

## E Lectures.

### 9<sup>th</sup> Semester (Code of Criminal Procedure)

#### UNIT II:-

##### **Section 36:-**

Section 36 of the code empowers the police officer superior in rank to an officer -in-charge of a police station to exercise the same powers conferred under the code throughout the local area to which they are appointed as may be exercised by such police officer within the limits of his station.

##### **Section 41:-**

this chapter deals with the arrests and they may be classified into two groups ie arrests under warrants issued by the court and arrests otherwise than under such warrants. The several sections collected under this chapter deal with the arrests made otherwise than under the warrants issued by the court under this code. This section sets out nine different circumstances in which a police officer may, without an order of a magistrate and without a warrant, arrest a person. This section does not purport to be exhaustive or unqualified and various provisions for arrest without warrant are to be found in other acts like Police act, Arms act, Explosives act, Indian railways act etc and section 5 of this code expressly lays down that the procedure of the code would not affect any special form of procedure prescribed by any law for the time being in force. It is clear from section 41 first, that a cognizable offence must be committed and the person sought to be arrested must have been concerned in the said offence or least reasonable suspicion existed of his been so concerned. It is not enough to arrest a person under this section that there was likelihood of a cognizable offence being committed in future.

##### **Section 42:-**

This section empowers the police to arrest a person in following contingencies:-

- a) When a person has committed a non cognizable offence in presence of a police officer, and
- b) If he is accused of committing a non cognizable offence provided he refuses to give out his name and residence to the police officer.

### **Section 43:-**

The provision of this section are extraordinary in the sense that they enable a private person to arrest a person in certain circumstances and therefore the section must be construed in a manner so as not to enlarge the power of private individuals to arrest a person. Further it is the intention of the legislature to prevent arrests by private persons on mere suspicion or information. Hence the limitation as to the persons who could be arrested by the words 'in his presence commits a non bailable and cognizable offence or any proclaimed offender'. A private person has no power, on receiving information of eg theft, to arrest the thief while carrying away the stolen property as the offence is neither a continuing offence nor one committed in his presence. Again the arrest by a private person on mere suspicion or inference or opinion or information is illegal.

### **Section 44:-**

Subsection 1 gives power to the magistrate to arrest a person who has committed an offence in his presence and also to commit him to custody. Under sub section 2 the magistrate has the power to arrest a person who is suspected of having committed an offence but he has no power to commit him to custody in this case.

The reason why under section 44(1) of the act the magistrate has been given the power to commit the offender to the custody and not under sub section (2) is because under the former the offence is committed before the magistrate himself and he is sure about the guilt of the person who does the offence while as in the latter due to the fact that the offence has not been committed in his presence and he is not sure whether the person has committed the offence or not.

### **Section 45:-**

when a member of the armed forces of the union is deputed for the purpose of the protection of the public property in a state or for other such purposes, it may happen that one or more persons may do or attempt to do something in regard to which such member may be called upon to take action in good faith. Such action may expose him to the possibility of being arrested and prosecuted by the police. To meet such or similar situations, a qualified protection is being given to such members requiring the previous consent of the central government or the state government, as the case may be, for the arrest of any such member and for the previous sanction of such government for taking cognizance of any case against any such member

### **Section 46:-**

arrest consists of actual seizure or touching of a person's body with a view to his detention. This section applies to all the arrests ,whether made under a warrant or without it. Confinement and rough handling are not permissible and are contrary to law, when a person to be arrested submits to the custody, that is, to the restraint which is necessary and sufficient for the purpose of the arrest. Every police officer knows that in making an arrest he must not subject the person to be arrested to unnecessary brutality and that he cannot confine any person unless the person refuses to submit to custody and it becomes necessary to confine him. Further we may also note down that an arrest can be effected by an order of either a police officer, police officer in charge of a police station, a magistrate; verbally or by order and a High court.

### **Section 47:-**

This section is not intended to restrict the powers of the police to enter the place to be searched; on the contrary, it is a provision compelling householders to afford the police facilities in carrying out their duties and sub section 2 provides that if difficulties are places in way of a police officer, he may use force to obtain ingress. It is not illegal to arrest a person in a house other than his own.

### **Section 48:-**

If a police officer while investigating an offence is pursuing an offender whom he can arrest without warrant, he can pursue him to any place within the territory of India and arrest him even outside his own circle. Any arrest so made shall be legal.

### **Section 61:-**

Summons is a milder form of process issued either for enforcing the appearance of the accused or witnesses or for production of a document or thing. It should be clear and specific. It must bear the seal of the court and show the name and address of the person summoned, the place at which the person has to appear and the date and time. In absence of such things the proceedings taken thereon would be invalid. This section deals with the form of the summons issued.

### **Section 62:-**

It should be noted, as has been said earlier, that words 'service' and 'served' are technical terms implying a definite process of law. This section deals with the personal service of the summons. It requires that summons should only be shown but a copy of it be left, exhibited, delivered or tendered to the person summoned. Mere tender of the copy of the summons amounts to service. By requiring to obtain signed acknowledgement of the service of summons, sub-section 3 ensures a cogent evidence of the service.

### **Section 63:-**

Any incorporated company is a legal entity. There is nothing to prevent the issue of summons against the company itself and this section provides for the service of such summons.

### **Section 64:-**

Before the court can proceed against the accused, it must be shown by an affidavit from the person entrusted with the service of the summons, that he

made his endeavors to effect personal service on him and that he has evaded such service or that he cannot be found. It is not in every case where the accused is not found that resort can be had for substituted service, but only when he cannot be found by the exercise of due diligence.

#### **Section 65:-**

Where the personal service of summons as provided under the code is not possible this section makes provision for substituted service by affixing a duplicate copy of it to some conspicuous part of the house of the person summoned. The procedure for service of summons provided in this section cannot be made use of unless service in the manner prescribed in section 62,63 or 64 cannot be effected by the exercise of due diligence.

#### **Section 66:-**

This section requires that on receipt of the summons, the head of the office must cause it to be served personally on the government servant as required by section 62 and it would not be enough that he got the knowledge of the summons.

#### **Section 67:-**

For the service of the summons beyond the jurisdictional limits of the court, it shall be sent to the magistrate within whose local jurisdiction the person is either resident or otherwise present.

#### **Section 68:-**

Proof of the service of the summons has to be in the manner laid down in this section. It is not open to the court to accept proof of the same by reference to general or ordinary presumptions. The court cannot invoke general presumption that official acts would have been done properly with regard to the service of summons.

#### **Section 69:-**

The intention behind this section is to avoid delay in the service of the summons on the witnesses.

When the summons is issued to a witness, it may, in addition to the normal course, also be sent to him by registered post addressed to him at the place where he ordinarily resides or carries on business or personally works for gain.

### **Section 70:-**

The code does not define a warrant, but in schedule II, form no. 2, the format of a warrant under this section has been given. This format shows clearly that a warrant is an order addressed to a certain person directing him to arrest the accused and to produce him before the court. There are certain essentials of a warrant which can be summed up as :-

- i) It must be in writing'
- ii) It must be signed by the presiding officer,
- iii) It must be sealed,
- iv) It must clearly identify the person to be arrested,
- v) Must specify the offences charged,
- vi) It must name the persons who are to execute the warrant,
- vii) It must indicate the authority of the magistrate ie name of court.

### **Section 71:-**

This section authorizes the court issuing a warrant for the arrest of any person to make the warrant aailable warrant. To make it so the court has to endorse on the warrant that if the arrested person executes a bond with sufficient sureties for his attendance before the court at a specified time and thereafter until otherwise directed by the court, the officer shall take such surety and shall release such person from custody. This section indicates the option of offering bail vests in the person arrested. It is he who has to execute a bond with such sureties as the court demands.

### **Section 78:-**

This section provides for the execution of a warrant issued under section 70 at a place outside the local limits of the jurisdiction of the court issuing the warrant but within india. As soon as the boundary of india is crossed in

pursuit, the warrant ceases to have force. And the officer can only shadow a man and ask the local authorities to arrest and secure the fugitive with a view to his rendition upon application duly made.

### Proclamation and attachment:-

#### **Section 82:-**

this section provides that if a court has reasons to believe that any person against whom a warrant has been issued had absconded or was concealing himself so that such warrant could not be executed, such court might publish a written proclamation requiring him to appear at a specified place at a specified time not less than 30 days from the date of publication of such proclamation. But the processes of attachment and proclamation should not be issued whenever a warrant fails of its effect. The officer sent to serve the warrant should be examined as to the measures adopted by him to serve it, and if on his evidence, or in any other manner the magistrate is satisfied that the accused is evading the justice, then and then only can be processes of proclamation and attachment be issued. The magistrate must record the reasons which satisfied him that the accused was absconding or concealing himself to evade justice. Further the word absconding does not mean absence from one residence on a day but remaining out for some days thus if a police officer goes to the house and does not find the occupant there it cannot necessarily be said that the man was absconding.

#### **Section 83:-**

this section can be resorted to or processes under this section can be issued only after the issue of proclamation and that too for the reasons to be recorded in writing. Before passing any order under this section, the court should thoroughly apply its judicial mind to all the facts authorizing it to issue the proclamation under section 82 and specially the fact that the notice of proclamation was served upon the accused within such time so as to enable the accused to attend the court on the fixed date of hearing. If the order of attachment is passed without satisfying these requirements, the order would be invalid liable to be quashed by the High Court under its inherent

jurisdiction. The mode of attachment varies according to the nature of the property and the subsections even provide for the appointment of a receiver in suitable cases where the property to be attached is immovable.

The object of the attachment of the property of the absconder is not to punish him but to compel his appearance.

#### **Section 84:-**

This section provides for claims by a person other than the absconder in respect of the property attached in a process issued against an absconding person and their disposal. The subsections between them provide a complete machinery by which, so far as the criminal court is concerned, the rights and interests of claimants or objectors with regard to the attached property have to be determined. When a claim is made or an objection is preferred, opportunity has to be given by the magistrate who deals with the matter to enable the claimant or the objector to establish his claim or objections, as the case may be.

#### **Section 85:-**

the expression 'at the disposal of the state government' means that the government exercises absolute control over it. The government may deal with the attached property in whatever manner it deems appropriate and convenient. The attached property, unless it is perishable, shall remain with the government for six months after the expiry of which it shall be sold in the appropriate manner. In case the property is sold its sale proceeds shall await two years and if during this period the person satisfies the court as to his absence, the money may be restored to him, otherwise it will be forfeited in favor of the government.

#### **Section 87:-**

This section gives power to issue a warrant in lieu of or in addition to a summons. The power can be exercised in the two cases cited in the section itself. Where a court is empowered to issue a summons, it may under this section issue a warrant of arrest and whenever power conferred under this

section is exercised by a court, it must record reasons in writing for doing so because it is a condition precedent to any exercise of power under this section and any omission to do so is an irregularity not curable by section 465 of this code.

### **Section 88:-**

What is necessary for the exercise of the power under this section is that the officer should be empowered to issue summons or warrant. It is not necessary that a summons or warrant should have in fact been issued, much less that the person is present in the court in pursuance of any such summons or warrant. It is sufficient that if the officer is empowered, or in other words, has the power, to issue a summons or warrant for his appearance. Whenever this condition exists and the person is present in the court the officer can ask him to execute a bond with or without sureties for his presence.

### **Section 89:-**

In the most simplistic explanation as held in Pannalal Vs RK Sinha(AIR 1967 All 394), this section confers a right of cancelation of the bond and re-arrest of the accused or witness if he does not appear before the court at the time when he is bound to appear.

### **Section 91:-**

The legislature has endowed the courts with wide powers of ordering production of documents necessary for the determination of matters before the court and for directing inspection of those documents.

The document or the thing called must have a relation to or connection with the subject matter of the investigation, inquiry or trial and throw some light on the proceedings or some link in the claim of evidence. The most essential factor of an order under this section is a consideration by the court that the production of the documents concerned was desirable and necessary for the purpose of the trial.

## **Section 92:-**

The instant section provides for the production of documents, parcels or other things in the custody of the postal or telegraph authorities, which are exempted from the operation of section 91. In order to pass an order or issue a summons for the production of the documents or things, two conditions must be satisfied:-

- (i) The production of the documents or things should be necessary or desirable for the purpose of investigation, inquiry or other proceedings,
- (ii) They must be under the custody of the postal or telegraph authority.

Therefore no order under this section could be passed in respect of a parcel, document or thing not in the custody of the postal or telegraph authority.

## **Section 93:-**

This section gives wide powers to magistrate but in exercising them they have to use their discretion judicially. To issue such a search warrant is a grave step and such powers should not be exercised without fully appreciating the gravity of the step. It is therefore of paramount importance to confine the issue of search warrant, whether of general nature or a particular nature, to the strict requirements of law.

The section provides for two kinds of searches, particular and general. A 'general search' means a search not in respect of specific documents or things which the officer considers necessary or desirable for the purpose of investigation in hand but a roving inquiry for the purpose of discovering documents or things which might involve persons in criminal liability.

Further in order to simplify we can say that the section contemplates three alternative conditions under which a search warrant can be issued, namely:-

- (a) Where the court has reason to believe that a person, to whom a summons or order under section 91 or a requisition under section 92(1) has been or might be addressed, will not or would not produce

- the documents or thing as required by such summons or requisition,  
or
- (b) Where such document or thing is not known to the court to be in the possession of any person, or
  - (c) Where the court considers that the purpose of any inquiry, trial or other proceedings under this code will be served by a general search for inspection.

#### **Section 94:-**

The essential requirements of the section is that there must be some allegation or information which the magistrate believes that a particular place is used for the deposit or sale of stolen property or for manufacture of forged documents, false seals, counterfeit stamps etc. before a magistrate acts under this section he must have information and may make some enquiry though the nature, scope and character of such inquiry is not defined.

Section 92 has nothing to do with the rights of the parties, under this section the only question to be considered is whether the property in respect of which a search warrant is sought to be issued is prima facie a stolen property or there are good grounds to believe that it is a stolen property.

#### **Section 95:-**

This section confers enables the state govt., by notification in the official gazette, after stating the grounds for its opinion, to declare every copy thereof forfeited to the state govt. if any newspaper, book or document contains:-

- I. Any seditious matter punishable under section 124 A of the penal code,  
or
- II. Any matter promoting enmity between different classes or at places of worship, punishable under section 153 of the penal code, or
- III. Any matter containing obscene books or obscene objects punishable under section 292 or 293 of the penal code, or
- IV. Any matter which amounts to maliciously insulting the religion or religious beliefs of any class punishable under section 195 A of the penal code.

What should be noted again that the triple facets of a valid order are:-

- (i) That the book or document contains any matter,
- (ii) Such a matter promotes or intends to promote feelings of enmity or hatred between different classes of citizens of india and
- (iii) A statement of the grounds of govt. opinion.

Thereupon the state govt. may, by notification, declare every copy of the issue containing such matter to be forfeited.

### **Section 96:-**

The declaration in respect of the newspaper, book or any document can be challenged in the high court by any person who has an interest in the same. The application shall be heard in the high court by a special bench consisting of three or if the high court does not have three judges, by all the judges of the high court.

### **Section 97:-**

The search warrant under this section may be issued by a district magistrate, a sub divisional magistrate, a metropolitan magistrate and a judicial magistrate but when the person in respect of whom a search warrant has been issued is found, he shall be produced before a metropolitan magistrate or a judicial magistrate.

As we find in *Ashok Thadani vs Ramesh K Advani* (1982 CrLJ 1446{1450} A.P (DB), the section is a provision of emergency. The magistrate is not empowered to issue search warrants under this section on the mere allegations made in the affidavit filed along with the petition before him. The expression 'reason to believe' implies a belief in the judicial mind, arrived at after consideration of the available material with a sense of responsibility and effort of mind without ignoring as far as possible the other side of the controversy.

### **Section 98:-**

This section is intended to give immediate relief to a female, above or below 18 years, who is in unlawful detention for an unlawful purpose. It aims at summary disposal of an application. A protracted inquiry in such matters would defeat the very object for which this section has been enacted.

Here again a magistrate before the exercise of power under this section must be satisfied that there is detention against the will of those who are legally entitled to the custody of the minor girl and the purpose of the detention is also unlawful. Both unlawful detention and unlawful purpose must be proved, if either is not established, the magistrate has no jurisdiction to pass order under the aforesaid section. It may also be noted that in proceedings under this section, the magistrate has no jurisdiction to decide the civil rights of the parties.

### **Section 100:-**

There are only three important stages in a search:-

- I. That there must be some respectable person present at the spot to witness the search,
- II. That every process in the conduct of the search must be witnessed by those witnesses, and
- III. That a list must be prepared which will bear the signatures of those witnesses and of the things seized in the search.

No search can be made in absence of search witnesses. The presence of witnesses at a search is always desirable and their absence will weaken and may sometimes destroy the acceptance of the evidence as to the finding of the articles.

We may also say that this section is to ensure that searches are conducted fairly by the police and no 'planting' of articles at the time of search is possible by them as also they are saved from such allegation.

