

DISTRICT AND SESSIONS COURT, AURANGABAD.

WORKSHOP ON

वसुधैकुर्वितु

1. Execution of decrees:-
 - a) Money decree
 - b) Partition decree
 - c) Specific performance
 - d) Restitution of Conjugal Rights.
2. Procedure required to be followed to attach property.
3. Adjudication of claim to or objection to attachment of property.
4. Sale of property.
5. Resistance or obstruction to delivery of possession of immovable property.

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1. Remand.
2. Complaint of ill-treatment and procedure required to be followed.
3. Grant or refusal of bail.
4. Cancellation of bail.
5. Anticipatory bail and special powers under section 439 Cr.P.C.
6. Right of Victim and informant to be heard at the time to remand and bail.

Held on 11th October, 2014

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Execution of decrees

- a) Money decree
- b) Partition decree
- c) Specific performance
- d) Restitution of Conjugal Rights.

Section 51 of the Code of Civil Procedure enumerates different modes of execution in general terms which the executing court enforces on the application of the decree-holder. The conditions and limitations under which alone the respective modes can be availed are prescribed further on by different provisions.

A decree-holder has the option to choose a particular mode for executing and enforcing a decree passed by a competent court in his favour. This power of the decree-holder apart from the conditions and limitations prescribed by the Code, is also subject to the discretion of the court.

Now, we are dealing with the executions of :-

[a]Money-decree,

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[b]Partition-decree,

[c]Specific performance and

[d]Restitution of Conjugal Rights.

Money Decree

A decree for payment of money, including a decree where payment of money is an alternative to some other relief, can be executed by the detention of the judgment-debtor in the civil prison or by attachment and sale of his property.

Rule 11 (1) of Order XXI of Code of Civil Procedure permits oral application for execution of Money Decree by arrest of Judgment Debtor who is present within the precincts of the Court at the time of passing the decree. However, it is not advisable to order arrest of the Judgment Debtor on such an oral prayer. Rule 11 A requires an application for the arrest and detention of Judgment Debtor in Civil Prison along with the grounds on which arrest is sought. As per the amended Rule 37, the Court is obliged to issue a show cause notice to a Judgment Debtor whose arrest is sought, before ordering his arrest. The Court cannot place any limitation on modes of execution chosen by the Decree Holder. He may seek simultaneous

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execution against person and property of Judgment Debtor. However, Rule 21 gives discretion to the Court to refuse simultaneous execution. As per Section 82 of the Code of Civil Procedure, an execution against Public Officer or Government cannot be issued unless the decree remains unsatisfied for three months.

Mere existence of an unsatisfied money decree is not sufficient for ordering detention of a Judgment Debtor in Civil Prison. The Court must record a reasoned order indicating that the conditions prescribed in the proviso of Section 51 exists. In case of **Jolly George Varghese Vs. Bank of Cochin, AIR 1980 (SC) 470**

Hon'ble Apex Court laid down a test,

“Has the Decree Holder established dishonest intention or malafides on the part of Judgment Debtor in failure to discharge his obligations ?”

The provision regarding execution of partition decree is provided in Section 54 of the Code of Civil Procedure. Section 54 refers to the partition of estate assessed to payment of revenue. If a decree is for the partition of an undivided estate assessed to the payment of revenue to the Government, Section 54 requires that, the said partition should be carried out by the Collector. In a partition suit

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pertaining to agricultural lands in the State of Maharashtra, the execution of the decree is to be performed by the Collector or his subordinate officer according to the provisions of S. 85 of the Maharashtra Land Revenue Code, 1965 and rules 5, 6, 7 of the Maharashtra Land Revenue (Partition of Holdings) Rules, 1967. The civil court after passing the decree becomes *functus officio* so far putting the decree-holder in actual physical possession of the property. The provisions of Order 21 Rule 35 of the Code of Civil Procedure do not apply in case of possession of agricultural land.

In case of *Aannasaheb Rajaram Nagne Vs. Rajaram Maruti Nagne.* 2000 (3) Mh.L.J.53 it has been observed that :

It was not necessary for the decree-holder to move or make any application to the Court to send the decree to the Collector. An application even if made in the form of Darkhast application with a prayer to send the decree and papers to the Collector was not an application in execution.

II - Other immovable property or movable property which is impartible without further inquiry -

The Court shall pass a preliminary decree declaring the right of several parties interested in the property and giving such further directions as may be required. After passing of the preliminary

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decree, the suit continues before the Civil Court until passing of the final decree.

Until a final decree determining rights of the parties by metes and bounds is drawn up and it is engrossed on stamped papers supplied by the parties, there would be no executable decree. For example, the preliminary decree declaring shares of the parties in a house property cannot be executed unless the rights of the parties are determined by metes and bounds by appointing a Commission and passing of the final decree after hearing the parties as to the divisions proposed by the Commission. The practice of filing execution petition under Order XXI Rule 11 immediately after passing of the preliminary decree and in that proceeding issuing Commission for determining rights of the parties by metes and bounds is not at all in consonance with the provisions of law, unless final decree is passed, no execution petition under Order XXI Rule 11 of the Code of Civil Procedure can be entertained in respect of such a decree. (**Shankar Lokhande Vs. Chandrakant Lokhande, (1995) 3 SCC 413**).

(c) Specific Performance

Order 21 Rule 32 of the Code of Civil Procedure provides

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for execution of decree for specific performance, restitution of conjugal rights and injunction.

Under R.32, if a decree is passed against a person for specific performance of a contract or is in the nature of an injunction, and the person willfully fails to obey it, although he has had an opportunity of obeying it, the decree can be enforced by his detention in civil prison, or by the attachment of his property, or both. In addition, the Court may also order that the act which is to be done maybe done , so far as it practicable, by the decree-holder or some other person appointed by the Court, at the cost of the judgment-debtor.

(d)Restitution of Conjugal Rights

If decree for restitution of conjugal rights has been passed, and the party against whom it is passed wilfully fails to obey it, although he has had an opportunity of obeying it, the decree may be enforced by the attachment of his property. (R.32).

If the decree for restitution of conjugal right is against the husband, the Court may also order that if the husband does not comply with the decree within such time as may be prescribed, he shall make

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periodical payments to the wife of such amounts as may be fixed by the Court. The amount of payment and the intervals fixed for payment thereof may also be varied or modified by subsequent orders of the Court. Such amount can be recovered by the wife as if they were payable under the decree passed for the payment of money. (R.33).

Procedure required to be followed to attach property.

The Code of Civil Procedure enumerates properties which are liable to be attached and sold in execution of a decree. Likewise, it also specifies properties which are not liable to be attached or sold. It also prescribes the procedure where the same property is attached in execution of decrees by more than one court. The Code also declares that a private alienation of property after attachment is void.

An executing court is competent to attach the property if it is situated within the local limits of the jurisdiction of the court. The place of business of the judgment-debtor is not material.

The primary object of attachment of property is to give notice to the judgment-debtor not to alienate the property to anyone as also to the general public not to purchase or in any other manner deal with the property of the judgment-debtor attached in execution

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proceedings.

Section 60(1) declares what properties are liable to attachment and sale in execution of a decree, and what properties are exempt therefrom.

The proviso to sub-section (1) of Section 60 declares that the properties specified therein are exempt from attachment and sale in the execution of a decree.

: MODES OF ATTACHMENT :

(Section 62, Rules 43 - 54 of Order XXI C.P.C.)

Rules 43 to 54 of Order 21 lay down the procedure for attachment of different types of movable and immovable properties. These provisions may be explained by the following chart :-

	<i>Type of Property</i>	<i>Mode of Attachment</i>
1	Movable property (other than agricultural produce) in possession of judgment-debtor;	By actual seizure thereof. But if such property is subject to speedy and natural decay, or the expense of keeping it is likely to exceed its value, it may be sold.
2	Movable property consisting of livestock, agricultural implements or other articles which cannot conveniently be attached.	By leaving the same in the custody of a respectable person as the 'custodian'.
3	Movable property not in possession of the judgment-debtor	By an order prohibiting the person in possession thereof from giving it to the judgment-debtor.
4	Negotiable instrument neither	By actual seizure and bringing it

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	deposited in a court nor in the custody of a public officer	into court.
5	Debt not secured by a negotiable instrument;	By an order prohibiting the creditor from recovering the debt and the debtor from paying the debt.
6	Share in the capital of a corporation;	By an order prohibiting the person in whose name the share stands from transferring it or receiving dividend thereon.
7	Share or interest in movable property belonging to the judgment debtor and another as coowners;	By a notice to the judgment-debtor prohibiting him from transferring or charging it.
8	Salary or allowance of a public servant or a private employee;	By an order that the amount shall (subject to the provisions of Section 60), be withheld from such salary or allowances either in one payment or by monthly installments.
9	Partnership property;	-By making an order- (a) charging the interest of the partner in the partnership property. (b) appointing a receiver of the share of the partner in profits; (c) directing accounts and inquiries; and (d) ordering sale of such interests.
10	Property in custody of court or public officer;	By notice to such court or officer, requesting that such property, and any interest or dividend thereon, may be held subject to the order

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		of the court.
11	(i) Decree for payment of money or sale in enforcement of a mortgage or charge -	
	(a) passed by the court executing the decree;	By an order of such court.
	(b) passed by another court;	By issuing a notice to such court requesting it to stay execution thereof.
	(ii) Decree other than that mentioned above;	By issuing a notice (a) to the decree-holder prohibiting him from transferring or charging it in any way; (b) to the executing court from executing it until such notice is cancelled.
12	Agricultural produce;	By (i) affixing a copy of the warrant (a) in case of growing crop, on land on which such crop has grown; and (b) in case of ready crop, the place at which it is lying; and (ii) also by affixing a copy on the house in which the judgment-debtor ordinarily resides, carries on business or personally works for gain, or last resided, carried on business or personally worked for gain. - Where application is for the attachment of growing crop, it shall specify the time at which it is likely to be harvested. (The object is to enable the court to make necessary arrangements for

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		the custody of the crop.
13	Immovable property	By an order prohibiting the judgment-debtor from transferring or charging it in any manner an all persons from taking any benefit from such transfer or charge.

No dwelling house may be entered after sunset and before sunrise. No other door of it may be broken open, unless it is in the occupancy of the judgment-debtor and he refuses or prevents access thereto. Where a dwelling house is in actual occupation of a *pardanashin* woman, reasonable time and facility must be given to her to withdraw. Section 63 prescribes procedure to be followed in case the property is attached in execution of decrees by several courts.

: PRECEPT :

(Section 46 of C.P.C.)

Precept means 'a command' or an order. A precept is an order or direction given by the court which passed the decree to a court which would be competent to execute the decree to attach any property belonging to the judgment-debtor. Section 46 provides that the court which passed a decree may, upon an application by the decree-holder, issue a precept to that court within whose jurisdiction the property of the judgment-debtor is lying to attach any property specified in the

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precept.

: GARNISHEE :

(Rules 46-A - 46-I of Order XXI C.P.C.)

Rule 46-A to 46-I have been newly introduced in the Code by the Amendment Act of 1976. They lay down the procedure in garnishee cases. The Court may, in the case of a debt (other than a debt secured by a mortgage or charge) which has been attached under Rule 46, upon the application of the attaching creditor, issue a notice to the garnishee liable to pay such debt, calling upon him either to pay into court the debt due from him to the judgment-debtor or so much thereof as may be sufficient to satisfy the decree and costs of execution, or to appear and show cause why he should not do so. Rule 46-A requires a notice to be issued to a garnishee before a garnishee order is passed against him. If such notice is not issued and opportunity of hearing is not afforded before passing an order, the order would be null and void.

The payment made by the garnishee into the court pursuant to such notice shall be treated as a valid discharge to him as against the judgment-debtor. Where neither the garnishee makes the payment into the court, as ordered, nor appears and shows any cause in answer to the notice, the court may order the garnishee to comply with such notice as if such order were a decree against him.

Rule 415 of Civil Manual provides that, the following rules previously made under Section 269 of the old Code are still in

force so far as they are consistent with the present Code (Section 157):-

- (i) All live-stock and other movable property attached under Section 269 of C.P.C. shall ordinarily be removed and conveyed or covered by the attaching officer, or by his subordinates or by person specially engaged by him, for the purpose, to the Court premises or other appointed place, and there kept under due custody till sold or otherwise disposed of according to law.
- (ii) In cases where it is found more convenient so to do, the property may be handed over to the judgment-creditor under proper security, for removal and conveyance to the Court premises, or other appointed place, for the purpose specified in Rule (i).
- (iii) When the property is of such a nature that, in the opinion of attaching officer, or his subordinate, its removal to the Court premises or other appointed place, is impracticable, or can only be effected at a cost out of proportion to its value, the attaching officer shall report his opinion to the Court and, pending receipt of the order of the Court, shall arrange for its proper maintenance, guarding and custody at the place at which it has been attached.
- (iv) The Court, on receipt of such a report as is mentioned in Rule (iii), may either order the removal of the property to

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the Court premises, or other appointed place, or sanction its detention at the place at which it has been attached or elsewhere under such provisions as to its maintenance, guarding and custody as it thinks fit.

- (v) Before making any order for the attachment of livestock, or other movable property, or at any time after any such order has been passed, the Court may require the person, at whose instance the order of attachment is sought, or has been made, to deposit in the Court such sum of money as the Court may consider necessary -
- (a) for the removal of the property to the Court premises, or other appointed place, and its maintenance, guarding and custody till arrival thereat;
 - (b) or the maintenance, guarding and custody of the property at the Court premises or other appointed place, till it is sold or otherwise disposed of;
 - (c) for the maintenance, guarding and custody of the property at the place at which it was attached, or elsewhere.

Rule 54 provides for attachment of immovable property and the procedure for proclamation of such attachment. In order to

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minimise the delay in execution proceedings, new sub-rule (1-A) is being inserted to provide that the order shall also specify a date on which the judgment-debtor is to attend the Court in order to take notice of the date fixed for setting the terms of the proclamation. Sub-rule(2) is being amended to provide that in the case of a land situated in a village, a copy of the order should be affixed in the office of the panchayat, if any, constituted for that village. This is intended to secure adequate publicity with regard to the attachment. Hon'ble High Court in *2013(5) Mh. L.J. 128, N.V. Balta Industries Vs. Tike International & others* held that -

“ the plaintiffs or a party who wants to attach movable as well as immovable property must demonstrate on record that the Judgment debtor's property is owned, and/or possessed and/or he has right to dispose of the property in question. In absence of any such averments, the issuance of warrant of attachment of the property in such a fashion is contrary to the provisions of law and can cause great injustice and hardship to all the concerned. The third person's property just cannot be attached by the plaintiff merely on the basis of the vague and general statement”.

**Adjudication of claims or objection
to attachment of property.**

1. Rules 58 and 59 of Order 21 deals with adjudication of claims preferred to property attached in execution of decree and all objections to attachment of property. These objections and claims are usually raised by two categories of persons : I) By the parties to the litigation or their representatives ; II) By the third party.

2. In 1976, the provisions regarding this topic have been amended and accordingly the objections to attachment or claim to property made by Judgment Debtor or his representative required to be filed before Executing Court. The Executing Court used to decide those claim and objections u/s 47 of C.P.C. A separate suit for raising those objections and claims is barred. The word " The term " representative " used in said section includes not only legal representatives, in the sense of heirs, executors or administrators, but also includes representative in interest, i.e. any transferee of decree holder's interest is concerned is bound by the decree. Thus, the word "representative" used in Section 47 is much wider than the words legal representative as used in Section 50 of CPC. The expression " party " used in Section 47 includes the purchaser of the property in execution.

3. Whereas an objection to attachment or claim to attach property if made by a third party, the objector may either proceed by an

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application under this rule before the Executing Court or he may bring a Regular suit to establish his objection. His failure to proceed by an application under this rule is no bar to a separate suit. The object of this rule is to give a speedy and summary remedy, but this rule does not deprive him of his remedy by way of suit.

Who can raise such claims.

4. For raising a claim Ulo 21 Rule 58 the claimant must possess valid and substantial rights in the property which is sought to be attached or otherwise proceeded with in execution. Claims which are not recognized in Law, can not be permitted to be raised. All persons who on the date of attachment have some interest or are in possession of the property attached could prefer a claim under Rule 58 of Order 21.

Procedure of deciding such claims and objections.

5. As per Para 345 of Civil Manual, the concerned Court is required to frame issue casting burden of proof on a particular party. Objections or claims filed against execution must not be disposed off without granting an opportunity to lead evidence.

6. In Claim Petition, the burden is on the claimant to prove that, on the date of attachment, he has some right, title or interest or was in possession of property attached. If the claimant is succeeded in proving that fact, then burden is shifted on Decree Holder to prove

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that, the objector was not the owner or holds any interest for Judgment Debtor. In a suit filed by a third party to the litigation, burden of establishing right, title or interest in the property is upon the plaintiff.

Limitation for filing such objections or claims.

7. On being aggrieved by the Order passed by Executing Court refusing to entertain a claim or objection against attachment made by the Executing Court, the claimant has to bring the suit as per Rule 5 of Rule 58 of Order 21. Such suit has to be filed within a period of one year of the final order passed by the Executing Court and to such a suit Article 98 of Limitation Act is attracted.

8. When a suit filed by third party to challenge the attachment and sale of property residuary article of Limitation Act i.e. Article 113 is applicable and accordingly 3 years period of limitation is prescribed from arising of cause of action. In case of attachment of property before Judgment, during the pendency of the suit till the decree is passed in favour of plaintiff, it is not obligatory for the party to raise objection. Once decree is passed, cause of action would arise for the Judgment Debtor or such third party to file claim or objection to the attachment made. In case of attachment made during execution proceeding, limitation would start from the date of attachment of the property.

Valuation and Court Fees.

9. If the value of the attached property is less than the value of the decree, then market value of the property is deemed to be the value of the suit. The Court fees has to be paid accordingly. On the other hand if the value of the property is more than the decretal amount, the decretal amount determines the value of the suit and accordingly objector has to value the objection and pay the Court Fees.

The Order which Court can pass on such claims or objections :

As per Sub Rule 3 of Rule 58 of the CPC the Court either

- (a) allow the claim or objection and release the property from attachment either wholly or to such extent as it thinks fit; or
- (b) disallow the claim or objection; or
- (c) continue the attachment subject to any mortgage, charge or other interest in favour of any person; or
- (d) pass such order as in the circumstances of the case it deems fit.

I) As per (sub-rr(1) and (2)of Rule 58, while entertaining a claim or objection the Court must investigate fully, (and not summarily as before) and adjudicate upon all questions including questions of right, title and interest, in the attached property arising between the parties.

II) An order passed after such investigation determining such question, has the force of a decree and the remedy of the party against whom the order passed is by way of appeal and not by way of a suit (Sub -rule (3)(d). An order on a claim petition is subject to a suit

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under the present rule only if the Court has refused to entertain the claim or objection (Sub-r(5)).

III) Where the property attached is subject to a mortgage, charge or interest in favour of any person, the Court can continue the attachment.

Maintainability of claim after sale : -

9. The proviso to Order XXI Rule 58 (1) states that no claim or objection shall be preferred if the property has been sold. There was divergent opinions amongst the various High Courts as to the maintainability of claim after holding auctions. The Hon'ble Supreme Court in the matter of **Kancherla Lakshminarayana Vs. Mattaparthi Syamala (AIR 2008 SC 2069)** has clarified that the word "sold" used in clause (a) of the proviso to Rule 58 (1) has to be read as meaning thereby a complete sale including the confirmation of the sale. In view of this ratio, even after the auction sale, claim or objection would be maintainable till the court auctioning the property makes the sale absolute. However, sale once made absolute by the court, objection or claim will not be maintainable.

Sale of property.

1. **Introduction :-** Execution is the most important aspect of Civil Justice. Success or failure of system of Civil Justice depends on success in executing decrees of Civil Court. Sale of Property is one aspect of execution of fulfillment of decree. Sale of property with or

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without attachment is one of the modes of execution of decree. The relevant legal provisions are found in Section 65 to 67 and rules 64 to 95 of Order 21 of the Code of Civil Procedure. Every sale shall be conducted by officer of the Court or by such other person as the Court may appoint in his behalf and shall be made by public auction in the manner prescribed.

2. In all execution proceedings, the Court has to first decide whether it is necessary to bring the entire attached property to sale or such portion thereof as may seem necessary to satisfy the decree. If the property is large and the decree to be satisfied is small, the Court must bring only such portion of the property, the proceeds of which would be sufficient to satisfy the claim of the decree-holder. It is immaterial whether the property is one or several. Even if the property is one, if a separate portion could be sold without violating any provision of law then only such portion of the property should be sold. This is not just a discretion, but an obligation imposed on the Court. Care must be taken to put only such portion of the property to sale the consideration of which is sufficient to meet the claim in the execution petition. The sale held without examining this aspect and not in conformity with this

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requirement would be illegal and without jurisdiction. Ambati

Narsayya vs. M. Subba Rao, AIR 1990 SC 119 at 120.

3. Words 'necessary to satisfy decree' indicate that portion of property which could be sufficient to satisfy decree is only to be sold.

This was not just a discretion but an obligation on Court. Sale held without examining this aspect was illegal. Balakrishnan vs.

Malaiyandi Konar, AIR 2006 SC 1458.

4. **Responsibility of Court :-**

- a. To prevent sale of property in which judgment debtor does not appear to have interest.
- b. To see that property sold is in accordance with amount of debt.
- c. To see that reasonable price is realised.
- d. To secure that intending purchaser shall get opportunity to know all material particulars.

5. **Time of sale :** - Unless the property ordered to be sold is subject to speedy and natural decay or the expense of keeping it in custody is likely to exceed its value, no sale without the consent in

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writing of the judgment-debtor can take place before fifteen days in case of immovable property and before seven days in case of movable property from the date of proclamation in the Court-house. The Court may adjourn any sale. Where a sale is adjourned for more than 30 days a fresh proclamation shall be made unless judgment debtor consents to waive it.

6. **Restrictions to bid :-** A decree-holder cannot, without the express permission of the Court, purchase the property sold in execution of his own decree. No officer or other person having any duty to perform in connection with any sale shall either directly or indirectly bid for the property.

7. **Sale of movable property :-** Place of sale should be within jurisdiction of the Court and in case of agricultural produce it shall be held near the field where crop is lying or at nearest place of public resort where it may fetch a better price. The price of the property shall be paid at the time of sale. On payment of price the sale becomes absolute. Any person sustaining any injury by reason of any irregularity in the sale at the hand of any other person may sue him for compensation, or, if such person is the purchaser, for recovery of the specific property and for compensation in default of such recovery.

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8. **Sale of immovable property :-** Any Court other than a Court of Small Causes may order sale of immovable property in execution of a decree. The Court may postpone sale for reasonable period to enable the judgment-debtor to raise the decretal amount by private alienation.

9. **Deposit and payment of price :-** Immediately after the sale of immovable property, the person declared to be the purchaser of the property must deposit 25 per cent of the purchase money, unless such requirement is dispensed with by the Court. The provision regarding the deposit is mandatory and non-compliance with it will make the sale a nullity. In case of failure on the part of the purchaser to deposit the amount, the property will forthwith be resold and the defaulting purchaser will be liable for the deficiency in price. The balance of the purchase money must be paid by the purchaser within fifteen days from the date of the sale. In case of default in payment of price by the auction-purchaser, the amount of deposit can be forfeited and the property shall be re-sold after issuing a fresh notification, unless the judgment-debtor satisfies the decree by making payment before resale.

10. **Bid by co-owner :-** Where property sold is a share of undivided immovable property of two or more persons, a co-sharer has a right of pre-emption. The object of this provision is to enable co-sharers in the undivided immovable property to keep strangers out if they so desire.

11. **Setting aside sale :-** The decree-holder, or the purchaser, or any other person entitled to share in a rateable distribution of assets, or whose interests are affected by the sale can apply within period of 60 days from the sale to set aside sale upon conditions that -(i) the applicant must deposit in the Court for payment to the auction-purchaser five per cent of the purchase money; and (ii) he must also deposit the amount specified in the proclamation of sale, less any amount received by the decree-holder since the date of proclamation of sale for payment to the decree-holder. The executing Court has no jurisdiction to entertain an application for setting aside a sale after the prescribed period by invoking Section 148 of the Code or by applying Section 5 of the Limitation Act. [**Mohanlal Vs. Hariprasad- 1994 (4) SCC 177.**]

12. **Grounds for setting aside sale :-**

(1) There has been a material irregularity or fraud in publishing and conducting the sale.

(2) Substantial injury has been caused to the applicant.

13. The Hon'ble Apex Court in case **Saheb Khan Vs. Mohd. Yusufuddin and others, 2006 AIC (SC) 1871**, has further observed as under :-

“Before the sale can be set aside merely establishing a material

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irregularity or fraud will not do. The applicant must go further and establish to the satisfaction of the Court that the material irregularity or fraud has resulted in substantial injury to the applicant. Conversely even if the applicant has suffered substantial injury by reason of the sale, this would not be sufficient to set the sale aside unless substantial injury has been occasioned by a material irregularity or fraud in publishing or conducting the sale.

14. **Effect of setting aside sale :-** Where a sale of immovable property has been set aside, the purchaser is entitled to refund of the purchase money paid by him with or without interest as ordered by the Court. An application under this rule can be filed within three years from the date of the order setting aside the sale.

15. **Confirmation of sale :-** Where no application to set aside the sale is made or where such application is made and is disallowed by the Court, the Court shall make an order confirming the sale, and thereupon the sale shall become absolute. Once the Court comes to the conclusion that the price offered is adequate, no subsequent higher offer can constitute a valid ground for refusing confirmation of sale or offer already received [**Naulakha & Sons and Ramanigadas AIR 1970 SC 2087**]. Confirmation of sale does not require application by auction-purchaser.

16. Where the execution of a document or the endorsement of the party in whose name a negotiable instrument or a share in a corporation is standing is required to transfer such negotiable instrument or share, the Judge or such officer as he may appoint in this behalf may execute such document or make such endorsement as may be necessary, and such execution or endorsement shall have the same effect as an execution or endorsement by the party.

17. **Certificate of Sale :-** After the sale has become absolute, the Court shall grant a certificate in favour of the purchaser. It shall bear the date on which the sale became absolute and also specify the property sold and the name of the purchaser. Such certificate is conclusive in nature. Where purchaser is dead the certificate may be granted to his legal representative. Assignee of an auction-purchaser is also entitled to the certificate. The auction-purchaser can apply for possession even without sale certificate as he gets title by reason of his purchase and the sale certificate is only evidence thereof [**Babulal Vs. Annapurnabai AIR 1953 Nagpur, 215**].

18. **Effect of reversal of decree upon sale :-** Where the purchaser is a stranger, the judgment-debtor whose property is sold is entitled only to the sale proceeds of the property if the decree is subsequently reversed. But, where the purchaser is the decree-holder, he is bound to restore the property to the judgment-debtor.

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**RESISTANCE OR OBSTRUCTION TO THE DELIVERY OF
POSSESSION OF IMMOVABLE PROPERTY**

RELEVANT PROVISIONS: Sec. 74 and Order 21 Rules 97 to 106 of the Code of Civil Procedure as well as Para 443,444 of the Civil Manual deals with above subject.

OBJECT: Above mentioned provisions are incorporated in the Code of Civil Procedure with an intent to facilitate and empower Court to deal with all question in respect of the resistance or obstruction to delivery of possession of immovable property in execution of a decree.

**01. ORDER 21 RULE 97- RESISTANCE OR OBSTRUCTION
TO POSSESSION OF IMMOVABLE PROPERTY.**

(1) Where the holder of a decree for the possession of immovable property or the purchaser of any such property sold in execution of a decree is resisted or obstructed by any person in obtaining possession of the property, he may make an application to the Court complaining of such resistance or obstruction.

(2) Where any application is made under sub-rule (1), the Court shall proceed to adjudicate upon the application in accordance with the provisions herein contained.

02. WHO CAN MAKE APPLICATION UNDER RULE 97 OF THE CODE OF CIVIL PROCEDURE, 1908 :

Rule 97 gives right to decree holder to make an application to the Court against obstructionist to remove obstruction. After that application court makes an enquiry thereon.

03. QUESTIONS TO BE DETERMINED: RULE 101

All questions (including questions relating to right, title or interest in the property) arising between the parties to a proceeding on an application under Rule 97 or Rule 99 or their representatives, and relevant to the adjudication of the application, shall be determined by the Court dealing with the application and not by a separate suit and for this purpose, the Court shall, notwithstanding anything to the contrary contained in any other law for the time being in force, be deemed to have jurisdiction to decide such question.

04. HEARING ON APPLICATION :-

1) The Court, before which an application under any of the foregoing rules of this order is pending, may fix a day for the hearing of the application.

2) Where on the day fixed or on any other day to which the hearing may be adjourned the applicant does not appear when the case is called on for hearing, the Court may make an order that the application be dismissed.

3) Where the applicant appears and the opposite party to whom the notice has been issued by the Court does not appear, the

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Court may hear the application ex-parte and pass such order as it thinks fit.

05. TERM OF “ANY PERSON”:

Hon’ble Supreme Court in Sheenath Vs. Rajesh AIR 1998 SC 1827 held that term “Any person” is wide enough to include even a person not bound by decree or claiming right in the property on his behalf that of a tenant including stranger, title or interest in the property.’’

06. DIFFERENCE BETWEEN SECTION 47 OF THE CODE OF CIVIL PROCEDURE AND ORDER 21 R 97 :

Section 47 speaks that all questions between parties or their representative relating to execution, discharge or satisfaction of decree are to be decided by executing Court. Under Rule 97,98,99 of Order 21 right, title or interest of such third party obstructing execution is to be decided by the Court like a suit.

07. RIGHT OF OBSTRUCTIONIST.- Obstructionist has two-fold rights to resist execution-(1) that he has independent right of possession, (2) the decree is not enforceable and nullity. (Mani Nariman Daruwala and others V. Phiroz M. Bhatena and others, AIR 1991 Bom 328 : 1991 Mah LJ 376 : (1991) 2 Bom CR 370).

08. THE TERM “ADJUDICATION”

The adjudication mentioned in Rule 97 need not necessarily involve a detailed enquiry or collection of evidence. If the Court deems fit, can make the adjudication on admitted facts or even on the averments made by the resistor. The Court may direct the parties to

adduce evidence for such determination, if it necessary but issues on that point are required to be required to be framed.

09. APPLICABILITY OF RESJUDICATA

In the case of Nooruddin Vs. K.K.L. Anand 1995(1) SCC 242 It was held that, "octrine of res judicata" is applicable to the adjudication under Rule 97 of Order 21."

10. ORDER AFTER ADJUDICATION : Rule 98

1) Upon the determination of the question referred to in rule 101, the Court shall, in accordance with such determination and subject to the provision of sub rule (2),

(a) make an order allowing the application and directing that the applicant be put into the possession of the property or dismissing the application or

(b) Pass such other order as, in the circumstance of the case, it may deem fit.

2. Where, upon such determination, the Court is satisfied that the resistance or obstruction was occasioned without any just cause by the judgment debtor or by some other person at his instigation or on his behalf or by any transferee, where such transfer was made during the pendency of the suit or execution proceeding it shall direct that the applicant be put into possession of the property, and where the applicant is still resisted or obstructed in obtaining possession, the Court may also, at the instance of the applicant, order the judgment debtor or any person acting at his instigation or on his behalf, to be

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detained in civil prison for a term which may extent to 30 days.

11. DISPOSSESSION BY DECREE HOLDER OR PURCHASER Rule 99 ORDER TO BE PASSED Rule100.

1. Where any person other than the judgment debtor is dispossessed of immovable property by the holder of a decree for the possession of such property or, where such property has been sold in execution of a decree, by the purchaser there of, he may make an application to the Court complaining of such dispossession.

Where any such application is made, the Court shall proceed to adjudicate upon the application in accordance with the provisions herein contained. Upon determination of questions referred in Rule101 the court shall,in accordance with such determination ,(a)make an order allowing the application and directing that the applicant be put in to possession of the property or dismissing the application ; or (b) pass such order as , in the circumstance of the case ,it may deem fit.

12. POLICE HELP :

Where it is evident to the Court that delivery of possession is not possible without police help, then the Court may allow such prayer of police help.

13. LIMITATION FOR MOVING APPLICATION UNDER

ORDER 21 RULE 99:

Article 167 of the Limitation Act imposes limitation on the decree holder to make a first move under Rule 97 within 30 days from the date of resistance .Each obstruction in execution of warrant for delivery of possession provides fresh cause of action, therefore fresh application is maintainable.

***Under Rule 103 orders passed on an application adjudicated upon under Rule 98 or 100 are deemed to be a decree.**

*** Orders passed under Rule 101 or 103 shall be subject to the result of any suit that may be pending on the date of commencement of the proceeding in which such order is made .**

****IMPORTANT CASE LAWS****

- (1) *Sheenath V. Rajesh, AIR 1998 SC 1827.*
- (2) *Silverline Forum Pvt. Ltd. Vs. Rajiv Trust And Another, AIR 1998 SC 1754.*
- (3) *Bramhama Deo Chaudhary V. Rishikesh Prasad Jaiswal 1997 (1) Mh.L.J.817. : 1997 AIR SCW 685.*
- (4) *Smt. Ratnabai Narayanrao Naik V. Satwarrao Narayanrao Naik [1995(1) Mh.L.R. 43].*
- (5) *Joginder Singh Rawail Singh V. Sitawanti Avtar Singh Bhasia 1983 Mh.L.J. 203.*
- (6) *Vaniyankandy Bhaskarao V. Mooliyil Pandintjarekandy Sheela*

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AIR 2009 SC250.

(7) Anwarbhai V. Pramod 2000(10) SCC 405.

(8) Ghashiram V. Chait Ram Saini [1998] 6 SCC 200.

(9) S. Rajeshwari V. S.N. Kulaserkaran 2006 (4) Mh.L.J. 7344 L.

(10) NSS Narayana Sarma Vs. M/s. Goldstone Exports (P) Ltd. 2002

(1) Civil L.J. 553 (SC).

REMAND

Introduction :-

- 1) Word, "Remand" connotes 'a re-committal to custody of a person who has been brought up in custody.
- 2) Remand is mainly divided into police custody remand and Magistrate custody remand. The main object of police custody is Interrogation of offenders and suspect and investigation.
- 3) The remand is followed by arrest. Section 41 of the Code of Criminal Procedure deals with the arrest. The arrest is one of a pivot factor in the process of investigation. The investigation of a crime is one of the primary functions of the investigating agency. The investigation is carried out for presentation of evidence in the Court. Section 41 of the Code of Criminal Procedure has conferred general powers of arrest without warrant upon police officers. Section 41(1) of the Criminal Procedure Code is confined only to the power of arrest and extends to both cognizable and non-cognizable offences. If the offence is non-cognizable, without order of competent Magistrate, under Section 155(2) of the Code of Criminal Procedure, it cannot be investigated. Section 56 of the Cr.P.C. provides that a person arrested without warrant should be taken before the Magistrate or any officer-in-charge of police station without unnecessary delay subject to the provisions regarding bail. Medical examination of arrested accused is mandatory in view of section 54 of Cr. P. C.

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4) Section 167(1) of the Code clearly lays down that whenever any person is arrested and detained in custody, and it appears that the investigation cannot be completed within 24 hours fixed by section 57 and there are grounds for believing that the accusation or information is well-founded, the officer-in-charge of the police station, or the police officer making the investigation if he is not below the rank of Sub-Inspector, shall forthwith transmit to the nearest Judicial Magistrate a copy of the entries in the diary and seek his further detention. Under Section 167(2), the Magistrate, to whom an accused person is forwarded may, whether he has or has no jurisdiction to try the case, from time to time, authorise the detention of the accused in such custody as such magistrate thinks fit, for a term not exceeding fifteen days in the whole; and if he has no jurisdiction to try the case or commit it for trial, and considers further detention unnecessary, he may order the accused to be forwarded to a Magistrate having such jurisdiction. The proviso to section 167(2) further provides that in what manner and for what period the accused can be detained.

5) Some principles are provided as general principles and guidelines for the Magistrate to be considered at the time of remand.

1) Accused should not be ordinarily remanded to police custody unless there is reason to believe that material and valuable information is to be obtained which cannot be obtained except by remanding the accused to police custody.

2) Only for verifying statement made by accused police custody may not be necessary. Ordinarily Magistrate should remand accused person to Magisterial custody in such case.

3) If Magistrate thinks that it is not necessary for investigation to remand accused to police custody, the accused should be remanded in Magisterial custody.

4) In case Magistrate finds that he has no jurisdiction to try the offence charged, he should issue order for forwarding accused person to the Magistrate having jurisdiction to try the offence.

5) If it is found that police not only require more time for investigation but for some good reasons they require accused to be present with them during investigation, in such situation also Magistrate may grant police custody.

6) While granting custody Magistrate must record reasons for his order.

6) When a lady is detained certain directions are to be followed as laid down by Honourable Supreme Court in case of **Shila Barse Vs. State of Maharashtra.**

1) Female suspects should not be kept in the police lock-up in which male suspects are detained. Some police lockups should be selected in reasonable good localities of the city where only female suspects should be kept. They should be guarded by female Constables.

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2) Interrogation of female should be carried out only in presence of female police officer.

3) A person arrested without a warrant must be immediately informed, the grounds for arrest and in case of every arrest it must immediately be made known to the arrested person that he/she is entitled to apply for bail.

4) The arrested person being taken to the police lock-up police are immediately to give intimation of the fact of such arrest to nearest Legal Aid Committee and such committee to take steps to offer legal assistance to the arrested persons.

5] Police custody can be granted for the period of 15 days and after expiry of the period of 15 days if further police custody remand is granted it would be violation of section 167 of Cr. P. C. **(2000) 9 Supreme Court Cases page 266 C. B. I. Vs. Anupam Kumar.** Section 167 (2) of Cr. P. C. provides that at a time accused can be remanded for 15 days. If further detention of accused is necessary on satisfaction of the Magistrate further detention in Magisterial custody can be allowed. Magistrate may authorise detention of accused beyond the period of 15 days if he satisfies that adequate grounds exist. However, there is further limitation for detention of accused persons in such custody. Accused can be so detained for the period of 90 days where the investigation relates to an offence punishable with death, imprisonment for life or imprisonment for a term not less than 10 years. The detention can be authorised for 60

days where the investigation relates to any other offence. On expiry of said period i.e. 90 or 60 days as the case may be accused persons shall be released on bail if he is prepared to do so and does furnish the bail. No Magistrate shall authorise detention of accused in custody under this section unless accused is produced before Magistrate in person for the first time and subsequently every time till accused remains in custody. However, Magistrate may extend further detention in Judicial custody on production of accused either in person or through medium of electronic video linkage as provided under section 167 (2) (b) explanation II of Criminal Amendment Act 8 of 2005.

6] It is made clear that even after expiry of 90 or 60 days period as the case may be, detention of accused can be authorised so long as he does not furnish bail. It is also clear that if charge-sheet is filed within time limit i.e. 60 or 90 days as the case may be, further detention of accused can be authorised.

7) In the case of **State V/s Sundaramorthy, 2008 CrI.L.J 898**, Honble Apex Court has held that application for grant of police custody must be strictly considered on materials as it involves fundamental right and personal liberty of individual.

8) In the case of *Uday Mohanlal Acharya V/s State of Maharashtra, AIR 2001 SC 1910*, it is held that where a charge-sheet is not filed within requisite period of 60 days, the accused is entitled to an indefeasible right to be released on bail. His application to bail was rejected by the magistrate. He approached to the higher authority, in

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meantime charge-sheet was filed. It was held that the right to bail was not extinguished.

9) In the case of **Mohammed Ajmal Mohammad Amir Kasab @ Abu Mujahid v/s. State of Maharashtra** [MANU/SC/0681/2012](#) Hon'ble Apex court held that the accused is entitled for free legal aid even at the stage of remand also.

10) In the case of **D. K. Basu V/s State of W. B., AIR 1997 S. C. 610** Hon'ble Supreme Court issued the requirement to be followed in all cases of arrest or detention till legal provisions are made in that behalf as preventive measures.

(1) The police personnel carrying out the arrest and handling the interrogation of the arrestee should bear accurate, visible and clear identification and name tags with their designation. The particulars of all such police personnel who handle interrogation of the arrestee must be recorded in a register.

(2) That the police officer carrying out the arrest of the arrestee shall prepare a memo of arrest at the time of arrest and such memo shall be attested by at least one witness. Who may be either a member of the family of the arrestee or a respectable person of the locality from where the arrest is made. It shall also be counter signed by the arrestee and shall contain the time and date of arrest.

(3) A person who has been arrested or detained and is being held in custody in a police station or interrogation centre or other lock-up, shall be entitled to have one friend or relative or other person known to

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him or having interest in his welfare being informed, as soon as practicable, that he has been arrested and is being detained at the particular place, unless the attesting witness of the memo of arrest is himself such a friend or relative of the arrestee.

(4) The time, place of arrest and venue of custody of an arrestee must be notified by the police where the next friend or relative of the arrestee lives outside the district or town through the Legal Aid Organisation in the District and the police station of the area concerned telegraphically within a period of 8 to 12 hours after the arrest.

(5) The person arrested must be made aware of this right to have someone informed of his arrest or detention as soon as he is put under arrest or is detained.

(6) An entry must be made in the diary at the place of detention regarding the arrest of the person which shall also disclose the name of the next friend of the person who has been informed of the arrest and the names and particulars of the police officials in whose custody the arrestee is.

(7) The arrestee should, where he so requests, be also examined at the time of his arrest and major and minor injuries, if any present on his/her body, must be recorded at that time. The "Inspection Memo" must be signed both by the arrestee and the police officer effecting the arrest and its copy provided to the arrestee.

(8) The arrestee should be subjected to medical examination by

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a trained doctor every 48 hours during his detention in custody by a doctor on the panel of approved doctors appointed by Director, Health Services of the concerned State or Union Territory Director, Health Services should prepare such a panel for all Tehsils and Districts as well.

(9) Copies of all the documents including the memo of arrest, referred to above, should be sent to the illaqa Magistrate for his record.

(10) The arrestee may be permitted to meet his lawyer during interrogation, though not through out the interrogation.

(11) A police central room should be provided at all Districts and State headquarters, where information regarding the arrest and the place of custody of the arrestee shall be communicated by the officer causing the arrest, within 12 hours of effecting the arrest and at the police central room it should be displayed on a conspicuous notice board.

Failure to comply with the said requirements shall apart from rendering the concerned official liable for departmental action, also render him liable to be punished for contempt of Court and the proceedings for contempt of Court may be instituted in any High Court of the country, having territorial jurisdiction over the matter.

11) In the case of **Husenara Khatun Vs. State of Bihar, AIR 1977 SC 1377** the under-trial prisoners who remained in jail without trial for period longer than maximum term for which they should have been sentenced or convicted. Their detention has been declared to be illegal

and violation of their fundamental rights.

12) Apart from these general rules regarding remand in some Special Acts special provisions are made for remand of the accused. Some extra period is also provided in the serious matters such as T. A. D. A. In Special Cases sometimes accused are required to be produced before said Special Court particularly in case of Prevention of Children From Sexual Offences Act, N. D. P. S. Act, Anti-Corruption Act, in these matters accused are directly to be produced before Special Judge for remand.

13) If the prima facie accusation or information is not well founded and sufficient grounds do not exist for the Magistrate to exercise his power of remand, in such cases, remand of accused can be refused. It means, a remand by a Magistrate is not an automatic one and sufficient grounds must exist for the Magistrate to exercise their powers of remand.” Judicial remands should not be passed in a routine manner.

14) The Hon'ble Supreme Court has issued various guidelines to handle remand carefully and cautiously. These guidelines are very important in discharging remand work. The custody under section 309 of Cr.P.C. is quite different from custody under section 167 of Cr.P.C. The custody under this section is intended for under trial prisoner and person accused of offence should be speedily tried.

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**COMPLAINT OF ILL-TREATMENT AND PROCEDURE TO
BE FOLLOWED.**

1] Custodial violence is worst form of human rights violation which has become very serious and alarming problem. "Torture" denotes intense suffering physical, mental and psychological, aimed at forcing someone to do or say something against his or her will. It means an attempt to break down detainee under severe physical pain and extreme psychological pressure. The suspect is detained in some isolated place beyond reach of family, friends and legal assistance. Interrogators control everything, even life. The torture is not called torture for obvious reasons, by those who practice it. It goes under the names of "sustained interrogation" 'questioning' or "examining". Whatever the name be, brutalisation is the result always. In the words of Hon"ble Justice V.R. Krishna Iyyer :

"We are deeply disturbed by the diabolical recurrence of police torture resulting in a terrible scare in the minds of common citizens, that their lives and liberty are under a new peril when the guardians of the law gore human rights to death. The vulnerability of human rights assumes a traumatic, torturesome poignancy (when) violent violations is perpetrated by the police arm of the State whose function is to protect the citizens and not to commit gruesome offenses against them. The state, at the highest administrative and political levels is expected to organize special strategy to prevent and

punish brutality by the police methodology. Otherwise, the credibility and the rule of law in our republic vis-a-vis the people of the country will deteriorate . There is urgency of stamping out the vice of third degree from the investigative armoury of the police".

Although safeguards are put in place to protect the rights of accused on his arrest, there is no specific provision in the code as to what procedure is to be followed if any accused alleges ill-treatment at the hands of police on his arrest or during his custody. Criminal Manual has provided a mechanism for the same

2] **Procedure in complaint of ill-treatment :-**

It is mandatory on the Magistrate to inquire to every arrestee about ill-treatment by police whenever he produced before him by police or investigation agency for remand. If any complaint of ill treatment is made by accused or prisoner procedure to be followed by Magistrate is given in para no.3 of Chapter 1 of Criminal Manual.

If any accused or prisoner makes allegation of ill-treatment to the Magistrate then Magistrate shall examine the prisoner's body if the prisoner consents. Magistrate has to see personally if there are any marks of injuries as alleged, and shall place on record the reason of his examination.

If the prisoner refuse to permit Magistrate for such examination. He shall record of such refusal and reasons thereof. If the Magistrate finds substance in allegation of ill treatment. He

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shall first record the complaint of prisoner and forward him for medical examination to Medical Officer or Registered Medical Practitioner as provided in section 54 of the Code of criminal procedure 1973. and Magistrate shall make report to the Hon'ble Sessions Judge. If magistrate has not the power to take necessary inquiry himself, he should forward the prisoner with the record to the Judicial Magistrate having jurisdiction to investigate the case.

Section 54 of the Code of Criminal Procedure, 1973 provides that Magistrate shall at the request of arrested person direct the examination of the body of such arrested persons by a registered Medical Practitioner in case of his allegation before him that such examination of his body will afford evidence which will disprove the commission by him of any offence or which will establish the commission by any other person of any offence against his body.

If prisoner forwarded by Magistrate to Medical Officer or registered Medical Practitioner for examination, such Medical Officer shall examine the prisoner and make report to that effect. In report, Medical Practitioner has to mention the nature of injuries, age of injuries, marks of injuries and shall forward such report to the Judicial Magistrate concerned and also to the Hon'ble Sessions Judge with his opinion and also state whether the prisoner makes any allegations in regard to the police or others responsible for his arrest or custody, or state how else the prisoner explains them.

Thereafter Hon'ble Session Judge after satisfaction on receipt

of report from Magistrate and also report from concern Medical Officer should arrange for an immediate Magisterial investigation into the complaint through such Judicial Magistrate as he may deem most convenient.

Result of such investigation must be communicated as early as possible to the court seized of substantive case. If it considers necessary, the court may summon the Medical Officer or the registered Medical practitioner to give evidence in the case.

3] **Other relevant provisions in respect of ill-treatment in the code of Criminal Procedure 1973 :-**

Section 53 - According to Section 53 of the Criminal Procedure Code the police officer not below the rank of a sub inspector can request the registered Medical Practitioner to medically examine an arrested person under certain circumstance, and if he is unwilling to undergo it, the Section empowers the Medical Practitioner and his assistants to use such force as reasonably necessary making the medical examination.

Section 53 A - Examination of person accused of rape by Medical Practitioner - Amendment Act 2005 provide for a detailed medical examination of a person accused of an offence of rape or an attempt to commit rape by a registered Medical Practitioner employed in a Hospital run by the Government or by a local authority and in the absence of such practitioner within the radius of 16 km from the place where the offence has been committed by any other Medical

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registered practitioner.

Section 54 - Examination of arrested person by Medical Officer-

Amendment Act 2008 Clause 8 substitutes Section 54 relating to examination of the arrested person by Medical Officer. The amendment makes it obligatory on the part of the states to have the arrested person examined by a medical Officer in the service of central or state governments and in case of Medical Officer is not available by a registered Medical Practitioner soon after the arrest is made. It also provides that where the arrested person is female the examination of the body shall be made only by or under the supervision of female Medical Officer, in case female Medical Officer is not available by female registered practitioner. Such Medical Officer shall prepare the record of such examination, mentioning therein any injuries or marks of violence upon the person arrested, and approximate time when such injuries or marks may have been inflicted.

Section 55 A - Health and Safety of a arrested Person - Amendment Act 2008 Clause 9 inserts a new Section 55 A so as to make it obligatory on the part of person having the custody of accused to take reasonable care of the health and safety of the accused.

Section 176 - Inquiry by Magistrate into cause of death - Amendment Act, 2005, Section 176 is being amended to provide that

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in the case of death or disappearance of a person, or rape of a woman while in the custody of the police, there shall be a mandatory judicial inquiry and in case of death, examination of the dead body shall be conducted within twenty-four hours of death.

Conclusion

The Magistrate must record the complaint of ill-treatment made by the accused. Police are duty bound to conduct the medical examination of accused prior to arrest. The Magistrate must if consented by the accused the examine the person of the accused and note the injuries if any. The Magistrate must then sent the accused for medical examination to a registered a medical practitioner. On receipt of the report from the medical officer Magistrate can compare both the reports and reach to conclusion. If substance is found in the allegation of the accused he is to be taken in to Magisterial custody. The complaint lodged by the accused must be treated as a private complaint and it must be sent to the Magistrate having jurisdiction to take cognizance.

The Magistrate is also duty bound to send the report (giving information about the allegation and not to sent the entire complaint) to Hon'ble Sessions Court. If the Magistrate having jurisdiction to take cognizance has not proceeded in accordance with Chapter XV, the Session Court may direct the Magistrate accordingly.

GRANT OR REFUSAL OF BAIL

1. Bail walks the thin line between harmonizing the conflicting claims of individual freedom and the interests of justice. Bail has not been defined in the Code of Criminal Procedure per se and is covered under Chapter XXXIII of the Code "Provision as to bail and bonds" under sections 436-439. The decision is always expected to be guided by law and the principle that bail is the rule and refusal of it the exception.
2. In considering an application for bail a court is not required to conduct a preliminary trial of the case and consider the probability of the accused being found guilty or innocent. The court while deciding such applications, will be traversing beyond their proper ambit and would be exceeding the limits of their function if they engage themselves in discovering the guilt or innocence of the accused applicant, which can only be determined at the trial stage.
3. The Court while granting bail cannot go into the details of evidence to find out whether the evidence will be sufficient in establishing the guilt of the accused beyond reasonable doubt, it being not relevant consideration at this stage to ascertain the probability or improbability of the prosecution case terminating in the conviction of the accused or not. While deciding a bail application, it is not desirable to dissect or pronounce on the evidence otherwise in resorting to such a procedure the Court would be exceeding the limits of its functions. The probability of the guilt or innocence of the accused persons is not

a relevant consideration while dealing with bail applications as the question to determine is whether the prosecution will be able to show prima-facie evidence in support of the charge and not evidence establishing the guilt of the accused persons beyond a reasonable doubt.

4. Broadly speaking, bail must be granted in the following cases -
 - a. If the person arrested is not accused of non bailable offence.
 - b. If the investigation is not completed within the prescribed time.
 - c. If there are no reasonable grounds which exists to believe or assume that the accused person is guilty of committing a non bailable offence.

5. The power to grant bail given by sections 436 and 437 of Cr. P. C. vests in the court before whom an accused appear or is brought. The provisions as regards bail can be broadly classed into two categories- [1] bailable cases. [2] non bailable cases. In bailable cases grant of bail is a matter of course. It may be given either by the police officer in charge of police station having custody of accused or by the court. In non bailable cases the accused may be released on bail but no bail can be granted where the accused appears on reasonable grounds to be guilty of an offence punishable either with death or for imprisonment for life. But the rule does not apply to (1) a person under 16 years of age. (2) woman (3) sick or infirm person . As soon as reasonable grounds for the guilt cease to appear, the accused is entitled to be released on bail. To grant or refuse the bail is discretionary power of the court. However, the discretionary power is

not arbitrary, but is judicial and is governed by established principles.

6. Section 436 A – A new section 436 A is being inserted in the Code to provide that where an under trial prisoner other than the one accused of an offence for which death has been prescribed has one of the punishments, has been under detention for a period extending to 1/2 of the maximum period of imprisonment provided for alleged offence, he should be released on his personal bond with or without sureties.

7. Section 437 of Cr. P. C. provides when a person arrested in non bailable offences can be released on bail. This section gives the court power to release the accused on bail in non bailable offences unless there appear reasonable grounds that the accused has been guilty of an offence punishable with death or with imprisonment for life. Where a person is charged with 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 enquiry. The same may be done after the conclusion of a trial and before Judgment is pronounced. The court should take into consideration various matters such as nature and seriousness of offence, the character of evidence, circumstances which are peculiar to the accused, reasonable possibility of the presence of the accused not being secured at the trial, reasonable apprehension of witnesses being tampered with, the interest of the public or the State before granting the bail. The discretionary power of grant of bail should be exercised with great care and caution by

balancing the individual right of liberty with the interest of the society in general. The court has to state reasons for its order.

8. Section 439 of Cr. P. C. makes provisions for special powers of High Court or Court of Session regarding bail. Section 439 reads as follows :-

(1) A High Court or Court of Session may direct -

(a) that any person accused of an offence and in custody, be released on bail, and if the offence is of the nature specified in subsection (3) of section 437, may impose any condition which it considers necessary for the purposes mentioned in that sub-section;

(b) that any condition imposed by a Magistrate when releasing any person on bail be set aside or modified;

Provided that the High Court or the Court of Session shall, before granting bail to a person who is accused of an offence which is triable exclusively by the Court of session or which, though not so triable, is punishable with imprisonment for life, give notice of the application for bail to the Public Prosecutor unless it is, for reasons to be recorded in writing, of opinion that it is not practicable to give such notice.

(2) A High Court or Court of Session may direct that any person who has been released on bail under this Chapter be arrested and commit him to custody.

(a) Who being accused of or suspected of committing an offence Section 439 of Cr.P.C. given an unfettered discretion to the High Court or to the Court of Session to grant bail to the accused but of course

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that discretion must be exercised judicially. In every case it is the cumulative effect of all the combined circumstances that must weigh with the court and those considerations are far too numerous to be classified or catalogued exhaustively. Though the bail is a rule and jail is an exception, but where the accused is involved in offences which are grave, serious and heinous, it is the exception and not the rule which is attracted. The principles underlying section 437 are to be kept in view. The courts must not be too liberal in granting bail particularly when bail is asked with regard to a serious crime like murder. Bail is not to be withheld merely as a punishment and the requirements as to bail are merely to secure the attendance of the accused at the trial. Bail must be given where the accused was below 16 years of age, unless the court has reasonable ground to believe that, his release was likely to bring him in association with any known criminal or expose him to moral danger or his release would defeat the ends of justice. While considering the application for grant of bail the court is not required to evaluate the evidence. The court is required to see whether a prima facie case exists or not and to take into consideration the gravity of the offence, antecedents of accused, nature of participation of accused in commission of offence.

9. Personal liberty is fundamental and can be circumscribed only by some process sanctioned by law. In case of **Sidhram Mhetre Vs. State of Maharashtra (2011) 1 SCC 694** Hon'ble Apex Court

observed that, just as liberty is precious to an individual, so is the society's interest in maintenance of peace, law and order. Both are equally important. The principles which the court must consider while granting or refusing bail have been mentioned by **Hon'ble Apex Court in the case of Pralhadsingh Bhati Vs. N.C.T. Delhi (2001) 4 SCC 280**. The jurisdiction to grant bail has to be exercised on the basis of well settled principles having regard to the circumstances of each case and not in an arbitrary manner. In Motiram Vs. State of M. P. Hon'ble Apex Court held that, the consequences of pretrial detention are grave. Accused presumed innocent are subjected to the psychological and physical deprivations of jail life. When the under trial prisoners are detained in jail to an indefinite period, article 21 of the Constitution is violated.

CONCLUSION

To sum up it is clear that, though to grant or refuse the bail is discretion of the Court, it has to be exercised judiciously by taking into consideration all the provisions regarding grant or refusal of bail and facts and circumstances of the case and all other factors mentioned above.

CANCELLATION OF BAIL

Rejection of bail when bail is applied for is one thing; cancellation of bail already granted is quite another. It is easier to

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reject a bail application in a non-bailable case than to cancel a bail granted in such a case. Cancellation of bail necessarily involves the review of a decision already made and can by and large be permitted only if, by reason of supervening circumstances, it would be no longer conducive to a fair trial to allow the accused to retain his freedom during the trial. **(State (Delhi Administration) Vs. Sanjay Gandhi (AIR 1978 SC 961)).**

Section 437 (5) of the Cr. P. C. empowers the Magistrate or Court which releases the accused of any non-bailable offence to cancel the bail, whereas, Section 439 (2) of the Cr. P. C. empowers the High Court or Court of Session to cancel the bail of any person who has been released on bail. The grounds for cancellation of bail are as under:

- (i) When the person on bail is found tampering with the evidence either during the investigation or during the trial.
- (ii) When the person on bail commits similar offence or any heinous offence during the period of bail.
- (iii) When the person on bail has absconded and trial of the case gets delayed on that account.
- (iv) When there is likelihood of the accused fleeing away to another country.
- (v) When it is alleged that the person on bail is terrorizing the witness and committing acts of violence against the police.
- (vi) When the person on bail creates serious law and order

problems in the society and he had become a hazard on the peaceful living of the people.

- (vii) When it is found that the subsequent events make out a non-bailable offence or a graver offence.
- (viii) When the High Court found that there was a wrong exercise of judicial discretion to grant the accused bail.
- (ix) When the circumstances were proved that the accused has misused the liberty granted to him, it is sufficient ground to cancel bail.
- (x) If the life of the accused person on bails itself be in danger.

In **(State (Delhi Administration) Vs. Sanjay Gandhi (AIR 1978 SC 961))** it is held that, “Indeed, proof of facts by preponderance of probabilities as in a civil case is not foreign to criminal jurisprudence because, in cases where the statute raises a presumption of guilt as, for example, the Prevention of Corruption Act, the accused is entitled to rebut that presumption by proving his defence by a balance of probabilities. He does not have to establish his case beyond a reasonable doubt. The same standard of proof as in a civil case applies to proof of incidental issues involved in a criminal trial like the cancellation of bail of an accused. The prosecution, therefore, can establish its case in an application for cancellation of bail by showing on a preponderance of probabilities that the accused has attempted to tamper or has tampered with its witnesses. Proving by the test of balance of probabilities that the accused has abused his liberty or that

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there is a reasonable apprehension that he will interfere with the course of justice is all that is necessary for the prosecution to do in order to succeed in an application for cancellation of bail”.

There is distinction between cancellation of bail and setting aside unjustified illegal or perverse order granting bail. In **Gurucharan Vs. State (Delhi Administration) (AIR 1978 SC 179)** it is held that ground for cancellation of bail would be where ignoring material and evidence on record, a perverse order granting bail is passed in a heinous crime that too without giving any reasons interest of justice would also require that such a perverse order be set aside and bail be cancelled.

In **Puran Vs. Rambilas (AIR 2001 SC 2023)** it is held that power vested in the Courts can be invoked either by the State or by any aggrieved party or even the said power could also be exercised suo motu by the High Court. Any member of the public, whether he belongs to any particular profession or otherwise could move the High Court to remind it of the need to exercise its power suo motu. In **Aslam Babalal Desai Vs. State of Maharashtra (AIR 1993 SC 1)** it is held in the contest of bail on default granted under Sec. 167 (2) of the Cr. P. C. that, “the fact that the bail was earlier rejected or that it was secured by the thrust of proviso (a) to Section 167(2) of the Code then recedes in the background. Once the accused has been released on bail his liberty cannot be interfered with lightly i.e. on the ground that the prosecution has subsequently submitted a charge-sheet. Such

a view would introduce a sense of complacency in the investigating agency and would destroy the very purpose of instilling a sense of urgency expected by Sections 57 and 167(2) of the Code. We are, therefore, of the view that once an accused is released on bail under Section 167(2) he cannot be taken back in custody merely on the filing of a charge-sheet but there must exist special reasons for so doing besides the fact that the charge-sheet reveals the commission of a non-bailable crime”.

ANTICIPATORY BAIL :-

1. The law relating to bail is contained in Sections- 436 to 450 of Chapter XXXIII of the Code of Criminal Procedure, 1973. Section 436 deals with the situation when bail may be granted in case of bailable offences. Section 439, deals with special powers of the Hon'ble High Court or the Court of Sessions regarding grand of bail. Under Sections 437 and 439 of Cr.P.C., bail is granted when the accused is in jail. The provision of anticipatory bail was introduced for the first time in the Code of Criminal Procedure,1973 with a view to recognize the importance of the personal liberty and freedom in a free and democratic country.

2. The 41st Report of the Law Commission recommended for the first time, inclusion of a provision for anticipatory bail. Section 438 contemplates an application by a person on an apprehension of arrest in regard to the commission of non-bailable offence: the object being to relieve a person from unnecessary harassment or disgrace and it is

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granted when the Court is otherwise convinced that there is no likelihood of misuser of the liberty granted since he would neither abscond nor taken such step so as to avoid due process of law.

3. The exercise of the power to grant anticipatory is confined only to cases involving non-bailable offences. The Hon'ble High Court or the Court of Sessions can only order that “ in the event of such arrest” the person concerned shall be released on bail. Section 438 of Cr.P.C. provides that if any person has reason to believe that he may be arrested on an accusation of having committed a non- bailable offence, he may apply to the Court of Sessions for direction under this section and that the court may if it thinks fit, direct that in the event of such arrest, he shall be released on bail. Sub-Section -3 of Section 438 of Cr.P.C. shows that if such person is thereafter arrested without warrant by an officer in-charge of the Police Station and is prepared either at the time of arrest or at any time, while in the custody of such officer to give bail, he shall be released on bail.

4. The main purpose of the anticipatory bail is to protect the person who under garb of criminal prosecution is harassed and that, his status in society is lowered. The anticipatory bail is a sort of protection afforded to persons who were victims of fake accusation, but the court should exercise these powers when such circumstances exist. After all, the court has to strike a balance between the liberty of the individual and duties which the investigating machinery has to perform.

5. The ambit and scope of Section 438 of Cr.P.C. came for consideration before the Constitution Bench of the Hon'ble Supreme Court in the case of *Gurbaksh Singh Sibbia and others Vs. State of Punjab, reported in A.I.R. 1980 S.C.1632.* The Hon'ble Supreme Court in the said case has comprehensively dealt with at most all aspects of the concept of anticipatory bail under Section 438 of Cr.P.C. Relying on this judgment in the recent case of *Siddaram Satlingappa Mhetre Vs.State of Maharashtra and others, reported in 2011 Cri.L.J.- 3905.* The Hon'ble Supreme Court has again considered the scope and ambit of the anticipatory bail, relevance and importance of the person liberty and relevant consideration for exercise of the power under Section 438 of Cr.P.C to maintain fine balance between the personal liberty and social interest. The Hon'ble Apex Court further observed that grant of bail for limited period is contrary to the legislative intention and law declared by the constitutional Bench of the Supreme Court in Sibbia's Case. Therefore, after hearing the public prosecutor when the bail order is confirmed, then the benefit of grant of bail should continue till the end of the trial of case. The Hon'ble Apex Court has given the following factors and para-meters which can be taken into consideration while dealing with the anticipatory bail.

- i) The nature and gravity of the accusation and the exact role of the accused must be properly comprehended before arrest is made;
- ii) The antecedents of the applicant including the fact as

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to whether the accused has previously undergone imprisonment on conviction by a Court in respect of any cognizable offence;

- iii) The possibility of the applicant to flee from justice;
- iv) The possibility of the accused's likelihood to repeat similar or the other offences;
- v) Where the accusations have been made only with the object of injuring or humiliating the applicant by arresting him or her.
- vi) Impact of grant of anticipatory bail particularly in cases of large magnitude affecting a very large number of people.
- vii) The Court must evaluate the entire available material against the accused very carefully. The court must also clearly comprehend the exact role of the accused in the case. The cases in which accused is implicated with the help of Sections 34 and 149 of the Indian Penal Code, the Court should consider with even greater care and caution because over implication in the cases is a matter of common knowledge and concern;
- viii) While considering the prayer for grant of anticipatory bail, a balance has to be struck between two factors namely, no prejudice should be caused to the free, fair and full investigation and there should be prevention of harassment, humiliation and unjustified detention of the accused;
- ix) The Court to consider reasonable apprehension of tampering of the witnesses or apprehension of threat to the complainant;
- x) Frivolity in prosecution should always be considered and it is only the element of genuineness that shall

have to be considered in the matter of grant of bail and in the event of there being some doubt as to the genuineness of the prosecution, in the normal course of events, the accused is entitled to an order of bail.

SPECIAL POWERS UNDER SECTION- 439 OF CR.P.C. :-

6. Special powers regarding bail under section 439 of the Code of Criminal Procedure are given only to the High Court or Court of Session. The word 'special' is used in contrast to the term general. The work of remand is generally done by the courts of magistrates. Work of detaining the accused in custody, whether police or judicial, is generally done by the magistrates. Even in the cases triable exclusively by the Court of Session, magistrate under Section 209 (b) of Cr.P.C. remand the accused to custody during and until the conclusion of the trial. It is well settled that bail comes under the head of Remand. There are some cases in which the magistrates can not grant bail. The legislature, to cover those category of cases, has enacted Section 439 by giving special powers to High Court or Court of Session. Unlike Section 437 (1), there is no ban imposed on the power of the High Court or the Court of Session under Section 439 of Cr.P.C. However, the Supreme Court in the case of ***Harsh Sawhney. Vs. Union Territory, AIR 1978 SC 1016*** cautioned the High Courts and the Court of Sessions that even though the discretion is unfettered, it can not be exercised arbitrarily and must be exercised judiciously. The court has to consider the question of prima facie case at the time of hearing bail application. No detailed examination of

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evidence at that stage is necessary. It was so held in the case of *Niranjan Singh Vs. Prabhakar Kharote, AIR 1980 SC 785.*

RIGHT OF VICTIM AND INFORMANT TO BE HEARD

AT THE TIME OF REMAND.

1) The criminal justice system has been designed with the State at the centre-stage. Law and order is the prime duty of the State. It fosters peace and prosperity. The rule of law is to prevail for a welfare State to prosper. The citizens in a welfare State are expected to have their basic human rights. These rights are often violated. The law and order is breached. A citizen is harmed, injured or even killed as a result of the crime. He/she is a victim of an act termed an 'offence' in the criminal justice system. He/she seeks recourse to law and justice. Justice is given to him/her upon upholding the rule of law. It is denied to him/her upon any breach by the perpetrator of the violation or even by the defender of his rights-the State.

2) VICTIM :-

A thin difference between the victim and the complainant may first be noted.

Section 2 of the Code of Criminal Procedure which was incorporated by the Amending Act, 5 of 2009 defines a victim as:

a person who has suffered any loss or injury caused by reason of the act or omission for which the accused person has been charged

and the expression "victim" includes his or her guardian or legal heir;

3) The state of the victims in the discipline of victimology has gone far ahead in the west. The victims have a right to speak and to be heard at all stages of the criminal prosecution - bail, release, evidence, sentence and parole. 'Victims impact statements' are recorded and extensively used by the jury and the judge whilst convicting and sentencing respectively and thereafter 'victims impact assessments' are required to be done as a continuous act.

4) In the case of **Vijay Valia vs. State of Maharashtra, 1987 Mh.L.J. 49** whilst considering the question of appointment of Special Public Prosecutors, the Division Bench of this Court sounded the requirement of the Courts accepting the right of the victim to partake in the criminal prosecution for doing the victim justice.

5) In the case of **Nilabati Behera (Smt) alias Behera Vs. State of Orissa & Ors. (193) 2 SCC 746** the Hon'ble Supreme Court enjoined Court to 'evolve' new tools and mould the remedies for harm done variously. We may also consider the recommendatory history leading to this legislative enactment. The Code of Criminal Procedure was sought to be wholly amended in tune with the reforms suggested by the well-known Malimath Committee constituted by the Ministry of Home Affairs, Govt.of India on 24th November, 2000 which submitted its Report popularly called the Malimath Committee Report to the Ministry of Home Affairs in March, 2003. Though the Report sought

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to make more than the usual cosmetic changes and indeed suggested recommendations in the areas of victims participation in trial and investigation and victim compensation by way of the grant of Rights of Victims of Crimes, even that committee's recommendations fell far short of the depth that the victim's place in the Indian criminal justice system.

6) **RIGHT TO SAY IN GRANT OF BAIL :-**

In the case of *Puran v. Ramvilas (2001) SCC 338*, the Hon'ble Supreme Court observed that Section 439 (2) recognizes the right of the complainant or any "aggrieved party" to move The High Court or Court of Sessions for cancellation of bail granted to the accused.

Vinay Poddar v. State (2009) ALL MR 687. The Hon'ble Court held that in a proceeding filed for relief of anticipatory bail, the victim/complainant has right to intervene right to address the court to oppose the bail application.

In the case of *Kashinath Jairam Shetye v. Ramakant Mahadev Sawant & ors. 2013 ALL MR (Cri) 861*, the Hon'ble Division Bench held that although the complainant or first informant is heard in an anticipatory bail application filed by the accused his rights are not unfettered and cannot be construed as giving him liberty to make submissions for any length of time. In our view, the interest of justice would be served if the complainant/first informant is called upon to file his say, in writing containing facts and legal submissions pointing

out as to why the anticipatory bail should not be granted to the accused. If such a course is adopted, the same would save valuable time of the Court.

7) In the case of *Kunhiraman v. State of Kerala* (2005) MLJ (Cri) 741 it is held that Section 301 of the Cr.P.C. cannot be interpreted to hold that it would be a bar for hearing a victim in an application of section 438 of Cr.P.C. for the reasons no inquiry, trial or appeal is involved. Therefore, the restriction under Section 301 cannot be made applicable to the procedure under section 438 of Cr.P.C. Hon'ble High Court in the case of Annasaheb Vs. Dr.Patil, Criminal Application No. 2458/2011, has held that such counsel cannot be allowed to address the Court and at the most, he can assist the learned Public Prosecutor/Assistant Public Prosecutor appointed by the State and who is incharge of the case. It is also held by this Court that the original complainant can file written arguments and this is possible both in a proceeding filed for bail and anticipatory bail.

8) **THE RIGHTS OF VICTIM IN SEXUAL ASSAULT :-**

In the case of *Delhi Domestic Working Women's Forum V. Union of India* (1995) 1 SCC 14, the Hon'ble Supreme Court indicated the following "broad parameters for assisting the victims of rape".

A] The complainants in sexual assault cases had to be provided with legal representation. It was important to have someone

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well acquainted with the criminal justice system. The role of the victim's advocate would not only be to explain to the victim the nature of the proceedings, to prepare her for the case and to assist her in the police station and in court but to provide her with guidance as to how she might obtain help of a different nature from other agencies, for example, mind counselling or medical assistance. It was important to secure continuity of assistance by ensuring that the same person who looked after the complainant's interests in the police station represented her till the end of the case.

B] Legal assistance would have to be provided at the police station since the victim of sexual assault might very well be in a distressed state upon arrival at the police station; the guidance and support of a lawyer at this stage and whilst she was being questioned would be of great assistance to her.

C] The police was under a duty to inform the victim of her right to representation before any questions were asked of her and the police report would state that the victim was so informed.

D] A list of advocates willing to act in these cases should be kept at the police station for victims who did not have a particular lawyer in mind or whose own lawyer was unavailable. An advocate would be appointed by the court, upon application by the police at the earliest convenient moment, but in order to ensure that victims were questioned without undue delay, advocates would be authorised to act at the police station before leave of the court was sought or obtained.

9) SECTION 12 (1) OF LEGAL SERVICES AUTHORITIES

ACT, 1987 :-

It entitles every person who has to file or defend a case to legal services. A victim of crime has a right to legal assistance at every state of a case.

A survivor has a right to contest the bail. One can do so by submitting an application to the public prosecutor or the investigating officer. It is the survivor's right to appoint a "watching advocate" who can keep the survivor informed of when the accused applies for bail, when chargesheet is filed, etc.

As discussed above, the Court may permit the victim/informant to engage his advocate to assist the prosecution and with permission of the court they may submit their written arguments and assist to the public prosecutor at the time of remand and bail.

10) The word 'Victim' would also include a legitimate and genuine person representing a victim. When an application is filed by other person other than the guardian seeking to represent the victim, the court has to consider the bonafides, legitimacy and genuineness of the representative.

An important object of the criminal justice system is to ensure justice to the victim. It includes right of the victim to participate in cases involving serious crimes and to adequate compensation. At present, the victims are worst sufferers in a crime

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and they don't have much role in the court proceedings.

The victim and the informant need to be given certain rights, so that there is no distortion of the criminal justice system. The right of participation during the course of remand and bail is helpful to reduce delays. There is also an urgent need to provide relief to woman, particularly victims of sexual offences and provide fair trial to persons of unsound mind who are not able to defend themselves. The rights of victim/complainant get automatically protected if at the initial stage their participation in a trial is invoked. The interest of the society are to be protected not only by the court but by the prosecuting agency and investigating agency.