

This order is corrected in pursuance
to speaking to minutes order dated 20.2.2024

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

**WRIT PETITION NO. 378 OF 2023
WITH
INTERIM APPLICATION NO. 804 OF 2023**

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

..Petitioner

v/s.

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 400098

2. State of Maharashtra

..Respondents

**WRIT PETITION NO. 377 OF 2023
WITH
INTERIM APPLICATION NO. 311 OF 2023**

Deepak Kochhar

..Petitioner

v/s.

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 400098

2. State of Maharashtra
& Another.

..Respondents

Mr. Amit Desai, Senior Advocate a/w. Mr, Gopalakrishna Shenoy, Mr.Rohan Dakshini, Ms.Pooja Kothari , Ms. Deepa Shetty, Mr. Pranav Narsaria and Mr. Tejas Popat I/b. Rashmikanth & Partners for the Petitioners in both the petitions.

Mr. Kuldeep Patil a/w. Limosin DLA for the Respondent No.1.

Ms. Rutuja Ambekar, APP for the State.

**CORAM : ANUJA PRABHUDESSAI, &
N. R. BORKAR, JJ.**

DATED : 6th FEBRUARY, 2024.

P.C.

1. By this Petition under Article 226 of the Constitution of India, the petitioners seek to:

(i) quash the FIR No. RCB DI/2019/E/0001 dated 22.01.2019 registered under Section 120 B and Section 420 of the Indian Penal Code and Section 7 and 13(2) r/w. 13(1)(d) of the prevention of Corruption Act, 1988.

(ii) quash arrest of the petitioners being in violation of settled tenets of law under Section 46 and 41A (3) of Cr.P.C. and

(iii) to quash the remand order dated 24.12.2022 and subsequent orders passed by the learned Special Judge, CBI.

2. The brief facts necessary to decide this petition are as under.

. On 8.12.2017, CBI registered preliminary inquiry bearing No. PE.BDI/2017/E0001 in view of the information that during the period from 2009 to 2012, the officials of ICICI Bank had sanctioned credit facilities/ high value loan to the Videocon Group of Companies promoted by Venugopal Dhoot, in violation of the Banking Regulation Act under RBI guidelines and the credit policy of the Bank. The petitioner Chanda Kochhar was one of the members of the sanctioning committee. It is alleged that as a part of quid pro quo, Mr. Dhoot made investment of Rs.64 Crores in NuPower Renewables Pvt. Ltd. (NRPL) through M/s. Supreme Energy Private Limited (SEPL), and also to Pinnacle Energy Trust managed by the petitioner Deepak Kochhar, through circuitous route. It is also alleged that the flat at CCI Chambers owned by the Videocon Group was sold to the family trust of Deepak Kochhar for Rs.11 lakhs, though the value of the flat was Rs.5.25 Crores.

3. The preliminary inquiry revealed that the petitioner Chanda Kochhar had abused her official position in sanctioning loan to M/s. VIEL and got illegal gratification through her husband Deepak Kochhar. The finding of the preliminary inquiry led to registration of the FIR against the petitioners for the aforesaid offences.

4. The petitioners were issued notice dated 27.06.2022 under Section 41A of Cr.P.C., pursuant to which they appeared before the Investigating Officer on 8.7.2022 and were duly interrogated. The petitioners were placed under arrest on 23.12.2022, when they had appeared before the Investigating Officer for interrogation pursuant to notice dated 15.12.2022 issued under Section 41A of the Cr.P.C. The petitioners were produced before the learned Special Judge for remand. By order dated 24.12.2022, and subsequent remand orders, the learned CBI Special Judge remanded the petitioners initially to police custody and later to judicial custody. Hence, these petitions for the reliefs, as stated above.

5. By order dated 09.01.2023 the co-ordinate bench of this Court released the petitioner on interim bail mainly on the ground that the arrest was in contravention of the mandatory provisions of Section 41A Cr.P.C. The said order has been challenged by the CBI before the Apex Court in Special Leave to Appeal (Cri.) Nos. 13697-13698/2023. By order dated 03.01.2024, the Hon'ble Supreme Court directed this Court to hear the main writ petition which was fixed for hearing before this Court on 05.01.2024, with further directions to the parties not to ask for adjournment on the

said date. In view of the said directions, the petitions were taken up for final hearing.

6. On 05.01.2024, Mr. Amit Desai, learned Senior Counsel for the petitioner made a statement that the petitioners do not wish to press the prayer clause (a) (i) which relates to quashing of the FIR. The challenge is restricted to the legality of the arrest as well as the remand orders. The challenge is mainly on the ground of violation of mandatory provisions of Section 41A, 46 & 50 of Cr.P.C.

7. Mr. Amit Desai, learned Sr. Counsel representing the Petitioner submits that the arrest of the petitioner is in violation of the mandatory provisions under Section 41A of Cr.P.C. He submits that the petitioners had co-operated with the investigation right from the time of the preliminary inquiry. The petitioners had complied with the terms of the notice under Section 41A of the Cr.P.C. and furnished the requisite information. The petitioner Chanda Kochhar had sought to produce detail notes prepared by her, however, the same were not accepted and she was not allowed to make it part of the statement.

8. Mr. Desai, learned Senior Counsel submits that both the petitioners had also co-operated with the other investigating agency i.e. Enforcement Directorate (ED) investigating offences under PMLA. They were interrogated and their statements were recorded on several dates. Hence, the contention that the petitioners have not been co-operating is baseless. Even otherwise, the petitioners have right to remain silent and their silence cannot be construed as non-cooperation.

9. Learned counsel for the petitioner submits that the adjudicating authority vide detail order dated 06.11.2020 had accepted the explanation given by the petitioner and held that the properties alleged to be illegal gratification were not proceeds of crime and lifted the provisional attachment order passed by the E.D. This Court (Coram : Prakash Naik J.) while considering the bail application of Deepak Kochhar has set out in detail the explanation given by the petitioner in the course of the investigation and granted bail to Deepak Kochhar. The challenge to the said order has been dismissed by the Apex Court. The Investigating Agency failed to consider this material aspect while placing the petitioner under arrest. As regards confrontation of the petitioners and the co-

accused Venugopal Dhoot, to investigate the allegation of quid pro quo, learned Senior Counsel submits that these allegations were within the knowledge of the investigating agency, despite which the petitioners and the co-accused were not interrogated for over three years. This aspect has been considered by this Court in Writ Petition No.300 of 2023 filed by Venugopal Dhoot. Learned Counsel further submits that even after the arrest of the petitioners, the co-accused Venugopal Dhoot was served with notice under Section 41-A, making it appear that his presence was not required for confrontation.

10. Learned Senior Counsel further submits that ‘reason to believe’ cannot be the mere *ipse dixit* of the investigating officer. There must be rational and reasonable justification as to the need to effect arrest. In the present case, the arrest is made in routine manner, without reasonable satisfaction and without satisfying the requirements of Section 41 of Cr. P.C.

11. Mr. Desai submits that the petitioners were arrested a few weeks before the marriage of their son, which fact makes it evident that the arrest was malafide. The arrest was not based on any material evidence and was in contravention of Section 41A(3)

Cr.P.C as well as the provisions under Section 46 of the Cr. P.C. He submits that the remanding Court also failed to consider this aspect and thereby failed to comply with the duties and obligation as required under the dictum of the Apex Court in ***Arnesh Kumar v. State of Bihar (2014) 8 SCC 273***. Reliance has been placed on several decisions, including the decision in ***Satendar Kumar Antil v. CBI (2022) 10 SCC 51***; ***Arnesh Kumar vs. State of Bihar (supra)***; ***Santosh v. State of Maharashtra (2017) 9 SCC 714***; ***Joginder Kumar vs. State of U.P. (1994) 4 SCC 260***; ***Arnab Goswami vs. State of Maharashtra 9(2021) 2 SCC 427***; ***Daulat Samirmal Mehta v. Union of India 2021 SCC Online Bom. 200***.

12. Per contra, Mr. Kuldeep Patil, learned Counsel for the respondent CBI submits that there is no violation of the provisions under Section 41A (3). He contends that the case diary records the reasons for the arrest. He submits that several complex issues are involved in the matter and that the co-accused V.N.Dhoot had not given satisfactory answers. Hence they were required to be confronted with each other. He submits that the Court cannot go into the sufficiency of the material and cannot substitute its objective opinion for the subjective satisfaction. He further submits

that the first remand report submitted before the Special Judge incorporated the reasons. The Special Judge had also perused the case diary and only upon being satisfied with the reasons recorded in the case diary, the Special Judge had passed the remand order.

13. Mr. Kuldip Patil, learned Counsel for CBI contends that the arrest of the petitioner Chanda Kochhar was effected in presence of a woman constable Sarita Kumari, which fact is also reflected in the personal search memo as well as the case diary. The arrest was effected before the sunset, and hence the decisions in Kavita and Alexandar (supra) are not applicable. He further submits that the grounds of arrest were informed to the petitioners and even otherwise the petitioners were well aware of the charges leveled against them. He submits that the respondent CBI has followed the legal mandate, as well as the procedural safeguards, hence the arrest cannot be considered to be illegal.

14. We have perused the records and considered the submissions advanced by the learned Counsel for the respective parties.

15. The legality of arrest is challenged essentially for non-

compliance of the mandate of Section 41A Cr.P.C. which reads thus:

“ 41A- 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 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 the 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.”

16. Section 41A was inserted to avoid routine arrests. This

section mandates issuance of notice ‘where the arrest of a person is not required under Sub Section (1) of Section 41. This provision casts an obligation on such person to comply with the provision and further restricts the power to arrest when such person complies or continues to comply with the terms of notice, unless the police officer is of the opinion that the arrest is necessary, and further mandates to record to reasons for the arrest.

17. In Satyendra Kumar Antil (supra) the Apex Court has observed that Sections 41 and 41A are facets of Article 21 of the Constitution of India, and the Investigating Agencies and their officers are duty bound to comply with the mandate of the said provisions as well as the directions issued in ***Arnesh Kumar vs. State of Bihar (2014) 8 SCC 273***. The relevant paras of Satyendra Kumar Antil read thus:

“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 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 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 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;

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 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.

.....

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 maybe 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)

18. The scope and ambit of Section 41 and 41A as well as the dictum of the Apex Court in Satyender Kumar Antil, Arnab Goswami etc was considered by the co-ordinate Bench of this Court while granting interim bail to the petitioners for non compliance of the mandate of Section 41A. We are conscious of the fact that the interim order does not substantially decide the rights, liability or lis between the parties and that the interim order is always subject to

the final order, which will adjudicate the final rights and liabilities of the parties. Hence, there can be no gainsaying that the prima facie observation or tentative view expressed at interim stage is not binding at the final adjudication.

19. Nevertheless, a perusal of order dated 09.01.2023 reveals that while considering the plea for interim bail pending final disposal of the petition, this Court referred to the relevant provisions under Section 41, 41A, 60 and 60A and relying upon the principles enunciated by the Apex Court in Satyendra Kumar Antil, Arnab Goswami, Santosh, Joginder Kumr, Mohd Zuben and considered whether the petitioners arrest being contrary to the mandate of law i.e. whether the arrests are in violation of Section 41, 41A and 60A of Cr.P.C., the petitioners are entitled to be released on bail.

20. In this regard it was observed that it is always open for a Court to examine whether the reason for formation of the belief have a rational connection with a formation of the belief that there was direct live link between the material before the Officer and the formation of the belief. Upon examining the grounds of arrest, as recorded in the arrest memo and considering the dictum in **Selvi v.**

State of Karnataka (2010) 7SCC 263, it was observed thus:

“8.10. 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 the person can be arrested, that is contrary to the Mandate of Section 41(1)(b)(ii)(a) to (e). ‘Not disclosing true and correct facts’ cannot be the reason, inasmuch as, the right against self-incrimination as provided for in Article 20(3) of the Constitution”

x x x

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; tht 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 officer, 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 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 mandatory provisions of Section 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 Arnesht Kumar (Supra) and Satender Kumar Antil (Supr). 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 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 the 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. ...*

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. ...”*

21. As regards the legality of the remand order, the co-ordinate bench of this Court has observed that the concerned Judge authorizing detention ought to have recorded its own satisfaction, may be in brief, but the satisfaction must be reflected from his order. It was observed that the order of remand does not confirm to the said requirement/direction given by the Apex Court in the case

of Arnesh Kumar, this Court held that the petitioners are entitled for bail, pending hearing and final disposal of the petitions.

22. The aforesaid observations recorded in order dated 9.1.2023, while considering the question “whether the arrest of the petitioner was illegal”, cannot be considered as prima facie observations or tentative view. It needs to be borne in mind that as on the date of the order, the challenge to the FIR was also pending before the Court. The said prayer has been deleted subsequent to the order dated 09.01.2023. In such circumstances, the findings recorded in Order dated 09.01.2023 cannot be construed as tentative view or prima facie observations solely for the reason that the Court had granted interim bail.

23. Be that as it may, the only other material which has now been placed before us is the case diary which purportedly records the reasons of arrest. A perusal of the case diary reveals that the petitioners were served with notice dated 27.06.2022 under Section 41A for appearance on 4.7.2022. The petitioners had requested to postpone the date to 08.07.2022 and accordingly, they appeared before the Investigating Officer on 08.07.2022 and were duly

interrogated. In the meantime, the co-accused V.N.Dhoot was also interrogated with respect to the allegations of quid pro qua of Rs.64 Crores and transfer of flat owned by Videocon to Quality Advisory Trust of Deepak Kochhar.

24. On 15.12.2022, the Investigating Officer issued notices under Section 41A to the petitioners as well as to the co-accused V.N.Dhoot, on the ground that there were several inconsistencies in their statements which were not satisfactorily answered and it was necessary to call and confront them with one another for proper investigation and for taking the case to its logical end.

25. Mr. V.N.Dhoot was interrogated on 22.12.2022, and the petitioners had expressed their inability to appear on the scheduled date as they had to attend the hearing of another matter listed before this Court. The date of appearance was fixed on 23.12.2022. Both the petitioners appeared before the Investigating Officer on 23.12.2022 at about 2.00 p.m. They were interrogated and on the same date, at about 4.30 p.m. they were placed under arrest.

26. The reasons for the arrest as recorded in the case dairy are that

(1) The petitioners are not cooperating with the investigation (2) their custodial interrogation is required to unearth (a) the entire gamut of conspiracies which led to sanction of term loan of Rs.1875 Crores to financially belligerent Videocon Group of Companies between June 2009 and April 2012, and (b) to unearth the conspiracy hatched for creation of complex financial structure to conceal the identity for quid pro qua of Rs.64 Crores by the petitioner Chanda Kochhar in the company account of her husband and transfer of flat situated at 45 CCI Chambers, valued at Rs.5.25 Crores to the family members of petitioner Deepak Kocchar for Rs.11 Crores in the year 2016, and (3) to ascertain the names and roles of the other conspirators /officials of ICICI Bank in sanctioning disbursement of the term loan to Videocon Group Companies.

27. There can be no dispute that it is within the domain of the Investigating Agency to interrogate the accused and to arrive at a subjective satisfaction on the issue of arrest. We are conscious and mindful that the satisfaction of the investigating agency is subjective in nature and the Court cannot go into the reasonableness of the reasons of arrest and or substitute its objective opinion for

the subjective satisfaction. Nevertheless, the subjective satisfaction is not wholly immune from judicial reviewability. The Court can consider whether the reasons for deprivation of liberty are rational, reasonable or fanciful. In *Barium Chemicals Ltd vs. Company law Board* the Apex Court with reference to Section 237 of the Companies Act has observed that the Court cannot go into the question of aptness or sufficiency of the grounds upon which the subjective satisfaction of an authority is based. However, the entire process is not subjective. While the existence of relevant material/information is objective, whereas drawing inference therefrom alone is a subjective process. Only check upon the subjective power is the existence of circumstances/material information. In case it is established that there was no material information or factual basis, the exercise of power becomes illegal. It is thus within the powers of the Court to ensure that the subjective satisfaction is on factual basis and not on the basis of the whims or caprice of the investigating agency.

28. In the instant case, the preliminary enquiry relating to the sanctioning of loan to the Videocon Group of Companies in violation of Banking Regulations and Guidelines since the year

2009 to 2012 was registered in the year 2017. The petitioners were questioned in the course of the preliminary inquiry, and subsequently the FIR was registered on 22.01.2019. The petitioners were named as accused in the said FIR for the alleged offences of criminal conspiracy and cheating. Despite the gravity of the offence, the petitioners were not interrogated or summoned for a period of over three years from the date of registration of the crime. They were served with notice under Section 41A dated 27.06.2022 thereby indicating that their arrest was not required in the said crime under the provisions of sub-section (1) of Section 41 Cr.P.C. The petitioners complied with the terms of the notice and appeared before the Investigating Officer and were duly interrogated. Furthermore, in compliance with the notice dated 15.12.2022, under Section 41A, the petitioners appeared before the Investigating Agency on 23.12.2022. It is on this date that they were placed under arrest, on the ground of non co-operation and purportedly to unearth the entire gamut of conspiracy which led to sanctioning of term loan of Rs.1875 Crores to financially beleaguered Videocon Group of Companies between June 2009 to April 2012.

29. It is relevant to note that though it is within the powers of the Investigating Agency to interrogate the accused has a right to remain silent. The right to silence emanates from Article 20(3) of the Indian Constitution, which gives an accused the right against self incrimination. Suffice it to say that exercise of the right to remain silent cannot be equated with non co-operation. Reliance is placed on the decision in Santosh Dwarkadas Fajat and Pankaj Sansal (supra)

30. The allegations that the petitioners are involved in the conspiracy, similarly the gravity of the offence and alleged quid pro quo were to the knowledge of the Investigating Agency as on the date of the registration of the FIR. The FIR states that the loan sanctioning Committees of ICICI Bank had sanctioned loan to Videocon Group of Companies. Some of the senior officials of ICICI Bank were also named in the first information report, and it was stated that the role of these senior officers of the sanctioning committee was also required to be investigated. Thus the involvement of the other bank officials in the conspiracy was not discovered in the course of the investigation but were to the knowledge of the Investigating agency, as on the date of registration

of the FIR, despite which the Investigating Agency did not feel the need to arrest and interrogate the petitioners for a period of over three years. The arrest on 23.12.2022 was not on the basis of any additional material discovered in the course of the investigation, but was based on the same material which was within the knowledge of the Investigating Officer at the time of issuance of notice under Section 41A. Such routine arrest without application of mind and due regard to the law amounts to an abuse of power and does not satisfy the requirement of Section 41A(3) Cr.P.C.

31. To sum up, the Investigating agency has not been able to demonstrate existence of circumstances or supportive material on the basis of which the decision to arrest was taken. Absence of such circumstances, information or material which is the sine qua non for the decision of arrest reduces the provision a dead letter and renders the arrest illegal.

32. The petitioners have also alleged breach of Section 46 of Cr.P.C. for the reason that the arrest of the petitioner Chanda Kochhar was not effected by a lady police officer. Section 46 provides the mode of arrest. Sub Section 1 of Section 46 provides

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. Proviso to this sub section provides 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. Sub Section 4 prescribes the procedure of arrest of woman after sunset and before sunrise.

33. In the instant case, the petitioner Chanda Kochhar was arrested before sunset. Hence, sub section (4) of Section 46 is not attracted. The decisions relied upon are therefore distinguishable. The case diary reveals that the arrest was in presence of a lady police officer. There is nothing on record to prima facie indicate that the petitioner was physically touched by a male police officer. No complaint in this regard was made to the Judge before whom the petitioner was produced for remand. Hence, we are of the view that there was no contravention of Section 46 or 60A Cr.P.C.

34. Under the circumstances, and for the reasons supra, the arrest of the petitioners is held to be illegal for breach of mandatory provision under Section 41A Cr.P.C. Hence the petition is allowed in terms of prayer clause (a)(ii). The Interim bail granted by order dated 9.1.2023 is confirmed. The petitions and the interim applications, if any, stand disposed of in above terms.

(N.R.BORKAR, J.)

(ANUJA PRABHUDESSAI, J.)

This order is corrected in pursuance to Speaking to Minutes order dated 20.02.2024. Since the Hon'ble Smt.Justice Anuja Prabhudessai has retired on 07.02.2024, this order is signed by Hon'ble Shri. Justice N.R. Borkar only.