# Pankaj Jain vs Union Of India on 23 February, 2018

## Equivalent citations: AIR 2018 SUPREME COURT 1155, AIR 2018 SC (CRIMINAL) 433, 2018 (3) ALJ 173, (2018) 6 MH LJ (CRI) 485, (2018) 1 MADLW(CRI) 938, (2018) 1 CRILR(RAJ) 255, (2018) 2 PAT LJR 71, (2018) 3 RAJ LW 1853, (2018) 70 OCR 198, (2018) 2 BOMCR(CRI) 399, (2018) 1 UC 439, 2018 (2) SCC (CRI) 867, (2018) 3 SCALE 421, (2018) 1 KER LJ 851, (2018) 1 KER LT 996, (2018) 2 JLJR 1, (2018) 1 ALD(CRL) 752, (2018) 2 CRIMES 5, 2018 CRILR(SC MAH GUJ) 255, (2018) 184 ALLINDCAS 110 (SC), (2018) 103 ALLCRIC 322, (2018) 4 ALLCRILR 781, 2018 CALCRILR 2 20, 2018 CRILR(SC&MP) 255, (2018) 1 CURCRIR 246, 2018 (5) SCC 743, 2018 (3) KCCR SN 297 (SC)

## Author: Ashok Bhushan

## Bench: Ashok Bhushan, A.K. Sikri

REPORTABL

IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 321 OF 2018
(Arising Out of SLP (Crl.) Diary No. 1445 of 2018)

PANKAJ JAIN … APPELLANT

VERSUS

UNION OF INDIA & ANR. … RESPONDENTS

J U D G M E N T

ASHOK BHUSHAN, J.

Leave granted.

2. This appeal has been filed against the judgment and order of Allahabad High Court dated 21.12.2017 dismissing the Writ Petition No. 62167 of 2017 filed by the appellant. The principal issue, which has arisen for interpretation of this Court, is the content and meaning of Section 88 of the Code of Criminal Procedure, 1973 (hereinafter referred to as “Cr.P.C.”). Before we come to the

impugned judgment of the High Court, it is necessary to note a series of litigations initiated at the instance of the appellant in different courts, arising out of criminal proceeding lodged against him.

3. A First Information Report under Sections 120-B, 409, 420, 466, 467, 469 and 471 of Indian Penal Code and under Sections 13(2) and 13(1)(d) of the Prevention of Corruption Act, 1988 was lodged against one Yadav Singh, the then Chief Engineer of Noida, Greater Noida and the Yamuna Expressway Authorities and a charge sheet dated 15.03.2016 being Charge Sheet No.02/2016 was submitted in the Court of Special Judge, C.B.I. against several accused including Yadav Singh and the appellant Pankaj Jain. The trial court took cognizance by order dated 29.03.2016 summoning accused for 29.04.2016 for appearance. The appellant filed an application under Section 482 Cr.P.C. in the Allahabad High Court being Application No. 31090 of 2016, praying for quashing the entire criminal proceeding of Special Case No. 10 of 2016 as well as summoning order dated 29.03.2016. The application was finally disposed off by the High Court vide order dated 17.10.2016 with a direction that if the applicant appears and surrenders before the Court below within two weeks and applies for bail, then his bail application shall be considered and decided. The appellant filed an Special Leave Petition (Crl.) No. 10191/2016 against the judgment of the High Court dated 17.10.2016, which was dismissed by this Court as withdrawn on 16.01.2017 with liberty to apply for regular bail.

4. A supplementary charge sheet was filed on 31.05.2017, on the basis of which a Cognizance Order dated 07.06.2017 was passed by the Special Judge, C.B.I. taking cognizance against the appellant and other accused under Sections 120B, 420, 468, 471 of I.P.C. and Sections 13(2) and 13(1)(d) of the Prevention of Corruption Act, 1988. Again an application under Section 482 Cr.P.C. being Application No. 18849 of 2017 was filed by the appellant in the High Court praying for quashing the criminal proceeding in pursuance of supplementary charge sheet dated 31.05.2017. The High Court vide its order dated 06.07.2017 disposed of the application under Section 482 Cr.P.c. directing that if the applicant appears and surrenders before the Special Judge, C.B.I. within two weeks and applies for bail, it is expected that the same will be disposed of expeditiously in accordance with law. It was further directed in the meantime for a period of two weeks, effect of non-bailable warrant shall be kept in abeyance. The appellant aggrieved by the order of the High Court dated 06.07.2017 again filed an Special Leave Petition (Criminal) No. 7749 of 2017, which was disposed of by this Court on 24.11.2017 granting further two weeks' time to the petitioner(appellant) to apply for regular bail before the Special Judge, C.B.I. with a direction to the trial court to consider the said application for bail forthwith.

5. On 27.11.2017, the case was taken up by the Special Judge, C.B.I. The Court noticed that appellant and one other accused was not present. The Court ordered for issuing non-bailable warrants and process of Sections 82 and 83 of Cr.P.C. against the appellant. On the same day, noticing the order passed by this Court on 24.11.2017 in S.L.P. (Criminal) No. 7749 of 2017, the learned Special Judge stayed the orders against the appellant for a period of two weeks' as per order of this Court. The appellant further filed Writ Petition (Criminal) No. 199 of 2017 in this Court under Article 32 of the Constitution of India contending that the petitioner (appellant), who was not arrested during investigation by the C.B.I., has to simply surrender and give a bond under Section 88 of the Code of Criminal Procedure. A direction to that effect was sought for by this Court. This Court disposed of

the writ petition vide its order dated 06.12.2017 noticing the earlier order of this Court dated 24.11.2017 with the following order:-

> "In view of our aforesaid orders dated 24.11.2017, we are of the opinion that the petitioner should, in the first instance, appear before the trial Court, which is the course of action already charted out. It would be open to the petitioner to move an application under Section 88 Cr.P.C. or a bail application, as may be advised. It will also be open to the petitioner to rely upon the judgments in support of his contention as noted above. It is for the trial Court to go through the matter and take a view thereupon. Insofar as this Court is concerned, no opinion on merits is expressed.
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> Mr. Mukul Rohatgi, learned senior counsel, submits that the petitioner, who is present in the Court today, shall surrender and appear before the trial Court tomorrow, 07.12.2017. This statement of the learned senior counsel is noted.
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> The writ petition stands disposed of in the aforesaid terms."
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> 6. After order of this Court dated 06.12.2017, the appellant appeared before Court of Special Judge, C.B.I. and submitted an application dated 07.12.2017. In the application, following prayer has been made:-
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> "a) That this Hon'ble Court may be pleased to forthwith take up and dispose this application made by the Applicant Pankaj Jain, who is voluntarily present before this Hon'ble Court, pursuant to the liberty granted by the Hon'ble Supreme Court vide Order dated 6.12.2017 passed in the Writ Petition (Crl.) No. 199 of 2017 read with Order dated 24.11.2017 passed in the SLP (Crl.) No. 7749 of 2017, and to permit him to furnish such bond, as may deemed fit, as per Section 88 of the Cr.P.C. in RC No. RC/DST/2015/A/0004/CBI/STF/DLI dated 30.07.2015/Case No. 10A/2016 and 3/2017 without sending him to any prison;

b) Any such other or further order as this Hon'ble Court may deem fit to grant in the facts and circumstances of the case and in the interest of justice."

7. The above application dated 07.12.2017 was rejected by the Special Judge, C.B.I. The Special Judge, C.B.I. observed that the word 'may' used in Section 88 signifies that Section 88 is not mandatory and it is a matter of judicial discretion. The Special Judge after noticing the allegations of the appellant rejected the application No. 14B of 2017. Aggrieved against the judgment dated 07.12.2017, another application No. 101B of 2017 was filed by the appellant, which was also rejected. The applicant filed a S.L.P. (Crl.) No. 9764 of 2017, which was disposed of vide its order dated 15.12.2017 observing that since the impugned order is passed by the Special Judge, CBI, it would be appropriate for the petitioner to challenge that order by approaching the High Court. Subsequent to the order dated 15.12.2017, the petitioner-appellant filed a Writ Petition No. 62167 of 2017, where the Petitioner-appellant also sought to challenge the vires of Section 88 as well as writ for Certiorari quashing the order dated 07.12.2017 of trial court. In the Writ Petition, following prayers have been

made:-

> (a) Issue an appropriate writ, order or direction, declaring in the above context, the use of word 'may' in Section 88 of Cr.P.C. as unconstitutional, manifestly arbitrary, unreasonable and ultra vires of the fundamental rights guaranteed under Article 14 and 21 of the Constitution of India or in the alternative to read it down by expounding, deliberating and delineating its scope in the context, to save Section 88 from unconstitutionally on the vice of Article 14 and 21 of the Constitution of India.
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> (b) Issue a writ of certiorari or any other appropriate writ, order or direction, setting aside the impugned Order/s dated 07.12.2017 passed by the Trial Court i.e. Special Judge for Anti-Corruption CBI cases at Ghaziabad, with consequential relief of setting the petitioner at liberty by permitting him to furnish his Bonds under Section 88 of Cr.P.C.

to the satisfaction of the said Trial Court in RC No. RC/DST/2015/A/0004/CBI/STF/DLI dated 30.07.2015.

(c) Any further Order as may be in the interest of justice may also be passed by this Hon'ble Court."

8. The writ petition has been dismissed by Division Bench of the High Court vide its judgment and order dated 21.12.2017, against which judgment this appeal has been filed.

9. We have heard Shri Mukul Rohtagi, learned senior counsel appearing for the appellant and Shri Maninder Singh, Additional Solicitor General of India for the respondent.

10. Shri Mukul Rohtagi, learned senior counsel appearing for the appellant submits that appellant having not been arrested during investigation when he appeared before the Special Judge, C.B.I., it was obligatory on the part of the Court to have accepted the bail bond under Section 88 of the Cr.P.C. and released the appellant forthwith. It is submitted that the Court of Special Judge committed error in rejecting the application under Section 88. It is further submitted that bail application was not filed by the appellant since all those, who appeared before the Court were taken into custody and their bail applications were rejected. Learned senior counsel submits that although Section 88 uses the word 'may' but the word 'may' has to be read as shall causing an obligation on the Court to release on bond, those, who appeared on their own volition in the Court. He further submits that the High Court committed error in observing that petitioner has concealed material facts from this Court when he had filed S.L.P. (Criminal) No. 7749 of 2017. It is submitted that all facts were mentioned in S.L.P. (Criminal) No. 7749 of 2017 and observation of the High Court that any fact was concealed is incorrect.

11. Shri Maninder Singh, learned Additional Solicitor General of India for the respondent refuting the submission of the appellant contended that Section 88 Cr.P.C. has been rightly interpreted by the High Court. It is submitted that against the appellant not only summons but non-bailable warrant and proceedings under Sections 82 and 83 Cr.P.C. were also initiated by the Special Judge.

Hence, he was not entitled for indulgence of being released on submission of bond under Section 88 Cr.P.C. He further submits that the Court has discretionary power under Section 88 to release a person on accepting bond, which cannot be claimed as a matter of right by the accused, who has already been summoned and against whom non-bailable warrant has been issued. It is further submitted that although the petitioner-appellant has filed various applications under Section 482 Cr.P.C. as well as Special Leave Petitions before this Court, but has so far not filed any bail application before the Special Judge, C.B.I. He submits that although liberty was taken by the appellant from this Court on 16.01.2017 when SLP (Crl.) No. 10190 of 2017 was dismissed as well as on 24.11.2017 when SLP (Crl.) No. 7749 of 2017 was disposed off to apply for regular bail before the Court but inspite of taking such liberty, no application for bail was filed by the appellant.

12. We have considered the submissions of the learned senior counsel for the parties and perused the records.

13. The main issue which needs to be answered in the present appeal is as to whether it was obligatory for the Court to release the appellant by accepting the bond under Section 88 Cr.P.C. on the ground that he was not arrested during investigation or the Court has rightly exercised its jurisdiction under Section 88 in rejecting the application filed by the appellant praying for release by accepting the bond under Section 88 Cr.P.C.

14. Section 88 Cr.P.C. is a provision which is contained in Chapter VI "Processes to Compel Appearance" of the Code of Criminal Procedure, 1973. Chapter VI is divided in four Sections – A.-Summons; B.-Warrant of arrest; C.- Proclamation and Attachment and D.-Other rules regarding processes. Section 88 provides as follows:-

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

15. We need to first consider as to what was the import of the words 'may' used in Section

88.

16. Justice G.P. Singh in "Principles of Statutory Interpretation", 14th Edition, while considering the enabling words 'may' explained the following principles of interpretation:-

> "(K) Enabling words, e.g., 'may', 'it shall be lawful', 'shall have power'. Power Coupled with duty Ordinarily, the words 'May' and 'It shall be lawful' are not words of compulsion. They are enabling words and they only confer capacity, power or authority and imply discretion. "They are both used in a statute to indicate that something may be done which prior to it could not be done". The use of words 'Shall

have power' also connotes the same idea."

17. Although, ordinary use of word 'may' imply discretion but when the word 'may' is coupled with duty on an authority or Court, it has been given meaning of shall that is an obligation on an authority or Court. Whether use of the word 'may' is coupled with duty is a question, which needs to be answered from the statutory scheme of a particular statute. The Principles of Interpretation have been laid down by Lord Cairns in Julius Vs. Lord Bishop of Oxford, (1874-80) All ER Rep. 43 where Lord Cairns enunciated Principles of Statutory Interpretation in the following words:-

> "There may be something in the nature of the thing empowered to be done, something in the object for which it is to be done, something in the conditions under which it is to be done, something in the title of the person or persons for whose benefit the power is to be exercised, which may couple the power with a duty and make it the duty of the person in whom the power is reposed to exercise the power when called upon to do so.
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> Where a power is deposited with a public officer for the purpose of being used for the benefit of persons specifically pointed out with regard to whom a definition is supplied by the Legislature of the conditions upon which they are entitled to call for its exercise, that power ought to be exercised and the Court will require it to be exercised.
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> The enabling words are construed as compulsory whenever the object of the power is to effectuate a legal right"

18. Learned senior counsel for the appellant has referred to judgments of this Court in the case of State of Uttar Pradesh Vs. Jogendra Singh, AIR 1963 SC 1618 and Ramji Missar & Anr. Vs. State of Bihar, AIR 1963 SC 1088. In State of Uttar Pradesh Vs. Jogendra Singh (supra), this Court had occasion to consider the use of word 'may' in Rule 4(2) of the Uttar Pradesh Disciplinary Proceedings (Administrative Tribunal) Rules, 1947. In the above regard, in Paragraph 8 following has been stated:-

> "8. Rule 4(2) deals with the class of gazetted government servants and gives them the right to make a request to the Governor that their cases should be referred to the Tribunal in respect of matters specified in clauses (a) to
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> (d) of sub-rule (1). The question for our decision is whether like the word "may" in Rule 4(1) which confers the discretion on the Governor, the word "may" in sub-rule (2) confers the dis-

cretion on him, or does the word "may" in sub-rule (2) really mean "shall" or "must"? There is no doubt that the word "may" generally does not mean "must" or "shall". But it is well set- tled that the word "may" is capable of meaning "must" or "shall" in the light of the context. It is also clear that where a discretion is conferred upon a public authority coupled with an obli- gation, the word "may"

which denotes discretion should be construed to mean a command. Sometimes, the legislature uses the word "may" out of deference to the high status of the authority on whom the power and the obligation are intended to be conferred and imposed. In the present case, it is the context which is decisive. The whole purpose of Rule 4(2) would be frustrated if the word "may" in the said rule receives the same construction as in sub-rule (1). It is because in regard to gazetted government servants the discretion had already been given to the Governor to refer their cases to the Tribunal that the rule making au- thority wanted to make a special pro- vision in respect of them as distinguished from other government servants falling under Rule 4(1) and Rule 4(2) has been prescribed, otherwise Rule 4(2) would be wholly redundant. In other words, the plain and unambiguous object of enacting Rule 4(2) is to provide an option to the gazetted gov- ernment servants to request the Gover- nor that their cases should be tried by a tribunal and not otherwise. The rule-making authority presumably thought that having regard to the sta- tus of the gazetted government servants, it would be legitimate to give such an option to them. Therefore, we feel no difficulty in accepting the view taken by the High Court that Rule 4(2) imposes an obligation on the Gov- ernor to grant a request made by the gazetted government servant that his case should be referred to the Tri- bunal under the Rules. Such a request was admittedly made by the respondent and has not been granted. Therefore, we are satisfied that the High Court was right in quashing the proceedings proposed to be taken by the appellant against the respondent otherwise than by referring his case to the Tribunal under the Rules."

19. This Court held that use of the word 'may' in Rule 4(2) confers an obligation and gaven the right to the government servants to make a request to the Governor. Thus, in the above case, the word 'may' was coupled with duty, which was held to be obligatory.

20. In Ramji Missar & Anr. Vs. State of Bihar (supra), this Court again considered Sections 11(1) and 6(2) of Probation of Offenders Act, 1958. In Para 16, this Court laid down following:-

> "16. Though the word "may" might con- note merely an enabling or premissive power in the sense of the usual phrase "it shall be lawful", it is also capa- ble of being construed as referring to a compellable duty, particularly when it refers to a power conferred on a court or other judicial authority. As observed in Maxwell on Statutes:
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> "Statutes which authorise persons to do acts for the benefit of oth- ers, or, as it is sometimes said, for the public good or the advance- ment of justice, have often given rise to controversy when conferring the authority in terms simply en- abling and not mandatory. In enact- ing that they 'may', or shall, if they think fit,' or, 'shall have power,' or that 'it shall be law-
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> ful' for them to do such acts, a statute appears to use the language of mere permission, but it has been so often decided as to have become an axiom that in such cases such expressions may have — to say the least — a compulsory force."……

21. This Court noticed that in the 1958 Act, certain tests as a guidance have been laid down for exercise of discretion by the Court. The Court rejected the submission that there is unfettered discretion in the Appellate Court in exercising power under Section 11. The above case was also a case where discretion given to the Court to be exercised under certain guidelines and tests, which was a case of discretion coupled with duty.

22. This Court in the case of State of Kerala & Ors. Vs. Kandath Distilleries, (2013) 6 SCC 573 came to consider the use of expression 'may' in Kerala Abkari Act, 1902. The Court held that the expression conferred discretionary power on the Commissioner and power is not coupled with duty. Following observation has been made in paragraph 29:-

> "29.Section 14 uses the expression "Commissioner may", "with the approval of the Government" so also Rule 4 uses the expressions "Commissioner may", "if he is satisfied" after making such enquiries as he may consider necessary "licence may be issued". All those expressions used in Section 14 and Rule 4 confer discretionary powers on the Commissioner as well as the State Government, not a discretionary power coupled with duty...."

23. Section 88 of the Cr.P.C. does not confer any right on any person, who is present in a Court. Discretionary power given to the Court is for the purpose and object of ensuring appearance of such person in that Court or to any other Court into which the case may be transferred for trial. Discretion given under Section 88 to the Court does not confer any right on a person, who is present in the Court rather it is the power given to the Court to facilitate his appearance, which clearly indicates that use of word 'may' is discretionary and it is for the Court to exercise its discretion when situation so demands. It is further relevant to note that the word used in Section 88 "any person" has to be given wide meaning, which may include persons, who are not even accused in a case and appeared as witnesses.

24. Learned counsel for the appellant has referred to two judgments of Delhi High Court, namely, Court on Its own Motion Vs. Central Bureau of Investigation, 109 (2003) Delhi Law Times 494. In the above case, certain general directions were issued by the Court in context of Section 173 and 170 of Cr.P.C. The said case was not a case where issue which has fallen in the present case pertaining to Section 88 Cr.P.C. was involved. The subsequent judgment of Delhi High Court in Sanjay Chaturvedi Vs. State, 132 (2006) Delhi Law Times 692 was also a case where earlier judgment of Delhi High Court in Court on Its own Motion Vs. Central Bureau of Investigation (supra) was followed. The said case also does not in any manner adopted the interpretation of Section 88 as contended by the appellant.

25. Another judgment of Delhi High Court in Bail Application No. 508 of 2011 Sanjay Chandra Vs. C.B.I. decided on 23.05.2011 supports the submission raised by learned Additional Solicitor General that power under Section 88 Cr.P.C., the word 'may' used in Section 88 Cr.P.C. is not mandatory and is a matter of judicial discretion. Paras 20, 21 and 22 of the judgment are to the following effect:-

"20. Learned Shri Ram Jethmalani and learned Shri K.T.S. Tulsi, Sr. Advocates appearing for accused Sanjay Chandra, learned Shri Mukul Rohtagi, Sr. Advocate appearing for accused Vinod Goenka, learned Shri Soli Sorabjee and learned Shri Ranjit Kumar, Sr. Advocates appearing for accused Gautam Doshi, learned Shri Rajiv Nayar, Sr. Advocate appearing for accused Hari Nair and learned Shri Neeraj Kishan Kaul, Sr. Advocate appearing for accused Surendra Pipara, at the outset, have contended that the order of learned Special Judge dated 20th April, 2011 rejecting the bail of the petitioners is violative of the mandate of Section 88 Cr.P.C. It is contended that admittedly the petitioners were neither arrested during investigation nor they were produced in custody along with the charge sheet as envisaged under Section 170 Cr.P.C. Therefore, the trial court was supposed to release the petitioners on bail by seeking bonds with or without sureties in view of Section 88 Cr.P.C. Thus, it is urged that on this count alone, the petitioners are entitled to bail.

21. The interpretation sought to be given by the petitioners is misconceived and based upon incorrect reading of Section 88 Cr.P.C., which is reproduced thus:

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

22. 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 Bail Applications No.508/2011, 509/2011, 510/2011, 511/2011 & 512/2011 Page 21 of 34 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."

26. Another judgment which is relevant in this context is judgment of Patna High Court in Dr. Anand Deo Singh Vs. The State of Bihar & Ors., 2000(2) Patna Law Journal Reports 686. The Patna High Court had occasion to consider Section 88 Cr.P.C. where in Para 18, following has been held:-

> "18. In my considered view, Section 88 of the Code is an enabling provision, which vests a discretion in the Magistrate to exercise power under said Section asking the person to execute a bond for appearance only in bailable cases or in trivial cases and it cannot be resorted to in a case of serious offences. Section 436 of the Code itself provides that bond may be asked for only in cases of bailable offences."

27. This Court had occasion to consider Section 91 of Cr.P.C. 1898, which was akin to present Section 88 of 1973 Act, in Madhu Limaye & Anr. Vs. Ved Murti & Ors., (1970) 3 SCC 739, following observations were made in context of Section 91:-

> ".....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 al- ready under arrest and in custody, as were the petitioners, their appearance depended not on their own violation but on the violation 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....."

> 28. Another judgment relied by the appellant is judgment of Punjab & Haryana High Court in Arun Sharma Vs. Union of India & Ors., 2016 (3) RCR (Criminal) 883. In the above case, the Punjab & Haryana High Court was considering Section 88 Cr.P.C. read with Section 65 of Prevention of Money Laundering Act. In the above context, following has been observed in Para 11:-

> "11. On the same principles, in absence of anything inconsistent in PMLA with section 88 of Cr.P.C., when a person voluntarily appears before the Special Court for PMLA pursuant to issuance of process vide summons or warrant, and offers submission of bonds for further appearances before the Court, any consideration of his application for furnishing such bond, would be necessarily governed by section 88 of the Cr.P.C. read with section 65 of PMLA. Section 88 of the Cr.P.C. reads as follows-

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

This Section 88 (corresponding to section 91 of Cr.P.C., 1898) would not apply qua a person whose appearance is not on his volition, but is brought in custody by the authorities as held by the

Constitution Bench of the Hon'ble Supreme Court in Madhu Limaye v. Ved Murti, AIR 1971 SC 2481 wherein it was observed that-

> "18.....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....."

Thus, in a situation like this where the accused were not arrested under section 19 of PMLA during investigations and were not produced in custody for taking cognizance, section 88 of Cr.P.C. shall apply upon appearance of the accused person on his own volition before the Trial Court to furnish bonds for further appearances."

29. The present is not a case where accused was a free agent whether to appear or not. He was already issued non-bailable warrant of arrest as well as proceeding of Sections 82 and 83 Cr.P.C. had been initiated. In this view of the matter he was not entitled to the benefit of Section

88.

30. In the Punjab & Haryana case, the High Court has relied on judgment of this Court in Madhu Limaye Vs. Ved Murti (supra) and held that Section 88 shall be applicable since accused were not arrested under Section 19 of PMLA during investigation and were not taken into custody for taking cognizance. What the Punjab & Haryana High Court missed, is that this Court in the same paragraph had observed "that shows that the person must be a free agent whether to appear or not". When accused was issued warrant of arrest to appear in the Court and proceeding under Sections 82 and 83 Cr.P.C. has been initiated, he cannot be held to be a free agent to appear or not to appear in the Court. We thus are of the view that the Punjab & Haryana High Court has not correctly applied Section 88 in the aforesaid case.

31. We thus conclude that the word 'may' used in Section 88 confers a discretion on the Court whether to accept a bond from an accused from a person appearing in the Court or not. The both Special Judge, C.B.I. as well as the High Court has given cogent reasons for not exercising the power under Section 88 Cr.P.C. We do not find any infirmity in the view taken by the Special Judge, C.B.I. as well as the High Court in coming to the conclusion that accused was not entitled to be released on acceptance of bond under Section 88 Cr.P.C. We thus do not find any error in the impugned judgment of the High Court.

32. Shri Mukul Rohtagi, learned senior counsel for the appellant has placed reliance on recent judgment of this Court dated 06.02.2018 in Dataram Singh Vs. State of Uttar Pradesh & Anr., Criminal Appeal No. 227 of 2018. Learned counsel for the appellant submits that this Court has elaborately explained principles for grant or refusal of bail. This Court in Paras 6 and 7 made following observations:-

> "6. The historical background of the provision for bail has been elaborately and lucidly explained in a recent decision delivered in Nikesh Tarachand Shah v. Union of India, 2017 (13) SCALE 609 going back to the days of the Magna Carta. In that decision, reference was made to Gurbaksh Singh Sibbia v. State of Punjab, (1980) 2 SCC 565 in which it is observed that it was held way back in Nagendra v.

King-Emperor, AIR 1924 Cal 476 that bail is not to be withheld as a punishment. Reference was also made to Emperor v. Hutchinson, AIR 1931 All 356 wherein it was observed that grant of bail is the rule and refusal is the exception. The provision for bail is therefore age-old and the liberal interpretation to the provision for bail is almost a century old, going back to colonial days.

7. However, we should not be understood to mean that bail should be granted in every case. The grant or refusal of bail is entirely within the discretion of the judge hearing the matter and though that discretion is unfettered, it must be exercised judiciously and in a humane manner and compassionately. Also, conditions for the grant of bail ought not to be so strict as to be incapable of compliance, thereby making the grant of bail illusory."

33. In the facts of the aforesaid case, the Court held that the trial court as well as the High Court ought to have exercised the discretion in granting the bail to the appellant. This Court in above circumstances, granted the bail to the appellant of that case. There cannot be any dispute to the proposition as laid down by this Court with regard to grant or refusal of the bail, which are well settled. The discretion to grant bail has to be exercised judiciously and in a humane manner and compassionately as has been laid down by this Court in the above case.

34. Shri Mukul Rohtagi, learned senior counsel appearing for the appellant submits that since the appellant has made a request to set him on liberty by accepting the bond before the Special Judge, C.B.I. as well may release the appellant on bail. He further submits that appellant is a person with 60% disability. He further submits that the loss which was alleged in the First Information Report is secured and this Court may exercise its jurisdiction in granting the bail to the appellant.

35. There are two reasons due to which we are unable to accept the request of the appellant to consider the case of bail of the appellant in present proceeding. Firstly, this Court on two earlier occasions had granted liberty to the appellant to make an application for bail before the trial court, the appellant has not filed any application for bail before the trial court and had insisted on releasing him on acceptance of bond under Section 88 Cr.P.C. Secondly, in the facts of this case, trial court is to first consider the prayer of grant of bail of the appellant. We, thus, are of the view that as and when the appellant files a bail application, the same shall be considered forthwith by trial court taking into consideration his claim of disability and other relevant grounds which are urged or may be urged by the appellant before it.

36. With these observations, the appeal is disposed of.

.....J. ( A.K. SIKRI ) .....J. NEW DELHI, ( ASHOK BHUSHAN ) February 23, 2018.