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A brief note on Section-88 CrPC: by Rakesh Kumar Singh

There are two types of litigants in general if we talk about criminal cases, one who can afford to create fantasy in the realm of legal procedure and the other, rest of the persons. Presently, we are considering the matter from the eyes of the persons who fall within the former class of litigants.

2. The first and foremost necessity of a person accused of any offence is securing a discretionary liberty called bail from the court. If he is able to secure a bail, the trial hardly matters for him. Reason is not far to seek. Once he is on this discretionary liberty of bail, he may assume himself to be entitled to play all the tricks in & out of the book and one of those may be that he may choose not to appear for one reason or the other and may delay the matter through some legal experts and even if courts take some adverse step, he may get through with the help of several technical loop holes.

3. Experience has shown that unless there is some media trial, the persons of the aforesaid class are hardly found in the police net during the investigation period and the specious premise normally projected by the investigating agency is that power of arrest does not necessarily mean that the arrest is always mandatory. So much so that a Learned Magistrate in Delhi apparently facing difficulty on this count had to send a reference to the Delhi High Court inviting it to give authoritative pronouncement on such type of attitude of the investigating agency. The said reference was apparently decided by the High Court holding that discretion of investigating agency regarding arrest or non arrest cannot be questioned by a Magistrate. This situation will however be the subject matter of some other paper. Presently, it may be sufficient to note that in such cases, the investigating agency when files the charge-sheet before the court, does not produce the accused before the court or forward the accused to the court. The court taking cognizance normally issues a summon for appearance. The person appears in the court and wants that he should be granted liberty. What he knows is that if he goes through the bail provision, the court has to deal with the matter on the basis of merits projected. It is at this stage that he chooses to create a fantasy and claims that the court may require him to execute a bond for appearance.

4. For this, the smart accused normally relies upon Section-88 of the Code of Criminal Procedure, 1973 which reads as "*88. Power to take bond for appearance.- When any person for whose appearance or arrest the officer presiding in any Court is empowered to issue a summons or warrant, is present in such Court, such officer may require such person to execute a bond, with or*

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without sureties, for his appearance in such Court, or any other Court to which the case may be transferred for trial".

5. Hon'ble High Court of Delhi in **Sanjay chandra vs CBI** 23.05.2011 has considered the scope of Section-88 CrPC and has come to the conclusion: "*The interpretation sought to be given by the petitioners is misconceived and based upon incorrect reading.....On reading of the above, it is obvious that Section 88 Cr.P.C. empowers the court to seek bond for appearance from any person present in the court in exercise of its judicial discretion. The Section also provides that aforesaid power is not unrestricted and it can be exercised only against such persons for whose appearance or arrest the court is empowered to issue summons or warrants. The words used in the Section are "may require such person to execute a bond" and any person present in the court. The user of word "may" signifies that Section 88 Cr.P.C. is not mandatory and it is a matter of judicial discretion of the court. The word "any person" signifies that the power of the court defined under Section 88 Cr.P.C. is not accused specific only, but it can be exercised against other category of persons such as the witness whose presence the court may deem necessary for the purpose of inquiry or trial. Careful reading of Section 88 Cr.P.C. makes it evident that it is a general provision defining the power of the court, but it does not provide how and in what manner this discretionary power is to be exercised. Petitioners are accused of having committed non-bailable offences. Therefore, their case for bail falls within Section 437 of the Code of Criminal Procedure which is the specific provision dealing with grant of bail to an accused in cases of non-bailable offences. Thus, on conjoint reading of Section 88 and 437 Cr.P.C., it is obvious that Section 88 Cr.P.C. is not an independent Section and it is subject to Section 437 Cr.P.C. Therefore, I do not find merit in the contention that order of learned Special Judge refusing bail to the petitioners is illegal being violation of Section 88 Cr.P.C*".

6. The above said judgment was challenged before Hon'ble Supreme Court in **Criminal Appeal No.-2178/2011 dated 23.11.2011** and same contention was raised therein by the accused persons. Though the court granted bail on factual position but specifically clarified that it was not expressing any opinion on the legal issues raised by the parties. Relevant observation is "*In the view we have taken, it may not be necessary to refer and discuss other issues canvassed by the learned counsel for the parties and the case laws relied on in support of their respective contentions. We clarify that we have not expressed any opinion regarding the other legal issues canvassed by learned counsel for the parties*".

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7. It is not as if Section-88 is a new provision. In CrPC 1898, it was also available in the form of Section-91. The provision had come before the Hon'ble Supreme Court and it had considered its scope. The **seven judges bench** of Hon'ble Supreme Court in **Madhu Limaye Vs Ved Murti** AIR 1971 SC 2481 has held as "*In fact section 91 applies to a person who is present in Court and is free because it speaks of his being bound over, to appear on another day before the Court. That shows that the person must 'be a free agent whether to appear or not. If the person is already under arrest and in custody, 'as were the petitioners, their appearance depended not on their own volition, but on the volition of the person who had their custody. This section was therefore inappropriate and the ruling cited in support of the case were wrongly decided as was held by the Special Bench.....It is not necessary to take a bond from a person who is already in detention and is-not released. The danger arises when the man is free and not when he is in custody. It is to prevent his acting that the bond is taken or he is kept in custody till he gives the bond*".

8. When a person should be deemed to be in custody has been the subject matter of several pronouncements. However, it has been accepted that the judgment rendered in **Niranjan Singh vs Prabhakar Rajaram Kharote** AIR 1980 SC 785 has been the locus classics on this point and is a binding precedent. This judgment in its relevant portions read as "*When is a person in custody, within the meaning of Section 439 CrPC? When he is in duress either because he is held by the investigating agency or other police or allied authority or is under the control of the court having been remanded by judicial order, or having offered himself to the court's jurisdiction and submitted to its orders by physical presence. No lexical dexterity nor precedential profusion is needed to come to the realistic conclusion that he who is under the control of the court or is in the physical hold of an officer with coercive power is in custody for the purpose of Section 439. This word is of elastic semantics but its core meaning is that the law has taken control of the person. The equivocatory quibblings and hide-and-seek niceties sometimes heard in court that the police have taken a man into informal custody but not arrested him, have detained him for interrogation but not taken him into formal custody and other like terminological dubieties are unfair evasions of the straightforwardness of the law. We need not dilate on this shady facet here because we are satisfied that the accused did physically submit before the Sessions Judge and the jurisdiction to grant bail thus arose. Custody, in the context of Section 439, (we are not, be it noted, dealing with anticipatory bail under Section 438) is physical control or at least physical presence of the accused in court coupled with submission to the jurisdiction and orders of the court. He can be in custody not merely when the police arrests him, produces him before a Magistrate and gets a remand to judicial or other custody. He can be stated to be in judicial custody when he surrenders before the court and submits to its directions*".

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9. What becomes clear from the aforesaid judgments is that Section-88 does not cover a person who is accused of an offence. Such person has to be governed by the provisions related to bail as available in CrPC. If the offenes is bailable, the accused is entitled to bail as a matter of right by virtue of Section-436 which is mandatory in nature. If the offence is non-bailable, such accused cannot claim bail as a matter of right as the governing Section-437 is discretionary and has several other limitations.

10. It can safely be said that even if an Investigating Officer chooses not to arrest any person during the course of investigation for any reason and files a charge-sheet in court showing the accused as non-arrested, the Court is bound to follow any of the course suggested by Section-204 CrPC and it may issue summon or warrant, as the case may be, for securing appearance of the accused before it. Accused cannot apply for utilization of Section-88 CrPC. If accused has been summoned for a non-bailable case, he has to apply for bail in terms of Section-437 CrPC and the Court has to decide the application on merits. In such consideration, non-arrest during the investigation may be taken as a factor in favour of the accused but it need not to be a sole factor. I have already, in some other paper, shown as to why the contrary decision of Hon'ble Delhi High Court in **Court On Its Own Motion v. Central Bureau of Investigation** 109 (2003) DLT 494 mandating the bail of such not-so-arrested accused, does not remain a binding precedent. Need therefore is not felt to again re-discuss the same point in this paper also.

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