

Chanda Kochhar vs Central Bureau Of Investigation And Anr on 9 January, 2023

Author: Revati Mohite Dere

Bench: Revati Mohite Dere, Prithviraj K. Chavan

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901 & 902-WP-ST-22494 & 22495-2022-

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION (STAMP) NO. 22494 OF 2022
WITH
INTERIM APPLICATION (STAMP) NO. 54 OF 2023

Chanda Deepak Kochhar,
aged 61 years, having address at
45, CCI Chambers, Churchgate,
Mumbai 400 020

...Petitioner/Applica

Versus

1. Central Bureau of Investigation,
BS & FC, 3rd & 4th Floor,
Plot No. C-35A, 'G' Block,
Bandra Kurla Complex (BKC),
Near MTNL Exchange,
Bandra (East), Mumbai - 400 098

...Respondents

WITH
CRIMINAL WRIT PETITION (STAMP) NO. 22495 OF 2022
WITH
INTERIM APPLICATION (STAMP) NO. 57 OF 2023

Deepak Virendra Kochhar
aged 61 years, having address at
45, CCI Chambers, Churchgate,
Mumbai 400 020

...Petitioner/Applica

Versus

1. Central Bureau of Investigation,
BS & FC, 3rd & 4th Floor,

Plot No. C-35A, 'G' Block,

SQ Pathan

901 & 902-WP-ST-22494 & 22495-2022-J.doc

Bandra Kurla Complex (BKC),
Near MTNL Exchange,
Bandra (East), Mumbai - 400 098 ...Respondents

Mr. Amit Desai, Sr. Advocate a/w Mr. Gopalkrishna Shenoy,
Mr. Kushal Mor, Mr. Rohan Dakshini, Ms. Pooja Kothari, Ms. Deepa
Shetty, Mr. Kyrus Modi, Mr. Pranav Narsaria and Mr. Tejas Popat i/b
Rashmikant and Partners for the Petitioners in WP/ST/22494/2022

Mr. Vikram Choudhary, Sr. Advocate a/w Mr. Kushal Mor, Mr. Rohan
Dakshini, Ms. Pooja Kothari, Ms. Deepa Shetty, Mr. Kyrus Modi,
Mr. Pranav Narsaria and Mr. Tejas Popat i/b Rashmikant and Partners
for the Petitioners in WP/ST/22495/2022

Mr. Raja Thakare, Spl. P.P. a/w Mr. Kuldeep S. Patil, Ms. Saili Dhuru,
Mr. Akash Kavade, Mr. Siddharth Jagushte for the Respondent No.1-
CBI

Mr. J. P. Yagnik, A.P.P for the Respondent No. 2-State

CORAM : REVATI MOHITE DERE &
PRITHVIRAJ K. CHAVAN, JJ.
RESERVED ON : 06.01.2023
PRONOUNCED ON : 09.01.2023

ORDER (Per Revati Mohite Dere, J.) :

1 By these petitions, preferred under Article 226 of the Constitution of India and under Section 482 of the Code of Criminal Procedure ('Cr.P.C'), the petitioners, who are husband and wife, seek; (i) quashing of the FIR, being No. 901 & 902-WP-ST-22494 & 22495-2022-J.doc RCB DI/2019/E/0001 dated 22.01.2019, registered under Sections 120B and 420 of the Indian Penal Code ('IPC') and Sections 7, 13(2) r/w 13(1)(d) of the Prevention of Corruption Act ('PC Act'); (ii) quashing of their illegal arrest being violative of Sections 41 and 41-A of Cr.P.C; and (iii) quashing of the remand orders dated 24.12.2022 and 26.12.2022 passed by the learned Special CBI Judge, Mumbai.

2 By way of interim relief, the petitioners seek their release from custody pending the hearing and final disposal of the petitions.

3 The petitions, as agreed between the parties, are heard only for the limited purpose for considering whether the arrest of the petitioners was illegal i.e. contrary to the constitutional mandate and statutory provisions and consequently, whether the petitioners are entitled to be released on interim bail.

901 & 902-WP-ST-22494 & 22495-2022-J.doc CRIMINAL WRIT PETITION/STAMP/22494/2022
4 Mr Amit Desai, learned senior counsel appearing for the petitioner-Chanda Kochhar submits; (i) that the respondent No. 1-CBI has, with blatant disregard to the rule of law, illegally and arbitrarily arrested the petitioner in clear contravention of the constitutional mandate and the provisions of Cr.P.C, pertaining to arrest; (ii) that there was no occasion whatsoever to arrest the petitioner, inasmuch as, the petitioner had cooperated with the CBI throughout, right from the time the Preliminary Enquiry (‘PE’) was registered by the CBI till she was arrested.

Learned senior counsel pointed to the number of times, the petitioner appeared before the CBI, and the documents submitted by her to the CBI; (iii) that the petitioner had appeared before the Directorate of Enforcement (‘ED’), after the ED registered offences under Sections 3 and 4 of the Prevention of Money-

Laundering Act (‘PMLA Act’) on 31.01.2019 against her and others and that the petitioner had co-operated with the investigation conducted by the ED; (iv) that even in the 901 & 902-WP-ST-22494 & 22495-2022-J.doc adjudicating proceeding before the PMLA Authority, the petitioner had appeared and participated. He submitted that the Adjudicating Authority had after hearing the parties lifted the provisional attachment order passed by ED, vide order dated 06.11.2020; (v) that throughout, i.e. right from the registration of the PE by respondent No. 1, registration of FIR by ED, till date, it is the petitioner's case, that she had no knowledge regarding her husband Deepak Kochhar's transactions; (vi) that the respondent No.1-CBI by arresting the petitioner, had contravened the constitutional mandate and statutory rights granted to the petitioner. Learned senior counsel submits that there has been a clear breach of the mandate of Sections 41 and 41-A Cr.P.C, inasmuch as, the reasons for arrest have not been spelt out in the arrest memo and that arrest cannot be at the ipse dixit or at the whims and fancies of an officer, as done in the present case; (vii) that the provisions of the Cr.P.C. have not been complied with, as much as, there was no lady officer, as mandated, at the time of her arrest, as is evident from the arrest memo.

901 & 902-WP-ST-22494 & 22495-2022-J.doc Learned senior counsel submits that although a lady officer was present at the time of personal search of the petitioner, there is no endorsement that a lady officer was present at the time of petitioner's arrest; (viii) that there is no previous approval as required under the PC Act; (ix) that the remanding court had failed in its duty to consider that there was non-compliance of Sections 41 and 41-A Cr.P.C and the ratio of the judgments of the Apex Court on this aspect, in particular, the judgment in Arnesh Kumar v. State of Bihar¹ and Satender Kumar Antil v.

CBI².

4.1 Learned senior counsel, in support of his submissions, relied on the several judgments, in particular, the following judgments :

(1) Satender Kumar Antil v. CBI (Supra)

(2) Santosh v. State of Maharashtra³

(3) Lalita Kumari v. Govt. of Uttar Pradesh⁴

- 1 (2014) 9 SCC 273
- 2 (2022) 10 SCC 51
- 3 (2017) 9 SCC 714
- 4 (2014) 2 SCC 1

901 & 902-WP-ST-22494 & 22495-2022-J.doc (4) D. K. Basu v. State of West Bengal⁵ (5) Joginder Kumar v. State of Uttar Pradesh⁶ (6) Mohd. Zubair v. State (NCT of Delhi)⁷ (7) Arnesh Kumar v. State of Bihar (Supra) (8) Arnab Manoranjan Goswami v. State of Maharashtra⁸ CRIMINAL WRIT PETITION/STAMP/22495/2022 5 Mr. Choudhary, learned senior counsel appearing for the petitioner-Deepak Kochhar adopted the submissions so canvassed by Mr Desai. He submitted that even in the petitioner's case, there is non-compliance of the mandate of Sections 41 and 41-A of Cr.P.C. He too submitted that there was absolutely no justification for the respondent No. 1-CBI to arrest the petitioner, as he too had cooperated with the investigation and had attended the CBI Office, whenever summoned, and that all documents as sought, were submitted by him. Learned senior counsel also relied on the judgments cited by Mr Desai.

5 (1997) 1 SCC 416 6 (1994) 4 SCC 260 7 (2022) SCC OnLine SC 897 8 (2021) 2 SCC 427 901 & 902-WP-ST-22494 & 22495-2022-J.doc Mr. Thakare, learned Spl. PP for the Respondent No.1-CBI :

6 Mr. Thakare, learned Special PP submitted that there was no infringement/infracton of either the constitutional mandate or the statutory requirement vis-a-vis the petitioners' arrests. He submits that the reasons for arrest have been spelt out in the arrest memo i.e. 'the petitioners were not cooperating and not disclosing true and full facts of the case'. Learner Special PP submits that hence, for proper investigation, the petitioners' custody was necessary, so that, the accused could be confronted with each other. He further submitted that since the petitioners are now in judicial custody, it is always open for them to file a regular bail application under Section 439 Cr.P.C.

7 A few admitted facts as are necessary to decide the petitions are reproduced hereinunder:

08.12.2017 A PE bearing No. PE.BD1/2017/E/0001 was registered by the CBI.

06.09.2018 The petitioner-Deepak Kochhar received summons from the CBI to remain present at the CBI Office on 11.09.2018, for enquiry in the PE.

901 & 902-WP-ST-22494 & 22495-2022-J.doc 11.09.2018 The Petitioner-Deepak Kochhar attended the CBI Office, where he was interrogated. He had also attended the CBI office on two consecutive days in September 2018, when again he was questioned. 22.09.2018 Petitioner-Chanda Kochhar attended the office of CBI and at

New Delhi, where she was interrogated. 23.09.2018 22.01.2019 The CBI registered a FIR bearing No. RC-

BD12019E0001-CBI/BS & FC/Delhi, inter alia against Chanda Kochhar and Deepak Kochhar under Sections 120-B and 420 of the IPC and Sections 7, 13(2) r/w 13(1)(d) of the PC Act for the alleged offences during the period 2009-2012.

31.01.2019 The ED registered ECIR/02/HIU/2019 under Sections 3 and 4 of the PMLA Act, alleging that the proceeds of crime were Rs. 1794 Crores.

In 2019 Petitioner-Deepak Kochhar attended CBI Office on 15 dates and on 08.05.2019, 14.06.2019, 20.06.2019, 05.07.2019 and 19.08.2019 submitted documents sought for by the respondent No.1-CBI (more than 2300 pages).

The CBI seized documents submitted by the petitioner- Deepak Kochhar on 08.05.2019, vide two seizure memos; on 20.06.2019, vide two seizure memos; and on 19.08.2021 vide a seizure memo.

01.11.2019 The Petitioner-Chanda Kochhar, suo moto addressed an e-mail dated 01.11.2019 to respondent No.1-CBI requesting for a meeting on a date and time convenient to them, to present true, correct and full facts of the matter, in their right perspective.

901 & 902-WP-ST-22494 & 22495-2022-J.doc However, there was no response from respondent No.1 to this email.

2019, 2020 Petitioners were not summoned by the CBI during the and 2021 said period.

During the Petitioner-Chanda Kochhar was, however, summoned period 2019- by ED, pursuant to which, she remained present in the 2020 ED Office on the following dates:

01.03.2019, 02.03.2019, 03.03.2019, 04.03.2019, 13.05.2019, 14.05.2019, 15.05.2019, 16.05.2019, 17.05.2019, 28.06.2019, 15.07.2019, 16.07.2019, 17.07.2019, 14.10.2020, 19.10.2020 and 22.10.2020.

In addition to appearing on the said dates, petitioner- Chanda Kochhar also provided documents to ED on 16.03.2019 (206 pages), 12.04.2019, 14.05.2019 (446 pages), 08.06.2019 (11 pages), 13.06.2019, 22.06.2019, 03.09.2019, 14.10.2019, 14.10.2020 (78 pages) and 22.10.2020 (78 pages).

Petitioner-Deepak Kochhar attended ED office on 01.03.2019, 02.03.2019, 13.05.2019; 14.05.2019, 15.05.2019, 16.05.2019, 17.05.2019, 28.06.2019, 18.07.2019, 19.07.2019, 07.09.2020, 09.09.2020, 10.09.2020, 14.10.2020, 15.10.2020 and 16.10.2020.

In addition to appearing on the said dates, petitioner- Deepak Kochhar also provided documents to ED on 14.03.2019 (1307 pages), 23.04.2019, 13.05.2019 (877 pages), 29.05.2019 (1668 pages), 08.06.2019 (9128 pages), 10.10.2019, 14.10.2019 (1041 pages), 14.01.2020, 18.01.2020, 28.01.2020,

29.01.2020, 06.02.2020, 17.07.2020 (220 pages), 19.07.2020, 07.09.2020, 23.06.2021, 06.07.2021, 13.09.2021 and 25.11.2021.

901 & 902-WP-ST-22494 & 22495-2022-J.doc 07.09.2020 Petitioner-Deepak Kochhar was arrested by ED.

Petitioner-Chanda Kochhar was not arrested by ED during their investigation.

20.11.2020 Petitioner-Chanda Kochhar approached the Apex Court, after the arrest of her husband. The learned Solicitor General of India made a statement before the Supreme Court in a writ petition filed by petitioner- Chanda Kochhar, that no coercive steps would be taken against her.

12.02.2021 The Sessions Court granted bail to the petitioner-

Chanda Kochhar under Section 88 Cr.P.C. in the PMLA case, referring to the statement of the learned Solicitor General of India.

25.03.2021 Petitioner-Deepak Kochhar was enlarged on bail by this Court (Coram: Prakash D. Naik, J.).

10.01.2022 The Apex Court dismissed the ED's SLP and as such confirmed the order of bail.

27.06.2022 The Petitioner-Chanda Kochhar received a S.41-A notice dated 27.06.2022 from the CBI, directing her to appear before them on 04.07.2022. However, as the petitioner had a court case before the Hon'ble Bombay High Court on 04.07.2022, she addressed an email to CBI on 01.07.2022 requesting that her appearance be postponed to 08.07.2022. The request of the petitioner was acceded to by CBI vide email dated 04.07.2022.

06.07.2022 Petitioner-Deepak Kochhar received a S. 41-A notice dated 06.07.2022 from the CBI, directing him to appear before it on 07.07.2022. It appears that the petitioner requested the Investigating Officer, if he could remain present on 08.07.2022.

901 & 902-WP-ST-22494 & 22495-2022-J.doc 08.07.2022 Both the petitioners attended the office of the CBI on 08.07.2022. They were interrogated briefly and allowed to leave.

15.12.2022 The next S.41-A notice that the petitioner-Chanda / Kochhar received was dated 15.12.2022, whereby she 22.12.2022 was directed to appear before the CBI on 19.12.2022.

/ Since the petitioner's husband-Deepak Kochhar had 23.12.2022 also been summoned, and on the same date a part-

heard matter was being heard by the Division Bench of the Bombay High Court, the petitioner-Deepak Kochhar requested accomodation. This request made by the petitioner-Deepak Kochhar was acceded to by CBI and he was further informed that his wife (Chanda Kochhar) could

travel with him and appear before CBI on 22.12.2022/23.12.2022. However, as the petitioner's husband's matter was still continuing and a hearing was also kept for 22.12.2022, a request was made to the officer of CBI that the petitioners be permitted to appear before CBI on 23.12.2022 and the same was acceded to. Accordingly, the petitioners remained present before the CBI on 23.12.2022 at 12 noon at New Delhi where they were made to wait, and thereafter, both were arrested.

7.1 After the petitioners' arrest, they were remanded to CBI custody by the learned Special Judge vide orders dated 24.12.2022 and 26.12.2022. Presently, both the petitioners are in judicial custody.

901 & 902-WP-ST-22494 & 22495-2022-J.doc 7.2 Apart from the aforesaid, it is also a matter of record and which facts are admitted, that pursuant to the registration of the offence by the ED, the ED provisionally attached various properties of NuPower Renewables Pvt. Ltd. ('NRPL') and also the residential flat owned by the petitioner-Deepak Kochhar. On 03.02.2020, the ED filed an original complaint before the Adjudicating Authority, PMLA, seeking confirmation of the provisional attachment order. It appears that both the petitioners, who were respondents in the complaint, filed their responses before the Adjudicating Authority, PMLA, on 10.09.2020. The Adjudicating Authority, PMLA, vide order dated 06.11.2020 rejected the ED's complaint and released the properties from attachment inter alia holding that the properties in question were not proceeds of crime and were not involved in money laundering. It is also a matter of record that ED has challenged the said order before the Appellate Authority and the said appeal is pending.

REASONS :

901 & 902-WP-ST-22494 & 22495-2022-J.doc 8 As noted earlier and as agreed between the learned senior counsel for the parties, the aforesaid petitions were heard only with respect to the interim relief sought i.e. for interim bail, on the premise that the petitioners' arrest was illegal, being in contravention of the statutory provisions and the constitutional mandate.

8.1 Before we proceed to decide whether the petitioners' arrest can be said to be illegal, it would be apposite to reproduce the relevant provisions and the relevant judgments on this aspect.

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-

(a) who commits, in the presence of a police officer, a cognizable offence;

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

(i) the police officer has reason to believe on the basis of such complaint, information, or suspicion that such person has committed the said offence;

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(ii) the police officer is satisfied that such arrest is necessary-

(a) to prevent such person from committing any further offence; or

(b) for proper investigation of the offence; or

(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

(e) as unless such person is arrested, his presence in the Court whenever required cannot be ensured;

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

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.

(ba) against whom credible information has been received that he has committed a cognizable offence punishable with imprisonment for a term which may extend to more than seven years whether with or without fine or with death sentence and the police officer has reason to believe on the basis of that information that such person has committed the said offence;

(c) who has been proclaimed as an offender either under this Code or by order of the State Government; or 901 & 902-WP-ST-22494 & 22495-2022-J.doc

(d) in whose possession anything is found which may reasonably be suspected to be stolen property and who may reasonably be suspected of having committed an offence with reference to such thing; or

(e) who obstructs a police officer while in the execution of his duty, or who has escaped, or attempts to escape, from lawful custody; or

(f) who is reasonably suspected of being a deserter from any of the Armed Forces of the Union; or

(g) who has been concerned in, or against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists, of his having been concerned in, any act committed at any place out of India which, if committed in India, would have been punishable as an offence, and for which he is, under any law relating to extradition, or otherwise, liable to be apprehended or detained in custody in India; or

(h) who, being a released convict, commits a breach of any rule made under sub-section (5) of section 356; or

(i) for whose arrest any requisition, whether written or oral, has been received from another police officer, provided that the requisition specifies the person to be arrested and the offence or other cause for which the arrest is to be made and it appears therefrom that the person might lawfully be arrested without a warrant by the officer who issued the requisition.

(2) Subject to the provisions of section 42, no person concerned in a non-cognizable offence or against whom a complaint has been made or credible information has been received or reasonable suspicion exists of his having so concerned, shall be arrested except under a warrant or order of a Magistrate."

901 & 902-WP-ST-22494 & 22495-2022-J.doc 41-A. 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 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.

(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.

(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.

(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.

"46. Arrest how made.- (1) In making an arrest the police officer or other person making the same shall actually touch or confine the body of the person to be arrested,

unless there be a submission to the custody by word or action.

Provided that where a woman is to be arrested, unless the circumstances indicate to the contrary, her submission to custody on an oral intimation of arrest shall be presumed and, unless the circumstances otherwise require or unless the police officer is a female, the police officer shall not touch the person of the woman for making her arrest.

901 & 902-WP-ST-22494 & 22495-2022-J.doc (2) If such person forcibly resists the endeavour to arrest him, or attempts to evade the arrest, such police officer or other person may use all means necessary to effect the arrest.

(3) Nothing in this section gives a right to cause the death of a person who is not accused of an offence punishable with death or with imprisonment for life.

(4) Save in exceptional circumstances, no woman 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.

"60-A. Arrests to be made strictly according to the Code. No arrest shall be made except in accordance with the provisions of this Code or any other law for the time being in force providing for arrest."

8.2 The Apex Court in the case of Satender Kumar Antil (Supra), has issued certain directions to investigating agencies and the courts; has discussed arrest in cognizable offences, the mandate of Section 41, effect of its non-compliance while considering the bail application; has issued directions to ensure that police officers do not arrest the accused unnecessarily and 901 & 902-WP-ST-22494 & 22495-2022-J.doc magistrates do not authorise detention casually and mechanically;

has held that Sections 41 and 41-A are facets of Article 21 of the Constitution; and has issued certain guidelines for avoiding unwarranted arrest, amongst other directions/observations.

8.3 The relevant paras of Satender Kumar Antil (Supra), with which we are concerned, are reproduced hereinunder :

"24. This provision mandates the police officer to record his reasons in writing while making the arrest. Thus, a police officer is duty-bound to record the reasons for arrest in writing. Similarly, the police officer shall record reasons when he/she chooses not to arrest. There is no requirement of the aforesaid procedure when the offence alleged is more than seven years, among other reasons.

25. The consequence of non-compliance with Section 41 shall certainly enure to the benefit of the person suspected of the offence. Resultantly, while considering the application for enlargement on bail, courts will have to satisfy themselves on the due compliance of this provision. Any non-compliance would entitle the accused to a grant of bail.

26. Section 41A deals with the procedure for appearance before the police officer who is required to issue a notice to the person 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, and arrest is not required under Section 41(1). Section 41B deals with the procedure of arrest along with mandatory duty on the part of the officer.

27. On the scope and objective of Section 41 and 41A, it is obvious that they are facets of Article 21 of the Constitution. We need not elaborate any further, in light of the judgment of this Court in *Arnesh Kumar v. State of Bihar*, (2014) 8 SCC 273:

"7.1. From a plain reading of the aforesaid provision, it is evident that a person accused of an 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 his satisfaction that such person had committed the offence punishable as aforesaid. A police officer before arrest, in such cases has to be further 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. These are the conclusions, which one may reach based on facts.

7.2. The 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 901 & 902-WP-ST-22494 & 22495-2022-J.doc provisions aforesaid, while making such arrest. The law further requires the police officers to record the reasons in writing for not making the arrest.

7.3. In pith and core, the police officer before arrest must put a question to 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 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 CrPC.

8. An accused arrested without warrant by the police has the constitutional right under Article 22(2) of the Constitution of India and Section 57 CrPC to be produced before the Magistrate without unnecessary delay and in no circumstances beyond 24 hours excluding the time necessary for the journey:

8.1.

8.2. Before a Magistrate authorises detention under Section 167 CrPC, 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 are 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 901 & 902-WP-ST-22494 & 22495-2022-J.doc 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 the condition precedent for arrest under Section 41 CrPC has been satisfied and it is only thereafter that he will authorise the detention of an accused.

8.3. The Magistrate before authorising detention will record his own satisfaction, may be in brief but the said satisfaction must reflect from his 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 his satisfaction in writing that the Magistrate will authorise the detention of the accused.

9. ...The aforesaid provision makes it clear that in all cases where the arrest of a person is not required under Section 41(1) CrPC, 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 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 901 & 902-WP-ST-22494 & 22495-2022-J.doc arrest is necessary. At this stage also, the condition precedent for arrest as envisaged under Section 41 CrPC has to be complied and shall be subject to the same scrutiny by the Magistrate as aforesaid.

10.

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

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 detention;

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;

901 & 902-WP-ST-22494 & 22495-2022-J.doc 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 by 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."

28. We only reiterate that the directions aforesaid ought to be complied with in letter and spirit by the investigating 901 & 902-WP-ST-22494 & 22495-2022-J.doc and prosecuting agencies, while the view expressed by us on the non-compliance of Section 41 and the consequences that flow from it has to be kept in mind by the Court, which is expected to be reflected in the orders.

29. Despite the dictum of this Court in Arnesh Kumar (supra), no concrete step has been taken to comply with the mandate of Section 41A of the Code. This Court has clearly interpreted Section 41(1)(b)(i) and (ii) inter alia holding that notwithstanding the existence of a reason to believe qua a police officer, the satisfaction for the need to arrest shall also be present. Thus, sub-clause (1)(b)(i) of Section 41 has to be read along with sub-clause (ii) and therefore both the elements of 'reason to believe' and 'satisfaction qua an arrest' are mandated and accordingly are to be recorded by the police officer.

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32. We also expect the courts to come down heavily on the officers effecting arrest without due compliance of Section 41 and Section 41A. We express our hope that the Investigating Agencies would keep in mind the law laid down in Arnesh Kumar (Supra), the discretion to be exercised on the touchstone of presumption of innocence, and the safeguards provided under Section 41, since an arrest is not mandatory. If discretion is exercised to effect such an arrest, there shall be procedural compliance. Our view is also reflected by the interpretation of the specific provision under Section 60A of the Code which warrants the officer concerned to make the arrest strictly in accordance with the Code.

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100. In conclusion, we would like to issue certain directions. These directions are meant for the investigating agencies and also for the courts. Accordingly, we deem it appropriate to issue the following directions, which may be subject to State amendments.:

100.1

100.2 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.

100.3 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." (emphasis supplied) 8.4 In Arnab Manoranjan Goswami v. State of Maharashtra⁹, the Apex Court in para 67 has held as under :

"67. Human liberty is a precious constitutional value, which is undoubtedly subject to regulation by validly enacted legislation. As such, the citizen is subject to the edicts of criminal law and procedure. Section 482

9 (2021) 2 SCC 427 901 & 902-WP-ST-22494 & 22495-2022-J.doc recognizes the inherent power of the High Court to make such orders as are necessary to give effect to the provisions of the CrPC or prevent abuse of the process of any Court or otherwise to secure the ends of justice. Decisions of this court require the High Courts, in exercising the jurisdiction entrusted to them under Section 482, to act with circumspection. In emphasising that the High Court must exercise this power with a sense of restraint, the decisions of this Court are founded on the basic principle that the due enforcement of criminal law should not be obstructed by the accused taking recourse to artifices and strategies. The public interest in ensuring the due investigation of crime is protected by ensuring that the inherent power of the High Court is exercised with caution. That indeed is one - and a significant - end of the spectrum. The other end of the spectrum is equally important: the recognition by Section 482 of the power inhering in the High Court to prevent the abuse of process or to secure the ends of justice is a valuable safeguard for protecting liberty. The Code of Criminal Procedure of 1898 was enacted by a legislature which was not subject to constitutional rights and limitations; yet it recognized the inherent power in Section 561A. Post Independence, the recognition by Parliament³⁷ of the inherent power of the High Court must be construed as an aid to preserve the constitutional value of liberty. The writ of liberty runs through the fabric of the Constitution. The need to ensure the fair investigation of crime is undoubtedly important in itself, because it protects at one level the rights of the victim and, at a more fundamental level, the societal interest in ensuring that crime is investigated and dealt with in accordance with law. On the other hand, the misuse of the criminal law is a matter of which the High Court and the lower Courts in this country must be alive. In the present case, the High Court could not but have been cognizant of the specific ground which was raised before it by the appellant that he was being made a target as a part of a series of occurrences which have been taking place since April 2020. The specific case of the appellant is that he has been targeted because his 901 & 902-WP-ST-22494 & 22495-2022-J.doc opinions on his television channel are unpalatable to authority. Whether the appellant has established a case for quashing the FIR is something on which the High Court will take a final view when the proceedings are listed before it but we are clearly of the view that in failing to make even a prima facie evaluation of the FIR, the High Court abdicated its constitutional duty and function as a protector of liberty. Courts must be alive to the need to safeguard the public interest in ensuring that the due enforcement of criminal law is not obstructed. The fair investigation of crime is an aid to it. Equally it is the duty of courts across the spectrum - the district judiciary, the High Courts and the Supreme Court - to ensure that the criminal law does not become a weapon for the selective harassment of citizens. Courts should be alive to both ends of the spectrum - the need to ensure the proper enforcement of criminal law on the one hand and the need, on the other, of ensuring that the law does not become a ruse for targeted harassment. Liberty across human eras is as tenuous as tenuous can be. Liberty survives by the vigilance of her citizens, on the cacophony of the media and in the dusty corridors of courts alive to the rule of (and not by) law. Yet, much too often, liberty is a casualty when one of these components is found wanting."

8.5 In Santosh v. State of Maharashtra¹⁰, the Apex Court in para 6 has observed as under :

"6. It appears, the IO was of the view that the custody of the Appellant is required for recording his confessional statement in terms of what the co-accused had already stated in the Statement Under Section 161 of the Code of Criminal Procedure, 1973. The IO was of the opinion that the Appellant 10 (2017) 9 SCC 714 (2021) 2 SCC 427 901 & 902-WP-ST-22494 & 22495-2022-J.doc was not cooperating because he kept reiterating that he had not purchased the food-grains. The purpose of custodial interrogation is not just for the purpose of confession. The right against self-incrimination is provided for in Article 20(3) of the Constitution. It is a well settled position in view of the Constitution Bench decision in Selvi and Ors. v. State of Karnataka-(2010) 7 SCC 263, that Article 20(3) enjoys an "exalted status". This provision is an essential safeguard in criminal procedure and is also meant to be a vital safeguard against torture and other coercive methods used by investigating authorities. Therefore, merely because the Appellant did not confess, it cannot be said that the Appellant was not cooperating with the investigation. However, in case, there is no cooperation on the part of the Appellant for the completion of the investigation, it will certainly be open to the Respondent to seek for cancellation of bail."

8.6 In Joginder Kumar v. State of UP 11, it is observed in Para 20 by the Apex Court as under :

"20. In India, Third Report of the National Police Commission at page 32 also suggested:

"An arrest during the investigation of a cognizable case may be considered justified in one or other of the following circumstances:

(i) The case involves a grave offence like murder;

dacoity, robbery, rape, etc., and it is necessary to arrest 11 (1994) 4 SCC 260 901 & 902-WP-ST-22494 & 22495-2022-J.doc the accused and bring his movements under restraint to infuse confidence among the terror stricken victims.

(ii) The accused is likely to abscond and evade the processes of law.

(iii) The accused is given to violent behaviour and is likely to commit further offences unless his movements are brought under restraint.

(iv) The accused is a habitual offender and unless kept in custody he is likely to commit similar offences again.

It would be desirable to insist through departmental instructions that a police officer making an arrest should also record in the case diary the reasons for making the arrest, thereby clarifying his conformity to the specified guidelines...."

The above guidelines are merely incidents of personal liberty guaranteed under the Constitution of India. No arrest can be made because it is lawful for the Police Officer to do so. The existence of the power to arrest is one thing. The justification for the exercise of it is quite another. The Police Officer must be able to justify the arrest apart from his power to do so. Arrest and detention in police lock-up of a person can cause incalculable harm to the reputation and self esteem of a person. No arrest can be made in a routine manner on a mere allegation of commission of an offence made against a person. It would be prudent for a Police Officer in the interest of protection of the constitutional rights of a citizen" and perhaps in his own interest that no 901 & 902-WP-ST-22494 & 22495-2022-J.doc arrest should be made without a reasonable satisfaction reached after some investigation as to the genuineness and bonafides of a complaint and a reasonable belief both as to the person's complicity and even so as to the need to effect arrest. Denying a person of his liberty is a serious matter. The recommendations of the Police Commission merely reflect the constitutional concomitants of the fundamental right to personal liberty and freedom. A person is not liable to arrest merely on the suspicion of complicity in an offence. There must be some reasonable justification in the opinion of the Officer effecting the arrest that such arrest is necessary and justified. Except in heinous offences, an arrest must be avoided if a Police Officer issues notice to person to attend the Station House and not to leave Station without permission would do".

(emphasis supplied) 8.7 In Mohd. Zubair v. State (NCT of Delhi) 12, the Apex Court in paras 28, 29, 30 has held as under :

"28. Police officers are vested with the power to arrest individuals at various stages of the criminal justice process, including during the course of investigation. However, this power is not unbridled. In terms of Section 41(1)(b)(ii) of the CrPC, the police officer in question must be satisfied that such arrest is necessary to prevent the person sought to be arrested from committing any further offence, for proper investigation of the offence, to prevent the arrestee from tampering with or destroying evidence, to prevent them from influencing or intimidating potential witnesses, or when it is not possible to ensure their presence in court without arresting them.

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29. Police officers have a duty to apply their mind to the case before them and ensure that the condition(s) in Section 41 are met before they conduct an arrest. This Court has time and again, reiterated the importance of doing so, including in Arnesh Kumar v. State of Bihar,⁹ where the Court observed:

"6. [...] 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..."

30. We once again have occasion to reiterate that the guidelines laid down in Arnesh Kumar (supra) must be followed, without exception. The *raison d'être* of the powers of arrest in relation to cognizable offences is laid down in Section 41. Arrest is not meant to be and must not be used as a punitive tool because it results in one of the gravest possible consequences emanating from criminal law: the loss of personal liberty. Individuals must not be punished solely on the basis of allegations, and without a fair trial. When the power to arrest is exercised without application of mind and without due regard to the law, it amounts to an abuse of power. The criminal law and its processes ought not to be instrumentalized as a tool of harassment. Section 41 of the CrPC as well as the safeguards in criminal law exist in recognition of the reality that any criminal proceeding almost inevitably involves the might of the state, with unlimited resources at its disposal, against a lone individual."

(emphasis supplied) 901 & 902-WP-ST-22494 & 22495-2022-J.doc 8.8 From the aforesaid judgments, it is evident that arrest is not mandatory; that the notice issued under Section 41-A is to ensure that the persons upon whom notice is served, is required to attend for 'answering certain queries' relating to the case; that if an officer is satisfied that a person has committed a cognizable offence punishable with imprisonment for a term, which may be less than 7 years or which may extend to the said period, with or without fine, an arrest can follow only when there is a reason to believe or suspect that the said person has committed an offence, and there is a necessity for an arrest.

8.9 The conditions or necessity to arrest is stipulated in Section 41(1)(b)(ii) from (a) to (e). The same are reproduced hereunder:

"(a) to prevent such person from committing any further offence; or

(b) for proper investigation of the offence; or

(c) to prevent such person from causing the evidence of the offence to disappear or tampering with such evidence in any manner; or 901 & 902-WP-ST-22494 & 22495-2022-J.doc

(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

(e) as unless such person is arrested, his presence in the Court whenever required cannot be ensured, and the police officer shall record while making such arrest, his reasons in writing."

8.10 It is incumbent upon the police not only to record reasons for arrest in writing, but, even in cases, where the police choose not to arrest. It is also incumbent on courts to satisfy themselves that there is due compliance of Section 41 and 41-A, failing which, the same will enure to the benefit of the person suspected of the offence, entitling the person to be released on bail.

8.11 Having regard to the legal position as stated aforesaid, the short question that arises for consideration before us is, whether the petitioners' arrest being contrary to the 901 & 902-WP-ST-22494 & 22495-2022-J.doc mandate of law i.e. whether the arrests are in violation of Sections 41, 41-A and 60-A Cr.P.C, the petitioners are entitled to be released on bail.

8.12 In order to consider the same, we deem it appropriate to reproduce the arrest memo of petitioner-Chanda Kochhar. The same reads thus :

1. Case No. RCBD1/2019/E/0001 dated 22.01.2019 (Videocon Case)
2. Section of Law 120-B r/w 420 IPC & Section 7 r/w section 13(2) r/w 13(1)(d) of the PC Act, 1988
3. Name of the SPE/Branch CBI, BSFB, New Delhi
4. Date, time & Place of 23.12.2022, 16.30 hrs arrest O/o Head of Branch & DIG of Police, Central Bureau of Investigation, Banking Securities Fraud Branch, A Wing, 5 th Floor, CBI Head Quarters, Lodhi Road, New Delhi-110003
5. Name, age, Parentage and Ms. Chanda Kochhar, W/o Shri Deepak address of the arrestee Kochhar, 45 CCI Chambers, Church Road, Mumbai. (D.O.B. - 17.11.1961)
6. Name & Designation of Nitesh Kumar, Dy. Supdt. Of Police, Central officer effecting arrestee Bureau of Investigation, Banking Securities Fraud Branch, New Delhi.
7. Ground of Arrest The accused is an FIR named.

She has been not cooperating and disclosing true and full facts of the Case.

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8. Name & address of 1. Shri Pankaj Chauhan, Assistant witness Manager, Bank of Baroda, Cannaught Palace, New Delhi (Emp.

Code no. 177857)

2. Shri Aditya Tomar, Officer, Punjab National Bank, Sector-63, Noida (Emp. No. 5195198)

9. Whether the grounds of Yes.

arrest have been explained (in vernacular if possible) to accused 10 Name and particulars of Shri Aditya Kaji, Son-in-Law of Shri Deepak . the persons notified about Kochhar (Mobile no. 9987200003) the arrest of the accused and their relations with accused 11 Whether any visible signs

No . of trauma/injury present on the body of the arrestee 12 Any identification mark of Mole on nose.

- . accused (include peculiar physiognomic features also, if present)
- 13 Whether personal search Yes.
- . of the accused carried out.
- 14 Any other remarks
- .

(Nitesh Kumar)
Dy. SP/CBI, BS&FC, New Delhi

Received copy

(Signature/thumb impression of Arrestee)"

8.13 The arrest memo of the petitioner-Deepak Kochhar is identical. The ground of arrest reason given by the respondent 901 & 902-WP-ST-22494 & 22495-2022-J.doc No.1-CBI even in petitioner-Deepak Kochhar's arrest memo is identical. The same reads thus:

Ground of Arrest The accused is an FIR named.

He has been not cooperating and disclosing true and full facts of the Case.

8.14 Does the aforesaid reason/ground of arrest, satisfy the mandate of Sections 41 and 41-A of Cr.P.C and the directions given and the observations made by the Apex Court in the judgments reproduced hereinabove? We are afraid, it does not.

Arrest may be authorised only if the concerned officer has 'reason to believe' and there is 'satisfaction qua an arrest' that the person has committed an offence. The term/expression, 'reason to believe' finds place in a number of penal statutes. It postulates belief and the existence of reasons for that belief.

Belief must be in good faith and not casual or as an ipse dixit or a pretence or on mere suspicion. It is always open for a court to examine whether the reasons for the formation of the belief have a rational connection with the formation of the belief. There 901 & 902-WP-ST-22494 & 22495-2022-J.doc must be a direct nexus or live link between the material before the officer and the formation of his belief. Thus, there must be a rational connection between the two. We may note, that 'reason to believe' must be based on credible material and no decision to arrest can be recorded on fancy or whimsical grounds.

8.15 Section 41 Cr.P.C. mandates the concerned officer to record his reasons in writing while making the arrest. Thus, a statutory duty is cast on the officer not only to record the reasons for arrest in

writing, but also, if the officer chooses not to arrest.

The Apex Court in its judgments in Arnesh Kumar (Supra) and Satender Kumar Antil (Supra), has clearly interpreted Sections 41(1)(b)(i) and (ii) Cr.P.C. It is evident from the said judgments that both the elements, "reason to believe" and "satisfaction for an arrest" as mandated in Section 41(1)(b)(i) and Section 41(1)(b)

(ii) have to be read together and as such recorded by the concerned officer whilst arresting an accused. The object being to ensure that officers do not arrest the accused unnecessarily and 901 & 902-WP-ST-22494 & 22495-2022-J.doc the Magistrates do not authorise detention casually and mechanically. The Apex Court has issued directions in the said judgments to the investigating agencies to check arbitrary arrests of persons. The direction further stipulates that failure to comply with the directions would render the officer liable for departmental action, apart from contempt of court. As per the direction, even the Magistrate concerned, shall be liable for departmental action by the appropriate High Court, for authorising detention without recording reasons. In Satender Kumar Antil (Supra), the Apex Court in para 32 has observed as under:

"32. We also expect the courts to come down heavily on the officers effecting arrest without due compliance of Section 41 and Section 41A. We express our hope that the Investigating Agencies would keep in mind the law laid down in Arnesh Kumar (Supra), the discretion to be exercised on the touchstone of presumption of innocence, and the safeguards provided under Section 41, since an arrest is not mandatory. If discretion is exercised to effect such an arrest, there shall be procedural compliance. Our view is also reflected by the interpretation of the specific provision under Section 60A of the Code which warrants the officer concerned to make the arrest strictly in accordance with the Code.

901 & 902-WP-ST-22494 & 22495-2022-J.doc 8.16 In conclusion, in Satender Kumar Antil (Supra), the Apex Court has, in para 100.3, observed that `the courts will have to satisfy themselves on the compliance of Section 41 and 41-A of the Code. Any non-compliance would entitle the accused for grant of bail.

8.17 Thus, it is clearly evident from the mandate of Section 41 Cr.P.C, that for a cognizable offence, an arrest is not mandatory and the onus lies with the officer who seeks to arrest.

For effecting arrest, the officer must be satisfied that a person has committed a cognizable offence, punishable with imprisonment for a term which may be less than seven years or which may extend to the said period with or without fine, and that there is a necessity for an arrest. The necessity to arrest is spelt out in Section 41 (1)(b)(ii) from (a) to (e) i.e. (a) to prevent such person from committing any further offence; or (b) for proper investigation of the offence; or (c) to prevent such person from causing the evidence of the offence to disappear or tampering 901 & 902-WP-ST-22494 & 22495-2022-J.doc 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 (e) unless such a person is arrested, his presence in the Court whenever required cannot be ensured.

8.18 In the facts, it is evident that the officer, in the arrest memo, in the column, 'Grounds of arrest' has merely stated that 'The accused is an FIR named. She has been not cooperating and disclosing true and full facts of the Case.', which prima-facie appears to be contrary to the facts on record. Nothing specific has been noted/set-out therein, as mandated by Section 41(1)(b)

(ii) (a) to (e). The only reason mentioned is that the petitioners have not co-operated and not given true and correct disclosure.

The same cannot be a ground for arrest.

901 & 902-WP-ST-22494 & 22495-2022-J.doc 8.19 The ground for arresting the petitioners as stated in the arrest memos, is unacceptable and is contrary to the reason(s)/ ground(s) on which a person can be arrested i.e. contrary to the mandate of Section 41(1)(b)(ii) (a) to (e). 'Not disclosing true and correct facts' cannot be a reason, inasmuch as, the right against self incrimination is provided for in Article 20(3) of the Constitution. It is a well settled position in view of the Constitution Bench decision in Selvi vs. State of Karnataka 13.

Article 20(3) is an essential safeguard in criminal cases and is meant to be a vital safeguard against torture and other coercive methods used by investigating agencies. Hence, merely because an accused does not confess, it cannot be said that the accused have not co-operated with the investigation. The Apex Court in Santosh v. State of Maharashtra (Supra), has clearly held that in view of the Constitutional Bench judgment in Selvi's case (Supra), Article 20(3) of the Constitution enjoys an "exalted status" and serves as an essential safeguard against torture and coercive measures used by investigating officers. 13 (2010) 7 SCC 263 901 & 902-WP-ST-22494 & 22495-2022-J.doc 8.20 Courts have time and again re-iterated the role of courts in protecting personal liberty and ensuring that investigations are not used as a tool of harassment.

8.21 The facts reveal that the petitioners after registration of PE in December 2017 had reported to the CBI, pursuant to the summons issued; that they not only appeared but also submitted documents, details of which are mentioned in the seizure memos, as set-out in the facts stated aforesaid. Admittedly, during the period, 2019 till June 2022, for around four years, neither any summons were issued to the petitioners nor any communication was established by the respondent No.1- CBI with the petitioners. On 08.07.2022, the petitioners reported to the CBI Office, New Delhi, pursuant to the notice issued under Section 41-A. Thereafter, again Section 41-A notice was issued by the CBI in December 2022, pursuant to which, the petitioners appeared before the CBI on 23.12.2022, when they came to be 901 & 902-WP-ST-22494 & 22495-2022-J.doc arrested. What was the reason to arrest the petitioners after four years is not spelt out in the arrest memos, as mandated by Section 41(1)(b)(ii) Cr.P.C. The reason given in the arrest memos to arrest the

petitioners, having regard to the facts as stated aforesaid, appears to us, to be casual, mechanical and perfunctory, clearly without application of mind. The ground for arrest of the petitioners mentioned in the arrest memos is in clear breach of the mandatory provisions of Sections 41 and 41-A and 60-A of Cr.P.C.

8.22 As a Constitutional Court, we cannot be oblivious to the contravention of the mandatory provisions of law and the judgments of the Apex Court, in particular, the directions given in Arnesh Kumar (Supra) and Satender Kumar Antil (Supra). It is expected that the directions and provisions be complied with by the concerned officers/courts, in letter and spirit. Needless to state, that personal liberty of an individual is an important aspect of our constitutional mandate. Merely because an arrest can be 901 & 902-WP-ST-22494 & 22495-2022-J.doc made because it is lawful, does not mandate that arrest must be made. As emphasized by the Apex Court, a distinction must be made between the existence of the power to arrest and the justification for exercise of it. It is further observed that if arrests are made in a routine manner, it could cause incalculable harm to the reputation and self-esteem of a person and that presumption of innocence is a facet of Article 21, which would enure to the benefit of an accused.

8.23 In the present case, the reasons recorded by the Officer in the ground of arrest, does not satisfy the tests laid down in Section 41(1)(b)(ii) (a) to (e) of Cr.P.C, for the reasons set-out hereinabove. It does not disclose as to whether the arrest was necessary for one or more purpose(s) as envisaged in the said provision. The same is also in contravention of the directions given by the Apex Court in Arnesh Kumar (Supra), in particular, the direction stipulated in para 11.2 and 11.3 which reads thus :

901 & 902-WP-ST-22494 & 22495-2022-J.doc "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 detention."

8.24 Accordingly, in the facts, we hold that the petitioners' arrest is not in accordance with law. Thus, non-compliance of the mandate of Section 41(1)(b)(ii), Section 41-A and Section 60-A of Cr.P.C will enure to the benefit of the petitioners, warranting their release on bail. We may also note that even the learned Special Judge has overlooked the mandate of law as well as the dicta laid down by the Supreme Court in Arnesh Kumar (Supra) and Satender Kumar Antil (Supra). It is incumbent on the judicial officer authorising detention under Section 167 Cr.P.C, to be first satisfied that the arrest made is legal and in accordance with law and that all the constitutional rights of the person arrested, are satisfied. The same is not an empty formality. If the arrest effected, does not satisfy the requirements of Section 41 of 901 & 902-WP-ST-22494 & 22495-2022-J.doc Cr.P.C, the concerned court is duty bound not to authorise further detention of the accused and release the accused forthwith. Infact, when an accused is arrested and produced before the concerned court, it is the duty of the said Judge to consider whether specific reasons have been recorded for

arrest, and if so, prima facie, whether those reasons are relevant and whether a reasonable conclusion could at all, be reached by the officer that one or the other conditions in Section 41(1)(b)(ii)(a) to (e) are attracted. As observed in Arnesh Kumar (Supra), to this limited extent, the concerned court will make judicial scrutiny. A perusal of the remand order passed by the learned Special Judge, Mumbai, does not record the satisfaction as required to be given for authorising the detention of the petitioners with the respondent No.1-CBI. The onus of recording satisfaction lies not only on the officer but even on the Judge.

8.25 The concerned Judge authorising detention, ought to have recorded his own satisfaction, may be, in brief, but the said 901 & 902-WP-ST-22494 & 22495-2022-J.doc satisfaction must reflect from his order. A perusal of the order does not conform to the said requirements/directions given by the Apex Court.

8.26 We may note, that we have not gone into the other submissions advanced by Mr. Desai, learned senior counsel appearing for the petitioner-Chanda Kochhar, in particular, the submission, that as per the mandate, a lady officer was not present at the time of the petitioner-Chanda Kochhar's arrest, in view of the finding recorded by us hereinabove.

9 For the reasons set-out hereinabove, the petitioners are entitled to be released on bail, pending the hearing and final disposal of the aforesaid petitions, on the following terms and conditions:

ORDER

(i) The petitioners-Chanda Kochhar and Deepak Kochhar be released on cash bail in the sum of Rs. 1,00,000/- each, for a period of two weeks;

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(ii) The petitioners shall within the said period of two weeks, furnish P.R. Bond in the sum of Rs. 1,00,000/- each, with one or more sureties in the like amount, to the satisfaction of the Special Judge, CBI;

(iii) The petitioners shall co-operate in the investigation conducted by the Respondent No.1-CBI and shall attend the Office of the Respondent No.1-CBI, as and when summoned;

(iv) The petitioners shall not tamper with the evidence or attempt to influence or contact the complainant, witnesses or any person concerned with the case.

10 Writ petitions and interim applications be listed on 06.02.2023.

11 All concerned to act on the authenticated copy of this order.

PRITHVIRAJ K. CHAVAN, J. REVATI MOHITE DERE, J.