

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

WRIT PETITION NO.1142/2018

Kavita Manikikar of Mumbai
w/o Ravikiran Mankikar,
r/o Jer Villa, 3rd Road, TPS-III,
Santacruz (E), Mumbai.

.....PETITIONER

...V E R S U S...

1. Central Bureau of Investigation BS & FC,
through its Standing Counsel of Bombay,
Mumbai.
2. State of Maharashtra
through its Standing Counsel,
Hon'ble High Court of Bombay,
Mumbai.

...RESPONDENTS

Mr. Vijay Aggarwal i/b. Ashul Aggarwal and Yashwardhan Tiwari,
Counsel for the petitioner.
Ms.Ameeta Kuttikrushnan, , Counsel for the respondent no.1.
Mr.Rajan Salvi, A.P.P. for the respondent no.2.
Ms.Sharda Raut, Superintendent of Police, present in person.

CORAM: S. J. KATHAWALLA AND

SMT. BHARTI H. DANGRE, JJ.

DATED : MAY 10, 2018

JUDGMENT (Per : Smt. Bharti H. Dangre, J.) :

1. Rule. Rule returnable forthwith. Heard by consent of the parties. The petitioner has approached this Court seeking a

declaration that her arrest dated 20.02.2018 by CBI. be declared as illegal and contrary to Section 46 (4) of the Code of Criminal Procedure The petitioner has also prayed for issuance of a writ in the nature of mandamus for setting aside the order dated 21.02.2018 passed by Special Judge, Greater Bombay, by which the petitioner has been remanded to the Central Bureau of Investigation Custody for 14 days. The petitioner has also prayed for a direction to initiate an inquiry against the officers who have arrested the petitioner in contravention of the statutory provisions.

2. In order to deal with the reliefs sought for in the present petition, it would be necessary to refer to the brief chronology of facts and events leading to the filing of the present petition.

An FIR bearing No. RC RCBSM2018E0001, was registered by the respondent-Central Bureau of Investigation (hereinafter referred to as "CBI"), BS&FC, Mumbai on a written complaint of the Deputy General Manager, Zonal Office, Mumbai, Punjab National Bank under Section 120-B read with 420 of the Indian Penal Code and Section 13 (2) read with Section 13 (1) (d) of the Prevention of Corruption Act, 1988. On registration of the said FIR, the petitioner was called to attend the investigation and it is the specific case of the petitioner that she cooperated with the investigating agency. As a part thereof, she was called in the office

of CBI on 20.02.2018 and at about 8.00 p.m. she came to be arrested. It is the specific case of the petitioner that the said arrest is in violation of the provisions contained in Section 46 (4) of the Code of Criminal Procedure. The petitioner was thereafter produced before the learned Special Judge, Greater Bombay, on 21.02.2018 wherein the respondent-CBI sought her custody for a period of 14 days. The petitioner invited the attention of the learned Special Judge to the alleged illegal arrest in contravention to the provisions of the law. However, according to the petitioner, an order of remand was passed thereby remanding the petitioner to the custody of the respondent-CBI for a period of 14 days. Being aggrieved by the said action of the respondent-CBI as well as the order passed by the Special Judge, the petitioner has approached this Court.

3. In order to contest the claim of the petitioner, the CBI has filed an affidavit-in-reply and in the said affidavit, it is stated that a complaint was registered by the Deputy General Manager, Punjab National Bank, Zonal Office, Mumbai on 31.01.2018 with the CBI, BS&FC, Mumbai categorically disclosing that the petitioner was working as an Executive Assistant with Mr. Niram Modi and she was an authorised signatory of M/s. Diamonds R US, M/s. Solar Exports and M/s. Stellar Diamond, which had obtained

fraudulent Letters of Understanding (LOUs) from the Punjab National Bank, Mid Corporate Branch, Brady House, Mumbai for raising various credits. In the complaint, it was disclosed that Nirav Modi along with other partners of M/s Diamonds R US, M/s. Solar Exports and M/s. Stellar Diamond, had entered into criminal conspiracy with Gokulnath Shetty, the then Deputy Manager of Punjab National Bank, Mid Corporate Branch, Mumbai and other unknown persons with an object to cheat the Punjab National Bank. It was alleged in the complaint that in furtherance of the criminal conspiracy, the accused public servants abused their official positions to cause pecuniary advantage to M/s. Diamonds R US, M/s. Solar Exports and M/s. Stellar Diamond by issuing fraudulent Letters of Undertaking (LOUs) without following the prescribed procedure. As a conspiracy, the accused-public servants transmitted the SWIFT instructions to the overseas branches of Indian banks for raising Buyer's Credit for payment of import bills, consequent to which, such overseas branches of the Indian banks credited the NOSTRO Bank accounts of Punjab National Bank abroad. The Buyer's Credit so raised, in many cases, was not used for the said purpose and was siphoned off. By this activity, Punjab National Bank was cheated to the tune of Rs.280,70,12,293.98/- (Rs. 280.70 Crores approximately)

The complaint alleged that the applicant is one of the co-conspirators in the massive fraud wherein she fraudulently and dishonestly signed the applications for issuance of large fraudulent LOUs, which were ultimately issued by co-accused Gokulnath Shetty and Manoj Hanumant Kharat of the Punjab National Bank.

4. The affidavit emphasizes the involvement of the petitioner in the crime and it is stated in the affidavit that she was called on 20.02.2018 at 15:15 hrs. in the CBI, BS&FC Office, Mumbai for the purpose of investigation. It is specifically stated that she was accompanied with her husband and during investigation she was not cooperating and there was a strong suspicion that she may abscond if not arrested and therefore in order to unravel the large conspiracy in this fraud, she was placed under arrest formally and the arrest was carried out at 20:00 hrs. by preparing a detailed Arrest-cum-Personal Search Memo. It is specifically denied in the affidavit that the arrest is ex facie illegal. As regards the impugned order passed by the learned Special Judge, it is stated in the affidavit that the Special Judge delved into the provisions of Section 46(4) of the Code of Criminal Procedure and had concluded that the petitioner was present in the office of the CBI along with her husband and the Special Court did not notice any breach of Section 46 (4) of the Code of Criminal

Procedure.

5. We have heard Mr. Yashwardhan Tiwari, Advocate appearing for the petitioner, Ms.Ameeta Kuttikrushnan, appearing on behalf of the respondent no.1-CBI as well as the learned Additional Public Prosecutor for the respondent no.2-State of Maharashtra.

6. The learned counsel for the petitioner Adv Shri Tiwari has invited our attention to the scheme as contained in Chapter V of the Code of Criminal Procedure which deals with '*Arrest of persons*' and the said Chapter enumerates contingencies when a Police Officer can effect arrest and provides for the procedure to be followed by him. He would submit that the Section 46 specifically provide for '*Arrest how made*' and it sets out the manner in which a person can be '*arrested*' which includes the safeguards to be adhered to while arresting a woman. He would further submit that sub-section (4) of Section 46 came to be inserted by an Act XXV of 2005, which came into effect from 23.06.2006. According to the learned counsel, the said provision is salutary one which provides safeguard against the arrest of a woman after sunset and before sunrise and as per the learned counsel, the said safeguards have to

be strictly adhered to. He would submit that the petitioner was cooperating with the investigation and whenever she was summoned by the CBI for the purpose of interrogation, she had visited the office of the CBI on her own. It is the specific submission of the learned Counsel that on the particular day i.e. on 20.02.2018, she herself attended the office of the investigating officer and there was no exigency of resorting to the extreme step of arrest after sunset. He would submit that she was ready and willing to attend the office of the CBI on the immediate next day and as such there was no compelling circumstance for effecting the arrest of the petitioner after sunset in gross violation of the said sub-section (4). According to him, time of arrest i.e. 20:00 hrs has been categorically admitted by the CBI in their affidavit-in-reply. According to him, the said time of arrest was beyond the permissible time limits as per Section 46(4) of the Code. He would also invite attention of this Court to Section 60-A which was inserted in the Code by Amendment Act, 2008 and he would emphasize that as per the said newly added Section, every arrest has to be in conformity with the provisions of the Code or any other law for the time being in force. In turn, he would submit that non adherence to the provisions contained in the said chapter would render the said arrest illegal. He would also invite attention

of this Court to the CBI Manual and specifically Section 12 of the said Manual to submit that the CBI is bound by the said Manual which in turn makes it imperative for them to follow the procedure prescribed by law.

He would invite attention of this Court to the Division Bench judgment of this Court in the case of *Christian Community Welfare Council of India and anr. Vs. Government of Maharashtra and anr.*; reported in *1995 CRI L. J. 4223*, and he would submit that in the year 1995 itself, it was this Court, which had issued guidelines in relation to the matters relating to the custodial evaluation by police officer and arrest of a female person in the State. He would submit that the directives were issued by this Court to the State Government to issue instructions immediately and in unequivocal terms that no female person shall be detained or arrested without presence of a lady constable and in no case after sunset and before sunrise. He would also place reliance on the Division Bench judgment of this Court in *Mrs. Bharti S. Khandhar Vs. Maruti Govind Jadhav, PSI and Ors.*; reported in *2013 CRI. L. J. 677*, and would submit that in similar circumstances where the woman was apprehended by police officer at 05:30 p.m. and made to stay in the Police Station but was shown to be arrested at 08:45 p.m. in execution of the Non

Bailable Warrant, without following the procedure prescribed under Section 46 (4) of the Code of Criminal Procedure, the Division Bench of this Court had declared her arrest and detention to be illegal.

7. Mr. Tiwari, learned counsel for the petitioner, would submit that it is the settled position of law that if initial action is not in consonance with law, all the subsequent and consequential proceedings would fall through for the reason that illegality strikes at the root of the order. He would place reliance on the judgment of the Hon'ble Apex Court to submit that if an order is a nullity, the consequential action/proceeding which is fallout of the said order must also meet with the same fate. By relying on the said judgments, the learned counsel would submit that since the arrest itself is illegal, the subsequent remand order passed by the Special Court, which fails to take into consideration the compliance of the statutory provisions and safeguards contained in Section 46 (4) of the Code of Criminal Procedure for arresting a woman is totally untenable. He would submit that till date, the petitioner has not applied for bail since, according to him, the arrest of the petitioner itself is illegal and he is approaching this Court seeking a declaration to that effect. In nutshell, his submission is that since the action of the respondent-CBI in arresting the petitioner is bad

at its inception being in utter violation of the statutory provisions, it cannot be legalized at later stage by the order of Special Judge and therefore the action of the respondent in arresting the petitioner along with the order passed by the Special Judge granting the remand to her to the custody of the CBI for a period of 14 days; both are liable to be quashed and set aside.

8. As against the said arguments, Ms. Ameeta Kuttikrushnan, learned counsel appearing on behalf of the CBI would invite attention of this Court to the affidavit-in-reply and would submit that the nature of accusations against the petitioner are grave in nature. The learned counsel would submit that the investigation itself reveals that she is authorised signatory in the 3 firms of Nirav Modi Group mentioned in the FIR namely; M/s. Diamonds R US, M/s Solar Exports and M/s Stellar Diamond. The learned counsel would submit that she is conversant with the business being carried out by the said firms and she was holding the post of Executive Assistant of Nirav Modi and it was she who intentionally and fraudulently approved the applications in respect of many of the LOUs, to the tune of approximately Rs.6498.20 Crores, which came to be issued by public servant of the Punjab National Bank in conspiracy with the present petitioner. It is specifically submitted that she is in knowhow of the operations but

she did not divulge the details thereof during investigation. According to the CBI, she was one of the most resourceful person who would assist the CBI to track the real culprit.

The learned counsel would submit that she was not revealing the truth and there was a serious apprehension that she would abscond and therefore it was decided to arrest her and seek her Police Custody Remand since she was able to throw light on the nature of transactions which had led to the large conspiracy. The learned counsel would submit that though she was called for the purpose of investigation, she attended the office of the CBI at 15:15 hrs. she was formally arrested at 20:00 hrs on executing a detailed Arrest-cum-Personal Search Memo. The learned counsel would submit that it was not a case where she was called after sunset and then arrested but it was a case where she was already in the office of the CBI for investigation well before sunset along with her husband. There were other officials, lady staff members, inspectors, etc. present in the office of CBI. It is specifically submitted that there was no ill treatment meted out to her. The learned counsel would also submit that she was produced before the Special Judge on 21.02.2018 before completion of period of 24 hours with a prayer to obtain remand for 14 days, which came to be accordingly granted. As regards the allegation of violation of

provisions of Section 46 (4) of the Cr.P.C., the learned Counsel would submit that the petitioner was present in the office of the CBI along with her husband therefore there was no breach of Section 46(4) of the Code.

The learned counsel for the respondent-CBI made an attempt to draw a distinction between two terminologies namely; “Arrest” and “Custody”. The learned counsel would submit that in any case, the petitioner was in custody of the CBI since 15:15 hrs. and only the formality of Arrest-cum-Personal Search Memo was done at 20:00 hrs. She would place reliance on the judgment of the Supreme Court in *State of Haryana and ors. Vs. Dinesh Kumar;* reported in *(2008) 3 SCC 222*, wherein the Hon'ble Apex Court has dealt with the thin line of distinction between “Arrest” and “Custody”. Reliance is also placed on the judgment of the Delhi High Court in the case of *Rakesh Chand Vs. State of NCT of Delhi*, and also judgment of the Rajasthan High Court in *Smt. Sandhya Upmanyu Vs. Station House Officer, ACB & Ors.;* reported in *2016 SCC OnLine Raj 6502*.

The learned counsel would then submit that if a person is confined or kept in police station and/or his movements are restricted within the precincts of the police station, it would be undoubtedly a case of arrest and in such a situation, since the

petitioner was in custody of the CBI since 15:15 hrs., it cannot be said that she was arrested after sunset. As regards the presence of the female officers is concerned, our attention is invited to the Arrest-cum-Personal Search Memo and it is submitted that it is stated in the said memo that the personal search of the petitioner was taken by Ms. Vaishali Ghorpade, PI, CBI, ACB, Mumbai and according to the learned counsel, substantial compliance of the provisions contained in the Code granting protection to the women s accused, was done. She would submit that looking to the object of Section 46(4) of the Code, it is imperative that the provisions are to be followed so that woman accused is not put to harassment or ill treatment is not meted out to her. In such circumstances, she would pray for dismissal of the present writ petition considering the nature of accusation against the present petitioner as found in the complaint, which the CBI is investigating into.

9. We have perused writ petition and the affidavit-in-reply in response to the petition and have also carefully considered the submissions advanced by the learned counsel for the parties. It is no doubt true that Chapter V of the Code of Criminal procedure deals with the arrest of persons. Though the word “Arrest” has not been defined in the Code, Section 46 provides as to how the arrest is to be made. Section 46 (1) contemplates that 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. However, from 31.12.2009 a proviso is carved out of the said sub section, which provides that where a woman is to be arrested, the police officer shall not touch person of the woman for making her arrest unless the police officer is female and unless the circumstances indicate to the contrary, her submission to custody on an oral intimation of arrest shall be presumed. Sub Section (4) came to be inserted with effect from 23.06.2006. The said provision came to be introduced by the Amendment Bill of 2004 which was approved by Parliament on 09.05.2005. The recommendation of the Law Commission in its 135th Report on '*Women in custody*' made various recommendations which were introduced by inserting sub-section (4) to Section 46. The report of the Commission attended the concern of law to prevent harassment and exploitation of women and to deal with the women accused with honour and dignity, the first step that was recommended to be incorporated in the form of Legislation was that; no woman accused shall be arrested after sunset and before sunrise. However, that was not to be considered as absolute preposition and therefore a proviso was carved out where; in

exceptional circumstances, if there is need to arrest a person who happens to be a woman accused then she could be arrested by obtaining prior permission being sought of the Judicial Magistrate of the First Class within whose local jurisdiction the offence is committed or arrest is to be made.

The said provision undoubtedly creates an embargo on arrest of a woman who is an accused in an offence to be arrested after sunset and before sunrise. However, in the backdrop of the exceptional circumstances, it is permissible for a woman police officer by making written report to obtain prior permission of the Judicial Magistrate First Class and then effect arrest.

10. The Division Bench of this Court in the case of *Christian Community Welfare Council of India and anr.* (supra), prior to the amendment to the Code had given a deep consideration to the matter regarding custodial violence and the arrest of a female persons in the State. This Court directed the constitution of committee to have an introspection of custodial violence committed by the police in the State and to suggest comprehensive measures. In the said judgment, the Court also directed the State Government to issue instructions that no female persons shall be detained or arrested without presence of lady constable and in no case after sunset and before sunrise. The said

direction came to be issued by the Division Bench of this Court with an expectation that the State Government would rise to the occasion by striking the balance between the life of a person in police custody and the power of law enforcing agencies to bring the criminals to book by making appropriate rules or providing guidelines to the police personnels. With this object in mind, the Court expected the State also to ensure safeguards regarding before the arrest of women in the State. This Court further directed the State to ensure that no lady or female person is arrested without presence of lady constable and in no case, after sunset and before sunrise and if there are already rules or guidelines to that effect, these are to be strictly followed and complied with.

Subsequent to this judgment the provisions for ensuring protection of the women accused came to be incorporated in the Code by Amendment Act, 2005 and it came into effect from 23.06.2006., with the same avowed purpose of subjecting to a woman suspect/accused be vulnerable to the misdeeds from such arrest effected after sunset.

11. In the backdrop of the said provisions in existence, the respondent no.1-CBI is making an attempt to justify the said arrest by relying on the exigency and the situation that had emerged. It

is the specific case of the CBI that there was a strong suspicion that the petitioner would abscond and in that contingency, it was necessary to arrest her.

No doubt true, Section 46 (4) of the Code itself carves out an exception incorporating the provision of obtaining written permission from the Judicial Magistrate First Class. The said procedure can be set into motion for dealing with such an exigency. However, the CBI has failed to demonstrate any such exercise being undertaken. Perusal of the Arrest-cum-Personal Search Memo which is signed by D. Damodaran, Inspector of Police, CBI, BS&FC, Mumbai dated 20.02.2018, which has been placed on record as Annexure-C to the petition, would reveal that the arrest is effected on 20:00 hrs. As against the column; Whether any near relative or friend of the arrested person was intimated of the arrest; it is stated that Mr. Ravikiran Mankikar, husband of the petitioner was present along with her. The Arrest-cum-Personal Search Memo contains a note to the following effect;

“(Personal search taken by Ms. Vaishali Ghorpade, PI, CBI, ACB, Mumbai)”.

12. Except expressing that there was a strong suspicion of the petitioner being absconding, no exigency has been pointed out in

the affidavit justifying non-compliance of mandatory requirement in sub-section (4) . In any case, if such an exigency were in existence, recourse could have been sought to the exception carved out in Section 46 (4) itself. However, none of this exercise has been undertaken. Further, the arrest is not made by the female Police Inspector and it can be seen that the police inspector making arrest is D. Damodaran, Inspector of Police, CBI, BS&FC, Mumbai. The presence of the other lady police official in the office of the CBI at the time of effecting arrest or presence of her husband is of no consequence.

13. The learned Special Judge who passed the order of remand on 21.02.2018 while dealing with the submission of contravention of Section 46(4) of the Code has recorded some finding on perusal of the case diary. It is observed in the order by the learned Special Judge as under:

“Ld SPP submitted that the IO has brought the case diary. In regard accused no.1 he submitted that at the time of arrest accused no.1 was in the office of CBI and after completing remand proceeding in the court, IO went to office. Husband of accused no.1 was present in the office. Lady Inspector was present at the time of arrest and thereafter formality arrest of accused was completed.”

The observation of the learned Special Judge, as regards presence of the Lady Inspector at the time of arrest, however, did not find any mention in the Arrest-cum-Personal Search Memo dated 20.02.2018. The learned Special Judge has concluded that since the petitioner was present in the office of the CBI along with husband, there was no breach of Section 46 (4) of the Code. The learned Judge has failed to take into consideration the mandate of Section 46 (4) of the Code and has erred in making the observation that there is no violation of provision of Section 46 (4). Section 60-A of the Code makes it imperative that no arrest shall be made except in accordance with the provisions of this Code. Resultantly, any arrest which is made in violation of provisions contained in the Code shall be liable to be termed as not in accordance with the Code and thus, illegal. Where a statute mandates that no woman shall be arrested after sunset and before sunrise and the arrest of a person when she is a woman has to be made by police officer, who is a female, the provisions of the statute cannot be simply ignored.

Perusal of the affidavit-in-reply filed by the CBI clearly reveals that the petitioner was present in the office of CBI from 15:15 hrs. However, from the affidavit as well as Arrest-cum-

Personal Search Memo, it is clear that the arrest came to be effected at 20:00 hrs. Section 46(4) contemplates that while making arrest, the police officer or the person making the same shall actually touch or confine the body of the person to be arrested and in case of a female, it shall be necessarily done by a female police officer since there is apprehension that the male police officer might touch the person of a woman while making arrest. The contention of the learned counsel for the respondent-CBI that she was already in custody and being confined to the jurisdiction of the CBI, formal arrest being effected at 20:00 hrs. would not vitiate the said arrest; do not appear to be correct approach in the light of settled legal position.

14. Perusal of Section 46(4) would make it amply clear that it mandates that no woman shall be arrested after sunset and before sunrise, save in exceptional circumstances when prior permission of Judicial Magistrate First Class in whose legal jurisdiction the offence is committed or arrest is to be made. Thus, it is clear that no woman shall be arrested beyond the prescribed schedule of time and where in exceptional circumstances, by Lady Police Officer by making a written report and obtaining permission from the Judicial Magistrate First Class. Mandate of Sub-section (4) of Section 46 is two fold. The said Section sets out that no

woman be arrested after sunset and before sunrise and in the exceptional circumstances, she may be so arrested on a Lady Police Officer making a report and obtaining permission of the Judicial Magistrate First Class for effecting such an arrest.

Admittedly, in this case, before effecting the arrest, no such mandate was followed. The attempt on the part of the CBI to demonstrate that the petitioner was in custody from 15:15 hrs., it was only at 20:00 hrs. the Arrest-cum-Personal Search Memo came to be signed. The said document appears to be wholly fallacious as there is clear distinction between “Custody” and “Arrest” and Section 46 deals with how the arrest is to be made and the provisions contained in Section 46(4) are in relation to the arrest only. The Legislature was conscious while it used the term as “Arrest” as distinct from “Custody” and the safeguard which it intended to be provide to a woman is in relation to “Arrest”. The petitioner may have been in custody before the sunset, however, she is arrested at 20:00 hrs. which is after sunset and therefore the action of the CBI clearly falls within the prohibition imposed under Sub Section (4) of Section 46 of the Code.

15. Reliance placed by the learned counsel for C.B.I on the judgment of the Hon'ble Apex Court in *State of Haryana and ors. Vs. Dinesh Kumar*, (supra), is of no assistance. The Hon'ble Apex

Court, after making clear distinction between the expression “Custody” and “Arrest” did not find favour with the view expressed by the Full Bench of Madras High Court and made a reference to its earlier judgment in the case of Niranjan Singh Vs. Prabhakar Rajaram Kharate; reported in (1980) 2 SCC 559 and affirmed its earlier view and observed thus:

“7. When is a person in custody, within the meaning of Section 439 Cr. P.C.? When he is in duress either because he is held by the investigating agency or other police or allied authority or is under the control of the court having been remanded by judicial order, or having offered himself to the court's jurisdiction and submitted to its orders by physical presence. No lexical dexterity nor precedential profusion is needed to come to the realistic conclusion that he who is under the control of the court or is in the physical hold of an officer with coercive power is in custody for the purpose of Section 439. This word is of elastic semantics but its core meaning is that the law has taken control of the person. The equivocatory quibblings and hide-and-seek niceties sometimes heard in court that the police have taken a man into informal custody but not arrested him, have detained him for interrogation but not taken him into formal custody and other like terminological dubieties are unfair evasions of the straightforwardness of the law. We need not dilate on this shady facet here because

we are satisfied that the accused did physically submit before the Sessions Judge and the jurisdiction to grant bail thus arose.

8. *Custody, in the context of Section 439, (we are not, be it noted, dealing with anticipatory bail under Section 438) is physical control or an least physical presence of the accused in court coupled with submission to the jurisdiction and orders of the court.*

9. *He can be in custody not merely when the police arrests him, produces him before a Magistrate and gets a remand to judicial or other custody. He can, be stated to be in judicial custody when he surrenders before the court and submits to its directions.”*

By referring to the said judgment, the Apex Court observed that the interpretation of the terms “Arrest” and “Custody” rendered by the Full Bench of the Madras High Court may be relevant in the context of Section 107 and 108 of the Customs Act which do not contemplate the immediate arrest of a person being summoned in connection with an inquiry but only contemplates surrendering to the custody of the Customs Officer which would subsequently lead to arrest and detention. However, the Apex Court made it clear in paragraph 27 of the said judgment that the position is different as proceedings in the Courts are concerned in relation to the inquiry into the offences under the

Penal Code and other criminal enactments. In the latter set of cases, in order to obtain the benefit of bail, an accused has to surrender to the custody of the Court or the police authorities before he can be granted the benefit thereunder. In paragraph 28, the Apex Court observed thus:

“28. The aforesaid definition is similar in spirit to what is incorporated in Section 46 of the Code of Criminal Procedure. The concept was expanded by this Court in State of U. P. vs. Deomen wherein it was inter alia observed as follows: (AIR p.1131, para 12)

12. ...Section 46 of the Code of Criminal Procedure does not contemplate any formality before a person can be said to be taken in custody. Submission to the custody by words of mouth or action by a person is sufficient. A person directly giving a police officer by word of mouth information which may be used as evidence against him may be deemed to have submitted himself to the custody of the Police Officer....”

16. In these circumstances, the said judgment which lays down the preposition of law in the backdrop of the provisions of the Customs Act is of no assistance to the CBI. On the contrary, the Division Bench of this Court, while dealing with the similar situation in the case of Mrs. Bharti S. Khandhar Vs. Maruti Govind Jadhav, PSI and Ors. (supra) had an occasion to deal

with the identical situation where the Division Bench was dealing with a case where the petitioner was called to the Police Station at evening hours and came to be arrested at 20:45 hrs. by the respondent-PSI in presence of her sister and in absence of Lady Police Constable. By relying upon the mandate contained in Section 46(4), the Division Bench concluded that the action of the respondent to take custody of the petitioner at 5:30 p.m. and asking her to sit there in total disregard to the provisions of the Code and particularly Section 46(4), was illegal. The Court further concluded that the arrest of the petitioner at 08:45 hrs was totally illegal and cannot be countenanced. Resultantly, the Court held that the arrest was in flagrant violation of Section 46(4) of the Code and the act of the police officer detaining the petitioner from 5.30 p.m. till the petitioner was produced before the Judicial Magistrate First Class was in utter violation of the said provisions. In this backdrop, the Division Bench directed that an action be initiated against the concerned by superior police officers of the police department, in accordance with law.

The case of the petitioner is squarely covered by the said judgment. Though the learned counsel for the CBI has placed reliance on the judgment of the Rajasthan High Court, taking a

view that the provisions of Section 46 (4) are merely procedural in nature and though they are expected to be followed honestly but there may be cases where it is impossible to fulfill the requirement and that each and every contravention would not entitle for declaration that the said act was illegal, is not correct view and in true application of Section 46(4) of the Code.

The Division Bench of this Court in *Mrs. Bharti S. Khandhar Vs. Maruti Govind Jadhav, PSI and Ors.*; (supra), has clearly held the consequence for non observance of the mandate prescribed under Section 46(4) of the Code and squarely covers the facts of the present case. The divergent views relied upon by the learned counsel for the CBI in judgments in *Rakesh Chand Vs. State of NCT of Delhi*, and *Smt. Sandhya Upmanyu Vs. Station House Officer, ACB & Ors.*; supra, where it has been held that exigency of situation will have to be taken into account before it can be held that arrest of a woman after sunset is in contravention of Section 46(4) of the Code. However, in the light of clear pronouncement of this Court in *Mrs. Bharti S. Khandhar Vs. Maruti Govind Jadhav, PSI and Ors.*; (supra), the arrest of the petitioner is liable to be declared as illegal and in utter violation of the provisions contained in Section 46(4) of the Code.

16. The precious guarantee of 'Life and Liberty' as enshrined in Art. 21 of Constitution of India available to a citizen of this Country can not be denied to a convict, an accused in custody and surely not to a suspect who is sought to be converted to an accused on investigation and then from an accused to a convict on trial. It is an obligation upon State to ensure that there is no infringement of indefeasible right of citizen to life and liberty, which he can not be deprived of without following the procedure established by law. The Code of Criminal Procedure which outlines the manner and to the extent to which a person can be denuded of his liberty, hence, needs a strict compliance. Any deviation from the prescribed procedure in the matter of arrest can therefore, be not countenanced and is liable to be declared as illegal. In such circumstances action of respondent No. 1 – CBI in arresting the petitioner at 22.00 hrs on 20.2.2018 is in violation and utter disregard to Section 46(4) of Code of Criminal Procedure and hence declared as illegal. Needless to say that all consequent actions more particularly that of CBI remand of the petitioner by order dated 21.2.2018 by learned Special Judge are of no legal consequences, null and void.

The officers of the respondent-CBI who are responsible

for the flagrant violation of the said provisions are liable for the disciplinary proceedings. The competent authorities are at liberty to initiate such an action against the erring officers, so that officers from such a responsible agency shall deter from committing such an overtact of violation of the statutory provisions, which aim at ensuring an individual's life and liberty and depriving the same in accordance with the procedure prescribed by law.

17. In result, of the aforesaid discussion, the writ petition is allowed in terms of prayer clause (a) and it is held that the arrest of the petitioner is illegal and contrary to the provisions of Section 46(4) of the Code of Criminal Procedure. However, the CBI is not precluded to arrest the petitioner if investigation warrants so, by following the due procedure of law

The competent authorities are at liberty to initiate disciplinary proceedings against the erring officers, for flagrant violation of the statutory provisions.

The respondent No. 1 shall pay costs of Rs.50,000/- to the petitioner within the period of eight weeks from date of this order. The respondent No. 1 is at liberty to recover the said cost from erring officer/s responsible for violations, as may be concluded after disciplinary proceedings.

All concerned to act on an ordinary copy of this Order,
duly authenticated by Ms.M.P.Kunte, Associate.

(S.J. KATHAWALLA, J.)

(SMT. BHARTI H. DANGRE, J.)