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Arrest of Fair Sex Fairly: A Quandary

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Under **Article 14** of Indian constitution men and women are equal but simultaneously **Article 15 (3)** empowers the state to make provisions in favour of women owing to her vulnerability. Women are more prone to crime owing to biological facts. To remove these disabilities and to countenance her modesty legislature enacted many enactments and courts bridge the gap, if any provided by legislation.

In **Christian Community Welfare Council of India v. State of Maharastra** (1995 Cr LJ 4223 Bom.) Bombay High Court, to uphold the dignity of women, held that no female persons shall be detained or arrested without the presence of lady constable and in no case, after sunset and before sunrise. But apex court in appeal (**State of Maharastra v. Christian Community Welfare Council of India AIR 2004 SC 7**), whilst agreeing with the object behind the direction issued by high court, opined that strict compliance of the said direction, in the given circumstance, would cause practical difficulties to the investigating agency and might give room for evading the process of law by unscrupulous accused. Apex court further observed that while it is necessary to protect the female sought to be arrested by the police from police misdeeds. But apex court said that it may not be always possible and practical to have the presence of a lady constable when the necessity for such arrest arises. Therefore apex court decided to modify the direction issued by Bombay High Court without disturbing the object behind the same and held that arresting authority, while arresting female person, all efforts should be made to keep a lady constable present but in circumstances where the arresting officers is reasonably satisfied that presence of a lady constable is not available or possible and / or the delay in arresting caused by securing the presence of a lady constable would impede the course of investigation such arresting officer for reasons to be recorded either before the arrest or immediately after the arrest be permitted to arrest a female person for lawful reasons at any time of the day or night depending on the circumstances of the case even without the presence of a lady constable.

But court of Criminal Procedure (Amendment) Act, 2005 seems to be midway between absolute immunity invented by Bombay High Court and practical approach adopted by Supreme Court, as newly inserted (by amendment of 2005) sub-section 4 in section 46 of Code of Criminal Procedure 1973 tells that in exceptional circumstances woman can be arrested after sunset but by woman officer with prior permission of judicial magistrate. Newly inserted (by amendment of 2005) Sub-section 4 in Section 46:

(4) Save in exceptional circumstances, no women shall be arrested after sunset and before sunrise, and where such exceptional circumstances exist, the woman police officer shall, by making a written report, obtain the prior permission of the judicial magistrate of the first class within whose local jurisdiction the offence is committed or the arrest is to be made.

Amendment in section 46 unequivocally ratify the view of apex court that in exceptional circumstances woman can be arrested after sunset and before sunrise but newly inserted provision over-rides the judgment by making it mandatory that arrest after sunset and before sunrise can be made only by women officer with prior permission of judicial magistrate of first class. But newly inserted provision does not make stance clear about arrest of female at day time: can she be arrested by male officer at day time.

When enactment is mute about this proposition then apex court ruling that in exceptional circumstances women can be arrested by a male officer will prevail. So, at day time, in exceptional circumstances, women can be arrested by a male officer.

Recently, **Bina Ramani** challenged her arrest in violation of newly inserted (by amendment of 2005) provision, sub-section 4 in section 46 of code of criminal procedure, before Additional Metropolitan Magistrate Ms. Kamini Lau but Ms. Lau got rid of matter by saying that she could not say anything about it, as there were ambiguities in the law, which only the higher court had the power to decide. What are ambiguities to be decided

Bina Ramani case make it mandatory for us to contemplate about repercussions of violation of procedure enumerated in newly inserted (by amendment of 2005) provision, sub-section 4 in section 46 of Code Of Criminal Procedure 1973, and court directives. Apex court in **Mobarik Ali Ahmed V. State Of Bombay** (AIR 1957 SC 857) held that a trial will not be void simply because the provisions relating to arrest have not been fully complied with. Apex court further observed that if the court has jurisdiction to try an offence, any illegality or irregularity in arrest will not oust the jurisdiction of the court to try the offence.

In **Subramania Chetty Re** (Air 1941 Mad. 181) court opined that the question whether the police officer making the arrest was acting within or beyond his powers in effecting the arrest, does not effect the question whether the accused person was guilty or not guilty of the offence with which he is charged.

A moot point is what would be the implications of enactment of sub-section 4 of section 46? Article 21 of Indian constitution says: 21. **Protection of life and personal liberty**.- No person shall be deprived of his life and personal liberty except according to procedure established by law.

It means arrest made in breach of law can be challenged under Article 21 but it appears from above- mentioned decided authorities that the accused can not be released on this ground nor it can be treated as ground for bail. But compensation may be claimed for violation of sub-section 4 of section 46. Question may be raised whether article 21 can be invoked, if woman is arrested by male officer without any mala fide intention on his part and without any filthy activity.

Question also arises if woman is arrested by female officer after sunset and before sunrise in breach of sub-section 4 of section 46 then what would be the repercussion. Still can she claim compensation? In pursuant of above-mentioned propositions it seems that newly inserted sub-section 4 is directory in nature owing to absence of repercussions of breach of provisions.

Now days when there is upsurge in crime by women, indulgence of women in drug trafficking, non availability of lady police officers, implementation of such kind of provision is not practical but at the same time we can not expose the women, most vulnerable group of society, to danger of masculine misdeeds.

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