesh Kumar ("Petitioner") vs. State of Bihar and Ors.¹ ("Ruling") ruled on the principles for making arrest and detention under the Code of Criminal Procedure, 1973 ("Cr.P.C."). The Supreme Court, in its Ruling, has issued certain directions to be followed by the police authorities and the Magistrates while making arrest and/or authorizing detention of an accused.

APPLICABILITY ON WHITE COLLAR CRIMES

Over the years, India Inc. has witnessed a rampant increase in white collar crimes. Police in India has almost set a trend of effecting immediate arrests with a view to come down heavily on white collar criminals. Even worse is a growing trend of the investors, promoters, directors, senior management and other officers of companies being indicted in criminal cases so as to bring the corporate to the negotiating table. Although the Ruling deals with the issue of misuse of anti-dowry provisions under the Indian Penal Code, 1100% ("I.P.C."), it carves out certain parameters for making arrests and/or authorizing detentions and the role of police authorities as well as the Magistrate involved in order to prevent automatic arrests and detention under the criminal law framework of India, which may be applied to the other offences including the alleged white collar crimes which ordinarily comprise of offences such as cheating, fraud, criminal breach of trust, forgery, falsification of accounts etc. and other offences punishable with imprisonment for a term which may extend to seven years or less.

FACTS

The Petitioner had preferred a Special Leave Petition before the Supreme Court after having failed to secure anticipatory bail before the Sessions Judge and thereafter, the High Court of Bihar in a matrimonial dispute. The allegation levelled against the Petitioner involved making illicit demands for dowry, an offence punishable under Section 498 A of I.P.C. and Section 4 of the Dowry Prohibition Act, 1961.

RULING

The Supreme Court, in its Ruling, emphasized on the need for caution while exercising the drastic power of arrest, which has for years, been treated as a tool for harassment and oppression in the hands of the police authorities and has greatly contributed to police corruption in India. Citing statistics to demonstrate the misuse of the power of arrest by the police authorities, the Supreme Court proceeded to set out certain objective criteria to be applied before making arrest under the Cr.P.C.

The Supreme Court held that no arrest should be made only because the offence is non-bailable and cognizable. Neither should arrest be made in a routine, casual and cavalier manner or on a mere allegation of commission of an offence made against a person. Arrest should only be made after reasonable satisfaction reached after due investigation as to the genuineness of the allegation. Dealing with Section 41 (1) of the Cr.P.C., which provides for conditions precedent to making arrest, the Supreme Court emphasized that for making arrest, the police must be satisfied that all the conditions set out in the provision are met viz.,:

Arrest is necessary:

- to prevent such person from committing any further offence; or
- for proper investigation of the case; or
- to prevent destruction or tampering with evidence by the accused; or
- to prevent such person from influencing the witnesses; or
- to ensure presence of the accused in the court.

Police must, in any case, record reasons for making, or not making the arrest in a particular case.

Further, the Supreme Court laid down the circumstances in which the Magistrate might authorize detention of the accused. As per Article 22(2) of the Constitution of India and Section 57 of the Cr.P.C., an accused must be produced

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before the Magistrate without unnecessary delay and in no circumstance beyond 24 hours, excluding the time necessary for the journey. An accused may be kept in detention beyond 24 hours of his arrest, only when authorized by the Magistrate². The Supreme Court held that when an accused is produced before the Magistrate, the police officer effecting the arrest must furnish the facts, the reasons and the conclusions for arrest and the Magistrate, only upon being satisfied that the conditions of Section 41 of Cr.P.C. are met and after recording its satisfaction in writing, may proceed to authorize the detention of an accused.

The Supreme Court, further, clarified that even in terms of **Section 41 A of the Cr.P.C.**, where arrest of an accused is not required, the conditions precedent to arrest as envisaged under **Section 41 of Cr.P.C.** must be complied with and shall be subject to the same scrutiny by the Magistrate. The Supreme Court, in its Ruling, further condemned the practice of police mechanically reproducing reasons contained in **Section 41 Cr.P.C.** for effecting arrest in case diaries being maintained by the police officers.

In light of the above, the Supreme Court has issued the following directions to all the State Governments:-

- To instruct the police officers to not mechanically arrest the accused under **Section 498 A of I.P.C.** without satisfying themselves that the conditions of arrest are met;
- All police officers to be provided with the check-list of conditions precedent prescribed under **Section 41 of Cr.P.C.** This checklist is to be duly filed and forwarded to the Magistrate while producing the accused for further detention;
- The Magistrate shall then peruse the report provided by the police officer and only after recording its satisfaction in writing, may authorize detention;
- The decision to not arrest the accused should be forwarded to the Magistrate within two weeks from the date of institution of the case. The period may be extended by the Superintendent of police for reasons to be recorded in writing;
- The notice of appearance in terms of **Section 41 A Cr.P.C.** should be served on the accused within two weeks from the date of institution of the case. The same may be extended by the Superintendent of police for reasons to be recorded in writing.
- Failure to comply with the directives set out above may render police officers/Magistrates liable for departmental action and proceedings for contempt of court to be instituted before the High Court having territorial jurisdiction.

ANALYSIS

Litigation risks in India have proven to be a serious deterrent in attracting foreign investments in India. As per the Annual Global Fraud Report of FY 2013-14³, percentage dissuaded from investing in India is 8% on account of its high-corruption environment.

India's law on arrest, though fairly evolved, still lacks the desired clarity. The unprecedented rise in the instances of arrest coupled with high charge-sheeting rate on the one hand and low conviction rate on the other hand clearly demonstrate the need to check abuse of the power of arrest vested with the authorities in India. The directions issued by the Supreme Court in the Ruling provide some respite from the casual/mechanical approach of the authorities in making arrest/authorizing detentions on the basis of mere allegations of commission of an offence.

More importantly, from the perspective of the reluctant foreign nationals doing business in India, the Ruling proves to be another step forward in India's efforts in developing a fair and corruption-free environment.

– **Tanya Pahwa, Moazzam Khan & Vyapak Desai**

You can direct your queries or comments to the authors

¹ Special Leave Petition (Crl.) No.9127 Of 2013, Order dated July 01, 2014, available on <http://judis.nic.in/supremecourt/imgs1.aspx?filename=41736>

² Section 167 of the Code of Criminal Procedure, 1973

³ Seventh edition of Kroll's Global Fraud Report, prepared in conjunction with the Economist Intelligence Unit, available at http://www.kroll.com/media/krl_fraudreport2013-14_usletterpress_revised_10182013.pdf

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