Possession of knife is a bailable offence: a discussion

by Rakesh Kumar Singh

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Knife is an arm as per definition available in Section-2(c) of the Arms Act read with Rule-3 of Arms Rules and Category-V of Schedule-I appended to the Arms Rules.

2. It is Section-4 which deals with the possession of arms and obliges any person to have a licence in this respect if he is in the area notified for the purposes of that section. Seemingly, if any person contravenes the provision of Section-4, he shall become punishable under Section-25(1B)(b). There is no other provision in the Arms Act carrying any punishment for the possession simplicitor of a knife.

2.1. Section-25(1B)(b) provides for a punishment for a term which may extend to three years alongwith fine with a qualification that minimum punishment should not be less than one year unless adequate & special reasons are provided.

3. It is at this juncture that the problem arises in respect of the nature of the offence. Whether this offence is bailable or non-bailable? Arms Act does not provide any direct answer to this question. In such circumstances, we have to look into the general provisions contained in the Code of Criminal Procedure. Section-4(2) Cr.PC provides that offences under any law shall be dealt with in accordance with the same provisions subject to other enactments regulating such dealings. Here we have already seen that Arms Act is not regulating such dealings i.e. whether the offence is bailable or non-bailable. Therefore, the question has to be answered in accordance with the provisions of Cr.PC.

3.1. Section-2(a) Cr.PC provides that if offence is shown as bailable in first schedule thereto, then it should be a bailable offence. It has also provided that if other law has made the offence bailable, then it should be a bailable offence. A perusal of Arms Act shows that it does not directly answer the question. Therefore, we have to rely upon first schedule of Cr.PC.

4. First schedule is enacted in two parts. First part deals with the offences under Indian Penal Code and the second part deals with the offences provided under other laws. Clearly, we have to go

by Part-II of the first schedule.

4.1. Part-II has three categories of offences. First category deals with an offence of more than 7 years imprisonment, therefore it is not applicable. Second category deals with an offence of 3 years or more. Third category deals with an offence for less than 3 years imprisonment.

5. The prime question is as to whether the expression "**extend to three years**" is equivalent to an expression "**for three years**". This question has engaged the attention of the higher courts on many occasions as there are several enactments in which punishment is provided as extending to three years.

6. Several High Courts and Supreme Court have already come across this question in respect of offence punishable under Section-135(1)(ii) of the Customs Act. Therefore this issue can be best dealt with having the reference of that section of Customs Act. The said section of the Customs Act is being referred only to a limited extent confined to the necessity of the expression "extend to three years". Otherwise, by a larger bench decision the Hon'ble Supreme Court has already made all the offences in the Customs Act as bailable. (see Om Prakash vs Union of India dated 30.09.2011). However, subsequently the Legislature intervened and practically overriden the judicial mandate. We are presently however not concerned with all those happenings.

7. In several decisions, Hon'ble High Court of Delhi came to hold that the offences punishable under other enactments for imprisonment upto three years do fall under the second entry of part-2 of Schedule-I Cr.PC and therefore are non-bailable. **Mohan Lal Thapar v. Y.P.Dabara** 2002(1) JCC 460 and **Inderjeet Nagpal v. Director of Revenue Intelligence** ILR(2005) I Delhi 296 are the example.

8. Hon'ble Bombay High Court taken similar view in **Avinash Bhosle vs Union of India** CRLA 1174/2007 decided on 07.08.2007 and held that offence which may extend to three years are non-bailable.

8.1. However, Hon'ble Supreme Court in **Avinash Bhosle vs Union of India** Criminal Appeal No. 1138/2007 decided on 27.08.2007 has set aside the above view taken by the Hon'ble Bombay High Court in following terms:

> "Leave granted. On the material placed on record, and the amended Section 135(1)(ii) of the Customs Act, 1962 it appears to us that **apparently the offence which is alleged to have been committed is a bailable offence** and thus the Magistrate has rightly granted bail to the appellant. In view of this, the order of the High Court is set aside. We make it clear that if the Department wants to proceed with the appellant in regard to any other violation or infraction of the Customs Act or any other Act which are distinct from the offence for which the appellant was arrested, the Department can proceed with such matters in accordance with law. The appeal is accordingly, allowed."

8.2. The above decision of the Hon'ble Supreme Court was cited before the Hon'ble High Court Delhi in subsequent matters but somehow that was not followed.

8.3. In **Lalit Goel vs Commissioner of Central Excise (Delhi-1)** Bail Application No. 2102/2007 decided on 02.11.2007, it was submitted in opposition before the Hon'ble Court as under:

> "In reply to the application, it is stated that the order of the Supreme Court cited by the applicant would not apply to facts and circumstances of the present case. The order pertains to amended Section 135(1)(ii) of Customs Act, 1962 and was passed by the Hon'ble Supreme Court on the basis of material placed before it while case of applicant was under unamended provisions. It is further submitted that order of Supreme Court in Avinash Bhosale's case was per incuriam. It was not brought to the notice of the Supreme Court. Hon'ble Supreme Court had already stayed the order of Mumbai High Court holding that the offence was bailable, in Criminal Appeal No. 189/2006. It was stated that in view of the judgment of Supreme Court in A.R.Antuley v. R.S.Nayak (1988) 2 SCC 602, if the decision is per incuriam, the Court should ignore it. Similar observation was made by Supreme Court in West Bengal v. Tarun K. Roy (2004) 1 SCC 347. The Supreme Court has yet to decide the issue if the offence was bailable or not in Criminal Appeal No. 189/2006. **It is further pointed out that for the first time Mumbai High Court in**

case of Subhash Chaudhary v. Deepak Jyala and Ors. 2004(64) RLT 651 (Bom) had held that offence under Section 135(1)(ii) of Customs Act was bailable. The matter was agitated in Supreme Court by Union of India and the judgment of Mumbai High Court was stayed vide above Criminal Appeal. It is also submitted that this Court has already taken a different view and held that offence under Section 135(1)(ii) of Customs Act was non-bailable. View of this Court was not brought to the notice of Mumbai High Court in Subhash Choudhary's case. This Court had held similar view in other two cases viz. Mohan Lal Thapar v. Y.P.Dabara 2002(1) JCC 460 and Inderjeet Nagpal v. Director of Revenue Intelligence ILR(2005) I Delhi 296. It is submitted that whether the offence under Section 135(1)(ii) of Customs Act 1962 was bailable or not is sub-judiced and no final decision has been given by Supreme Court after considering the judgments of various High Courts. Delhi High Court has consistently held that offence was not bailable."

8.4. Hon'ble High Court of Delhi in such circumstances has held that:

"....In view of the fact that the SLP against the Mumbai High Court is pending and the decision of the Mumbai High Court holding that the offence is bailable has been stayed by Supreme Court and the order relied upon by the applicant was passed solely on the facts and the circumstances of the case, I consider that this Court cannot take a different view from what it has been already taken....."

8.5. In **Arun Kumar Gupta Vs DRI** decided on 18 February 2008 (Hon'ble High Court of Delhi), it was submitted in opposition before the Hon'ble Court as under:

"13. In so far as the bailability of the said offence is concerned, the respondent pleaded that during the period of the alleged export, the unamended Section 135(1)(ii) of the said Act was applicable where the punishment prescribed is imprisonment for a term which may extend up to three years or fine or both. Since the said Act is a Special

statute, Table II of the First Schedule of the said Code would be applicable, which makes the offence non-bailable. It is stated that in case the offence committed by the petitioner is considered under the amended Customs Act, Section 135(1)(i) would be applicable since the drawback claimed exceeds Rs. 30 lakhs in which case the punishment prescribed is up to seven years and with fine. The respondent's contention of the offence under Section 135(1)(ii) of the unamended Act being non-bailable is further supported by three decisions of this Court in Mohan Lal Thapar v. Y.P. Dabra, Inspector of Customs, New Customs House, New Delhi 2002 (1) JCC 460, Inderjeet Nagpal v. Directorate of Revenue Intelligence 2005 (1) JCC 433 and Lalit Goel v. Commissioner of Central Excise, Delhi B.A. No. 2102/2007 decided on 02-11-2007, **it is the case of the respondent that the judgment of Avinash Bhosle(supra) would not be applicable since the matter is sub-judice on account of the fact that the Government has filed a review against the said order.** The respondent has also made an attempt to distinguish the case of Terai Overseas (supra) and Sun Industries case (Supra) with the present one wherein it is stated that the facts of the present case are different from the cases mentioned aforesaid and thus, the ratio of both the cases cannot be applied to the present case."

8.6. Hon'ble High Court of Delhi in such circumstances has held that:

"17. It is, however, not possible to accept the plea of the learned Counsel for the petitioner that the offence is bailable for the reason that this Court on previous occasions has taken a view that the offences under the relevant provisions are not bailable. If the offences would have been bailable, there would have been no occasion to apply for anticipatory bail."

9. It is necessary to look at the decision in **Subhash Choudhary vs Deepak Jyala** cited in above referred cases. Hon'ble Bombay High Court in Subhash Choudhary vs Deepak Jyala decided

on 20 September, 2004 has held such offences to be bailable in the following terms:

> "12. After considering the rival submissions, I have no hesitation in accepting the submission canvassed, on behalf of the Petitioner-Applicant that the offence "under Section 135(1)(ii)" is a bailable offence. This is so, because firstly, the said offence has been made a non-cognizable offence by virtue of the non ob-stante clause in Section 104(4) of the Act. Secondly, it is triable "summarily" by a Magistrate by virtue of Section 138 of the Act. Moreover, Section 135(1)(ii) provides for punishment as imprisonment for a term which may extend to three years, or with fine, or with both. Indeed, it is provided that imprisonment may extend to three years; but the same provision also provides for alternative punishment of fine (only) or imprisonment and fine both. **The question is, merely because the punishment of imprisonment provided for is for a term which may extend to three years i.e. three years, does it mean that it will fall in Entry 2 of Part II of First Schedule of the Code and not in Entry 3 thereof.** To appreciate this aspect, it may be necessary to advert to the scheme of the Code, which has application to the case on hand. On analysing the Part I of the First Schedule of the Code, the Scheme of the Code is that, non-cognizable offences have been made bailable, except the non-cognizable offences such as under Sections 194, 195, 466, 467, 476, 477 and 493, which provide for punishment of more than three years of imprisonment. The only exception where punishment of imprisonment which may extend to three years and still has been made non-bailable, is Section 505 of the Indian Penal Code. But that is an exception. We shall now specifically advert to the non-cognizable offences where punishment provided is imprisonment which may extend to three years, or fine, or both, as is the case in the present enactment: and in Part I of the First Schedule to the Code, those offences have been made bailable. These offences are under Sections 181, 193 (IInd Part), 201 (IInd Part), 205, 214 (IInd Part), 225A, 312 (1st Part), 404, 418, 484, 485, 487 and 488 of the Indian Penal Code. In other words, all these offences under the Indian Penal

> Code, the punishment provided is imprisonment, which may extend to three years, or with fine, or with both, even then have been made bailable. **In that sense, the Scheme of the Code is indicative of the Legislative intention that non-cognizable offences punishable with imprisonment which may extend to three years, have bean treated on par with offences where imprisonment is for "less than three years", so as to make them bailable.** Applying the same analogy to the case on hand, Section 135(1)(ii) of the Act, which provides for punishment similar to several provisions in the Indian Penal Code, as referred to above, I have no hesitation in holding that the subject offence is bailable; and more so, when the offence in question is required to be tried summarily by the Magistrate by virtue of Section 138 of the Act."

9.1. The above quoted judgment of the Hon'ble Bombay High Court was stayed by the Hon'ble Supreme Court in Union of India vs Subhash Choudhary **Criminal Appeal No. 189/2006**. And on the basis of the stay order, the doctrine of per-incurrium was raised in respect of applicability of ratio of Avinash Bhosle (Supreme Court). The said contention appears to have been accepted by the Hon'ble High Court of Delhi in Lalit Goel(supra). Applicability of ratio of Avinash Bhosle (Supreme Court) was also opposed on the ground that a review petition against the said judgment was filed before the Hon'ble Supreme Court. This opposition also appears to have been accepted by the Hon'ble High Court of Delhi in Arun Kumar Gupta(supra).

10. It appears that both the contentions raised before the Hon'ble High Court of Delhi have lost its significance in view of the subsequent developments. The review petition in Avinash Bhosle(supra) came to be dismissed in the year 2008. Hon'ble Supreme Court of India in Union of India vs Avinash Bhosle, **Rev Pet.(Cri.) 130/2008** decided on 07.05.2008 has held that:

> "Delay condoned. We have carefully gone through the review petition and the connected papers. We do not find any merit in the same. Accordingly, the review petition is dismissed."

10.1. Case of Subhash Choudhary has been disposed of without commenting upon merit. Since matter has been disposed of, there is no question of stay. Hon'ble Supreme Court of India has disposed of the appeal in Union of India vs Subhash Choudhary **Criminal Appeal No. 189/2006** decided on 16.03.2011 in following terms:

> "We are told by the learned counsel for the Union of India that despite the passage of five years no prosecution has been launched against the respondents so far. In this view of the matter we feel that there is no need to consider the issues that have been raised in these appeals which are left open for decision in some other matter. All the appeals are disposed of."

10.2. Once the stay goes, the doctrine of per incurrium in respect of Avinash Bhosle (Supreme Court) raised before the Hon'ble High Court of Delhi can no longer hold the field. Further, by dismissal of review petition, law has been reiterated by the Hon'ble Supreme Court that the offences falling under Section-135(1)(ii) Custom Act is bailable. In such circumstances, judgment of Hon'ble High Court of Delhi in Mohan Lal Thapar, Inderjeet Nagpal, Lalit Goel and Arun Kumar Gupta (supra), can no longer hold the field. Avinash Bhosle (Supreme Court) has to be followed in its true spirit.

Applicability of Avinash Bhosle (Supreme Court) to other enactments

11. Above judgments were rendered in respect of offences punishable under Customs Act. However, the fact remains the same i.e. the offences discussed in the above noted judgments are punishable for an imprisonment for a term which may "extend to three years". Therefore, the ratio has to be applied to all such offences providing an imprisonment for a term which may extend to three years.

11.1. One such offence is provided under Section-63 of Copy Right Act which reads as under:

> ".....shall be punishable with imprisonment for a term which shall not be less than six months but **which may extend to three years** and with fine which shall not be less than fifty thousand rupees but which may extend to two lakh rupees : Provided that where the infringement

> has not been made for gain in the course of trade or business the court may, for adequate and special reasons to be mentioned in the judgement, impose a sentence of imprisonment for a term of less than six months or a fine of less than fifty thousand rupees"

11.2. There seems to be no reason for denying the applicability of Avinash Bhosle (Supreme Court) to the offence under above section of Copy Rights Act. Punishment provided in the above section is extendable to three years as in the case of Section-135(1)(ii) of Custom Act. It has to be accepted that the above offence under Copy Rights Act is clearly bailable offence.

11.3. It seems that the Hon'ble High Court of Delhi later on applied the ratio of Avinash Bhosle (Supreme Court) to the offence punishable under section-63 of the Copy Rights Act and accepted the same as bailable. In the same case i.e. **State vs Naresh Kumar Garg**, Crl.M.C. No. 3488/2012 dated 20.03.2013, Hon'ble High Court of Delhi further held that:

> "In fact in Mohan Lal Thapar v. Y.P. Dabara, Inspector, Customs, New Customs House New Delhi 2002 (1) JCC 460; and Inderjeet Nagpal v. Director of Revenue Intelligence (DRI), 2005 (1) JCC 433, two Coordinate Benches of this Court had taken the view that the offence under Section 135 (i)(ii) of the Act of 1962 is non bailable which no longer holds good in view of the report of the Supreme Court in Avinash Bhosale."

12. Now, it seems to be clear that any offence punishable for a term which may extend to three years is bound to be treated as a bailable offence unless otherewise declared by the enactment itself.

13. Coming to the question in respect of Arms Act. Section-25(1B)(b) thereof provides a punishment for a term which may extend to three years. There is no reason why the ratio of Avinash Bhosle (Supreme Court) and Naresh Kumar Garg (Delhi High Court) should not be applied. And therefore, we have to treat the offence punishable under Section-25(1B)(b) as a bailable one.

14. Does the prescription of a minimum sentence of one year in Section-25(1B)(b) make any difference to the nature of the offence? I consider that prescription of minimum punishment can not be a decisive factor for determining the issue of bailability. Even otherwise, the section itself

provides that for adequate and special reasons, the court may award punishment lesser than one year minimum prescription. Therefore this can not change the nature of offence. More over, Hon'ble High Court of Delhi has accepted the offence punishable u/s-63 Copy Rights Act as bailable. A bare perusal of the said section goes to show that the same also provides for a minimum punishment.

15. At this juncture, however, one collateral issue is also required to be dealt with. The same arises in the scenario mentioned hereinafter. The offences under Copy Rights Act and Customs Act are non-cognizable offences and therefore on the analogy of several non-cognizable offences in IPC having similar expression of "**extend to three years**" and are bailable, the offences under Copy Rights Act and Customs Act have been treated as bailable. Whereas the offences under Arms Act are cognizable by virtue of Section-38 thereof. Some fertile mind will definitely raise a contention that in the given circumstances, analogy of Copy Rights Act/Customs Act can not be made applicable to Arms Act.

15.1. Though the contention is seemingly attractive, the same does not stand a closure scrutiny. Arms Act provides for several offences which are punishable even for a period of 6 months. This punishment does clearly fall under entry third of the Part-II of second schedule of Cr.PC and is therefore bailable without any hesitation. However, at the same time the said entry classify such offence as a non-cognizable offence. But then by virtue of Section-38 of Arms Act, we have to treat all offence as cognizable offence. Does this fact change the nature of offence punishable for an imprisonment of 6 months under Arms Act? No, it can not. The offence has to remain a bailable offence despite the fact that it is also a cognizable offence. Therefore, non-cognizability can be a factor in deciding the bailability of an offence but can not be treated as a sole factor therefor. Moreover, cognizability itself can not change the character of the offence in respect of bailability or non-bailability.

15.2. If we are to believe that since non-cognizable offences having punishment which may extend to three years under IPC are generally bailable, therefore such offences under other enactments should also be treated as bailable if they are non-cognizable, we will be giving two different meaning to a single expression. The expression is "**extend to three years**". Meaning given is "**less than three years**" if the offence is non-cognizable and "**three years**" if the offence is cognizable. How we can give two different meaning to the same expression?

15.3. Even further, non-cognizable offences are not the only class which have been made bailable

under IPC if they are having punishment which may extend to three years. There are atleast 20 cognizable offences such as 129, 148, 152, 167, 212, 213, 216, 218, 221, 222, 261, 263, 293, 324, 344, 347, 348, 419,462,469 in the IPC having punishment which **may extend to three years** and yet they have been made bailable. In such circumstances we can not say that only non-cognizable offences having punishment which may extend to three years are generally made bailable. Therefore, arguments on the basis of cognizability or non-cognizability can not stand.

16. It will not be out of place to mention that the Hon'ble Supreme Court in **Rajeev Chaudhary vs State** (2001) 5 SCC 34, in the context of Section-167 Cr.PC has discussed the expression "**not less than 10 years**" and come to the conclusion that it means a clear 10 years or more and does not include imprisonment which may extend to 10 years. Then how an expression "**less than 10 years**" can be treated as equivalent to 10 years? It can't be. Similarly, the expression "less than 3 years" can't be treated as equivalent to 3 years.

16.1. Pertinently, the subsequent judgment **Bhupinder Singh & Ors vs Jarnail Singh & Anr** 2006 Cri.L.J. 3621 never overruled **Rajeev Chaudhary(supra)**, rather it could not have done so as bench strength in both the cases was equal.

16.2. **Bhupinder Singh(supra)** was dealing with an offence providing life imprisonment which itself is distinct category for the purpose of Section-167 Cr.PC and therefore held that the minimum sentence of 7 years can not make any difference.

17. Issue in respect of Section-167 CrPC has recently been settled by a three judges bench of Hon'ble Supreme Court in **Rakesh Kumar Paul vs State of Assam** dated 16.08.2017. In this case, the majority has not only accepted the view taken in Rajeev Chaudhary(supra) but has gone ahead and held that unless a minimum punishment of 10 years imprisonment has been provided, the 90 days period will not attract whatever the maximum sentence may be (this concept is for the third category as the other two categories of death and life are altogether different things).

18. Ergo, we have to believe that possession simplicitor of a knife even if punishable has to be treated as a bailable offence as it provides for a punishment which may extend to three years.

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