

BHARATIYA NAGARIK SURAKHSA SANHITA
2023 (Notes)

ARREST -I

What is arrest?

Arrest means the deprivation of a person of his liberty by a legal authority of a person who is accused of any offence or under an apprehension that he may commit a crime.

Arrest is one of the steps in ensuring a fair trial and it is not to be done arbitrarily. It must be done by due process of law and the arresting authority shall exercise the power of arrest keeping the spirit of Article 20 (protection in respect for conviction for offences) in mind. The person exercising such power should also comply with the rights provided under Article 21, and the due procedure should be just, fair and reasonable.

The Sanhita also contemplates two types of arrests. They are –

- I. Arrest made in pursuance of a warrant issued by a Magistrate, and
- II. Arrest made without warrant but made in accordance with some legal provision permitting such arrest.

The provisions containing arrest have been provided under Chapter V of the BNSS, 2023 from Sections 35-62.

Who can make an arrest and when?

Arrest can be done by police officers (Section 35), magistrates (Section 41) as well private persons (Section 40).

Private persons

This has been covered under ‘Section 40: Arrest by private person and procedure on such arrest’

Section 40(1) says that any private person may arrest a person who commits a non-bailable and cognizable offence, or is a habitual offender. After the arrests, he has to hand over that person to a police officer within 6 hours of such arrest. If there is no police officer present, the person caught should be taken to the nearest police station so that change of custody from the person to the police happens.

On handover, the police shall follow the provisions for his arrest if he has committed a cognizable offence as laid down in Section 35(1). If the police think that the person has committed no offence, they shall release the person.

Thus the section provides that any private person may arrest or cause to be arrested any person who in his presence commits a non-bailable and cognizable offence. In Cr.P.C. it was covered under Section 41.

By Magistrates

It is covered under ‘Section 41: Arrest by Magistrate’

An executive or judicial magistrate can arrest or order anyone to arrest a person under two circumstances.

Under Section 41(1), when an offence (cognisable or non-cognisable) is committed in the presence of a magistrate, he can himself, or by ordering any other person to, arrest that offender.

Under Section 41(2), if the magistrate is competent to issue a warrant of arrest on a person, he can at any time arrest such person, or direct the arrest of such person. This is so that the person may not escape from the investigation or trial.

The word ‘presence’ present in both 41(1) and 41(2) has different meanings. In 41(1), when it is read with Section 210 (1)(c) (*Cognisance of offenses by Magistrate*), ‘presence’ means that the Magistrate is taking cognisance of the offense on his own knowledge. Arrest may not always happen.

In 41(2), the arrest is to be done in his presence. Here, the meaning of the word is literal, i.e., the Magistrate should be present when the arrest directed by him happens.

By Police

In all warrant cases, in summons case if necessary and in case of breach of bond, the police arrest someone through the authority of judge through a warrant. A warrant is an order issued by some authority empowering an officer to make an arrest or search and seize or to carry out a judicial sentence. But in some cases, the police officer can arrest without a warrant.

When and how such an arrest may happen is detailed in ‘Section 35: When police may arrest without warrant’.

Section 35 talks about when the police may or may not arrest without a warrant in criminal cases. Every person committing a cognisable offense does not need to be arrested. Also, someone accused of a non-cognisable offence can still be arrested. (35(2)).

Section 35(1) and (2) details the conditions when the police officer may arrest a person committing cognisable offenses or against whom a reasonable complaint has been received. Section 41A of Cr.P.C. has been included in BNSS under Section 35(3), (4), (5) and (6), and it talks about when and how the police may not arrest in cognizable cases. Section 35(7) is a new inclusion in this Act.

May Not Arrest In Cognisable Cases

If a reasonable complaint has been made, or credible information is received or reasonable suspicion exists that someone has committed a cognisable offense but his arrest is not required, the police officer receiving that information shall issue a notice to the person requiring his presence before him or other place specified in the notice.

35(4) imposes a duty on the person receiving the notice to comply with it. 35(5) tells that the person complying with the notice need not be arrested for the offenses mentioned in the notice. If the police officer feels that at some point that it is necessary to arrest him, he shall do so and record his reasons for the arrest in writing.

If the person complying with the notice stops complying, or is unwilling to identify himself at any time, the police officer may arrest him for the offenses mentioned in the notice. (35(6))

35(7), which is a new inclusion, says that an infirm person or a person above 60 years of age who is accused of an offense punishable with imprisonment of less than 3 years, will be arrested only after getting permission from an officer not below the rank of Deputy Superintendent of Police.

May Arrest In Cognisable Cases

- Section 35(1) says that any police officer may without an order from the Magistrate and without a warrant may arrest any person who, in his presence commits a cognisable offense.
- In case of a person against whom a reasonable complaint has been made, or a reasonable suspicion exists or credible information received that he has committed an cognizable offence which is punishable upto seven years of imprisonment with or without fine, the

person shall be arrested if conditions under Section 35(1)(b) are satisfied. Here, the meaning of reasonable shall always be a question of fact.

According to Section 35(1)(b), upon receiving the information, if the police officer has reason to believe that the person has committed the said offence and fulfills at least one of the five conditions under Section 35(1)(b)(ii), arrest such person and record his reasons for arrest in writing.

The conditions on which the police officer can be satisfied that the arrest is necessary are (Section 35(1)(b)(ii)(a) - Section 35(1)(b)(ii)(e))

1. To prevent that person from committing any further offence
 2. For proper investigation of the offence
 3. To prevent the person from tampering the evidence or making it disappear,
 4. To prevent the person from inducing or threatening any person who can disclose facts of the case to the police or the court, and
 5. If his presence in the court when required can only be ensured by his arrest.
- If the police officer receives credible information that the person has committed a cognizable offense punishable with a term of more than seven years to life imprisonment or punishable with death penalty, and the police officer has reason to believe such information, he may arrest the person. (Section 35(1)(c))

Apart from the above cases, the police officer may without warrant arrest a person

- Who is proclaimed as an offender under this act or by the State government. (Section 35(1)(d))
- In whose possession anything which is suspected to be stolen property is found and reasonable suspicion exists that he may have been involved in the offence in getting such thing. (Section 35(1)(e))
- Who obstructs a police officer in his duty's execution, or escapes or attempts to escape from lawful custody. (Section 35(1)(f))
- Who is suspected of being a deserter from any of the armed forces. (Section 35(1)(g))
- Against whom a reasonable complaint made, or credible information received, or is reasonably suspected of, of doing something which would be punishable as an offence in India. (Section 35(1)(h))
- Who after being a released convict, commits a breach of rule under Section 394(5) (notifying the State government of change or absence from address of person convicted more than once) (Section 35(1)(i))

- For whose specific arrest an oral or written requisition has been received from another police officer and it appears that the other officer can arrest him without warrant.(Section 35(1)(j))

In non-cognisable offences

According to Section 35(2), any person concerned in a non-cognisable offense is to be arrested except under Section 39 or under a warrant or order of magistrate.

‘Section 39: Arrest on refusal to give name and residence’ says that when a person accused of committing a non-cognisable offense refuses to disclose his name and residence, or gives false information regarding these when demanded by the officer, the person may be arrested by the police officer so that his name and address may be ascertained. (Section 39(1))

When such correct name and address are ascertained, the person may be released on bond or a bail bond, and will appear before the magistrate when required. Also, if a person who is not a resident of India is arrested, his bond shall be secured by a citizen of India. (Section 39(2))

If the true name and residence of that person is not ascertained within 24 hours, or he cannot furnish sureties, or he cannot execute the bond or bail bond, he shall be presented to the nearest Magistrate having jurisdiction. (Section 39(3))