

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL WRIT PETITION NO.3293 OF 2021

Rana Kapoor
presently lodged in Taloja Jail,
R/o.Flat No.34, NCPA Apartment,
Nariman Point, Mumbai-400021.

Petitioner

versus

1. The Central Bureau of Investigation,
BKC, Mumbai.
2. The State of Maharashtra.

Respondents

Mr.Vijay Aggarwal with Mr.Ashul Agrawal and Ms.Aashvi Shah i/by
Mr.Rahul Agarwal, Advocate for petitioner.

Mr.H.S.Venegavkar along with Mr.Saurabh Kshirsagar, Advocate for
respondent-CBI.

Mr.Arfan Sait, APP, for respondent-State.

CORAM : PRAKASH D. NAIK, J.

Date of Reserving the Judgment : 1st April 2022

Date of Pronouncing the Judgment : 20th June 2022

JUDGMENT :

1. The petitioner has preferred this petition by invoking Article 227 of Constitution of India and Section 482 of Code of Criminal Procedure challenging the impugned order dated 14th August 2021 passed by Special Court (CBI) on Remand Application No.868 of 2021 and Exhibits 3 and 6 filed by petitioner seeking compliance of order dated 12th August 2021 passed by this Court in Writ Petition No.2846 of 2021 and granting police custody remand of petitioner. The petitioner also seeks declaration that CBI remand and custody and all subsequent proceedings including further custody of petitioner as illegal, non est and void ab initio in law.

2. The brief factual matrix relevant for adjudicating the issue in this petition is as follows :-

(a) The FIR bearing No.RC BA1/2020/A0004 was registered by CBI/ACB, Mumbai on 12th March 2020 for offence under Section 120B r/w 420 of Indian Penal Code and under Sections 7, 11 and 12 of Prevention of Corruption Act, 1988 ('P.C.Act' for short);

(b) It is alleged that the applicant was the Managing Director and Chief Executive Officer of YES Bank Limited ('YBL'). He had obtained illegal gratification in the form of property in prime location in New Delhi at much less than realizable market value belonging to M/s.Avantha Reality Limited ('ARL') for a loan taken by ARL from YBL for extending concessions, relaxations and waivers in the already existing credit facilities provided to Avantha Group ('AG;') Companies and for advancing new/additional loans to them. The petitioner entered into criminal conspiracy with his wife Smt.Bindu Kapoor and Mr.Gautam Thapar-Promotor of AG Companies, for the purpose of obtaining illegal gratification;

(c) Information reveals that M/s.Avantha Holding Limited had obtained credit facilities from ICICI Bank Ltd and Development Credit Bank ('DCB') against collateral security of the immovable property at 40, Amrita Shergil Marg, New Delhi. This property is owned by ARL and is lavish bungalow spread over an area of 1.2 acres approximately in prime location in Delhi. The valuation of the property in the loan books of ICICI Bank was done at Rs.550 crores. M/s.Avantha Holding Ltd and ARL are part of AG Companies;

(d) Information reveals that there was principal outstanding of Rs.350 crores to ICICI Bank and Rs.30 crores to DCB in March-2016 against charge of the above property;

(e) As a part of conspiracy, YES Bank sanctioned loan of Rs.400 crores to ARL in March-2016 as lease rental discounting (LRD) for a period of ten years. In lease rental discounting, the discounted values of future lease rentals proposed to be received by the borrower by leasing its properties are sanctioned as loan amount. For this purpose ARL is stated to have entered into lease rental agreement with M/s.BILT Graphics Paper Pvt.Ltd (`BGPPL), another AG Company. As per agreement, lease rental of Rs.65 crore per annum was payable by BGPPL to ARL. The lease rental agreement was executed on 22nd March 2016, just two days prior to sanction of loan of Rs.400 crores by YES Bank to ARL;

(f) Earlier the aforesaid property was leased to M/s.Ballarpur Industries Ltd (BILT) on a lease rent. The proposed increase of rent of Rs.1.02 crore per annum to Rs.65 crores per annum was high and intentionally done to deceive YBL to make the loan approval look justifiable without reasonable basis. This appears to have been done with intention to get the loan account become stressed for justifying sale of the charged property at 40, Amrita Shergil Marg by ARL to Mr.Rana Kapoor in the name of BAPL. Wife of Rana Kapoor is Director in BAPL;

(g) ARL was not eligible for loan. It had outstanding liability of Rs.690 crore and Rs.643 crore with YBL and reporting losses;

(h) Rana Kapoor as MD and CEO of YBL was head of Management Credit Committee of the Bank, which approved the loan of Rs.400 crores to ARL as well as release of property against repayment of loan;

(i) Instead of initiating transparent process of sale of the charged property by YBL for recovery of its loan as per banking

norms, it entrusted this responsibility to ARL. Transparent process was not initiated by ARL and it did not give wide publicity to the proposed sale of prime property;

(j) ARL received offer of buying property from M/s.Bliss Abode Pvt.Ltd at price of Rs.378 crore. Smt.Bindu Kapoor, wife of petitioner is one of the director of said company. The committee headed by petitioner agreed to said offer and issued NOC to ARL for its sale on 6th September 2017;

(k) M/s.Bliss Abode had already obtained loan of Rs.90 crores from India Bulls vide agreement dated 13th July 2017 against charge of said property. The said fact was not disclosed by petitioner to board of YBL;

(l) The facts relating to criminal conspiracy establish obtaining illegal gratification to the tune of Rs.367 crore by Rana Kapoor (petitioner) by acquiring an expensive property situated at a prime location in New Delhi at a price of Rs.378 crore against declared value of Rs.685 crores by Bindu Kapoor and Rana Kapoor in lieu of favours extended by YBL to Avantha group companies promoted by Mr.Gautam Thapar.

3. The petitioner was in judicial custody remand in Directorate of Enforcement's ECIR No.MB20-1/39/2020. The respondent no.1-CBI preferred Miscellaneous Application No.931 of 2021 before PMLA Court and prayed that custody of petitioner may be transferred and respondent no.1 be allowed to arrest petitioner. As he is in the judicial custody under the orders of that Court, necessary directions be given to jail authorities to allow the respondent no.1-CBI to arrest petitioner and produce him before Special Judge for CBI cases. It was stated that CBI is investigating case RC.BA1/2020/A0004 and

custodial interrogation of the petitioner, the accused in the case is required for the purpose of investigation, who is presently in judicial custody remand in ECIR No.MB20-1/39/2020.

4. The PMLA Court vide order dated 3rd August 2020 observed that CBI shall justify how such application is maintainable.

5. The CBI preferred application for issuance of production warrant under Section 267 of Cr.PC and letter to Designated Court for transfer of custody of petitioner who is presently in judicial custody in PMLA case of Directorate of Enforcement, Mumbai. It was also stated that custodial interrogation of petitioner is required for the purpose of investigation in RC BA1/2020/A0004, dated 12th March 2020. The petitioner is presently in judicial custody remand in ECIR No.MB20-1/39/2020 of Enforcement Directorate. This application was preferred on 3rd August 2021. Application was numbered as Miscellaneous Application No.995 of 2021.

6. The petitioner filed application dated 5th August 2021 before the Special Judge, CBI praying dismissal of application for production warrant. The petitioner also filed written submissions before the said Court. This application was numbered as Miscellaneous Application No.997 of 2021.

7. Vide order dated 9th August 2021 the Special Judge (CBI) allowed Miscellaneous Application No.995 of 2021 and directed that production warrant of petitioner be issued, directing the jail authority to produce the accused (petitioner) before said Court on 13th August 2021 through video conferencing. It was directed that on production of accused before Court the Investigating Officer is at

liberty to make a request to the Court for authorizing the detention of accused either in police custody or in judicial custody. On such request after following procedure and hearing the Court will pass appropriate order. If there is difficulty to produce the accused through video conference due to technical glitch, the accused be physically produced before the Court on 14th August 2021. The Court further directed issuance of request letter to PMLA Court to direct the jail authority to produce the accused-petitioner in terms of production warrant before Court. Miscellaneous application No.997 of 2021 was treated as objection to Miscellaneous Application No.995 of 2021. Both the applications were disposed of.

8. The petitioner preferred Writ Petition No.2946 of 2021 before this Court challenging order dated 9th August 2021 passed CBI Court. Relying on judgment of Supreme Court in the case of **Arnesh Kumar Vs. State of Bihar and another**¹, it was submitted before this Court that before arresting the petitioner it is necessary to follow the rituals laid down u/s.41A of Cr.PC. It was also contended that in the case of **Susan Abraham Vs. State of Maharashtra and others**² the Division Bench of the Court has categorically held that the protection to an accused provided under Section 41-A of Cr.PC is extended even to proceedings for production of prisoner u/s.267 of Cr.PC. The officer in the proceedings u/s.267 of Cr.PC has expressly stated about his intention to arrest the petitioner who is already in judicial custody in some other crime. Since the offence is punishable for not more than seven years, the respondents be directed to comply with the provisions of Section 41A of Cr.PC by quashing the impugned order.

1 (2014)8-SCC-273

2 Criminal Writ Petition No.1951 of 2007

9. The order dated 12th August 2021 passed in Writ Petition No.2846 of 2021 refers to the submissions of learned counsel for respondent that it is pre-mature to hold that respondent will not comply with the requirements u/s.41A of Cr.P.C. Para 18 of the order impugned is sufficient enough to observe that respondent would follow the appropriate procedure prescribed under law. The Court then observed that in the aforesaid background and particularly in the light of submissions of learned counsel for respondent therein on instructions from officer that procedure as contemplated in the judgment of Hon'ble Supreme Court in the case of Arnesh Kumar (supra) will be adhered to, at this stage no interference is called for in the impugned order. The petition was disposed of.

10. The respondent no.1 filed Remand Application No.868 of 2021 before CBI Court for arrest and police custody remand of accused (petitioner) on 13th August 2021. The petitioner filed application Exhibit-3 before same Court to comply order dated 12th August 2021 passed by High Court in Writ Petition No.2846 of 2021, in terms of Section 41(1)(b)(ii) of Cr.P.C and guidelines laid down by Supreme Court in the case of Arnesh Kumar (supra). The petitioner also filed application before the said Court for dismissal of remand application filed by CBI (Exhibit-6).

11. Application Exhibit-6 preferred by petitioner was rejected by Special Judge, CBI by order dated 14th August 2021.

12. Vide order dated 14th August 2021 passed on Remand Application No.868 of 2021 Application Exhibit-3, the learned Special Judge (CBI) allowed the relief of police custody of accused (petitioner) till 21st August 2021. The Superintendent of Taloja Jail

was directed to hand over custody to petitioner to the officer of CBI on 15th August 2021. The Investigating Officer was directed to adhere to guidelines, provisions which are required to be followed while the accused is in police custody. Prayer for arrest as contemplated u/s.41 of Cr.PC of the accused/petitioner was rejected. The application Exhibit-3 is rejected.

13. Learned advocate for petitioner submitted as follows :-

(a) Although the petitioner was in custody in another case, it was necessary to comply Section 41A of Cr.PC;

(b) Learned Special Judge (CBI) remanded the petitioner to police custody in compliance of the provisions of Section 167(1) of Cr.PC. The petitioner was not arrested. Arrest is pre-condition for grant of custody under the said provision. The police custody and further judicial custody of petitioner is illegal and non-est in the eyes of law;

(c) Learned Special Judge has rejected the request of CBI to arrest petitioner. The Special Judge (CBI) has no jurisdiction to remand the petitioner to custody u/s.167(1) of Cr.PC;

(d) Learned Special Judge has come to the conclusion that before remanding the petitioner to police custody there was no requirement of arresting the petitioner. The observations of Special Court is contrary to law.

(e) The application filed by CBI was in non-compliance of order dated 12th August 2021 passed by this court. It was not in compliance of the undertaking given to the High Court to adhere to the guidelines in the decision of Supreme Court in case of Arnesh Kumar (supra);

(f) The FIR was registered for the offence punishable u/s.120B r/w 420 of IPC and Sections 7, 11 and 12 of P.C.Act which is punishable for a maximum period of seven years. Hence, compliance of Section 41A of Cr.PC r/w sub-clauses of Section 41(1)(b)(ii) of Cr.PC in terms of guidelines laid down by Supreme Court in the case of Arnesh Kumar is mandatory;

(g) While disposing of Writ Petition No.2846 of 2021 the respondent-CBI had submitted that compliance of Section 41A of Cr.PC would be adhered. The High Court had recorded in the order dated 12th August 2021 that learned counsel representing respondent had submitted, on instructions, that appropriate procedure as contemplated in the decision of Apex Court in case of Arnesh Kumar (supra) will be adhered to and hence the petition was disposed of by taking into consideration said statement. However, the respondent-CBI has not acted in accordance with the statement made before High Court and not complied the directions contained in the case of Arnesh Kumar (supra). The application preferred by respondent-CBI was contemptuous and in disregard to the order dated 12th August 2021 passed by this Court. The Special Court (CBI) has failed to take note of observations in order dated 12th August 2021 passed by High Court in Writ Petition N.2846 of 2021;

(h) Without notice u/s.41A of Cr.PC, the CBI had preferred application for custody of petitioner. Though the petitioner has filed an application seeking compliance of order dated 12th August 2021, learned Special Judge failed to appreciate that composite application filed by CBI seeking permission to arrest and remand was not maintainable. The CBI is required to follow the provisions of criminal manual;

(i) Learned Special Judge (CBI) erred in dismissing the application filed by petitioner about non-compliance of Section 172 of Cr.PC and High Court criminal manual;

(j) If initial action is not in consonance with law, all subsequent and consequential proceedings would fail. The request of CBI to arrest petitioner was not in compliance with order dated 12th August 2021 passed by this Court. The petitioner is under illegal detention;

(k) The impugned order dated 14th August 2021 is non speaking order. No reasons were assigned for dismissing the application preferred by the petitioner;

(l) In the case of Arnesh Kumar (supra) it is observed that arrest brings humiliation, curtails freedom and casts scars forever. Lawmakers know it so also the police. There is a battle between the lawmakers and the police and it seems that the police has not learnt its lesson; the lesson implicit and embodied in CrPC. The need for caution in exercising the drastic power of arrest has been emphasised time and again by the courts but has not yielded desired result;

(m) CBI Manual 2005 was not complied;

(n) Section 172 Cr.PC was not complied;

(o) If a thing is to be done in a particular manner, the same shall be done in that manner only or not at all.

14. Mr.Venegavkar representing respondent-CBI has submitted that petition is devoid of merits. There is no breach of guidelines laid down in Supreme Court decision in the case of Arnesh Kumar (supra). There is no breach of order dated 12th August 2021 passed by this Court in Criminal Writ Petition No.2846 of 2021. The custody of petitioner was sought by following due process of law. The remand

of accused and his detention in custody cannot be termed as illegal. The petitioner is involved in serious offence. The FIR was registered against him on 12th March 2020 by CBI. He was arrested in another case and was in custody in relation to case relating to PMLA Court. In accordance with Section 267 of Cr.PC appropriate application was preferred before the Court and requisite directions were issued by the Court. Thereafter custody of petitioner was sought which was granted vide order dated 14th August 2021. There is no illegality in the impugned order dated 14th August 2021. The petitioner has been rightly remanded in custody. The remand application was allowed by Special Judge (CB). The order is given effect to. The petitioner was already in custody in another case. The question of giving notice of arrest u/s/41-A of Cr.PC did not arise. Proper procedure was followed for issuance of production warrant and for transfer of custody. The order dated 9th August 2021 was not set aside by high Court. While passing order dated 12th August 2021 the High Court did not disturb order dated 9th August 2021. While passing the order dated 14th August 2021, the Special Court (CBI) has assigned reasons and remanded the petitioner to custody. The prayer of petitioner was rejected. This petition deserved to be dismissed.

15. The CBI has registered FIR dated 12th March 2020 for the aforesaid offences. The allegations in the FIR are reproduced hereinabove. The petitioner was in judicial custody in ECIR/MB20/2020.

16. The petitioner preferred Anticipatory Bail Application No.6561 of 2020 before Special Court for CBI apprehending arrest in FIR, RC No.BA1/2020/A0004 registered against him and others. The

application was opposed by CBI. Vide order dated 7th September 2020, the said application was rejected.

17. The application for production warrant preferred by CBI was opposed by petitioner by preferring application dated 5th August 2021 and filing written submissions. While allowing the application for production warrant vide order dated 9th August 2021, the learned Special Judge (CBI) has observed that guidelines 11.6 pertaining to the notice of appearance in terms of 41A of Cr.PC and guideline 11.7 consequence of failure to comply with the direction laid down in the case of Arnesh Kumar (supra) are not applicable relating to present case, as if petitioner was otherwise available, then there was no impediment in the way the Investigating Officer to cause his arrest by making compliance of guidelines laid down in the cited case as well as in the case of Arnesh Kumar (supra). As petitioner is in custody in another crime and detained in Taloja jail pursuant to the order of PMLA Court, Mumbai, so option of production warrant is available to the investigating officer. The prosecution has averred in the application as well as submissions that the custodial interrogation of accused is necessary for proper investigation in the crime. In the FIR prima facie allegations levelled against accused indicate that he obtained gratification of Rs.378 crores and caused loss to YES Bank. After the production of accused before the Court, pursuant to production warrant the investigating officer is at liberty to either claim CBI custody or judicial custody. This order was challenged before High Court. While disposing of Writ Petition No.2846 of 2021, by order dated 12th August 2021, the High Court did not set aside the order dated 9th August 2021 issuing production warrant.

18. From the tenor of the impugned order dated 14th August 2021 below Remand Application No.868 of 2021 and Exhibit-3, the objections of the petitioner can be summarized as under :-

(i) Order of High Court passed in Writ Petition No.2846 of 2021 needs to be complied;

(ii) CBI has prayed in remand application that permission may be granted to them to arrest petitioner and grant police custody. By relying on order of High Court dated 12th August 2021 it was submitted that High Court has set aside observations of Court that guidelines issued in the case of Arnesh Kumar (supra) are not applicable. Hence the guidelines in the said decision needs compliance;

(iii) The directions issued by Supreme Court in Arnesh Kumar (supra) considering mandate of Section 41 and 41A viz paragraph 11.6 and 11.7 needs compliance;

(iv) The judicial obligation to reach satisfaction regarding compliance with mandatory requirement of Section 41A Cr.PC is applicable even in the case of accused who are in judicial custody in relation to other cases;

(v) Court is bound to follow the directions given by High Court in Writ Petition No.2846 of 2021;

(vi) Even in the case of **Susan Abraham Vs. State of Maharashtra**³, the Court observed that Section 41A of Cr.PC is applicable when arrest is effected under Section 267 of Cr.PC..

19. The Special Judge (CBI) allowed the prayer for police custody. Prayer for arrest was rejected. Application Exhibit-3 preferred by petitioner was rejected. The observations leading to conclusions in

3 2010(112)-Bom.L.R.-552

impugned order dated 14th August 2021 passed below remand application and application Exhibit-3 are as under :-

(a) The High Court has not set aside the order of that Court. What is directed in that order is that investigating officer to adhere appropriate procedure as contemplated in the judgment of Apex Court;

(b) Accused is not a free person. He is detained in prison relating to crime, which is pending before Special PMLA Court, Mumbai. The relief of production warrant claimed by prosecution is allowed. The accused is produced before the Court. When he was produced option was available to CBI to make request to grant police custody, then Court has to pass appropriate orders on it including other orders. It does not mandate arrest as contemplated under Section 41 of Cr.PC for securing police custody of accused, when he was already in judicial custody and confined in prison. Reliance was placed on decision of this Court in case of Susan Abraham (supra);

(c) Relying on decision in the case of State by Inspector of Police, Anti Land Grabbing Special Cell, City Crime Branch, Trichy decided by Madras High Court, it was observed that CBI placed remand application claiming both relief at once, application for arrest as contemplated under Section 41 of Cr.PC and police custody of accused. The option available with the Court, when the accused is produced before it pursuant to production warrant to consider police custody or pass appropriate orders. It does not contemplate arrest. The decision in the case of State by Inspector of Police, Trichy (supra) contemplates modes when accused is already in judicial custody in connection with different case, either formal arrest or even without effecting a formal arrest, the police officer is entitled to

seek police custody or judicial custody. The dicta does not contemplate arrest of accused detained in jail by police, as contemplated under Section 41 of Cr.PC. It is a formal arrest pursuant to Section 267 of Cr.PC; when relief of production warrant is allowed by the Court;

(d) No grounds exist to entertain the prayer of CBI for arrest as contemplated under Section 41 of Cr.PC since they are not claiming formal arrest, contemplated under Section 267 of Cr.PC;

(e) In view of observations in the case of Susan Abraham (supra), the prayer of CBI for police custody remand of accused is maintainable, without effecting arrest. The High Court upheld the order of the CBI Court passed in Miscellaneous Application No.995 of 2021, wherein it is mentioned that pursuant to the production warrant, when accused will be produced before the Court, at that time, the investigation officer will be entitled to make a request before the Court for authorising the detention of accused either in police custody or judicial custody. On such request after following the procedure appropriate orders would be passed after hearing the accused;

(f) Before the High Court, in Writ Petition No.2846 of 2021, issue was that if accused is arrested, then it is necessary to follow the rituals as laid down under Section 41 of Cr.PC. Accordingly prosecution made submission that they will comply appropriate procedure as contemplated in the judgment of Apex Court in the case of Arnesh Kumar (supra). As the prayer of CBI to effect arrest was rejected, circumstances does not exist to follow guidelines in case of Arnesh Kumar (supra);

(g) Section 41A, 41B, 60A of Cr.PC are applicable, when accused is free person, whereby police effected arrest directly;

(h) The submission of petitioner that even in case of Susan Abraham (supra) the Court observed that Section 41A of Cr.PC is applicable when arrest is effected under Section 267 of Cr.PC while issuing production warrant of accused was rejected. The observations in the said decision were made in different context;

(i) The remand application is considered under Section 167 of Cr.PC. Two modes are available to police on securing the presence of accused before Court. One is after effecting arrest under Section 41 of Cr.PC and thereby following all the requisites and secondly when accused is already in judicial custody in different case on securing production of accused by the Court to apply for police custody without effecting arrest. The CBI was permitted to apply for police custody without arrest. Circumstances arising out of Section 41A, 41B, 60A of Cr.PC is not applicable;

(j) The allegations indicate that offence is of grave nature. Rs.1,800 crore loss is caused to YES Bank. Custodial interrogation is necessary. Prayer for police custody is allowed.

20. Whereas, while rejecting application Exhibit-6, it is observed that the Court had issued production warrant with regard to the production of accused before Court with the aid of guidelines enunciated in the case of State of Maharashtra Vs. Yadav Kohachade passed in Criminal Revision Application No.101 of 1999 decided by Bombay High Court. The said procedure is approved by the Division Bench of Bombay High Court in the case of Susan Abraham Vs. State of Maharashtra and others in Criminal Writ Petition No.1951 of 2007 with Criminal Application No.57 and 108 of 2008 decided by Bombay High Court on 20th January 2010, wherein it is held that after obtaining an order under Section 267 of Cr.PC from the competent

Court, then prosecution to approach the Court under whose orders an accused is confined or detained in prison for seeking permission of the concerned Court on the basis of that the custody of the accused is required for the purpose of proceeding pending before a Court of competent jurisdiction. The accused will be produced before the Court and at that time the investigating officer will be entitled to make a request before the Court for authorising detention of accused either in police custody or judicial custody. There is no direct arrest made by CBI, thereby occasion does not arise to comply direction in the case of D.K.Basu relating to arrest by police. The investigating officer has placed case diary from no.1 to 140. Case diary no.140 is dated 12th August 2021. So no ground exist to claim that investigating officer has not prepared case diary in accordance with law. Prima facie allegations levelled against accused indicates that he obtained gratification or pecuniary advantage of Rs.307 crores, thereby caused loss to YES Bank Ltd of Rs.1,800 crores by extending credit facilities to M/s.Avantha Group of companies, when it was not eligible for the same. There are sufficient averments in remand application and for the purpose of proper investigation custody of accused is required.

21. In the case of Arnesh Kumar (supra), the Supreme Court was dealing with the issue of apprehension of arrest of husband for offence under Section 498A of IPC. The Court observed that arrest brings humiliation, curtails freedom and casts scars forever. The Court referred to Section 41 of Cr.PC which relates to powers of police to arrest without warrant. It was observed that a Police Officer before arrest has to be 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 and 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. Court then referred to Section 41-A which relates to notice of appearance before police officer. It was further observed that if provisions of Section 41 of Cr.PC which authorizes the police officer to arrest an accused without an order from Magistrate and without a warrant are scrupulously enforced, the wrong committed by the police officers intentionally or unwittingly would be reversed and the number of cases which come to the Court for anticipatory bail will be reduced. The Supreme Court gave certain directions.

22. Chapter-V of Code of Criminal Procedure relates to arrest of persons. Section 41, 41A, 41B, 41C and 41-D are as follows :

“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;*

(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*

(d) *in whose possession anything is found*

which 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.

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 officers 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.

41-B. Procedure of arrest and duties of officer making arrest.- Every police officer while making an arrest shall-

(a) bear an accurate, visible and clear identification of his name which will facilitate easy identification;

(b) prepare a memorandum of arrest which shall be-

(i) attested by at least one witness, who is a member of the family of the person arrested or a respectable member of the locality where the arrest is made;

(ii) counter-signed by the person arrested; and

(c) inform the person arrested, unless the memorandum is attested by a member of his family, that he has a right to have a relative or a friend named by him to be informed of his arrest.

41-C. Control room at districts.-

(1) The State Government shall establish a police control room -

- (a) in every district; and*
- (b) at State level.*

(2) The State Government shall cause to be displayed on the notice board kept outside the control rooms at every district, the names and addresses of the persons arrested and the name and designation of the police officers who made the arrests.

(3) The control room at the Police Headquarters at the State level shall collect from time to time, details about the persons arrested, nature of the offence with which they are charged and maintain a database for the information of the general public.

41-D. Right of arrested person to meet an advocate of his choice during interrogation.- *When any person is arrested and interrogated by the police, he shall be entitled to meet an advocate of his choice during interrogation, though not throughout interrogation.”*

23. As per Section 41 of Cr.PC, any police officer may without an order from a Magistrate and without a warrant, arrest any person for the reasons referred therein. The police officer to record reasons while making arrest. It also provided that a police officer in all cases where arrest is not required shall record reasons for not making the arrest. Section 41A of Cr.PC provides issuance of notice of appearance before police officer. In all cases where the arrest of a person is not required under provisions of sub-section (1) of Section 41, police officer issues notice directing person against whom reasonable complaint has been made, or credible information has been received or reasonable suspicion exists that he has committed

cognizable offence, to appear before him or such other place specified in the notice. When such notice is complied, the person shall not be arrested in respect of offence unless for reasons to be recorded, the police officer is of the opinion that he ought to be arrested. Thus, notice contemplated under Section 41A of Cr.P.C. is where the arrest of person is not required. Such person can be arrested in terms of sub-section (3) of Section 41A of Cr.P.C. Section 41B relates to procedure of arrest and duties of officer making arrest. Section 41-C provides establishment of police control room and Section 41-D refers to right of arrested person to meet an advocate of his choice.

24. In the case of Arnesh Kumar (supra), it is observed that Section 41-A makes it clear that in all cases where the arrest of a person is not required under Section 41(1) Cr.P.C., the police officer is required to issue notice directing the accused to appear before him. Such person has to appear before police officer and he shall not be arrested, unless for the reasons to be recorded, the police officer is of the opinion that the arrest is necessary. The Court issued directions in paragraph 11 of the decision to ensure that police officers do not arrest the accused unnecessarily and Magistrate do not authorise detention causally. Clause 11.6 of directions refers to serving notice of appearance in terms of Section 41-A Cr.P.C. on the accused within two weeks from the date of institution of the case, which may be extended by Superintendent of Police for the reasons to be recorded in writing.

25. Thus, notice contemplated under Section 41-A is in the circumstance where arrest of person is not required under provision of Section 41(1) of Cr.P.C.

26. Chapter-XXII makes provisions for attendance of persons confined and detained in prisons. Section 267 of Cr.PC reads as follows :

“267. Power to require attendance of prisoners.- (1) Whenever, in the course of an inquiry, trial or other proceeding under this Code, it appears to a Criminal Court,-

(a) that a person confined or detained in a prison should be brought before the Court for answering to a charge of an offence, or for the purpose of any proceedings against him, or

(b) that it is necessary for the ends of justice to examine such person as a witness,
the Court may make an order requiring the officer in charge of the prison to produce such person before the Court for answering to the charge or for the purpose of such proceedings or, as the case may be, for giving evidence.

(2) Where an order under sub-section (1) is made by a Magistrate of the second class, it shall not be forwarded to, or acted upon by, the officer in charge of the prison unless it is countersigned by the Chief Judicial Magistrate to whom such Magistrate is subordinate.

(3) Every order submitted for countersigning under sub-section (2) shall be accompanied by a statement of the facts which, in the opinion of the Magistrate, render the order necessary, and the Chief Judicial Magistrate to whom it is submitted may, after considering such statement, decline to countersign the order.”

On reading sub-section (1) of Section 267, it would appear that the Court may issue a production warrant directing the officer in charge of prison to produce a person confined or detained in prison before

the Court for answering to a charge of an offence or for examining of such person as a witness or for the purpose of any proceeding against him in the course of inquiry, trial or other proceedings, under the Code.

27. In the case of Susan Abraham (supra), the Division Bench of this Court in paragraphs 9 to 13 has observed as follows :

“9. It is material to note that no specific provision is made in the Criminal Procedure Code to deal with a situation where a person, detained or confined in a prison under the orders of any Court or Magistrate, is required for investigation in some other case. It is possible that a person may be confined in a prison in one case and some other criminal case is also registered against him or his custody may become necessary for investigation of some other case. In such circumstances, the police cannot arrest the person without warrant or even with warrant of the Court because the person is already in judicial custody and is confined in some prison. He cannot be taken out from the jail without direction from the Court under whose order the person was confined in the jail or any superior Court or under some production warrant from any Court. Therefore, when the investigating officer finds it necessary to have custody of such person for the proper investigation of the case, he will have to make a request to the Court having jurisdiction to issue production warrant so that the person may be produced before the Court and then that Court may consider the request of the police to grant police custody or to pass any other appropriate order.

10. Section 269 provides that in certain circumstances, the officer in charge of the prison, in which such person, is confined and in respect of whom a production warrant under Section 267 has been issued, shall abstain from carrying out the Court's order for production and shall send to the Court a statement of reasons for so abstaining. Under Section 269(b) he may abstain from producing the person before the Court, in spite of production warrant

under Section 267, if the person is under committal for trial or under remand pending trial or pending a preliminary investigation. Therefore, in such a situation, the consent, sanction or approval of the Court or Magistrate, under whose order that person was confined in the jail, may become necessary so that the officer in charge may be obliged to comply with the production warrant issued under Section 267 and produce the person before the Magistrate or the Court which issued the warrant under Section 267. When the accused is produced before such Magistrate he will be required to peruse the police papers and hear the concerned police officer and may also hear the accused to consider the request for custody of the person. This is a kind of proceeding before the Court or the Magistrate. Therefore, it may be held that warrant under Section 267 may be issued for production of the accused before the Magistrate for the purpose of the proceeding, to be undertaken to consider and to take a decision on the request of police for custody of such person in the case in which he is not already arrested or in custody.

11. *In Harshad S.Mehta vs. CBI (supra), a Single Judge of the Delhi High Court held that words “other proceedings” occurring in Section 267 Cr.PC. have to be construed according to the principle of ejusdem generis and cannot be said to include investigation and came to conclusion that the Court cannot order officer in charge of the jail to produce a person detained except to face a charge or such other proceeding or to be a witness before the Court and production warrant of such other person cannot be issued to assist the investigating agency. However, in State of Maharashtra vs. Yadav Kohachade (supra), the learned Single Judge of this Court dealt with the relevant provisions of section 267 and came to conclusion that the Magistrate was competent to issue warrant of production of accused confined in prison for the purpose of considering the request of the investigating officer for police custody in another case. The learned Single Judge observed as follows in para 24 :-*

“Proceedings” would mean and include an

action or prosecution and sometimes as meaning a step in an action and, therefore, it includes all steps taken in furtherance of prosecution, i.e., arrest, remand, interrogation and investigation. The judicial Magistrate, First Class, 2nd Court, was, therefore, justified in passing an order under section 267 of the Criminal Procedure Code and issuing warrant as per Form No.36 of Second schedule addressed to the officer-in-charge of Central Prison, Nagpur, to produce before him the non-applicant accused for the purpose of proceedings, i.e., remand. The legislature has used the words “other proceedings and any proceedings under the Code” in section 267 of the Criminal Procedure Code and not judicial proceedings and, therefore, seeking production of the accused for remand under section 267 of the Criminal Procedure Code cannot be faulted. There can be no quarrel over the decision in B.S. Rawat’s case (cited supra) relied upon by Mr. Manohar, as what the Court observed was that the order under section 267 of the Criminal Procedure Code cannot be passed to produce a person for the purpose of investigation before the agency which is engaged in the investigation; as in the said case, the warrant was sought or production of the accused before the Custom Officer for the purposes of investigation. Therefore, it cannot be said that the Magistrate was not competent to issue such a warrant of production of the accused confined or detained in a prison, before him, for the purposes of considering the request of the Investigating Officer to order his detention is police custody.”

12. In *B.S.Rawat vs. Mohmed Azan Khan (supra)*, the accused persons were arrested under the provisions of the NDPS Act on 19.7.1989 and after the arrest they were remanded to judicial custody till 4.8.1989. On 31.7.1989, an application was made by the concerned authority before the Magistrate for issue of examination warrant. Pending that

application, the accused were produced before the Addl.Sessions Judge. A similar application was made before Addl.Sessions Judge on 2.8.1989 who rejected the same, however, he permitted the authorities to interrogate the accused persons. While rejecting the application, the Addl.Sessions Judge took the view that Sec.267 which was sought to be invoked would not apply. In the revision application before the High Court, the learned Single Judge, after quoting the provisions of Section 267(1), observed thus :-

“3.....It is apparent that in order that sub-sec.(1) of S.267 should apply, it is necessary that the requirement should be that he has to be brought before the Court for one or the other purposes mentioned in Clauses (a) and (b) and it would not apply to a situation where it is necessary to produce the person for the purposes of investigation, before the agency which is engaged in the investigation. The learned Additional Sessions Judge was, therefore, right in pointing out that this provision would not apply to the stage at which the request was made by the investigating authorities to him.”

From these observations, it is clear that this Court in B.S.Rawat held that production warrant under Section 267(1) could not be issued to produce the person for the purpose of investigation before the agency which is engaged in the investigation. We do not find any inconsistency in the views expressed in B.SRawat and Yadav Kohachade. Section 267(1) clearly provides that the production warrant can be issued for production before the Court. It does not provide for issue of warrant for production of an accused before any investigating agency.

28. The petitioner had challenged order dated 9th August 2021 issuing production warrant before this Court. The petition challenging the said order was disposed off vide order dated 12th August 2021. The order dated 9th August 2021 was not set aside. The Special Court (CBI) has rightly observed that accused/petitioner is not a free person. He is detained in prison relating to crime,

pending before Special PMLA Court. When the petitioner was produced before the Court, option was available to CBI to make request to grant police custody. The Court was empowered to pass appropriate order. The Special Judge (CBI) has relied on decision in the case of State by Inspector of Police, Anti Land Grabbing Special Cell, Trichy O.P.(MD) No.13686 of 2011 decided by Madras High Court. In the said decision it was observed as follows :

“In a case where the police officer deems it is necessary to arrest when the accused is already in judicial custody in connection with a different case, in our considered opinion, there are two modes available for him to adopt. The first one is that instead of effecting formal arrest, he can very well make an application before the Jurisdictional Magistrate seeking a P.T. warrant for the production of the accused from prison. If the conditions required under 267 of Code of Criminal Procedure are satisfied, the Magistrate shall issue a P.T.Warrant for the production of the accused in Court. When the accused is so produced before the Court, in pursuance of the P.T.Warrant, the police officer will be at liberty to make a request for remanding the accused, either to police custody or judicial custody, as provided in Section 167(1) of the Code of Criminal Procedure. At that time, the Magistrate shall consider the request of Police, peruse the case diary and the representation of the accused and then pass appropriate order, either remanding the accused or declining to remand the accused. Thus, even without effecting a formal arrest, the police officer is entitled to seek police custody or judicial custody of the accused, as elaborated above.”

29. I do not find any infirmity in the impugned order dated 14th August 2021. There is no breach of order dated 12th August 2021. The Special Judge (CBI) has rightly observed that circumstances to comply Section 41 does not exist. The order issuing production warrant and order granting police custody are in conformity with law.

30. On reading Section 41-A of Cr.PC and considering purport of the said provision, the impugned order dated 14th August 2021 cannot be termed as illegal. The provision relates circumstance where arrest of a person is not required under the provisions of sub-Section 1 of Section 41-A. In the present case the accused was already in custody in another case. His custody was required in another serious case by CBI. CBI has chosen a mode of preferring an application before respective Court seeking arrest and custody. The Court noted that powers can be exercised u/s.267 of Cr.PC. On the ground that while passing the order dated 14th August 2021 the Court had stated that prayer for arrest is rejected, it cannot be held that order dated 14th August 2021 is not in conformity with law. The order dated 14th August 2021 does not violate guidelines in the case of Arnesh Kumar (supra) nor the order dated 12th August 2021 passed by this Court. Paragraph 19 in the decision in the case of Susan Abraham is misinterpreted at the instance of petitioner.

31. Hence, detention/custody of petitioner is not illegal. After completion of investigation, sanction has been obtained from competent authority and charge sheet was filed before Court against the petitioner for offences under Sections 120B, 420 of Indian Penal Code and under Sections 11, 12, 13 r/w 13(1)(d) of Prevention of Corruption Act, 1988 vide Special Case No.1233 of 2021 on 12th October 2021. The petition is devoid of merits and deserves to be dismissed.

ORDER

(i) Writ Petition No.3293 of 2021 is dismissed and stands disposed of.

(PRAKASH D. NAIK, J.)

MST