District Court, Sindhudurg-Oros.

SUBJECT OF THE THIRD WORKSHOP.

-: Criminal Group :-

(I) Cognizance of offence by Magistrate with reference to provisions of Section 156(3) and Sections 190 to 204 of the Code of Criminal Procedure.

(II) Provision as to bails and bonds.

(A) Investigation as contemplated under Section 156(3) of Criminal Procedure Code, 1973.

Chapter XII of Criminal procedure Code deals with information to police and their powers to investigate. Sec. 156 falling within this Chapter XII deals with power of police officer to investigate cognizable offences. Such investigation starts with the making of entry in book kept by officer incharge of police station. Substance of information received is being entered in book and investigation begins. It can end up only with report of police officer to be filed under Sec. 173 of Cr. P. C. This investigation can be commenced even without order of Magistrate. Subsection (3) of Section 156 of Code enables Magistrate to order the investigation of an offence of which he could take cognizance under Sec.190 of Code. This order could be passed at precognizance stage only and not after taking the cognizance.

By passing order under Section 156(3) of Cr.P.C., there occurs neither issuance of process nor the person against whom investigation is directed could be branded as accused. This is a pre cognizance stage.

Pavankumar Vs. State [2008(6) Mh. L. J. 691]

Panchabhai Vs. State [2010(1) Mh. L. J. 421] FB

In a complaint case, when Magistrate has passed order of investigation under Sec. 156(3), police officer need not seek permission for arrest during course of investigation.

Laxminarayan Vs. State [2007(5) Mh. L. J. 7] FB.

In exercise of power under Sec. 156 (3), Magistrate is not empowered to direct investigation to police officer other than one attached to
police station within his territorial jurisdiction.

State of Maha. Vs. Ibrahim Patel [2008(2) AIR Bom. R. 180]

A Magistrate has no power under Sec. 156(3) to direct the C.B.I. to conduct investigation in to any offence.

CBI Vs. State of Rajasthan (AIR 2001 SC 668)

Complainant can't choose any particular agency. Magistrate can order registration of FIR and equally can monitor the investigation.

Sakiri Vs. State of UP [(2008)2 SCC 171]

Magistrate has power to ensure that his order under Sec.156 (3) is complied with. Once investigation is ordered under Sec.156(3), it can't be stopped.

Vasant Vs. S. Y. Khaire [2001(3) Mh. L. J. 409]

Police investigation under Sec.156(3) of Criminal Procedure Code
is permissible only in cognizable offence and not in noncognizable offence.

Swati Vs. State of Maha. [2007 ALL MR (Cri.) 1473]

In case police officer files negative report, Magistrate has three options.

a] He may decide that there is no sufficient ground and drop the proceedings against the accused.

b] Magistrate can take the cognizance of the offence on the basis of police report under Sec. 190 of Cr. P. C., 1973.

c] He may take cognizance of the offence under Sec. 190 of Cr. P . C. on the basis of original complaint and proceed to examine upon oath the complainant and his witnesses under Sec. 202 and thereafter he may issue process or dismiss the complaint.

H. S. Bains Vs. State [1980 Cr. L. J. 1308]

(B) <u>Cognizance of offence by Magistrate under Section 190 of Criminal Procedure Code, 1973</u>. -

Ch. XIV of Cr.P.C. lays down provisions containing conditions required for initiation of proceedings. Sec. 190 lays that, Magistrate can take cognizance of offence

upon complaint;

upon police report; or

upon his own knowledge.

Hon'ble Supreme Court held that, it seems that there is no special charm or any magical formula in the expression. 'Taking cognizance' which merely means judicial application of the mind of the Magistrate to the facts mentioned in the complaint with a view to take further action. Thus, what Sec. 190 contemplates is that the Magistrate is said to have taken 'cognizance' once he makes himself fully conscious and aware of the allegations made in the complaint and decides to examine or test the validity of the said allegations.

Tula Ram Vs. Kishore Singh (AIR 1977 SC 2401)

Term 'cognizance' has not been defined in Code of Criminal Procedure. It's interpretation could be studied from, "*<u>S. K. Sinha Vs.Videocon (AIR 2008 SC 1213)</u>*."

It merely means 'become aware of'. When it is used with reference to Court, it connotes 'to take notice of judicially'. It indicates point when Court takes judicial notice of offence with a view to initiating proceeding in regard to such offence said to have been committed by someone. Taking cognizance does n't involve any formal action. It occurs as soon as Magistrate applies his mind to the offence.

Cognizance is taken of offence and not of the offender.

Taking cognizance is a condition precedent for valid trial.

If Magistrate records verification of complainant, it amounts to taking of cognizance. Taking of cognizance is a condition for valid trial.

Manisha Vs. State [2008 (1) Mh. L. J. 130]

Panchabhai Vs. State [2010(1) Mh. L. J. 421] FB

(C) <u>Complaint to Magistrate Section 200 to 204 of Criminal Procedure Code. -</u>

Ch. XV of Cr.P.C. lays down the procedure which a Magistrate has to follow when a complaint is made to him. Here, Magistrate taking cognizance has to examine the complainant and his witnesses if any. Object is to find out whether or not complaint is justifiable. Very purpose of law is to give a person an access to justice independent of police.

After above referred examination, question of issuance of summons comes in. Magistrate can either issue the summons or order inquiry under Sec. 202. When matter is at the stage whether or not process should be issued, accused has no right of being heard.

Laxmi Vs. State [1993 Mh. L. J. 609]

Sunil Vs. Asha [2007(6) AIR Bom. R. 613]

If evidence collected above is found insufficient to take decision, Magistrate may either inquire himself or direct investigation by police officer under Section 202(1) of Code. Such investigation is only for helping the Magistrate to decide whether or not there is sufficient ground to proceed further. Purpose of inquiry is to see whether there is sufficient ground to proceed and not to see whether there is sufficient ground of conviction.

CEO Vs. Videocon [(2008) 2 SCC 492]

After receiving the report of investigation under Sec. 202, the Court will consider whether there is sufficient ground to proceed. If there is no sufficient ground to proceed, the Court shall dismiss the complaint under Sec. 203. If there is sufficient ground to proceed, then the Magistrate will issue summons or warrant, as the case may be.

(D) Comparative Study Section 156(3), 190, 200 to 204 of Criminal Procedure Code, 1973. -

Distinction between power under Sec. 156(3) and Sec. 202(1) could be studied from Suresh Chand Vs. State of M.P. [2001 SCC (Cri.) 377] and Dilawar Singh Vs. State of Delhi (AIR 2007 SC 3234). Hon'ble Supreme Court held as under.

> The investigation referred to therein is the same investigation, the various steps to be adopted for it have been elaborated in Chapter XII of the Code. Such investigation would start with making the entry in a book to be kept by the officerincharge of a police station of the substance of the information relating to the commission of a cognizable offence. The investigation started thereafter can end up only with the report filed by the police as indicated in Sec. 173 of the Code. The investigation contemplated in that chapter can be commenced by the police even without the order of a Magistrate. But that does not mean that when a Magistrate orders an investigation under Section 156(3), it would be a different kind of investigation. Such investigation must also end up only with the report contemplated in Section 173 of the Code. But the significant point to be noticed is when a Magistrate orders investigation under Chapter XII, he does so before he takes cognizance of the offence.
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> But a Magistrate need not order any such investigation if he proposes to take cognizance of the offence. Once he takes cognizance of the offence, he has to follow the procedure envisaged in Chapter XV of the Code. A reading of Section 202(1) of the Code would convince that the investigation referred to therein is of a limited nature. The Magistrate can direct such an investigation to be made either by a police officer or by any other person. Such investigation is only for helping the Magistrate to decide whether or not there is sufficient ground for him to proceed further. This can be discerned from the culminating words in Section 202(1) i.e. "or direct an investigation to be made by a police officer or by such other person as he thinks fit, for the purpose of deciding whether or not there is sufficient ground for proceeding".

This is because he has already taken cognizance of the offence disclosed in the complaint, & the domain of the case would thereafter vest with vest with him.

The position is thus clear. Any Judicial Magistrate, before taking cognizance of offence can order investigation under Section 156(3) of the Code. If he does so, he is not to examine the complainant on oath because he was not taking cognizance of any offence therein. For the purpose of enabling the police to start investigation, it is open to the Magistrate to direct the police to register an FIR. There is nothing illegal in doing so. After all registration of an FIR involves only the process of entering the substance of the information relating to the commission of the cognizable o ffence in a book kept by the officer incharge of the police station as indicated in Section 154 of the Code. Even if a Magistrate does not say in so many words while directing investigation under Section 156 (3) of the Code that an FIR should be registered, it is the duty of the officer in charge of the police station to register the FIR regarding the cognizable offence disclosed by the complaint because that police officer could take further steps contemplated in Chapter XII of the Code only thereafter.

Difference between these two provisions also has been laid down by Hon'ble Bombay High Court in Suhas Vs. Chandrakant [2001(1) Mh.L.J.328]

referring to Devarapalli Vs. V. Narayana (AIR 1976 SC 1672) as under.

> "Sec. 156(3) occurs in Chapter XII under the caption : 'Information to the Police and their powers to investigate'; while Section 202 is in Chapter XV which bears the heading 'Of complaints to Magistrate'. The power to order police investigation under Section 156(3) is different from the power to direct investigation conferred by Section 202(1). The two operate in distinct spheres at different stages. The first is exercisable at the precognizance stage, the second at the postcognizance stage when the Magistrate is in seisin of the case. That is to say in the case of a complaint regarding the commission of a cognizable offence, the power under Section 156(3) can be invoked by the Magistrate before he takes cognizance of the offence under Section 190(1) (a). But if he once takes such cognizance and embarks

upon the procedure embodied in Chapter XV, he is not competent to switch back to the precognizance stage and avail of Section 156(3). It may be noted further that an order made under subsection (3) of Section 156 is in the nature of a peremptory reminder or intimation to the police to exercise their plenary powers of investigation under Section 156(1). Such an investigation embraces the entire continuous process which begins with the collection of evidence under Section 156 and ends with a report or charge-sheet under Section 173. On the other hand, Section 202 comes in at a stage when some evidence has been collected by the Magistrate in proceedings under Chapter XV, but the same is deemed insufficient to take a decision as to the next step in the prescribed procedure. In such a situation, the Magistrate is empowered under Section 202 to direct within the limits circumscribed by that section, an investigation for the purpose of deciding whether or not there is sufficient ground for proceeding. Thus the object of an investigation under Section 202 is not to initiate a fresh case on police report but to assist the Magistrate in completing proceedings already instituted upon a complaint before him.

It is therefore clear that a Magistrate is not making reference to the police for report under Section 202 Criminal Procedure Code for the purpose of taking cognizance of the offence which he has already taken but only to proceed further in the matter. On the other hand, reference under Section 156(3) is only to activate the police to investigate about the complaints whereas reference under section 202 is to collect further materials for the Court to proceed further.

(E) <u>Options available</u> -

Options which are available to the Magistrate after receipt of complaint could be summarized thus. Following five options are available to the Judicial Magistrate who is competent to take cognizance of the case.

a) <u>Rejection of the complaint</u> :

If the complaint on the background of facts does not at all make out any offence, then the Magistrate may reject the complaint. This power of

rejection at the precognizance stage is inherent and it cannot be mistaken for the power of dismissal available under Sec. 203 of Cr.P C. since the said power of dismissal is one which can be exercised only at precognizance stage.

b) Order of investigation under Sec. 156(3) :

Where the complaint is not rejected at the threshold, the

Magistrate may without taking cognizance of the offence, order an investigation by the police under Sec. 156(3) of Cr. P.C. and forward the complaint to the officer incharge of the police station concerned, provided that the complaint alleges the commission of a cognizable offence. Such a course can be adopted by the Magistrate only at the precognizance stage. In, "*Tukaram Vs. Kishorsing (AIR 1977 SC 2401)*," it was held that, even a complaint alleging the commission of offences exclusively triable by Court of Sessions can also be so forwarded under Section 156(3) of Cr. P. C. This power of the Magistrate under Sec. 156(3) of Cr. P. C. can't be exercised by him after taking the cognizance.

c) Taking cognizance of the offence :

Where the Magistrate does not order investigation under Sec. 156(3) of Cr. P. C. and does not return the complaint, the Magistrate may proceed under chapter XV of Cr.P.C. and thereby take cognizance of the offence. Where Magistrate chooses to take cognizance of the offence, he may may adopt the alternatives given in Ss. 200 and 202 of Code.

d) Issuance of process :

If upon examining the complainant and witnesses under Sec. 200 of Cr. P. C. and after conducting an inquiry or directing an investigation under Sec. 202, the Magistrate is of the opinion that there is sufficient ground for proceeding, he shall then issue summons or warrant against the accused under Sec. 204(1) depending on the nature of case.

e) Dismissal of the complaint :

If after considering the statements on oath of the complainant and witnesses, if any, and the result of the inquiry or investigation, if any, under Sec. 202 of Cr. P. C., the Magistrate is of the opinion that there is no sufficient

ground for proceeding, he shall then dismiss the complaint after briefly recording reasons for doing so under Sec. 203 of the Cr. P. C.

(II) Provision as to bails and bonds.

(A) Provisions as to bail -

The Code of Criminal Procedure has classified offences in two categories namely; Bailable offences and Non-bailable offences. The classification has been made for the obvious reason that seriousness and gravity of the charge and the severity of the punishment awardable are very probable factors which are likely to tempt an accused person either to tamper with the pro secution evidence or to abscond in order to escape the punishment.

If a person is arrested for an offence which is non bailable, in that case court in its discretion can grant bail. The definition of a nonbailable offence appears in Section 2 (a) of our Code of Criminal Procedure 1974. Section 2(a) provides that "Bailable offence" means an offence which is shown as bailable in the first schedule or which is made by any other law for the time being in force and "nonbailable offence" means any other offence.

By and large, offences punishable with imprisonment for not less than three years are taken as serious offences and are made nonbailable.

(i) Section 436 – In what cases bail to be taken -

(1) When any person other than a person accused of a non-bailable offence is arrested or detained without warrant by an officer in charge of a police station, or appears or is brought before a Court, and is prepared at any time while in the custody of such officer or at any stage of the proceeding before such Court to give bail, such person shall be released on bail :

Provided that such officer or Court,if he or it thinks fit, may, and shall, if such person is indigent and is unable to furnish surety, instead of taking bail from such person, discharge him on his executing a bond without sureties for his appearance as hereinafter.

Provided further that nothing in this section shall be deemed to affect the provisions of Sub-Section (3) of section 116 or section 446A.

Explanation :

– Where a person is unable to give bail within a week of the date of his arrest, it shall be a sufficient ground for the officer or the Court to presume that he is an indigent person for the purposes of this proviso.

(2) Notwithstanding anything contained in Sub-Section (1), where a person has failed to comply with the conditions of the bail bond as regards the time and place of attendance, the Court may refuse to release him on bail, when on a subsequent occasion in the same case he appears before the Court or is brought in custody and any such refusal shall be without prejudice to the powers of the Court to call upon any person bound by such bond to pay the penalty thereof under section 446.

In Morit Malhotra v. State of Rajasthan, 1991 Cri.LJ 806 (Raj)

> "The accused was granted bail under section 436 by the the police. But when he appeared before the court the was advised to take bail from the court. He challenged the orders in the Rajasthan High Court which ruled that it is not necessary for an accused to get bail granted by the court if he has already been granted bail by the police. The court drew support from the Supreme Court decision in, "*Free Legal Aid Committee Jamshedpur Vs. State of Bihar, A.I.R. 1982 S.C. 1463*," wherein it was ruled that in a sessions case if the magistrate has granted bail, the accused need not seek bail from the court of sessions "

3. Scope and Application -

'Bail' connotes the process of procuring the release of an accused charged with certain offence by ensuring his future attendance in the court for trial and compelling him to remain within the jurisdiction of the court. Where a person who is arrested is not accused of a non bailable offences no needless impediments should be placed in the way of his being admitted to to bail. In such cases the man is ordinarily to be at liberty and it is only if he is

unable to furnish such moderate security, if any as is required that he should remain in detention. The section is imperative and under its provision the magistrate is bound to release the person on bail or recognizance. But bail means release of a person from legal custody; it presupposes that he is in custody. Person who is under no such restraint cannot be granted bail. The fundamental principal of our system of justice is that a person should not be deprived of his liberty except for a distinct breach of law. If there is no substantial risk of the accused fleeing there is no reason why he should be imprisoned during the period of his trial. The basis rule is to release him on bail unless there are circumstances suggesting the possibility of his fleeing from justice or thwarting the course of justice. When bail is refused it is a restriction on personal liberty of the individual guaranteed by Article 21 of the Constitution and therefore, such refusal must be rare. Where delay take place in the disposal of criminal proceedings the accused ought not to be kept in custody for an inordinately long time and must be released on bail excep t when under extremely rare circumstances it is not possible to do so. Appearance under this section includes voluntary appearance.

Section 436A – Maximum period for which an under trial prisoner can be detained Where a person has, during the period of investigation, inquiry or trial under this Code of an offence under any law (not being an offence for which the punishment of death has been specified as one of the punishments under that law) undergone detention for a period extending up to one half of the maximum period of imprisonment specified for that offence under that law, he shall be released by the Court on his personal bond with or without sureties:

Provided that the Court may, after hearing the Public Prosecutor and for reasons to be recorded by it in writing, order the continued detention of such person for a period longer than one half of the said period or release him on bail instead of the personal bond with or without sureties:

Provided further that no such person shall in any case be detained during the period of investigation inquiry or trial for more than the maximum period of imprisonment provided for the said offence under that law.

Explanation – In computing the period of detention under this section for granting bail the period of detention passed due to delay in proceeding caused by the accused shall be excluded.

Section 437– When bail may be taken in case of nonbailable offence -

1. Section 437 of Criminal Procedure Code deals with in respect of the provisions of bail in non-bailable offence. Section 437 can be read as it is for this purpose. This section gives the Court or a police officer power to release an accused on bail in a non-bailable case, unless there appear reasonable grounds that the accused has been guilty of an offence punishable with death or with imprisonment for life. But (1) a person under the age of sixteen years (2) a woman; or (3) a sick or infirm person may be released on bail even if the offence charged is punishable with death or imprisonment for life. Where a person is charged with a non-bailable offence, but it appears in the course of the trial that he is not guilty of such offence, he can be immediately released on bail pending further inquiry. The same may be done after the conclusion of a trial and before judgment is pronounced, if the person is believed not to be guilty of a non-bailable offence. As a safeguard the section provides for review of the order by the Court which has released the person on. The power of the Magistrate under this section cannot be treated at par with the powers of the Sessions Court and the High Court under Section 439.

Power to Grant of Bail in NonBailable is Discretionary

Unlike a bailable offence where bail is a mater of right under S. 436 Cr.P. C., grant of bail for a non-bailable offence under S. 437 Cr. P.C. (or, for that matter, even under S. 439 Cr. P.C.), is a matter of discretion. The grant of bail in non-bailable cases is generally a matter in the discretion of the authorities in question. The grant of bail in respect of a person accused of or suspected of the commission of any non-bailable offence, is a matter of discretion and under Section 437 of the Code, if there is no prohibition otherwise & if the guidelines for enlarging on bail are satisfied, then, the Magistrate in his discretion may release such person on bail. It thus gives the jurisdiction that contains a

discretion which must be utilized judicially. It is stipulated that bail may not be denied only on the ground that the accused is required for getting him identified by the witnesses. Certain conditions can be annexed to the liberty and in certain contingencies liberty already granted can be snatched by cancellation of bail. In addition to these provisions, there is a ban even on such discretionary power of the Magistrate when there appear reasonable grounds for believing that the accused has been guilty of an offence punishable with death or imprisonment for life in which case, the Magistrate has no jurisdiction and power to release the accused on bail as it is well emphasized by the use of the words "but he shall not so release". Exception to this general ban finds place in the proviso relating to young persons or sick or infirm persons or women.

Bail is a mater of right if the offence is bailable. In the case of a non bailable offence, bail is a matter of judicial discretion. Bail shall not be granted by the Magistrate if the offence is punishable with death or imprisonment for life if he is of the view that there appear reasonable grounds for believing that the person concerned accused of or suspected of the commission of the offence has been guilty of the offence, provided that he may, in his discretion that he may, in his discretion, grant bail to a woman or a minor under the age of sixteen years or a sick or infirm person. In a case involving a non-bailable offence, a Court may impose reasonable conditions besides fixing of the bail amount for the attendance of the accused.

A discretion has to be exercised in granting bail in cases not punishable with imprisonment for life or death unless there may be some reasons for not exercising such a discretion in favour of the accused. Such reasons should be mentioned in the order while refusing bail. In cases of under-trials charged with commission of an offence or offences the Court is generally called upon to decide whether to release him on bail or to commit him to jail.

The decision has to be made mainly in non-bailable cases, having regard to the nature of the crime, the circumstances in which it was committed, the

background of the accused, the possibility of his jumping bail, the impact that his release may make on the prosecution witnesses, its impact on society and the possibility of retribution, etc.

While granting bail the court has to consider the nature and gravity of the circumstances in which the offence is committed; the position and status of the accused with reference to the victim and witnesses; the likelihood of the accused fleeing from justice, of repeating the offence, of jeopardizing his own life being faced with the grim prospect of the possible conviction in the case, of tampering with a witness; the history of the case as well as of its investigation and other relevant grounds.

Test Applied for Grant of Bail in Nonbailable Offence

Normally the courts apply the following tests while considering applicati ons for bail in case of nonbailable offences

(i) nature and seriousness of the accusation;

(ii) nature of the evidence in support of the accusation;

(iii) severity of the punishment which the conviction will entail;

(iv) the character, behavior and standing of the accused;

(v) a reasonable possibility of the presence of the accused not being secured at the trial;

(vi) the danger of the alleged offence being continued or repeated;

(vii) the danger of the witnesses being tampered with;

(viii) the larger interest of the public or the State,and similar other consideration.

Section 437A – Bail to require accused to appear before next appellate Court

(1)

Before conclusion of the trial and before disposal of the appeal, the Court trying the offence or the Appellate Court, as the case may be, shall require the accused to execute bail bonds with sureties, to appear before the higher Court as and when such Court issues notice in respect of any appeal or petition filed against the judgment of the respective Court and such bail bonds shall be in force for six months.

(2) If such accused fails to appear, the bond stand forfeited and the procedure

under section 446 shall apply.

Section 438– Direction for grant of bail to person apprehending arrest with reference to Maharashtra Amendment Section 438 of the Code of Criminal Procedure -

When any person has reason to believe that he may be arrested on accusation of having committed a non-bailable offence, he may apply to the

High Court or the Court of Session for a direction under this section that in the event of such arrest, he shall be released on bail, and that Court may, after taking into consideration, interalia, the following factors,

(i) the nature and gravity or seriousness of the accusation as apprehended by the applicant,

(ii) the antecedents of the applicant including the fact as to whether he has, on conviction by a Court, previously undergone imprisonment for a term in respect of any cognizable offence,

(iii) The likely objected of the accusation to humiliate or malign the reputation of the applicant by having him so arrested and

(iv) The possibility of the applicant, if granted anticipatory bail, fleeing from justice, either reject the application forthwith or issue an interim order for the grant of anticipatory bail,

Provided that, where the High Court, or as the case may be, the Court of Session, has not passed any interim order under this Sub-Section or has rejected the application for grant of anticipatory bail, it shall be open to an officer incharge of a police station to arrest, without warrant the applicant on the basis of the accusation apprehended in such application.

2. Where the High Court or, as the case may be, the Court of Session, considers it expedient to issue an interim order to grant anticipatory bail under subsection (1), the Court shall indicate therein the date on which the application for grant of anticipatory bail shall be finally heard for passing an order thereon, as the Court may deem fit, and if the Court passes any order granting

anticipatory bail, such order shall include, inter alia, the following conditions, namely

(i) that the applicant shall make himself available for interrogation by a police officer as and when required,

(ii) that the applicant shall not, directly or indirectly, make any inducement, threat or promise to any person acquainted with the facts of the accusation against him so as to dissuade him from disclosing such facts to the Court or to any police officer,

(iii) a condition that the person shall not leave India without the previous permission of the Court;

(iv) such other condition as may be imposed under SubSection (3) of section 437, as if the bail were granted under that section.

3. Where the Court grants an interim order under subsection (1), it shall forthwith cause a notice, being not less than seven days notice, together with a copy of such order to be served on the Public Prosecutor and the Commissioner of Police, or as the case may be, the concerned Superintendent of Police, with a view to give the Public Prosecutor a reasonable opportunity of being heard when the application shall be finally heard by the Court.

4. The presence of the applicant seeking anticipatory bail shall be obligatory at the time of final hearing of the application and passing of final order by the Court, if on an application made to it by the Public Prosecutor, the Court considers such presence necessary in the interest of justice.

5. On the date indicated in the interim order under sub-section (2) the Court shall hear the Public Prosecutor and the application and after due consideration of their contentions, it may either confirm, modify or cancel the interim order made under sub section (1).

In, "Vinay Poddat Vs. The State of Maharashtra, 2009 Mh.L.J. (Cri.) 584," in which it has been observed by the Hon'ble High Court that, "when

application for anticipatory bail is considered, the police may not place all factual details before the Court as the investigation in most of such cases is at is at a preliminary stage. Therefore, some role can be played by the complainant by pointing out factual aspects. In the circumstances, it is not possible to hold that the first informant or the complainant connot be heard in an application for anticipatory bail. When the complainant appears before the Court in the course of hearing of an application for grant of anticipatory bail, the Court is bound to hear him. But the said right cannot be allowed to be exercised in a manner which will delay the disposal of an application for anticipatory bail.

The delay in disposal of such application may adversely affect the investigation. Therefore, the right which can be spelt out in favour of the first informant or the complainant is of making oral submissions for pointing out the factual aspects of the case during the course of hearing of an application for anticipatory bail before the Court of Session. The said right is to be exercised by the complainant either by himself or through his Counsel. This is not to say that the Sessions Court hearing the application for anticipatory bail is under an obligation to issue notice to the first informant or the complainant. There is no such requirement of issuing notice to the first information or the complainant at the hearing of the application for anticipatory bail. However, if the complainant or the first informant appears before the Court, he cannot be denied a right of making oral submissions either in person or through his Counsel. It

must be noted here that the legal position on this aspect in the case of an application for regular bail may not be the same "

SPECIAL POWRS OF HIGH COURT OR COURT OF SESSION REGARDING BAIL SECTION 439 OF CRIMINAL PROCEDURE CODE.

Special Powers have been conferred on High Court or court of session in Criminal Procedure Code for Grant of Bail under this section. The powers under this section are wide enough to empower, the Court to exercise its discretion to grant bail to an accused person when he appears and surrenders

himself in the Court even in anticipation of his arrest. The powers of the High Court and the Court of Session under this section are of a concurrent jurisdiction with that of a Magistrate. It is seen on a comparison of Section 437 & 439, that the High Court is invested with power under this section, as a Court of superior, appellate or revisional jurisdiction and has vast powers to direct that any person be admitted to bail in any case.

There can be no doubt that sub section (1) deals with cases of persons accused of bailable as well as nonbailable offences. Even in regard to persons accused of bailable offences, if the amount of bail fixed under Section 436 is unreasonably high the accused person can move the High Court or the Court of Session for reducing of that amount. Similarly, a person accused of a bailable offence may move the High Court or the Court of Session to be released on bail and the High Court or the Court of Session may direct either that the amount should be reduced or that the person may be admitted to bail. If a person accused of a bailable offence is admitted to bail by an on order passed by the High Court or the Court of Session, the provisions of subsection (2) become applicable to his case; and under these provisions the High Court or the Court of Session is expressly empowered to cancel the bail granted by it and to arrest the accused and commit him to custody. The result is that this section applies not only to cases of persons accused of nonbailable offences but also those accused of bailable offences.

This section gives an unfettered discretion to the High Court or Court of Session to admit an accused person to bail, but that discretion must be exercised judicially. The power of the High Court and of a Court of Session to grant bail is not fettered by the restrictions contained in Section 437.

In every case i t is the cumulative effect of all the combined circumstances that must weight with the Court and those considerations are far too numerous to be classified or catalogued exhaustively. In exercising its

discretion under this section, the High Court need not confine its attention to the question whether the prisoner is or is not likely to abscond, as other circumstances may also affect the question of granting bail to persons accused of having committed crimes of a grave and serious nature. The principles underlying Sec.437 Cr.P.C. are to be kept in view. The previous conviction of an accused for a heinous crime punishable with imprisonment for life, his involvement in other crimes and the quantum for punishment for the offences in which the applicant is seeking bail are all relevant factors to which the Court should consciously advert while taking a decision in the matter of enlargement on bail. The Courts must not be too liberal in granting bail particularly when bail is asked for with regard to a serious crime like murder. There is greater justification for denying bail to persons charged of high corruption as from such persons there is a danger of subversion of evidence against them by the use of money power. Where an offence is not bailable the Court has to decide the question of grant of bail in the light of such considerations as the nature and seriousness of the offences, character of the evidence, circumstances which are peculiar to the accused, a reasonable possibility of presence of the accused not being secured at the trial, reasonable apprehension of witness being tampered with, the larger interest of the public or the State and similar other considerations.

Concurrent Jurisdiction

Although under this section concurrent jurisdiction is given to the High Court and Sessions Court, the fact that the Sessions Court has refused to bail under this section does not operate as a bar for the High Court entertaining a similar application on the same facts and for the same offence. However, if the choice was made by the party to move first the High Court and the High

Court has dismissed the application, then the decorum and the hierarchy of the Courts require that if the Sessions Court is moved with a similar application on on the same facts, the said application be dismissed. 19 Where bail petition of the accused is pending in the High Court, the accused cannot pursue his bail application simultaneously before the Court of Sessions.

When Bail May be Granted by High Court or Court of Session

There is no ban against the High Court or the Court of Session granting bail to persons accused of an offence punishable with death or imprisonment for life. Still that

Court will have to take the several considerations enumerated

by the Supreme Court in this case. Though both the High Court and the Court of Sessions have concurrent power, normal practice is to move the latter first. The High Court would directly entertain an application only in exceptional cases

or under special circumstances. Bail should not be granted by the High Court suo motu Whether a bail petition has been moved in a subordinate Court should Court should be mentioned in the application for bail. It is also the duty of the Court to obtain a statement about that fact before exercising its power. 'Court of Session' means the court presided over by the Sessions Judge.

Various principles have been enunciated in different cases, and some of them may be summarized as below:

(i) The law presumes the accused person to be innocent till his guilt is proved. He should be allowed an opportunity to look after his own case, unless the circumstances are such that he should not be released on bail.

(ii) Generally it is the rule to allow bail, rather than to refuse bail, and bail ought not to be held as punishment.

(iii) The fact that the offence is a serious one does not afford a sufficient ground to refuse bail.

(iv) The principle to guide the Court is the probability of the accused appearing to take his trial, and not his supposed guilt or innocence.

(v) If bail has been granted to one accused, other accused in the same case similarly placed are entitled to be released on bail.

(vi) In a serious offence such as murder, bail will be refused if there are reasonable grounds for believing that the accused is guilty.

(vii) The fact that the charge-sheet has not been submitted against the accused is a factor to be taken into consideration.

(viii) That the accused has been previously convicted is no bar to grant bail.

Provisions in respect of bonds - Section 441 to Section 449 of Criminal Procedure Code -

When a person is arrested for a crime and booked into jail, he has to go before the judge who then decides the terms and conditions of that particular person's bail order. Under certain circumstances, such as if the person is considered a threat to the society, bail is denied. In case of a person who can be released from jail, a bond order has to be granted by the judge. There are two types of bonds - secured and unsecured. A secured bond means that you actually pay money or bail property to secure your release. An unsecured bond or surety bond means you sign a document that says you will pay a certain amount of money if the accused breaks his/her bond conditions.

There are four different types of bonds categorized under secured and unsecured bonds. In some (rare) cases accused can be released "on his own recognizance." The other three are cash, property, and surety bonds ordered in most of the bail-bond cases. Cash bonds, generally referred to as "bail", are the payment made in cash to the court. Property bonds offer the title to accused own property, which will be forfeited in the event of non-compliance. And the last, surety bond, generally referred to as "bond", is the one when a third party agrees to be responsible for the debt or obligation of the accused.

In general, we can say bail and bond are two related terms referring to a requirement imposed by the court that accused will put forth a financial backing to their promise to appear in court as ordered.

(i) Bond of accused and sureties. (Section 441 to Section 445 of the Code of Criminal Procedure) -

Section 441 contemplates furnishing of a personal bond by the accused person and a bond by one or more sufficient sureties. It does not authorize a demand of case security by a Magistrate. An accused person is entitled as of right to bail, provided the necessary conditions prescribed by law are fulfilled,

and his sureties can not be rejected unless the Police Officer or Court is not satisfied about either their identity, solvency or reliability.

It is imperative for those who are in charge of receiving bonds from the accused and sureties to be very careful in complying with the provisions of law since the bonds are to be strictly enforced. If the time and place for the appearance of the accused is not mentioned and the space for it in the form is left blank the bond becomes vague and is void on that ground.

Section 441-A provides that a person standing surety for an accused person shall disclose as to in how many cases he has already stood surety for accused persons.

Section 442 deals with the period when the accused shall be discharged from custody after furnishing bond. As soon as the bond has been executed, the person for whose appearance it has been executed shall be released; and, when he is in jail, the Court admitting him to bail shall issue an order of release to the officer-in-charge of the jail, and such officer on receipt of the orders shall release him.

(2) Nothing in this section, Section 436 or section 437 shall be deemed to require the release of any person liable to be detained for some matter other than that in respect of which the bond was executed.

When court orders the release of an accused person under this section it has no right or power to put any restrictions on the accused's movement, and when an accused person is released on surety-ship of another, the intention is that the surety should have control over his movements. Otherwise, there is no sense in making the surety responsible for the attendance of the accused in the court.

If, through mistake, fraud, or otherwise, insufficient sureties have been accepted, or if they afterwards become insufficient, the Court may issue a warrant of arrest directing that the person released on bail be brought before it

and may order him to find sufficient sureties, and, on his failing so to do, may commit him to jail. In accordance with the provisions of Section 443 of Criminal Procedure Code.

Discharge of sureties. (Section 444) -

(1) All or any sureties for the attendance and appearance of a person released on bail may at any time may apply to a Magistrate to discharge the bond, either wholly or so far as relates to the applicants.

(2) On such application being made, the Magistrate shall issue his warrant of arrest directing that the person so released be brought before him.

(3) On the appearance of such person pursuant to the warrant, or on his voluntary surrender, the Magistrate shall direct the bond to be discharged either wholly or so far as relates to the applicants, and shall call upon such person to find other sufficient sureties, and, if he fails to do so, may commit him to jail.

When a surety applies for the cancellation of his bond there is no such thing as hearing the application on the merits. The presentation of the application itself imposes upon the Magistrate the duty of issuing a warrant for the arrest of the accused. Even if the surety fails to appear at a subsequent hearing, the Magistrate has to act under the section.

Section 445 permits payment of cash or Government promissory notes in substitution of passing a bond, except where the bond is one for good behaviour. This provision is salutary, and is meant to help an accused who is a stranger to the place. The presentation of the application itself imposes upon the Magistrate the duty of issuing a warrant for the arrest of the accused. Even if the surety fails to appear at a subsequent hearing, the Magistrate has to act under this section. The provisions of this section are meant for the continuity of the surety bond and for enabling the accused to offer other surety bonds; they are not conditions precedent from the acceptance of a fresh surety in place of an earlier one.

(ii) **PROCEDURE WHEN BOND HAS BEEN FOREFEITED. (SECTION 446) :-**

This section refers to two classes of bonds : (1) a bond under the Code for appearance or for production of property and (2) any other bond under the Code. Both stand on the same footing so far as forfeiture is concerned. The section lays down the procedure on forfeiture of such bonds. The Court before which an appearance is to be made or property is to be produced or the Court to which the case is subsequently, transferred or, in respect of the second class of bonds, the Court by which the bond was taken or any Court to which the case is subsequently transferred, or the Court of any Magistrate of the First Class may satisfy itself as to forfeiture and call upon the person bound by it either to pay penalty or to show cause. If sufficient cause is not shown and penalty not paid, the Court will recover the same as if it were a fine imposed by a Court under this Code as laid down in Section 421. The Court has a discretion to remit a portion of the penalty. If a surety dies before the bond is forfeited, his estate is discharged. Where the bond is forfeited and the penalty is not paid, the Court may proceed to recover the amount by issuing a warrant for attachment under Section 421.

(iii) CANCELLATION OF BOND AND BAIL BOND :-

Cancellation of bond and bail-bond. (Section 446A)

Cancellation of bail bond of the accused falls u/s.446A and not under Sec.446, as Sec.449 Cr.P.C. does not provide for appeal against the said order, and writ petition lies against the said order.

Procedure in case of insolvency or death of surety or when a bond is forfeited. (Section 447)

When any surety to a bond under this Code becomes insolvent or dies, or when any bond is forfeited under the provisions of section 446, the Court by whose order such bond was taken, or a Magistrate of the first class, may order

the person from whom such security was demanded to furnish fresh security in accordance with the directions of the original order, and if such security is not furnished, such Court or Magistrate may proceed as if there had been a default in complying with such original order.

On forfeiture of the bond, the accused has no right to be released on bail on his furnishing fresh securities. But it would be within the discretion of the Court to release him or not to release him upon the execution of fresh personal or surety bond.

Bond required from minor. (Section 448) -

When the person required by any Court or officer to execute a bond is a minor, such Court or officer may accept, in lieu thereof, a bond executed by a surety or sureties only.

Appeal from orders under Section 446. (Section 449) -

All orders passed under Section 446 shall be appeallable,- (i) in the case of an order made by a Magistrate, to the Sessions Judge;

(ii) in the case of an order made by a Court of Session, to the Court to which an appeal lies from an order of such Court.

An appeal ordinarily would lie to the Court of Session from an order passed by an Assistant Sessions Judge; but where the sentence imposed exceeds imprisonment for seven years, the appeal will lie before the High Court. Appeal against any sentence of fine would hence lie to the Court of Session only.

With this I conclude the summary/gist of subject for workshop.

Sindhudurg-Oros.

Date :- 10/03/2016.

(D.W.Modak)
District Judg -1, and
Addl. Sessions Judge, Sindhudurg.
Head of the Core Group of Judges,
(**CRIMINAL GROUP**).