TRAINING MODULE FOR LEGAL SERVICES LAWYERS

PART - 1

NATIONAL LEGAL SERVICES AUTHORITY

TRAINING MODULE FOR LEGAL SERVICES LAWYERS

PART-I (INDUCTION)

NATIONAL LEGAL SERVICES AUTHORITY

National Legal Services Authority
12/11, Jam Nagar House Shahajhan Road, New Delhi – 110011

Printed by : Sudhir Printers, 9810334493

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Message

March 17, 2015

I am delighted to pen down this message for the National Legal Services Authority's groundbreaking initiative - *'Training Module for Legal Services Lawyers'*. The foremost reason which sparks the desire to pursue law as a profession in most individuals is the ambition to make a meaningful contribution to the society. This endeavor inevitably entails percolation of an accessible justice delivery system to the most disadvantageous sections of the society. A system of justice delivery which is within the reach of the poverty stricken is a measure of the quality of our justice. The failure to provide equal justice to all threatens the stability of our institutions. It then becomes a matter of professional responsibility to lead the way to make legal services available to all in order to maintain the credibility and belief of our people that there exists an orderly process to redress their grievances.

National Legal Services Authority, since its inception, has made a laudable effort to live up to the purpose of its motto 'Access to Justice'. The creation of the Module for Training of Legal Services Lawyers is another step in furtherance of the objective of NALSA to cement the gap

between the study of law and its practice. There is no dearth of zeal amongst the young lawyers who have recently graduated out of law schools. However, the transition to actual practice of law in the real world is a difficult path. The release of this Module is a praiseworthy attempt to help the young lawyers in acquiring such abilities to make the above transition easier and bring them closer in becoming adroit enough to administer efficient legal advice to the public.

NALSA has played the role of a saviour by aiding the poor people who suffer from legal exclusivity and instilled hope by not only protecting but also enlightening the helpless of their rights. The challenge of providing equal justice to all is still before us for justice is not only for those who can afford the price. All of us face this pressing obligation today. In our response to this challenge lies the key in maintaining the faith of the people and the integrity of our profession.

(**H.L. DATTU**)

Justice T. S. Thakur
Judge
Supreme Court of India
&
Executive Chairman
National Legal Services Authority

6, Moti Lal Nehru Place,
New Delhi-110011

March 13, 2015

MESSAGE

Legal Aid Programmes and Schemes promoted by the National Legal Services Authority and the State Authorities have helped thousands of deserving litigants in their pursuit of justice. Experience has, however, shown that counsel empanelled for legal aid work are, at times, perceived to be untrained, raw practitioners, who opt for legal aid work only to sustain themselves in the profession and to acquire professional experience at the cost of the litigants who cannot afford a lawyer on their own. This perception is not entirely correct for senior and very experienced and competent lawyers also are willing to accept legal aid briefs at times even without any remuneration. Training of Legal Aid Lawyers will, however, not only help the lawyers discharge their professional duties better but dispel the impression that they are raw, inexperienced and inapt for legal aid assignments. The training modules so assiduously prepared by experts in the field will be of immense use and benefit to the lawyersfraternity and the litigant public both. I congratulate Justice ManjuGoel and her associate team for doing a commendable job and a great service to the cause of access to justice for all.

(T.S. Thakur)

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PREFACE

Representing litigants in courts is one of the major engagements of Legal Services Authorities (LSAs). The complexities involved in the litigation in the hands of the LSAs are as enormous as there can be in any other litigation. Accordingly, we endeavour to find suitable legal practitioners for our work. However, some of our lawyers are young enthusiasts with plenty of zeal but not sufficient experience. "Access to Justice" is the motto of the LSAs. This motto will become a reality only when our lawyers match the expertise of the best lawyers available in the country.

There is a gap between qualifying for a Degree in law and making a good lawyer. This gap is filled by experience and training. With a view to fill the gap of training, the Central Authority of the National Legal Services Authority (NALSA) resolved on 29.09.2013 to create a Module for Legal Services Lawyers Training and appointed a Committee to develop such a module for training of legal services lawyers.

The training is designed in two parts. The first part is Induction Training which is meant for new comers in the ranks of legal services. The next part will be Advance Training in specialised fields.This book comprisesof the basic Modules in Civil and Criminal litigation apart from attitudinal perspective. The Modules have been prepared with the help of trained and experienced Judges and competent senior lawyers.

The target participants for the Induction Course are young lawyers with about 3 years of experience at the Bar and have a lot to learn. The Modules prepared can be used all over the country. The Modules are so designed that any resource person available at the place of training may use these in their training Sessions. Each Module has two parts, thefirst part comprises of the activities postulated during the training Sessions. The second part is the information in that particular field which may be used by the resource persons as well as by the participants for a macro view.

This is a maiden attempt of NALSA in the area of training lawyers. The proof of the pudding is in the eating. The success of the experience is highly dependent upon the skill and zeal of the resource persons and of the participants alike. The result of this experience will show us the way forward for the advance courses which are in the pipeline.

The work was commissioned by the Central Authority in its Meeting dated 29.03.2013 when Hon'ble Mr. Justice P. Sathasivam was the then Chief Justice of India and Patron-in-Chief, NALSA and Hon'ble Mr. Justice G.S. Singhvi, Judge, Supreme Court of India was Hon'ble Executive Chairman, NALSA. Hon'ble Mr. Justice R.M. Lodha, Judge, Supreme Court of India as Executive Chairman and Patron-in-Chief, NALSA sustained the work with his constant encouragement.

Hon'ble Mr. Justice H.L.Dattu, Chief Justice, of India the Patron-in-Chief actually patronised the project with intermittent pats, encouraging us althrough. Hon'ble Mr. Justice T.S.Thakur, Judge, Supreme Court of India and Executive Chairman, NALSA infused buoyancy to the whole effort by continuously motivating us and pushing us into high tides which made us complete the work in time for its release on the occasion of the 13th All India Meet of the State Legal Services Authorities.

We acknowledge with gratitude the contribution made by Ms. Rebecca John, Sr. Advocate and Mr. Anupam Srivastava, Advocate.

We will fail in our duty if we do not acknowledge the tremendous contribution of Ms. Asha Menon, Member Secretary, NALSA and her entire office for providing valuable inputs, logistic supports and for coordinating between the members of the Committee.

For this beginning of a beginning, we seek blessings and cooperation from all stakeholders.

Committee for Developing a Module for Training of Lawyers

Justice Manju Goel
Former Judge, Delhi High Court
Dr. Bharat Bhushan Parsoon
Judge, Punjab and Haryana High Court, Chandigarh
Raju Ramachandran
Senior Advocate, Supreme Court of India
Vijay Hansaria
SeniorAdvocate, Supreme Court of India

FOR THE COORDINATORS AND RESOURCES PERSONS

— Justice Manju Goel (Retd.)*

The present work is a compilation of modules meant to be used for Induction Training to all legal services lawyers and particularly to the newly empanelled ones for the legal services work. We are bringing out more such modules on specific subjects for continued training to the legal services lawyers. It is important to share the ideas behind the modules with the course coordinators and the resource persons so that the best may be achieved.

WHO IS THE RESOURCE PERSON

Although, the work is produced entirely in Delhi, the actual training sessions are expected to be held at different centres of the country, wherever the legal services lawyers are to be trained. Actual training should preferably be conducted by an expert living in the same area or place where the training is to be done.

The resource person should ideally be an experienced Judge or a competent Advocate with good exposure at the Bench/Bar and who is capable of imparting the lawyering skills and expertise in the concerned areas.

The Resource Person will do well to acquaint himself/herself about the principles of adult learning. We expect the Resource Persons to be good listeners and good communicators with ability to deal with all kinds of learners including the resistant adult learners and to deal with not so comfortable questions, which at times are sprung on the resource person by the participants.

HOW TO USE THE MODULES

Adult learners are different from the school students in as much as they already have some knowledge and information on the subject of training. The adult learners like to build on their already existing knowledge. It is also recognized that learning is faster by doing i.e. by applying the information imparted. Accordingly, in the modules we have included activities that make the participants work with their colleagues and use as well as challenge their existing knowledge.

The modules are designed with a view to make the training process efficient and interesting. Each Modulehas two parts. The first part is the exercise/task for the live sessions of training. The second part consists of the necessary information to deal with the exercise/task. For best results, the information part given in 'short notes' should be used by the resource person for his/her preparation before conducting the actual live sessions and should be used also for validation, only after the participants have actually performed the part assigned to them viz. quiz or group discussion etc.

For every session the organiser/coordinator shall do well to photocopy the first set of pages containing the Module including the programme, exercises like group discussion, role play, experience sharing etc. The "short notes" provided for each Module should not be handed over till the exercises are over. The resource person can refer to the short notes preferably before the actual session and shall share those at the end for the participants to read for themselves.

TIME MANAGEMENT

We have given a time management plan in each module. At times it may not be possible to strictly follow the plan as the actual time spent on each part of the module will vary depending upon

*Member, NALSA

participation of the groups. However, in case the time allotted turns out to be too short, The resource Person may reorganize the time plan to cover the module. We are aware that the training sessions will throw up more questions than what can be dealt with within the given time,but the unanswered questions lead to a quest to be pursued beyond the sessions as well and, hence, would be welcome.

PHYSICAL ENVIRONMENT

The number of participants for a session should ideally be around 30. It will be greatly appreciated if the participants are not seated in any hierarchical manner. The seats, as far as possible should not be fixed to the floor so that they may be moved to make small groups.

A thought should be given in advance to facilitate breaking the whole group into four or five small groups as such breakout groups may need separate rooms/ spaces where they can carry out their discussion. The coordinator may form the groups in advance so that time is not lost during the session in dividing the whole group into smaller groups.

ICE BREAKING

A short ice breaking session is extremely useful to motivate the participants in any training session to open up, share and contribute to the discussions in the actual sessions. These ice breaking sessions ensure associative and active rather than passive participation. They are often interactive meaningful fun sessions before a full and focused programme is run. Two small examples are given below by way of suggestions:

1. Each participant is asked to introduce himself/herself by giving the usual information of name and work, adding thereto some interesting fact little known to others e.g. I am Rakesh practising on the Criminal side in the District Courts of Rohini. Now, I may look obese but I played football and was the captain of the school football team.
2. Each participant is asked to introduce himself/herself with his/her name and work and say in one sentence what he/she expects to gain from the training. No one is allowed to repeat what a participant has already said.

TRAINING METHODOLOGY USED

a) Group discussion and presentation:

Group discussions are meant to provide participants an opportunity to find answers to specific questions given to them with the help of their existing knowledge and experience. In the process they feel to be important contributors in the process of training. They also learn by doing and such learning lasts longer.At the end of the presentation of the views by each group, the resource person may fill the gap of information with his/her own rich experience and learning and can refer to information on the subject given in the book.

b) Quiz:

The quiz given in the modules are not meant to be used as a contest. It is meant to show to the participants that although the topics are familiar, there is still scope to learn about them. The resource person can open a discussion on questions that call for elaborate answers.

c) PowerPoint presentation:

No one can ignore the importance of traditional teaching method of lecturing. PowerPoint presentations provided here are meant to structure the lectures in a time efficient manner.

Further, the powerP oint presentation makes the lectures more effective with audio-visual impact which in turn makes a lasting impression on the mental horizons of the participants.

d) Experience Sharing:

The Lawyers participating in the programme are already into legal practice and have some experience in the topics they are being trained in. Experience sharing is the way of extracting from the participants themselves information on the subject for the session. The resource person may supply the information which is not provided by the participants in experience sharing. This method saves the participants of the monotony of hearing what they already know. At the same time, this makes the learning participatory since one person's experience informs the rest of the group. The resource person may supplement the information obtained by experience sharing so that the participants can receive full information.

e) Brainstorming:

Brainstorming is thinking together. This term has been used in Session-IV & V where the participants are expected to discuss in whole group but before actual discussion, they are made to think on each sub-topic with the help of one of their fellow participants.

f) Role-Play:

Role-Play is one of the best modes of learning by performing. For this exercise the whole group has to be divided in small groups of say 5. While some participants perform the given role, the others watch and give their feedback. In the process, everyone learns what is intended to be imparted.

Needless to say that the ingenuity of the resource persons should not be curbed by the modules that we have designed. We shall gratefully welcome all suggestions which may come from the resource persons and the participants so that our work servesthe cause better.

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SCHEDULE OF THE TRAINING PROGRAMME

Duration		Details
DAY-I		
9.30 AM to 9.45 AM		Arrival of Participants, Registration and Welcome Tea
9.45 AM to 10.30 AM		Inaugural Session
Session-I (10.30 AM to 11.45 AM)		
10.30 AM to 10.45 AM	(a)	Ice Breaking
10.45 AM to 11.15 AM	(b)	Constitutional Perspective
11.15 AM to 11.45AM	(c)	Legal Services Authorities Act, 1987 and the Schemes thereunder
Session-II (11.45AM to 1.30 PM)		
11.45 AMto 12.30PM	(a)	Role and Responsibilities of Legal Services Lawyers-Do's and Don'ts for a Panel Lawyer.
12.30 PM to 1.00 PM	(b)	Communication with Clients and Counselling.
1.00 PM to 1.25 PM	(c)	Role Play and Discussion.
1.25 PM to 1.30 PM	(d)	Concluding Remarks
1.30 PM to 2.00 PM		**Lunch Break**
Session-III (2.00 PM to 3.30 PM)		Basic Knowledge in Criminal Law
2.00 PM to 2.05 PM	(a)	Introduction
2.05 PM to 2.20 PM	(b)	Rights of an arrested person
2.20 PM to 2.30 PM	(c)	Bail
2.30 PM to 2.55 PM	(d)	Plea Bargaining
2.55 PM to 3.30 PM	(e)	Presentation and discussion
3.30 PM to 3.45 PM		**Tea Break**
Session-IV (3.45 PM to 5.15 PM)		Lawyering Skills – Criminal Law: Drafting, examination of witnesses, arguments
3.45 PM to 3.50 PM	(a)	Introduction
3.50PM to 4.10 PM	(b)	Brainstorming
4.10 PM to 4.30 PM	(c)	Whole group discussions
4.30 PM to 4.50 PM	(d)	Exercise on Drafting
4.50 PM to 5.10 PM	(e)	Discussion on drafting
5.10 PM to 5.15 PM	(f)	Concluding remarks

DAY-II

Session –V (9.30 AM to 11.00 AM)		Lawyering Skills – Criminal Law continued
09.30 AM to 09.35 AM	(a)	Introduction
09.35 AM to 09.55 AM	(b)	Brain storming exercise
09.55 AM to 10.15 AM	(c)	Discussions after brain storming exercise
10.15 AM to 10.35 AM	(d)	Group Discussion
10.35 AM to 10.55 AM	(e)	Presentation and discussion
10.55 AM to 11.00 AM	(f)	Concluding remarks
11.00 AM to 11.15 AM		**Tea Break**
Session-VI (11.15 AM to 1.00 PM)		Basic Knowledge in Civil remedies with special emphasis on Injunctions.
11.15 AM to 11.45 AM	(a)	Introduction
11.45 AM to 12.45 PM	(b)	Group discussions
12.45 PM to 1.00 PM	(c)	Quiz
1.00 PM to 1.30 PM		**Lunch Break**
Session – VII (1.30 PM to 3.00 PM)		Lawyering Skills – Civil Law : Drafting, Examination of witnesses, Arguments
1.30 PM to 1.35 PM	(a)	Introduction
1.35 PM to 2.00 PM	(b)	Experience Sharing
2.00 PM to 2.20 PM	(c)	Lecture
2.20 PM to 2.40 PM	(d)	Experience sharing
2.40 PM to 3.00 PM	(e)	Lecture
3.00 PM to 3.15 PM		**Tea Break**
Session – VIII (3.15 PM to 4.10 PM)		Lawyering Skills – Civil Law continued
3.15 PM to 3.35 PM	(a)	Group discussion
3.35 PM to 4.05 PM	(b)	Presentation
4.05 PM to 4.10 PM	(c)	Concluding remarks
Valedictory Session (4.10 PM to 5.15 PM)		
4.10 PM to 4.40 PM	(a)	Open House
4.40 PM to 5.15 PM	(b)	Valedictory address

Session – I

10.30 AM to 11.45 AM

Total time: 1 hr 15 min

Session – I
10.30 AM to 11.45 AM
Total time: 1 hr 15 min

Module for Training of Panel Lawyers

I. CONSTITUTIONAL PERSPECTIVE

II. LEGAL SERVICES AUTHORITIES ACT, 1987 AND SCHEMES THEREUNDER

Objective

— To provide the legal services lawyers the constitutional perspective behind all legal services provided by the various Legal Services Programmes run by the Legal Services Authorities

— To familiarize legal services lawyers with the legal aid movement in India

— To give an overview of the Schemes made under the Legal Services Authorities Act, 1987.

Expected learning outcome

— The panel lawyers are expected to acquaint themselves with the Constitutional provisions of free legal services and Legal Services Authorities Act, 1987 as also with the Regulations and Schemes/Guidelines framed under the Act.

— They will fully understand and are wholeheartedly involved in the delivery of legal services.

— The participants will be aware of the importance of legal services provided by them.

Training Method

1. Lecture
2. PowerPoint presentation

Programme:

Introductionand interactive lecture by Resource Person — 30 Minutes

The Resource Person will set the tone of the two-day training programme telling how training makes a difference in performance.

He/she shall also focus on how the Constitution of India is the inspiration behind all the activities of the State. The Trainer/Resource Person will speak on the subject of (i) the constitutional perspective regarding Human Rights with reference to Part-III and Part-IV of the Constitution of India with special reference to Article 39A of the Constitution of India and (ii) the Legal Services Authorities Act, 1987, NALSA Regulations and Schemes made under the Act.

This introductory lecture shall also include the perspective given in the "Short Note on Constitutional Perspective of Legal Servieces" given in the reading material.

Interactive lecture with PowerPoint presentation on
Legal Services Authorities Act, 1987 and the Schemes thereunder — 40 Minutes

Concluding Remarks — 05 Minutes

POWERPOINT PRESENTATION
ON
LEGAL SERVICES AUTHORITIES ACT, 1987 AND THE SCHEME THEREUNDER

ASHA MENON
MEMBER SECRETARY, NALSA

- IN MAY 1976, THE GOVERNMENT OF INDIA CONSTITUTED THE JURIDICARE COMMITTEE WITH JUSTICE P.N. BHAGWATI AS THE CHAIRMAN AND JUSTICE V.R. KRISHNA IYER AS MEMBER.
- IT WAS ASKED TO MAKE RECOMMENDATIONS FOR ESTABLISHING AND OPERATING A COMPREHENSIVE AND DYNAMIC LEGAL SERVICES PROGRAMME.
- THE JURIDICARE COMMITTEE SUBMITTED AN INTERIM REPORT FURNISHING A DRAFT OF THE NATIONAL LEGAL SERVICES BILL 1977 WHICH COMPREHENSIVELY DREW UP THE INSTITUTIONAL SET UP FOR THE DELIVERY OF LEGAL SERVICES.

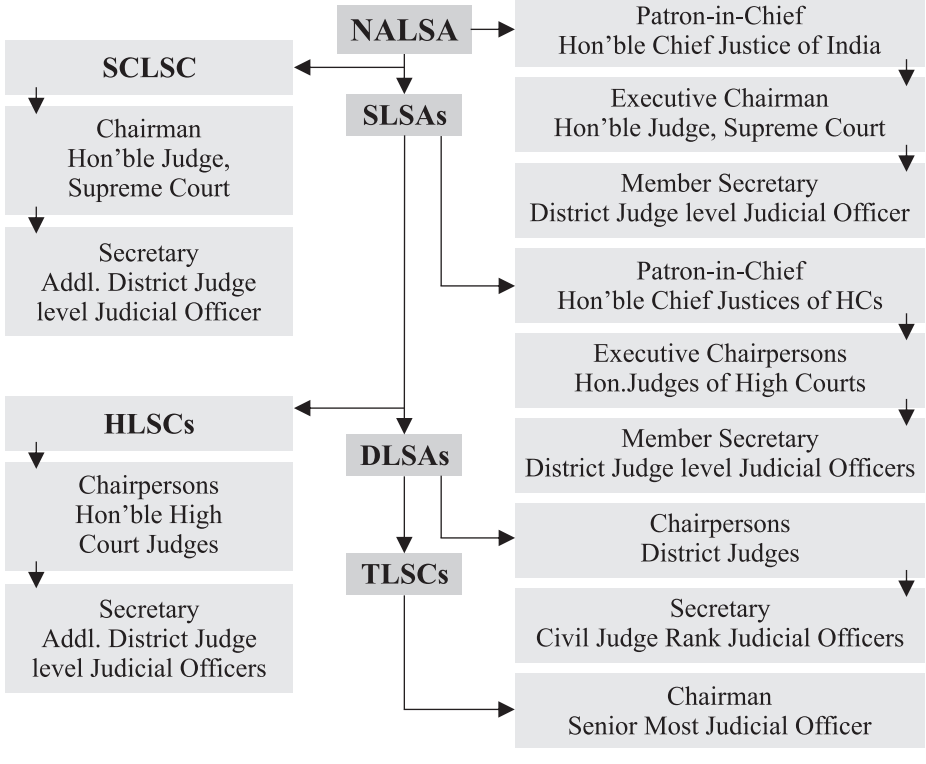
- ARTICLE 39A WAS INTRODUCED IN THE CONSTITUTION BY 42ND AMENDMENT IN 1976 AS ONE OF THE DIRECTIVE PRINCIPLES OF THE STATE POLICY. ARTICLE 39A PROVIDES :
- "THE STATE SHALL SECURE THAT THE OPERATION OF THE LEGAL SYSTEM PROMOTES JUSTICE ON A BASIS OF EQUAL OPPORTUNITY, AND SHALL, IN PARTICULAR, PROVIDE FREE LEGAL AID, BY SUITABLE LEGISLATION OR SCHEMES OR IN ANY OTHER WAY, TO ENSURE THAT OPPORTUNITIES FOR SECURING JUSTICE ARE NOT DENIED TO ANY CITIZEN BY REASON OF ECONOMIC OR OTHER DISABILITIES."

- THE GOVERNMENT OF INDIA APPOINTED A COMMITTEE KNOWN AS "COMMITTEE FOR IMPLEMENTING LEGAL AID SCHEMES" (CILAS) ON 26.09.1980 TO MONITOR AND IMPLEMENT LEGAL AID PROGRAMMES IN ALL THE STATES AND UNION TERRITORIES.
- LEGAL AID AND ADVICE BOARDS WERE SET UP ACROSS SEVERAL STATES IN INDIA BY THE CILAS.

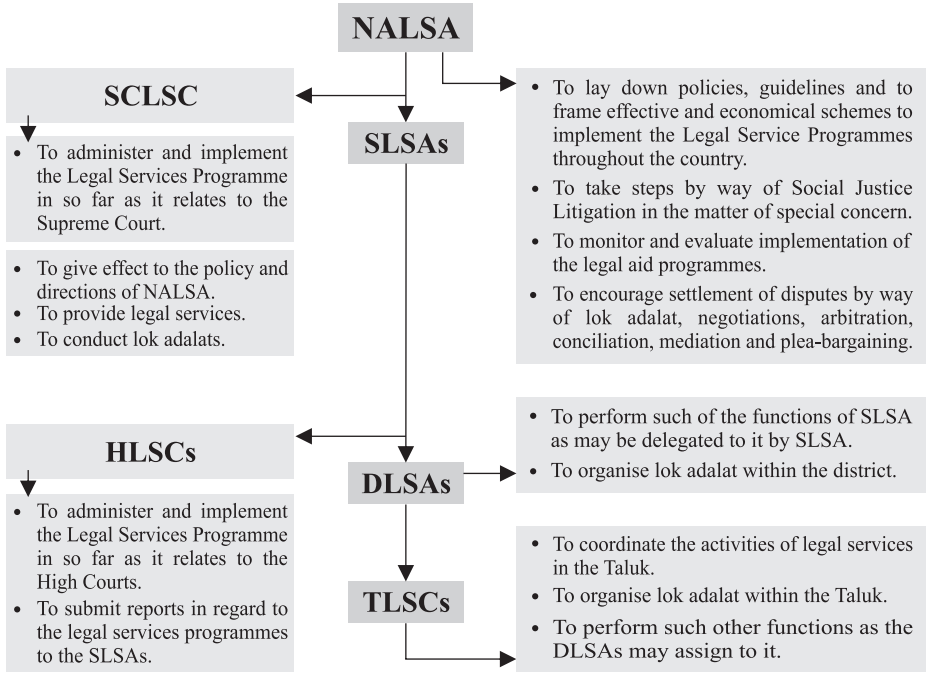
CONTD....

- IN 1987, THE LEGAL SERVICES AUTHORITIES ACT WAS ENACTED BY THE PARLIAMENT TO ESTABLISH A NATIONWIDE UNIFORM NETWORK FOR PROVIDING FREE AND COMPETENT LEGAL SERVICES TO THE WEAKER SECTIONS OF THE SOCIETY.
- THE ACT CAME INTO FORCE ON 9TH NOVEMBER, 1995 WHICH DAY IS NOW OBSERVED AS THE LEGAL SERVICES DAY.

ORGANOGRAM OF LEGAL SERVICES AUTHORITIES/COMMITTEES



FUNCTIONS OF LEGAL SERVICES AUTHORITIES/COMMITTEES



ELIGIBILITY CRITERIA- S. 12 LSA ACT, 1987
MERIT TEST – S.13 LSA ACT, 1987

LEGAL SERVICES ARE PROVIDED TO THE PERSONS ELIGIBLE UNDER SECTION 12 OF THE ACT PROVIDED THAT THE CONCERNED AUTHORITY IS SATISFIED THAT SUCH PERSON HAS A PRIMA FACIE CASE TO PROSECUTE OR TO DEFEND.

LOK ADALAT

- THE LOK ADALAT HAS BEEN GIVEN STATUTORY STATUS UNDER THE LEGAL SERVICES AUTHORITIES ACT, 1987. UNDER THIS ACT, AN AWARD MADE BY A LOK ADALAT IS DEEMED TO BE A DECREE OF A CIVIL COURT AND IS FINAL AND BINDING ON ALL PARTIES AND NO APPEAL LIES AGAINST IT BEFORE ANY COURT.
- LOK ADALAT HAS JURISDICTION TO FACILITATE COMPROMISE/SETTLEMENT BETWEEN THE PARTIES:
  - A) IN ANY CIVIL CASE PENDING BEFORE ANY COURT
  - B) IN ANY CRIMINAL CASE PENDING BEFORE ANY COURT, EXCEPT WHERE THE OFFENCE IS NOT COMPOUNDABLE
  - C) IN ANY OTHER MATTER WHICH FALLS WITHIN THE JURISDICTION OF THE CONCERNED LOK ADALAT THOUGH IT HAS NOT YET BEEN BROUGHT BEFORE ANY COURT
- TO STANDARDISE THE PROCEDURE FOR ORGANISING LOK ADALATS, NALSA HAS FRAMED NALSA (LOK ADALAT) REGULATIONS, 2009

LOK ADALAT U/S 19

THE FOLLOWING TYPES OF MATTERS CAN BE REFERRED TO THE LOK ADALAT:

- MATRIMONIAL / FAMILY DISPUTES
- CRIMINAL COMPOUNDABLE CASES
- LAND ACQUISITION CASES
- LABOUR DISPUTES
- WORKMEN'S COMPENSATION
- BANK RECOVERY CASES INCLUDING CHEQUE DISHONOUR CASES
- PENSION CASES

CONTD....

- HOUSING BOARD AND SLUM CLEARANCE CASES & HOUSING FINANCE CASES
- CONSUMER GRIEVANCE CASES
- ELECTRICITY MATTERS
- TELEPHONE BILLS DISPUTES
- MUNICIPAL MATTERS INCLUDING HOUSE TAX CASES
- DISPUTES WITH CELLULAR COMPANIES ETC.
- MACT MATTERS
- CIVIL DISPUTES
- RENT MATTERS
- EASEMENTS

CONTINUOUS LOK ADALAT : A LOK ADALAT BENCH SITS CONTINUOUSLY FOR A SET NUMBER OF DAYS TO FACILITATE SETTLEMENTS BY DEFERRING UNSETTLED MATTERS TO THE NEXT DATE AND ENCOURAGING PARTIES TO REFLECT ON THE TERMS OF THE MUTUALLY ACCEPTED SETTLEMENT BEFORE ACTUAL SETTLEMENT.

DAILY LOK ADALAT: THIS TYPE OF LOK ADALAT IS ORGANISED ON DAILY BASIS.

MOBILE LOK ADALAT: THE MOBILE LOK ADALATS ARE ORGANISED BY TAKING THE LOK ADALAT SET UP IN A MULTI-UTILITY VAN TO DIFFERENT AREAS FOR RESOLVING PETTY CASES AND ALSO SPREADING LEGAL AWARENESS IN THE AREA.

MEGA LOK ADALAT: THE MEGA LOK ADALAT IS ORGANISED IN THE STATE ON A SINGLE DAY IN ALL COURTS OF THE STATE.

NATIONAL LOK ADALAT: NATIONAL LOK ADALAT IS ORGANIZED IN ALL THE COURTS ON THE SAME DAY ACROSS THE COUNTRY INCLUDING AT THE SUPREME COURT.

PERMANENT LOK ADALAT U/S 22B

PERMANENT LOK ADALAT (P LA) PROVIDES FOR A COMPULSORY PRE-LITIGATIVE MECHANISM FOR CONCILIATION AND SETTLEMENT OF DISPUTES RELATING TO 'PUBLIC UTILITY SERVICES'. THE PLAs HAVE BEEN CONSTITUTED AS A PERMANENT BODY COMPRISING OF A CHAIRPERSON AND TWO OTHER MEMBERS.

UNDER S.22B PLAs CAN EXERCISE JURISDICTION ONLY IN RESPECT OF DISPUTES RELATING TO NOTIFIED PUBLIC UTILITY SERVICES, SUCH AS: (I) TRANSPORT SERVICE (II) POSTAL (III) COMMUNICATION (IV) SUPPLY OF POWER (V) SERVICE IN HOSPITAL/DISPENSARY (VI) INSURANCE SERVICE AND ANY SERVICES WHICH THE CENTRE/STATE GOVT. DECLARES BY NOTIFICATION TO BE A PUBLIC UTILITY SERVICE.

SERVICES PROPOSED TO BE DECLARED AS PUBLIC UTILITY SERVICES:

(VII) BANKING SERVICE; (VIII) PRIVATE FINANCIAL INSTITUTIONS (IX) EDUCATION/EDUCATIONAL INSTITUTIONS; (X) HOUSING AND REAL ESTATE SERVICE;(XI) MAHATMA GANDHI NATIONAL RURAL EMPLOYMENT GUARANTEE ACT, 2005; (X) FUEL INCLUDING LPG, COAL ETC.

REGULATIONS/SCHEMES OF NALSA

NATIONAL LEGAL SERVICES AUTHORITY (FREE AND COMPETENT LEGAL SERVICES) REGULATIONS, 2010

THE HIGHLIGHTS OF THESE REGULATIONS ARE:

- **FRONT OFFICE** MANNED BY RETAINER LAWYERS/PLVS **TO PROVIDE** SERVICES LIKE DRAFTING NOTICES, SENDING REPLIES AND DRAFTING APPLICATIONS, PETITIONS ETC.
- **PANEL LAWYERS:** LEGAL PRACTITIONERS HAVING 3 YEARS EXPERIENCE CAN BE EMPANELLED AS PANEL LAWYERS. RETAINERS ARE APPOINTED AMONGST PANEL LAWYERS TO WORK AT THE FRONT OFFICES.
- **FINANCIAL ASSISTANCE:** IN DESERVING LEGAL AID CASES EXPENSES FOR PAYMENT OF COURT FEES AND OTHER COURT RELATED EXPENSES ARE MET BY THE LEGAL SERVICES AUTHORITIES.
- **SPECIAL ENGAGEMENT OF SENIOR ADVOCATES:** SPECIAL ENGAGEMENT OF SENIOR ADVOCATE CAN BE MADE BY THE EXECUTIVE CHAIRMAN OR THE CHAIRMAN OF THE LEGAL SERVICES AUTHORITY.

NATIONAL LEGAL SERVICES AUTHORITY (LEGAL SERVICES CLINICS) REGULATIONS, 2011

- VILLAGE LEGAL CARE AND SUPPORT CENTRES IN VILLAGES
- LEGAL SERVICES CLINICS IN:

  JAILS
  EDUCATIONAL INSTITUTIONS
  COMMUNITY CENTRES
  PROTECTION HOMES
  COURTS
  JUVENILE JUSTICE BOARDS AND OTHER AREAS.

THE VILLAGE LEGAL CARE AND SUPPORT CENTRES AND LEGAL SERVICES CLINICS ARE MANNED BY TRAINED PARA LEGAL VOLUNTEERS(PLVS) AND PANEL LAWYERS

SCHEME FOR PARA-LEGAL VOLUNTEERS & MODULE FOR THE ORIENTATION-INDUCTION TRAINING

THE PARA LEGAL VOLUNTEERS (PLVS) CAN BE:

- COMMUNITY WORKERS
- TEACHERS
- STUDENTS
- ANGANWADI WORKERS
- DOCTORS
- NGOS AND OTHER SELF HELP GROUPS

PLVS ARE EXPECTED TO HAVE A HIGH DEGREE OF COMMITMENT TO THE CAUSE AS THE PLV SCHEME IS NOT INTENDED TO BE A LIVELIHOOD SCHEME.

PLVS DISCHARGE THE FOLLOWING FUNCTIONS, AMONGST OTHERS:

- AWARENESS
- INTERACTION WITH GOVERNMENT OFFICES
- VISIT TO POLICE STATIONS FOR LEGAL ASSISTANCE
- VISIT TO JAILS

SCHEME FOR LEGAL SERVICES TO DISASTER VICTIMS THROUGH LEGAL SERVICES AUTHORITIES

LEGAL SERVICES ARE PROVIDED TO THE VICTIMS OF DISASTER-BOTH MANMADE AND NATURAL VIZ. RIOTS, FLOOD ETC.

INTERVENTION BY THE LEGAL SERVICES AUTHORITIES :

- ENSURING IMMEDIATE HELP BY GOVT./NGOS
- COORDINATING THE ACTIVITIES OF DIFFERENT DEPARTMENTS/NGOS
- SUPERVISING THE REUNION OF FAMILIES
- SUPERVISING THE HEALTH CARE AND SANITATION
- ENSURING AVAILABILITY OF FOOD, MEDICINE AND DRINKING WATER
- AWARENESS ON THE RIGHTS OF VICTIMS
- ASSISTING IN RESTORATION/RECONSTRUCTION OF VALUABLE DOCUMENTS
- ASSISTING VICTIMS TO GET THE BENEFITS PROVIDED BY THE GOVT
- ASSISTING IN THE PROBLEMS RELATING TO INSURANCE POLICIES

NALSA (LEGAL SERVICES TO THE MENTALLY ILL PERSONS AND PERSONS WITH MENTAL DISABILITIES) SCHEME, 2010

THE SCHEME IS INTENDED TO ASSIST THE PERSONS SUFFERING FROM MENTAL ILLNESS IN THE FOLLOWING MANNER:

- LEGAL SERVICES DURING THE PROCEEDINGS FOR RECEPTION ORDERS
- PROTECTION OF FUNDAMENTAL RIGHT
- VISITS TO PSYCHIATRIC HOSPITALS OR PSYCHIATRIC NURSING HOMES AND OTHER PLACES
- LEGAL SERVICES IN CASE OF FORCED ADMISSION INTO THE PSYCHIATRIC HOSPITALS OR PSYCHIATRIC NURSING HOMES
- FOLLOW UP OF THE CONDITION OF THE MENTALLY ILL PERSONS AGAINST WHOM A RECEPTION ORDER HAS BEEN PASSED
- LEGAL SERVICES DURING INQUISITION PROCEEDINGS
- WHEN THERE IS ATTEMPT TO MISAPPROPRIATE THE PROPERTY OF MENTALLY ILL PERSONS
- LEGAL AWARENESS PROGRAMMES ABOUT THE RIGHTS OF MENTALLY ILL PERSONS

NATIONAL LEGAL SERVICES AUTHORITY (LEGAL SERVICES TO WORKERS OF UNORGANISED SECTOR) SCHEME, 2010

UNDER THE SCHEME:

- AWARENESS IS CREATED AMONGST THE WORKERS IN UNORGANIZED SECTOR ABOUT THE RIGHTS UNDER THE LAW AND
- ASSISTANCE IS GIVEN TO THEM FOR SECURING THE BENEFITS UNDER THE UNORGANISED SOCIAL SECURITY ACT, 2008 AND ALSO SCHEMES THAT ARE PUT IN PLACE BY THE CENTRAL & STATE GOVERNMENTS.

NALSA (LEGAL SERVICES CLINICS IN UNIVERSITIES, LAW COLLEGES AND OTHER INSTITUTIONS) SCHEME, 2013

NALSA BY THIS SCHEME HAS EXTENDED SUPPORT TO THE ESTABLISHMENT OF LEGAL SERVICES CLINICS IN COLLEGES ETC. THE ACTIVITIES OF THE CLINICS ARE PLANNED BY THE COLLEGE CLINIC INCHARGES AND THE LEGAL SERVICES AUTHORITY CONCERNED. THE OBJECTIVES OF THE SCHEME ARE TO:

- SET UP NATIONWIDE COLLEGIATE LEGAL SERVICES CLINICS
- ATTAIN THE IDEALS OF "SOCIAL ECONOMIC AND POLITICAL" JUSTICE
- SPREAD LEGAL AWARENESS AMONG STUDENTS AND PEOPLE AT LARGE
- EXPOSE STUDENTS TO COMMUNITY SERVICES.
- INTRODUCE THE STUDENTS TO SOCIO-ECONOMIC IMPEDIMENTS TO ACCESS TO JUSTICE.
- PROVIDE THE STUDENTS A PLATFORM FOR THE EMPOWERMENT OF SOCIALLY AND ECONOMICALLY BACKWARD.

THANK YOU

SHORT NOTE ON CONSTITUTIONAL PERSPECTIVE OF LEGAL SERVICES

— Raju Ramachandran*

I. INTRODUCTION

Access to justice is essential to the rule of law. And legal aid is essential to provide this access.

The guarantee contained in Article 14 of our constitution is clear. It postulates that '*the state shall not deny to any person equality before the law or equal protection of the laws within the territory of India.*' Article 38 of the Directive Principle of State Policy (DPSP) is equally clear. It says that '*the state shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which Justice, social, economic and political shall inform all the institutions of national life.*'The institutions of national life are primarily three - the judiciary, the legislative and the executive. The Directive in Article 38 is to all the three wings of government. Hence, the judiciary has to interpret all laws in light of the guarantee contained in Article 14 read with the Directive contained in Article 38.

Equality in access to justice got a boost when Article 39A was introduced in the Directive Principle of State Policy by the 42nd Constitutional Amendment Act, 1976. It provides that '*the State shall secure that the operation of the legal system promotes justice, on a basis of equal opportunity, and shall, in particular, provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities*.'. Hence, legal aid is not a charity or bounty, but is a constitutional obligation of the state and right of the citizens. Legal aid strives to ensure that the constitutional pledge is fulfilled in its letter and spirit and equal justice is made available to the downtrodden and weaker sections of the society. It is the duty of the State to see that the legal system promotes justice on the basis of equal opportunity to all its citizens. It must therefore arrange to provide free legal aid to those who cannot access justice due to economic and other disabilities.

This note on Constitutional Perspectives is divided into the following Parts. Part II traces the origin and objective of Article 39A and looks into the other similar provisions in our statutes and codes. Part III will deal with the state of undertrials and the consequences of them languishing in jail. Part IV will deal with the Interpretation of Fundamental Rights in light of Directive Principles. Part V will focus on different judicial decisions on Article 21 linked with Legal Aid. Part VI will discuss the constitutional safeguards under Article 20(3) and Article 22(1).

II. ARTICLE 39A AND OTHER PROVISIONS

Since 1952, the Government of India started addressing the question of legal aid for the poor in various conferences of Law Ministers and Law Commissions. Different legal aid schemes were floated through Legal Aid Boards, Societies and Law Departments in various states. In 1958, the 14th Report of the Law Commission advocated legal aid. Citing the Preamble's pledges and Article 14's assurance of equality before law and equal protection of the law, the Commission felt that if a person is unable to access the courts for having redressal of wrongs or for defending himself

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against a criminal charge, justice becomes unequal, and laws meant for the protection of everyone have no meaning for the poorer section of the population. The Report therefore advocated free legal aid to the indigent.

Thereafter, in a report on Free Legal Aid in 1971, Justice Bhagwati observed "*even while retaining the adversary system, some changes may be effected whereby the judge is given greater participatory role in the trial so as to place poor, as far as possible, on a footing of equality with the rich in the administration of justice.*"

The late Justice Krishna Iyer was appointed as the Chairman of the Committee for Legal Aid in October 1972. The Committee after conducting sample surveys of large parts of the country submitted a 275 page report to the Government in May, 1973. Titled "Processual Justice to Poor," it dealt with the nexus between law and poverty, and spoke of Public Interest Litigations in this context. It emphasized the need for an active and widespread legal aid system that enables law to reach the people, rather than requiring people to reach the law. The report observed that it is the democratic obligation of the State towards its subjects to ensure that the legal system becomes an effective tool in helping secure the ends of social justice. Justice Iyer coined the word "Juridicare" to cover a scheme of legal aid which brought justice to the doorstep of the lowly and which was comprehensive in its coverage.

Article 39A was inserted, as already stated, in 1976. Justice Krishna Iyer and Justice Bhagwati joined forces as a two member committee on juridicare and released their final report in August 1977. The report, while emphasizing the need for a new philosophy of legal service programme cautioned that it 'must be framed in the light of socio-economic conditions prevailing in the country.' It further noted that 'the traditional legal service programme which is essentially Court or litigation oriented, cannot meet the specific needs and the peculiar problems of the poor in our country'. The report also included draft legislation for legal services, and referred to Social Action Litigation.

In 1980, a national committee was constituted, under the chairmanship of Justice P.N. Bhagwati, to oversee and supervise Legal Aid programs throughout the country. This committee came to be known as Committee for Implementing Legal Aid Schemes (CILAS) and started monitoring legal aid activities throughout the country.

The introduction of Lok Adalats added a new chapter to the justice dispensation system of this country and succeeded in providing a supplementary forum to the litigants for conciliatory settlement of their disputes. The year 1987, proved to be very significant in Legal Aid History as the "Legal Services Authorities Act" was enacted to give a statutory base to the Legal Service programs throughout the country and bring about a uniform pattern. This Act was finally enforced on the 9th of November, 1995 after certain amendments were introduced by the Amendment Act of 1994. With this Act, Article 39A was given its full effect, and now we have Legal Service Authorities in all the courts of the country.

Although Article 39A is a path-breaking provision in our Constitution, there are other provisions in our statutes which also talk of providing lawyers to those who cannot afford the services of one. The Code of Civil Procedure was amended in 1976 to insert Rule 9A in Order 33. This provision empowers the Court to assign a pleader to an indigent person who is not represented by any pleader. Courts should on the first available opportunity has to ascertain whether a litigant is in need of free legal services or not and then the same has to be extended to her.[1]

[1] Sugreev v Sushila Bai AIR 2003 Raj 149

Similarly, the Code of Criminal Procedure, 1973 (Section 304)provides for legal aid to accused at State expense when in a trial before the Court of Session, the accused is not represented by a pleader, and where it appears to the Court that the accused has not sufficient means to engage a pleader.

Chapter II of the Bar Council of India Rules deals with Standards of Professional Conduct and Etiquette. Section VIprescribes a Duty to Render Legal Aid. It states:

"46. Every advocate shall in the practice of the profession of law bear in mind that any one genuinely in need of a lawyer is entitled to legal assistance even though he cannot pay for it fully or adequately and that within the limits of an Advocate's economic condition, free legal assistance to the indigent and oppressed is one of the highest obligations an advocate owes to society."

Another issue which regularly features in any discourse relating to legal aid is that of court fees. Although the court fee is largely nominal, in some civil suits, the court fees are high since they are calculated on ad valorem basis. Recently, the Delhi High Court struck down the Court Fee (Delhi Amendment) Act 2012 (by which the Court Fees had been increased by almost ten times) for being unconstitutional and discriminatory. The High Court has held that the action by Delhi Government discriminated against those who had little means to pay fee and hampered their chances to litigate.[2]

III. PRISONERS LANGUISHING IN JAIL FOR LONG

The plight of undertrial prisoners who suffer prolonged incarceration without trial has been well documented in numerous landmark judgments. However, the problem persists and even today there are numerous prisoners in jails all around the country who are languishing without an end in sight to their trial. Hence, for a legal services lawyer, the issue of undertrial prisoners remains a burning issue.

One of the earliest cases of public interest litigationon behalf of undertrialsthat was institutedwas the case of *Hussainara Khatoon v. State of Bihar*.[3] The case was concerned with a series of articles published in the Indian Express which exposed the plight of undertrial prisoners in the state of Bihar. A writ petition was filed by an advocate drawing the Court's attention to the deplorable plight of these prisoners. Many of them had been in jail for longer periods than the maximum permissible sentences for the offences they had been charged with. The Supreme Court accepted the *locus standi* of the advocate to maintain the writ petition. Thereafter, a series of cases followed in which the Court gave directions through which the 'right to speedy trial' was deemed to be an integral and an essential part of the protection of life and personal liberty.

Soon thereafter, two noted professors of law filed writ petitions in the Supreme Court highlighting various abuses of the law, which, they asserted, were a violation of Article 21 of the Constitution.[4] These included inhuman conditions prevailing in protective homes, long pendency of trials in court, trafficking of women, importation of children for homosexual purposes, and the non-payment of wages to bonded labourers among others. The Supreme Court accepted their *locus standi* to represent the suffering masses and passed guidelines and orders that greatly ameliorated the conditions of the affected personns.

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[2] *Delhi High Court Bar Association &Anr v Governemnt of NCT of Delhi* [WP (Civil) 4770 of 2012]
[3] (1980) 1 SCC 81
[4] Upendra Baxi (Dr) v. State of U.P., (1983) 2 SCC 308
[5] Sheela Barse v. State of Maharashtra, (1983) 2 SCC 96

In another case, a journalist, *Ms. Sheela Barse*[5], took up the plight of women prisoners who were confined in the police jails in the city of Bombay. She asserted that they were victims of custodial violence. The Court took cognizance of the matter and directions were issued to the Director of College of Social Work, Bombay. He was ordered to visit the Bombay Central Jail and conduct interviews of various women prisoners in order to ascertain whether they had been subjected to torture or ill-treatment. He was asked to submit a report to the Court in this regard. Based on his findings, the Court issued directions such as the detention of female prisoners only in designated female lock-ups guarded by female constables, and that accused females could be interrogated only in the presence of a female police official.

In *Veena Sethi v. State of Bihar*,[6] the Court discussed the plight of prisoners located in Hazaribagh Central Jail. Regarding mentally unsound prisoners, it decided to direct their release from jail since it would not be in their interest or the society's interest to set them free. Moreover, the only mental asylum in the state was overcrowded. It however, directed the jail superintendent to release them if in future they become sane upon proper examination by psychiatrists. The State Government was also directed not to pursue their cases since they have already served 25 years in jail. Regarding other prisoners who have spent several decades in jail, the court quashed the charges against them (for some even charges u/s 302 IPC) and directed that they be released forthwith and be given some money so that they could cover their expenses to return to their native village and maintain themselves for a period of one week.

In *Francis Coralie Mullin vs. Administrator, Union Territory of Delhi*[7] the Court held that right to life means the right to live with basic human dignity. In the case, the petitioner, a British national, who was detained in the Central Jail, Tihar, in India, contended that her five-year-old daughter and her sister were not allowed to have interview with her for more than five minutes in a month. In the context of the detention order under Article 22 and its effect on Article 21, the Court held that while arriving at the proper meaning and content of the right to life, one must remember that it is a constitutional right which is being expounded, and moreover it is a provision enacting a fundamental right and the attempt of the court should always be to expand the reach and ambit of the fundamental right rather than to attenuate its meaning and content. The Court observed that the right to life enshrined in Article 21 cannot be restricted to mere animal existence. It means something much more than just physical survival, and held that it is the right to live with human dignity and all that goes along with it.It would include the bare necessities of life such as adequate nutrition, clothing, shelter over the head and facilities for reading, writing and expressing oneself in diverse forms, free movement and co-mingling with fellow human beings.

Often undertrial prisoners are kept in solitary confinement and thus legal services lawyers must enquire from their clients whether they have been subjected to it. Sections 73 and 74 of the Indian Penal Code 1860 deal with Solitary Confinement. Solitary confinement is a very severe form of punishment and is awardable only by Court.[8] The Indian Penal Code and the Code of Criminal Procedure regard punitive solitude as too harsh and the Legislature cannot in any case dilute the restrictions of Section 73 and 74 of the Indian Penal Code.[9] Solitary confinement should not be ordered unless there are special features appearing in the evidence such as extreme violence or brutality in the commission of the offence.[10] It can be imposed only by a court, and, in view of its

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[6] (1982) 2 SCC 583
[7] (1981) 1 SCC 608
[8] Sunil Batra v Delhi Administration, (1978) 4 S.C.C. 494,102-103.
[9] *Id.* 94
[10] Re Ramanjulu Naidu, A.I.R. 1947 Mad. 381, as quoted in *Id.* 91.
[11] Ranbir Singh Sehgal v State of Punjab, A.I.R. 1962 S.C. 510,3.

dangerous potentialities, stringent conditions are imposed thereon.[11] When a prisoner is committed under warrant for jail custody under Section 366(2) of Cr. P.C. and if he is detained in solitary confinement which is a punishment prescribed by Section 73 IPC, it will amount to imposing punishment for the same offence more than once which would be violative of Article 20(2) of the Constitution.[12]

Another handy tool with the legal services lawyers is the Probation of Offenders Act which is a reformative measure. Its object is to reclaim amateur offenders who, if spared the indignity of incarceration, can be usefully rehabilitated in society.[13] The Probation of Offenders Act recognises the importance of environmental influence in the commission of crimes and prescribes a remedy whereby the offender can be reformed and rehabilitated in society.[14] It tries to prevent the turning of youthful offenders into criminals by their association with hardened criminals of mature age within the walls of a prison.[15] The method adopted is to attempt their possible reformation instead of inflicting on them the normal punishment for their crime.[16] Broadly stated, the Act distinguishes offenders below 21 years of age and those above that age, and offenders who are guilty of having committed an offence punishable with death or imprisonment for life and those who are guilty of a lesser offence.[17] While in the case of offenders who are above the age of 21 years absolute discretion is given to the court to release them after admonition or on probation of good conduct, subject to the conditions laid down in the appropriate provisions of the Act, in the case of offenders below the age of 21 years an injunction is issued to the court not to sentence them to imprisonment unless it is satisfied that, having regard to the circumstances of the case, including the nature of the offence and the character of the offenders, it is not desirable to deal with them under Sections 3 and 4 of the Act.[18]

To save the prisoners from languishing in jail for long, legal services lawyers can take recourse to the concepts of parole and furlough to enable them have continuing ties with the outside world. Parole and furlough are parts of the penal and prison system for humanizing prison administration but the two have different purposes. Furlough is a matter of right but parole is not. Furlough is to be granted to the prisoner periodically irrespective of any particular reason merely to enable him to retain family and social ties and avoid ill-effects of continuous prison life. The period of furlough is treated as remission of sentence. Parole, on the other hand, is not a matter of right and may be denied to a prisoner even when he makes out sufficient case for release on parole if the competent authority is satisfied on valid grounds that release of a prisoner on parole would be against the interest of society or the prison administration.

IV. INTERPRETATION OF FUNDAMENTAL RIGHTS IN LIGHT OF DIRECTIVE PRINCIPLES

Article 39A states that the State shall provide legal services or in any other way ensure that justice is not denied to any citizen on account of economic or other disabilities. This should be held to be implicit in Article 21, that is, the fundamental right to life and personal liberty. Article 21 states that no person shall be deprived of his life or personal liberty except according to procedure established by law.

Thus, when Article 21 and 39A are read together, it becomes quite clear that equal justice required byArticle 39A is included within life and liberty of Article 21. Article 39A further gives the

[12] Sunil Batra, *supra* note 10,250.
[13] Arvind Mohan Sinha v Amulya Kumar Biswas and Ors (1974) 4 SCC 222 para 11
[14] Ibid para 11
[15] RamjiMissir and Anr v State of Bihar AIR 1963 SC 1088 para 10
[16] Ibid Para 10; Jugal Kishore Prasad v State of Bihar (1972) 2 SCC 633 para 6
[17] Rattan Lal v State of Punjab AIR 1965 SC 444 para 4; Abdul Qayum v State of Bihar (1972) 1 SCC 103 para 3
[18] Ibid

State a way to ensure that this Fundamental Right of the accused is not infringedby provision of free legal aid and opportunity to secure justice. So although Article 39A is not enforceable in a court of law by virtue of it being a Directive Principle, it may draw its mandate from Article 21.

The State must provide services of a lawyer to the accused if he or she is incapable of securing one on his or her own and if the circumstance demands it. When the enjoyment of justice becomes a right only of the rich and is denied to the poor, the threat to democracy becomes a real one because the existence of a democracy depends on the belief of the people in its efficacy. It also defeats the promise contained in the Preamble to our Constitution, of economic justice and equality of status and opportunity.

Right from the time of its introduction, petitions invoking Article 39A have come up many a time in courts of law. Most of these seek maintainability through Article 21 as 39A is not enforceable. In this part, some of the main decisions will be highlighted.

The first of these judgments is a 1978 decision of the Supreme Court in *Madhav Hayawadanrao Hoskot v State of Maharashtra*.[19] The case came up as a Special Leave Petition by the accused, M.H. Hoskot, who was charged with forgery and misrepresentation of a college degree. The shopkeeper to whom he went for getting a fake seal made gave pre-emptive information to the police. The Sessions court held the accused guilty beyond reasonable doubt for grave offences, but softened the punishment to a large degree. This gave rise to two appeals in the High Court: one by the Petitioner against the conviction and the other by the Respondents for the nominal punishment. High Court dismissed the Petitioner's appeal and allowed the Respondent's, increasing the punishment to three years rigorous imprisonment.The appeal in the Supreme Court came up against this harsh punishment, but after a period of four years. The reasons stated by the Petitioner for this delay was that a copy of the High Court judgment had not been served to him. The Supreme Court identified the perils of the legal system in this: first, the fact that prisoners are at the mercy of the prison officials with regard to their right to appeal; second, there is no statutory provision for free legal services to a prisoner because of which a right of appeal for the legal illiterates is nugatory and, therefore, a negation of that fair legal procedure which is implicit in Article 21 of the Constitution as was stated in the *Maneka Gandhi*[20] case. Though the Supreme Court provided the petitioner a lawyer, he decided to argue on his own.

The Court in its judgment categorically stated that the provision of the Code of Criminal Procedure granting a right to appeal was implicit in Article 21 of the Constitution. It could not be denied under any circumstances and it is the duty of courts to facilitate an accused invoking this right. It further stated that Article 39A is an 'interpretive tool' for Article 21. It affirms the position in *Maneka Gandhi v Union of India*[21] that personal liberty could not be cut down without fair legal procedure. To ensure this was the State's duty and not any form of charity. Further, though the services were to be free to the beneficiary, the lawyer had to be remunerated at the State's cost. Also taking note of Section 304 of Cr.P.C., the Supreme Court stated that if a prisoner who is sentenced to imprisonment is virtually unable to exercise his constitutional and statutory right of appeal, inclusive of special leave to appeal, for want of legal assistance, there is implicit power in the Court under Article 142, read with Articles 21, and 39A of the Constitution, power to assign counsel for such imprisoned individual for doing complete justice. This is a necessary incident of the right of appeal conferred by the Cr.PC. and allowed by Article 136 of the Constitution.

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[19] (1978) 3 SCC 544
[20] (1978) 1 SCC 248
[21] (1978) 1 SCC 248
[22] (1980) 1 SCC 91

The decision that came after this was *Hussainara Khatoon v Home Secretary, State of Bihar*.[22] The case came up to the court by writ petition filed by a public spirited lawyer based on newspaper reports. In the directions issued by the Supreme Court, the State of Bihar was required to file a revised chart of all under-trial prisoners, categorizing them between major and minor offences, which had not been carried out. It was found from lists of under-trial prisoners filed by the state that many of the prisoners had been kept in jail longer than the maximum period for which they could be sentenced, if convicted. These convicts were directed to be released with immediate effect as further detention would be illegal and violative of Article 21.

It was further discovered that many prisoners, charged for bailable offences, were still in jail because no application for bail had been made, or they were too poor to furnish it. This was because of their inability to avail a lawyer who could secure bail for them. The Court stated that such a situation signifies a desperate needed for an appropriate legal service program, but nothing was done in that context till then. It affirmed *Maneka Gandhi v Union of India*[23] and *MH Hoskot v State of Maharashtra*.[24]

The court strongly recommended to government that it was high time to get a comprehensive legal service program into the country which would ensure not only the mandates of stretched interpretations of art 14 (equal justice) and art 21 (life and liberty), but also compulsion embodied in 39A. Also, for an accused unable to get representation, it was a constitutional right that he may demand from the state. If the state fails to provide such machinery, it amounts to a denial of liberty under 21. Also, trial itself may be vitiated solely because article 21 is being denied to the accused.

In *Khatri (II) v State of Bihar*,[25] affidavits were filed by the Respondents including particulars of the Bhagalpur Central Jail. One of the issues discussed here was that the blinded prisoners brought before the Judicial Magistrates were not provided legal representation. The reason given was that none of them asked for representation.

The court stated that this was a gross violation of the principles laid down by it in the *Hussainara Khatoon*[26] case. It further states that the constitutional obligation to provide free legal services to an indigent accused does not arise only when the trial commences but also attaches when the accused is for the first time produced before the magistrate. It is elementary that the jeopardy to his personal liberty arises as soon as a person is arrested. That is the stage at which an accused person needs competent legal advice and representation and no procedure can be said to be reasonable, fair and just which denies legal advice and representation to him at this stage. The exercise of this right is not conditional on the accused asking for assistance. The magistrate or sessions court before which accused appears has the obligation to inform the accused of his right to avail free legal services if he is unable to afford it.

As regards financial constraints pleaded by the State, the Court stated that the State may have its financial constraints and its priorities in expenditure but, these arguments cannot be used to deprive the citizens of their constitutional rights. The court cited *Rhem v. Malcolm*. 377 F. Supp. 995 which held that "*the law does not per (sic) any Government to deprive its citizens of constitutional rights on a plea of poverty*" and also quoted the words of Justice Blackmum in *Jackson v. Bishop* 404. F. Supp. 2d 571 wherein he stated that the "*humane considerations and constitutional requirements are not in this day to be measured by dollar considerations.*"

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[23] (1978) 1 SCC 248
[24] (1978) 3 SCC 544
[25] (1981) 1 SCC 627
[26] (1980) 1 SCC 91
[27] (1986) 2 SCC 401

In *Sukh Das v Union Territory of Arunachal Pradesh*,[27] it was settled that free legal assistance at the State's cost is a fundamental right of the accused if the offence is such that it may involve jeopardy to his life or personal liberty. This is implicit in the requirement of reasonable, fair and just procedure prescribed by Article 21.

In *Centre for Legal Research v State of Kerala*,[28] the question was whether voluntary organizations or social action groups engaged in legal aid programs should be supported by the state government, and if yes, then till what extent? CJ Bhagwati said that legal service was not a charity but a social entitlement of the people. Those in need of assistance were not mere beneficiaries but participants in the entire process. Voluntary organizations and social action groups engaged in legal aid programs were the best way to ensure participation of the people. These organizations, because of the specialized nature of their functions, are well-versed with the people and their needs. Thus they must be encouraged and supported by the State. But they shall not be under control or direction of the State.

In a similar case much later in *State of Maharashtra v Manubhai Pragaji Vashi*,[29] the particular question of grants-in-aid to non-governmental law colleges was dealt with. It was held that provision of grants was duty of State which came out of a reading of Article 39A with 21. It also affirmed the position of Supreme Court in the previous cases.

The series of judgments by the Supreme Court dealing with this issue concur in their view that free legal aid is a fundamental right of the accused under Article 21 and cannot be denied. It is the duty of the State to ensure that justice is imparted equally and in furtherance of this, Magistrates and Sessions Courts (starting points of trials) have the onus of informing the accused of their right to legal service, and it is no excuse to say that the accused did not ask the court for assistance in representation. The State's duty also extends to funding of voluntary organizations and social groups that promote legal services to the deprived in order to ensure that the aim of Article 39A is achieved.

Article 14 guarantees the right to equality by stating that the State shall not deny to any person equality before the law or the equal protection of the laws. The aim is to provide opportunities for equal protection of the laws to those who lack the means to access them. An accused cannot get the protection of laws if he is not able to defend himself fairly in a court of law. Such a person may be convicted merely because he could not seek protection of the law and not because he was guilty. Our criminal justice system is based on the principle of innocent until proven guilty. This is to ensure that nobody who is innocent is made to suffer. In such a system, it is unfair to convict a person merely because he is not affluent enough to seek protection under the law.

V. JUDICIAL DECISIONS UNDER ARTICLE 21 LINKED WITH LEGAL AID

In a number of cases, the Supreme Court has established the proposition that the right to speedy trial is a Fundamental Right implicit in Article 21 because no procedure can be fair unless it ensures a speedy determination of the guilt of the accused. Looking at it in another way, it is in the society's interest that the trial concludes early and if the accused is guilty, he is duly punished. On the other hand, if the accused is not found to be guilty, an early conclusion of the trial is necessary to reduce his ordeal and vindicate his honour as soon as possible. Delay frustrates this objective and is detrimental to the interest of everyone.

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[28] (1986) 2 SCC 706
[29] (1995) 5 SCC 730
[30] (2002) 7 SCC 6

In *State v Narayan Waman Nerukar*,[30] the Supreme Court held that while considering the question of delay, the court has a duty to see whether the prolongation was on account of any delaying tactics adopted by the accused and other relevant aspects which contributed to the delay. Number of witnesses examined, volume of documents likely to be exhibited, nature and complexity of the offence which is under investigation or adjudication are some of the relevant factors. It was held that there could be no empirical formula of universal application is such matters. Each case has to be judged in its own background and special features. Similarly, in the case of *Anil Rai v State of Bihar*,[31] it was also held that long delay in pronouncing judgment after the arguments were concluded shakes the confidence of the people in the judicial system and affects the rights of parties under Article 21.

Delay in the trial will not vitiate the trial where the accused himself was responsible for a part of the delay and he was not prejudiced in the preparation of his defense by reason of his delay.[32] In cases where due to various circumstances the quashing of prosecution is not possible, bail should be granted on account of delay in concluding trial proceedings especially where there is no substantial risk of the accused's absconding.[33] Similar will be the case during hearing of the appeal also. In the case of *Akhtari Bi v State of Madhya Pradesh*,[34] it was held that when an appeal is filed against conviction and the appeal could not be disposed of for more than five years and the accused is in jail, he may be released on bail.

In the case of *Naresh Kumar Yadav v Ravindra Kumar*,[35] the accused moved an application for anticipatory bail, but the Supreme Court refused to grant the same and directed the accused to proceed for regular bail under section 439 of the CrPC. It also directed the trial court to dispose of the bail application without delay and on that day itself without adjourning the matter. Such has been the practice of the Supreme Court wherein in umpteen number of cases the Supreme Court has refused to grant anticipatory bail to the accused but has directed the trial court to dispose off the bail application on the same day as it has been presented before it.

A major breakthrough in the rights of prisoners facing death penalty came recently in the case of *Shatrughan Chauhan & Others v Union of India*.[36] Among other things, it held that undue long delay in execution of sentence of death will entitle the condemned prisoner to approach the Supreme Court under Article 32. However, the Court will only examine the circumstances surrounding the delay that has occurred and those that have ensued after sentence was finally confirmed by the judicial process. The Court cannot reopen the conclusion already reached but may consider the question of inordinate delay to decide whether the execution of sentence should be carried out or should be altered into imprisonment for life. Indisputably, this Court, while considering the rejection of the clemency petition by the President, under Article 32 read with Article 21 of the Constitution, cannot excuse the agonizing delay caused to the convict only on the basis of the gravity of the crime.

The Court also noted that there is no provision in any of the Prison Manuals for providing legal aid, for preparing appeals or mercy petitions or for accessing judicial remedies after the mercy petition has been rejected. Various judgments of this Court have held that legal aid is a fundamental right under Article 21. Since the Supreme Court has also held that Article 21 rights continue in a convict till his last breath, even after rejection of the mercy petition by the President, the convict can approach a writ court for commutation of the death sentence on the ground of supervening events, if available.He can challenge the rejection of the mercy petition and legal aid should be provided to the convict at all

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[31] (2001) 7 SCC 318
[32] Ankul Chandra Pradhan v Union of India (1996) 6 SCC 354
[33] Babu v State of Uttar Pradesh (1978) 1 SCC 579
[34] (2001) 4 SCC 355
[35] (2008) 1 SCC 632
[36] (2014) 3 SCC 1

stages. Accordingly, Superintendents of Jails were directed to should intimate the rejection of mercy petitions to the nearest Legal Aid Centre, apart from intimating the convicts.

VI. CONSTITUTIONAL SAFEGUARDS UNDER ARTICLE 20(3) AND ARTICLE 22(1)

One of the provisions of the Constitution which is most often used in criminal appeals by the convicts is the right against self-incrimination as contained in Article 20(3). The privilege against self incrimination is a fundamental canon of most modern jurisdictions. Art. 20(3) which embodies this privilege read, "*No person accused of any offence shall be compelled to be a witness against himself*." This means that no one is bound to criminate himself. Hence, although an accused person may of his own accord make a voluntary statement as to the charge against himself, the judge/magistrate, before receiving such statement from him is required to caution him that he is not obliged to sayanything and that what he does say may be used as evidence against himself. Thus, there also arises the rule that evidence of a confession by the accused is not admissible unless it is proved that such confession was free and voluntary.

The privilege against self-incrimination thus enables the maintenance of human privacy in the enforcement of criminal justice. It also goes with the maxim *NemoTeneturSeipsumAccusare* i.e., 'No man, not even the accused himself can be compelled to answer any question, which may tend to prove him guilty of a crime, he has been accused of.' If the confession from the accused is derived from any physical or moral compulsion (be it under hypnotic state of mind) it should stand to be rejected by the court. The right against forced self-incrimination, widely known as the Right to Silence is enshrined in the CrPC and the Constitution. In the CrPC, the legislature has guarded a citizen's right against self-incrimination. S.161 (2) of the Code of Criminal Procedure states that "every person is bound to answer truthfully all questions, put to him by [a police] officer, other than questions the answers to which would have a tendency to expose that person to a criminal charge, penalty or forfeiture."But where the accused makes a confession without any inducement, threat or promise art 20(3) does not apply.

Since voluntary confessions without any threats or inducements do not attract the bar under Article 20(3), investigation officers take refuge under this provision to try and press for a conviction based solely on confessional statements and corroborating evidences. In reality often these evidences are pre-planted to make up a believable story and the accused are threatened with dire consequences to confess as per the police's version of events. In many cases on appeal, the Supreme Court has turned down the convictions and has set the accused free. This happened in the recent judgment of the Supreme Court in the case of *Adambhai Suleman bhai Ajmeri and Ors.Vs. State of Gujarat*[37] wherein all the convicts were released after their appeals against their conviction was upheld.

An issue of contemporary interest is that of narco analysis, polygraph and brain mapping. In *Selvi v State of Karnataka*[38], the constitutionality of these tests was challenged and the Court held that the compulsory administration of the narco analysis, brain mapping and polygraph tests violates Article 20(3) of the Constitution of India and the right to privacy guaranteed by Article 21. Also forcing an individual to undergo any of the three tests violates the standard of "substantive due process" which is required for restraining personal liberty. Thus, it extended the ban to civil cases as well, by reading Article 20(3) into Article 21. The tests also cannot be conducted using Sections 53, 53A and 54 of the Code of Criminal Procedure. Placing reliance on the tests violates the right to fair trial guaranteed by Article 21 of the Constitution. "Compelling public interest" cannot justify the dilution of

[37] 2014(7) SCALE 100
[38] (2010) 7 SCC 263

constitutional rights. The only concession granted by the Court was that the tests can be administered if a person volunteers for the same, but the test results cannot be admitted as evidence. However, any information or material discovered, in accordance with Section 27 of the Indian Evidence Act can be admitted as evidence. The guidelines given by the NHRC in relation to polygraph tests (2000) need to be strictly adhered to in conducting the tests.

However, the provision of Article 20(3) protects only the accused and cannot be invoked in favour of a witness. He cannot refuse to testify on the ground that his answers might subject him to a criminal prosecution at a future date.[39] Thus, it is now settled law that the immunity against self-incrimination under Article 20(3) is available only to a person who is 'accused' of an offence in the proceeding where he is called upon to testify and not to a mere witness in that proceeding.[40]

The Supreme Court in *NandiniSatpathy v PL Dani*[41] has said that if the police can interrogate to the point of self-accusation, the subsequent exclusion of that evidence at the trial hardly helps because the harm has been already done. This is because the police will prove through other evidence what they have procured through forced confession. Both precedent procurement and subsequent exhibition of self-criminating testimony are obviated by intelligent constitutional anticipation. Every fact which has a nexus to any part of a case is relevant, but such nexus with the case does not make it noxious to the accused. Relevance may co-exist with innocence and constitutional censure is attracted only when inference of innocence exists. And an incriminatory inference is not enough for a confession. Only if, without more, the answer establishes guilt, does it amount to a confession. Clarifying the judgment in this case, the Supreme Court in the case of *Mohammed Ajmal Amir Kasab v State of Maharashtra*[42] has stated that the failure to provide legal aid to the accused at the beginning, or before his confession is recorded under section 164 of CrPC would not vitiate the trial. The object of the criminal law process is to find out the truth and not to shield the accused from the consequences of his wrongdoing. A defense lawyer has to conduct the trial on the basis of the materials lawfully collected in the course of investigation. The test to judge the Constitutional and legal acceptability of a confession recorded under Section 164 of CrPC is not whether the accused would have made the statement had he been sufficiently scared by the lawyer regarding the consequences of the confession. The true test is whether or not the confession is voluntary. If a doubt is created regarding the voluntariness of the confession, notwithstanding the safeguards stipulated in Section 164 it has to be trashed; but if a confession is established as voluntary it must be taken into account, not only constitutionally and legally but also morally.

However, in the aforesaid decision, the Court unambiguously held that the right of access to legal aid and to consult and be defended by a legal practitioner arises when a person arrested in connection with a cognizable offence is first produced before a magistrate. The Court held, *inter alia*, that:

> "*474.… It is the duty and obligation of the Magistrate before whom a person accused of committing a cognizable is first produced to make him fully aware that it is his right to consult and be defended by a legal practitioner and, in case he has no means to engage a lawyer of his choice, that one would be provided to him from legal aid at the expense of the State. The right flows from Articles 21 and 22(1) of the Constitution and needs to be strictly enforced. We accordingly, direct all the Magistrates in the country to faithfully discharge the aforesaid duty and obligation and further make it clear that any failure to*

[39] Narayanlal v Maneck AIR 1961 SC 29
[40] LaxmipatChoraria v State of Maharashtra AIR 1968 SC 938
[41] (1978) 2 SCC 424
[42] (2012) 9 SCC 1

fully discharge the duty would amount to dereliction in duty and would make the Magistrate concerned liable to departmental proceedings.

475.… It needs to be clarified here that the right to consult and be defended by a legal practitioner is not to be construed as sanctioning or permitting the presence of a lawyer during police interrogation. According to our system of law, the role of a lawyer is mainly focused on court proceedings. The accused would need a lawyer to resist remand to police or judicial custody and for granting of bail; to clearly explain to him the legal consequences in case he intended to make a confessional statement in terms of Section 164 CrPC; to represent him when the court examines the charge-sheet submitted by the police and decides upon the future course of proceedings and at that stage of the framing of charges; and beyond that, of course, for the trial. It is thus to be seen that the right to access to a lawyer in this country is not based on the Miranda *principles, as protection against self-incrimination, for which there are more than adequate safeguards in Indian laws. The right to access to a lawyer is for very Indian reasons; it flows from the provisions of the Constitution and the statutes, and is only intended to ensure that those provisions are faithfully adhered to in practice.*

476. At this stage the question arises, what would be the legal consequence of failure to provide legal aid to an indigent who is not in a position, on account of indigence or any other similar reasons, to engage a lawyer of his own choice?

477. Every accused unrepresented by a lawyer has to be provided a lawyer at the commencement of the trial, engaged to represent him during the entire course of the trial. Even if the accused does not ask for a lawyer or he remains silent, it is the constitutional duty of the court to provide him with a lawyer before commencing the trial. Unless the accused voluntarily makes an informed decision and tells the court, in clear and unambiguous words, that he does not want the assistance of any lawyer and would rather defend himself personally, the obligation to provide him with a lawyer at the commencement of the trial is absolute, and failure to do so would vitiate the trial and the resultant conviction and sentence, if any, given to the accused."

Alongwith Article 20(3), Article 22(1) is also important for legal aid lawyers since the very basis of a right to be represented by a lawyer of the accused's own choice flows from it. The accused has a right to consult a legal advisor of his own choice, ever since the moment of his arrest and also to have an effective interview with the lawyer.[43] The decision of the Supreme Court in the case of *Maneka Gandhi v Union of India*[44] is also an important one to secure the rights of an accused because it held that the right of an indigent person to be provided with a lawyer at State's expense is an essential ingredient of Article 21, for no procedure can be just and fair which does not make available legal services to an accused person who is too poor to pay for a lawyer. The Supreme Court has further extended the right to legal practitioner to mean a right to 'effective defense' which means a competent and experienced lawyer.[45]

The right to be defended by a lawyer of one's own choice cannot be curbed under any circumstances or by any statute. The Supreme Court in *State of Madhya Pradesh v Shobharam*[46] has stated that any statute which prohibits the appearance or defence by a lawyer before any tribunal which has the power to try a person of an offence or on a criminal charge, is void for contravention of

[43] Motilal v State AIR 1954 Raj 241
[44] (1978) 1 SCC 248
[45] Kishore Chand v State of HP AIR 1990 SC 2140
[46] AIR 1966 SC 1990

Article 22(1) to the extent that it denies the accused of his fundamental right to be defended by a lawyer of his choice in any trial of the crime for which he was arrested, even though such tribunal may not have the power to pass a sentence of imprisonment.

Another facet of Article 22(1) is that the accused has to be made aware of the grounds of his arrest. Often arbitrary arrests are conducted by the police and the accused are not told of the grounds of arrest. Their relatives are not informed and access to a lawyer of their choice is also restricted. Some of these arrests are not recorded too and hence the investigating officers do not come under the obligation to produce the accused before a Magistrate within twenty four hours of their arrest. Hence, it becomes extremely important for a legal aid lawyer to ensure that these requirements are scrupulously met. The Supreme Court took judicial notice of third degree methods being adopted by the police during investigation in the case of *DK Basu v State of West Bengal & Ors*[47]and issued various guidelines such as that the friend or relative of the arrestee should be notified immediately of the arrest or any Legal Aid Organization should also be notified. Moreover, when a person is being arrested a memo of arrest should be prepared which should be signed by at least one witness. The memo should also be countersigned by the arrestee.

In the case of *Arnesh Kumar v State of Bihar &Anr*,[48] the Supreme Court laid down certain guidelines to be followed by the police while conducting arrests for offences under section 498-A of the Indian Penal Code (IPC). The Court stated that police officers should not automatically arrest when a case under section 498-A is registered. They should first satisfy themselves that an arrest is necessary under the parameters laid down above flowing from section 41 CrPC. Direction was given to the state government to provide all police officers with a check list containing specific sub-clauses under section 41(1)(b)(ii). The Magistrates while authorizing detention should peruse this report prepared by the police officer before conducting the arrest. Moreover, the Supreme Court did not limit these guidelines only to cases registered under section 498A of IPC or section 4 of the Dowry Prohibition Act, but also such cases where offence is punishable with imprisonment for a term which may be less than seven years or which may extend to seven years; whether with or without fine.

To conclude, one needs to mention the fact that though PIL is a great mechanism to force the government to work or rather to work in the most appropriate manner possible, there have been instances of several frivolous PILs being filed. Such petitions have earned PILs a bad name and have resulted in the Supreme Court and the High Court to issue several guidelines on the nature of cases that will be accepted as PILs.[49] As members of the spirited citizenry of the country, we should thwart such efforts of few self-centred individuals, otherwise an effective mechanism of grievance redressal will slip away from our hands.

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[47] (1997) 1 SCC 416
[48] 2014(8) SCALE 250
[49] *See* State of UttaranchalvBalwant Singh Chaufal and Ors. (2010) 3 SCC 402

SHORT NOTE ON LEGAL SERVICES AUTHORITIES ACT, 1987 AND THE SCHEMES THEREUNDER

— Vijay Hansaria*

HISTORY OF LEGAL SERVICES IN INDIA

It is important for every empanelled lawyer to know the journey of legal services in India, starting as legal aid in court to legal services to access justice equally by all including the most vulnerable sections of our society.

Pre-independence Era

The right to counsel in criminal proceedings was recognized in 1898 with the enactment of the Criminal Procedure Code. Representation at state expense, however, was available only where an indigent accused was being tried for an offence punishable with a capital sentence. This was not a statutory right, but was made available at the discretion of the Court.

In 1942, the Bombay Legal Aid Society (BLAS) was formed for making justice accessible to the poor, reducing the cost of litigation, providing the poor with lawyers on need basis, rendering legal aid gratuitously, and making provisions for payment of court fees.

Post independence

The first and most important study after independence was made by the Committee on Legal Aid and Legal Advice (Bombay Committee) under the Chairmanship of Mr. Justice N.H. Bhagwati to consider the question of grant of legal aid in civil and criminal cases to persons of limited means or of backward classes. The Committee submitted its report in 1949.

Simultaneously, a Committee was constituted by the Government of West Bengal under the chairmanship of Sir Arthur Trevor Harries, Chief Justice, West Bengal (Trevor Harries Committee) to examine the question of the availability and administration of legal aid services in the State. The Trevor Harries Committee also placed its recommendations in 1949.

Interestingly, both the Reports were very similar in the recommendations that they gave.

In 1958, the first Law Commission of India in its report "Reforms in the Administration of Justice" recommended:

(i) representation by lawyers at government expense to indigent accused in all cases tried by the Sessions court;

(ii) representation by lawyers should be made available at government expense to persons without means in criminal proceedings;

(iii) representation by lawyers in jail appeals should be made available at government expense and

(iv) the expression 'Pauper' used in Order 33 of the Code of Civil Procedure should be replaced by the expression 'poor persons' or 'Assisted persons'.

The government of India appointed an expert committee in 1972 on legal aid under the Chairmanship of Mr. Justice V.R. Krishna Iyer to consider the question of making available legal aid

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and advice to the weaker sections of the community and persons of limited means in general and citizens belonging to socially and educationally backward classes in particular.

In 1973, the Committee came out with the most systematic and elaborate report regarding establishment of legal aid committees in each district, at state level and at the Centre. It also suggested that an autonomous corporation be set up, law clinics be established in Universities and lawyers be urged to help.

In May 1976, the Government of India constituted the Juridicare Committee to consider the question of legal aid and advice to weaker sections of the society and to make recommendations for establishing and operating a comprehensive and dynamic legal services programme. The Chairman of the Committee was Mr. Justice P.N.Bhagwati and Mr.Justice V.R. Krishna Iyer was its Member.

The Juridicare Committee submitted an interim report furnishing a draft of the National Legal Services Bill 1977 which comprehensively drew up the institutional set up for the delivery of legal services.

Before the Juridicare Committee could submit its report, on the recommendation of the Swaran Singh Committee Article 39A was introduced in the Constitution by the 42nd Amendment in 1976, as one of the Directive Principles of State Policy.

Article 39A provides:

> "The State shall secure that the operation of the legal system promotes justice on a basis of equal opportunity, and shall, in particular, provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities."

With the object of providing free legal aid, the Government of India, by a resolution dated 26th September, 1980 appointed a Committee known as "Committee for Implementing Legal Aid Schemes" (CILAS) under the chairmanship of Mr. Justice P.N. Bhagwati to monitor and implement legal aid programmes on a uniform basis in all the States and Union Territories. CILAS was wholly funded by the Central Government.

CILAS evolved a model scheme for legal aid programmes applicable throughout the country by which several Legal Aid and Advice Boards were set up in the States and UTs.

THE LEGAL SERVICES AUTHORITIES ACT, 1987

In 1987, the Legal Services Authorities Act was enacted by the Parliament which came into force on 9th November, 1995 to establish a nationwide uniform network for providing free and competent legal services to the weaker sections of the society on the basis of equal opportunity.

The Legal Services Authorities/Committees have been constituted under the Legal Services Authorities Act, 1987 at various levels, i.e. State, District &Taluka for implementation of the legal aid programmes and making legal services available under the Act.

The National Legal Services Authority at the national level is responsible for policies and for evolving economic schemes to reach legal services to the ones who need it. Accordingly, NALSA, as it is generally called, has promulgated several schemes, including some as regulations.

REGULATIONS / SCHEMES OF NALSA

National Legal Services Authority (Free And Competent Legal Services) Regulations, 2010

NALSA (Free and Competent Legal Services) Regulations, 2010 have been framed to make available free and competent legal services to the persons entitled under Section 12 of the Act. The Regulations envisage Retainer lawyers at Taluk, District, High Court and Supreme Court level and a monitoring system right from the time of receiving applications for legal aid. The highlights of these Regulations are:

- **Front Office**: In all Legal Services Institutions manned by the panel lawyers and PLVs the panel lawyers in the front office provide services like drafting notices, sending replies to lawyers' notices and drafting applications, petitions etc.
- **Panel Lawyers:** Legal practitioners having minimum three years experience can be empanelled as panel lawyers having regard to competence, suitability and experience of such lawyers. The Legal Services Authority may also appoint Retainers from amongst panel lawyers to work at the Front Offices. The panel lawyers/Retainers are paid as per the fee prescribed by the respective Legal Services Authorities.
- **Financial assistance:** In deserving legal aid cases expenses for payment of court fees and other court related expenses such as preparation of paper-book and translation of documents etc. are met by the Legal Services Authorities.
- **Special engagement of Senior Advocates**: In cases of great public importance and for defending cases of serious nature affecting life and liberty of the applicant, special engagement of Senior Advocate can be made by the Executive Chairman or the Chairman of the Legal Services Authority.

National Legal Services Authority (Legal Services Clinics) Regulations, 2011

The NALSA (Legal Services Clinics) Regulations, 2011 aims at establishing Village Legal Care and Support Centres in villages or for a cluster of villages, legal services clinics in jails, educational institutions, community centres, protection homes, courts, juvenile justice boards and other areas. The Village Legal Care and Support Centres and legal services clinics are manned by trained Para Legal Volunteers(PLVs). The PLVs engaged in the Village Legal Care and Support Centres and legal services clinics provide initial advice to the persons seeking legal services, help such people, especially the illiterate, in drafting petitions, representations and filling up the application forms for various benefits available under the government schemes. The panel lawyers also attend these Village Legal Care and Support Centres and other legal services clinics as per a schedule drawn up by the Secretary. The panel lawyers also are available to the PLVs for advice and mentorship.

Scheme For Para-Legal Volunteers & Module For The Orientation-Induction Training

The Scheme of Para-Legal Volunteers (PLVs) has been developed by NALSA for the purpose of imparting legal awareness to various target groups of Para Legal Volunteers who in turn bring legal awareness to all sections of people. The PLVs can be teachers, students, Anganwadi Workers, Doctors, NGOs and other Self Help Groups. District Legal Services Authorities empanelPLVs on the basis of interview. PLVs after empanelment are given training, on completion whereof they are issued identity cards valid for one year. Since the PLVs are drawn from the community, they are trusted by the community. PLVs are expected to have a high degree of commitment to the cause as the PLV Scheme is not intended to be a livelihood Scheme.

PLVs discharge the following functions, amongst others:

- Make people aware of their Constitutional and statutory rights and live with human dignity;

- Assist in organizing legal awareness camps and make people aware that they can approach the Legal Services Authority;
- Accompany people to government offices for interacting with officials;
- Keep a watch on transgressions of law or acts of injustice and bring them to the notice of the Legal Services Authority;
- Visit the Police Station and ensure that the arrested person gets legal assistance;
- Visit jails, lock-ups, psychiatric hospitals, children's homes and ascertain legal needs of the inmates after proper authorization from the Legal Services Authority;
- Report violations of child rights, child labour, missing children and trafficking of children to the Legal Services Authority or to the Child Welfare Committee;
- Generate awareness about the benefits of settlement of disputes through Lok Adalat, Permanent Lok Adalat, Conciliation & Mediation.

Scheme For Legal Services To Disaster Victims Through Legal Services Authorities

The Scheme has been formulated to provide legal services to the victims of disaster—both manmade and natural – who are under circumstances of underserved want being victims of mass disaster, ethnic violence, caste atrocities, flood, drought, earthquake or industrial disaster. In case victims of disaster have lost valuable documents like title deeds, ration cards, identity cards, school and college certificates, certificate of death and birth, passport, driving licence etc., District Legal Services Authority shall organise legal aid clinics in the affected areas and assist the victims to get duplicate certificates and documents by taking up the matter with the authorities concerned. Arrangements for issuing Death Certificates of the deceased victims also shall be made. The Legal Services Authorities shall take up the insurance claims of the disaster victims with the Insurance Companies for settlement of such claims. Negotiations may be undertaken with the Insurance Company officials for a settlement favourable to the victims. In appropriate cases the service of Insurance Ombudsman also may be availed of.Intervention by the Legal Services Authorities :

- Ensuring immediate help by Govt./NGOs
- Coordinating the activities of different departments/NGOs
- Supervising the reunion of families
- Supervising the health care and sanitation
- Ensuring availability of food, medicine and drinking water
- Awareness on the rights of victims
- Assisting in restoration/reconstruction of valuable documents
- Assisting victims to get the benefits provided by the Govt
- Assisting in the problems relating to Insurance Policies

National Legal Services Authority (Legal Services To The Mentally Ill Persons And Persons With Mental Disabilities) Scheme, 2010

This scheme is to provide legal services to a neglected group of citizens, namely, mentally ill persons and the mentally retarded people including those who are suffering from Autism and cerebral palsy. Under this scheme, the Legal Services Authorities to provide legal assistance to the mentally ill persons for obtaining treatment and health care to them under the Mental Health Act 1984 and to

conduct awareness classes on the rights of the mentally ill persons and mentally retarded persons and to provide legal services to protect their property and health. Right to safety of the mentally retarded persons is also a part of this scheme.

The scheme is intended to assist the mentally ill and mentally retarded persons in the following manner:

- Legal services during the proceedings for Reception Orders
- Protection of fundamental right
- Visits to psychiatric hospitals or psychiatric nursing homes and other places
- Legal services in case of forced admission into the psychiatric hospitals or psychiatric nursing homes
- Follow up of the condition of the mentally ill persons against whom a Reception Order has been passed
- Legal services during inquisition proceedings
- When there is attempt to misappropriation of property of mentally ill persons
- Legal Awareness programmes about the rights of mentally ill persons
- To make available the benefits under the various schemes to the mentally retarded persons and their family members
- Legal services for ensuring health care services to the mentally retarded persons as a part of the fundamental rights
- Legal services for ensuring the fundamental rights of mentally regarded persons
- Legal services for the benefits under the PWD Act, 1995
- Assistance to mentally regarded persons in prevention their exploitation including sexual abuse and also for taking legal action against the abusers and exploiters
- Legal services to help the mentally regarded persons in protecting the rights of inheritance, owing properties and enjoying financial rights.
- Assistance to mentally retarded persons in the matter of appointment of guardian
- Awareness among the other school children, family members of mentally retarded persons and general public
- Sensitisation of judicial officers and lawyers about the mentally retarded persons and their rights.

National Legal Services Authority (Legal Services To Workers Of Unorganised Sector) Scheme, 2010

NALSA scheme for legal service to workers of unorganized sector, 2010 makes it obligatory on the part of the State Legal Services Authority, District Legal Services Authority and Taluk Legal Services Committee to create awareness amongst the workers in unorganized sector about the rights under the new law and to give assistance to them for securing the benefits under the Unorganised Social Security Act, 2008 and also schemes put in place by the State Governments

NALSA (Legal Services Clinics In Universities, Law Colleges And Other Institutions) Scheme, 2013

NALSA by this Scheme has extended support to the establishment of legal services clinics in colleges etc. The activities of the Clinics are planned by the college clinic incharges and the legal services authority concerned. The objectives of the Scheme are:

- To set up nationwide collegiate Legal Services Clinics to familiarize law students of the country to the problems faced by the masses ignorant about their rights and remedies under the law.
- To attain the ideals of "Social Economic and Political" justice as enshrined in the Constitution in the backdrop of poverty and inequality, by reaching out to the marginalized and the vulnerable communities through the collegiate Legal Services Clinics.
- To spread legal awareness among students and people at large through awareness camps, seminars, debates, legal counselling, poster making and street plays.
- To expose students to community services.
- To introduce the students to socio-economic impediments to access to justice.
- To provide the students a platform for the empowerment of socially and economically backward groups or individuals.

Guidelines Issued By NALSA For Legal Services In Juvenile Justice Institutions

Salient features of the guidelines framed by NALSA with regard to legal services in Juvenile Justice Institutions are :

- When a juvenile is produced, the Juvenile Justice Board should call the Legal Aid Lawyer and introduce juvenile / parents to the lawyer and inform that it is their right to have free legal aid.
- Legal Aid Lawyer should maintain a diary in which dates of cases are regularly entered.
- If the lawyer goes on leave or is not able to attend Board on any given day, he/she should ensure that cases are attended by fellow legal aid lawyer in his/her absence.
- He/she should inspire faith and confidence in children/ their families whose cases they take up.
- The Lawyer must inform the client about the next date of hearing and should give his/her phone number to the client.

SOME SUCCESS STORIES OF LEGAL SERVICES

1. Legal Services Rendered to Victims of Industrial Disaster – Rewari

On 24.12.2013 Sh. Anmol Singh Nayyar, CJM-Cum-Secretary, DLSA on receiving the information that an Industrial Disaster has occurred in Asian Colour Quotings Pvt.Ltd., Industrial Area, Bawal, Distt.Rewari, proceeded to the spot where he was informed by the local police officials that due to leakage of propane gas from the supply line of factory, there was a sudden blast in the area, which housed separate transformers of the factory and that 9 persons had been injured in the incident, out of which two succumbed to their injuries and the remaining had been admitted in the hospital.

The CJM then proceeded to visit the family of the deceased victims and thereafter, to the hospital in order to meet the injured victims. All were informed about their rights and the services, which they can avail from the Legal Services Authority. They were also told about the helpline

number of the District Legal Services Authority on which they could contact for obtaining any kind of legal services.

2. Minor Girls rescued by DLSA Sonipat

On receiving a telephonic message on 03.01.2014 regarding wrongful confinement of a minor girl for last 10 months by a person at a given address, Ms. Harshali Chaudhary, CJM-cum-Secretary, DLSA Sonipat immediately proceeded to the spot along with social worker Sh. Jaiveer Gehlawat, PLV Sh. Deepak Kumar and police officer of that area, where she found that the minor girl was being forcibly restrained in that house and was being mentally and psychically harassed by the member of that house. Said minor girl was rescued, who had been trafficked by an agency from the State of Jharkhand.

3. Medical treatment of a mentally challenged minor girl found in the Railway Station

It came to notice of the State Legal Services Authority through a newspaper report that the victim, who was rescued by the local police and taken to S.C.B. Medical College & Hospital, Cuttack, was lying in an uncared for and unattended condition because of apathy of the hospital staff. The State Authority with active support of District Legal Services Authority, Cuttack immediately swung into action by deputing the Secretary as well as two Para-Legal volunteers to coordinate with the Hospital Authorities so as to ensure proper treatment and care to the victim. As a result, the minor girl was rendered all possible medical care and attention. She is still undergoing treatment in the Mental Health Institute of the said hospital. Unfortunately, she is unable to state her address except that she belongs to Medinapur district of West Bengal. The State Authority has sent her photograph to the West Bengal State Legal Services Authority with a request to take steps to trace out her identity and her family members so that she can be reintegrated with them.

4. Free medical treatment to two mentally ill persons of Umerkot and Bhadrak

Two separate news item published in local newspapers came to the notice of Odisha State Legal Services Authority describing the pathetic condition of two mentally challenged persons who were chained by their own family members because of their mental ailments. Being instructed by the State Authority, the respective District Legal Services Authorities deputed PLVs to the houses of the ailing persons and obtained necessary information. Basing on their reports, the State Authority is coordinating with the Government authorities to provide specialized (Psychiatric) treatment to the victims free of cost in Premier Medical Institution of the State. In response, the R.D.C, Cuttack has already issued necessary instructions to the Superintendent of S.C.B. Medical College & Hospital, Cuttack to do the needful in the matter. As regards the other patient, a fruitful result is likely to ensure very shortly.

5. Immediate aid to acid attack victims.

It came to light through newspaper report that a lady suffered injuries in an acid attack by her first husband in the district of Malkangiri. The District Legal Services Authority immediately took up the matter and provided Rs.10,000/- as interim compensation under the Odisha Victim Compensation Scheme, 2012.

Similarly, another victim of acid attack belonging to Jaipur district who was denied medical assistance as well as the right of lodging FIR against her assailant was given all possible help. In fact, the Chairman of District Legal Services Authority himself rushed to the district headquarters hospital and because of his efforts, all necessary treatment was provided by the hospital authorities and a case was also registered by the concerned police station.

6. Rescue of minor bonded labourers from Karnataka.

It was reported in the local newspaper that ten bonded labourers of Rayagada district including some minor children were being illegally detained in the State of Karnataka. The District Legal Services Authority, Rayagada sought the assistance of the Odisha State Legal Services Authority which in turn requested the Karnataka State Legal Services Authority to take steps to rescue the labourers. Because of these efforts the labourers have safely returned to their village.

7. Rescue of bonded labourers from Andhra Pradesh.

Some Retainer-lawyers and PLVs of Bolangir district took steps on their own and have managed to rescue two labourers detained in the State of Andhra Pradesh and with the assistance of the District Legal Services Authority, have arranged financial assistance for the labourers.

8. The Legal Services Authorities have assisted the victims in the following disasters:

A. Major Cloudburst and flash floods in Leh District on 6th of Aug, 2010: A core group under the Supervision of Chairman DLSA Leh was set up as provided in the Disaster Scheme of NALSA. An amount of Rs.1 lac was released in favour of the DLSA Leh to meet the requirement of the Core Group. Reports on daily basis from the core group were called to monitor their performance. Hon'ble Executive Chairman, J & K SLSA requested the State Govt. to make adequate number of psychiatrists available in the relief camp in view of the fact that most of the victims were under stress due to sudden shock of disaster, loss of shelter and death.

B. High Flood 2011 in Odisha: The Member Secretary along with Secretary, DLSA Cuttack visited the flood affected areas and interacted with the BDO and other Government Officials who were administering the relief activities and taking care of the affected persons. The DLSAs of flood affected areas of Odisha helped the victims of the undeserved want.

C. Heavy rainfall, landslide and flash flood occurred in Uttarakhand: Hon'ble Executive Chairman, Uttarakhand issued the directions to the DLSAs to supervise the district management work on the following points:

(a)Food and drinking water; (b) shelter; (c) Transportation; (d) Health; (e) Electricity; (f) Safety of affected persons especially women and children; (g) compensation for loss of life, cattle and property; (h) clothing especially for children and women; (i) basic household items, utensil, cooking utensil, bedding and bed etc; (j) infrastructure e.g road connectivity, irrigation channel etc.

Core groups were constituted by the DLSAs. Rs.2 lacs were allocated to carry out effective implementation of the scheme of Legal Services to Disaster Victims and also for making the payment of honorarium to the volunteers.

Steps were taken by the core groups in coordination with the disaster management and district administration for rehabilitation of the victims. The core groups submitted list of families to the district administration who were in need of insurance claim and compensation from State Government to restore their cattle and chattel. The core group also coordinated with the police personnel to avoid instances of illegal trafficking of children affected by the disaster.

DLSAs organised 6 special legal literacy camps for the people affected by the natural calamity. 154 grievances were received regarding mismanagement of welfare schemes/programmes run by the Disaster Management Committees/District Administration and the same were

forwarded by the Chairpersons DLSAs to the concerned District Magistrate for solving the difficulties.

D. Cyclone 'Phailin' in Odisha: The Legal Services Institutions had been able to reach out to a large number of victims directly and ensured proper distribution of relief materials to them. The Core Group closely monitored and coordinated the activities of different government agencies so that all essential requirements such as medicine, health and hygiene materials etc. could be provided to the affected persons.

9. The Legal Services Authorities' successful conciliation and settlement in the Lok Adalats:

A. In the court of the Ld. Addl. Chief Judicial Magistrate at Agartala in the West Tripura District in case no. NI 32 of 2010 under N.I. Act the accused issued a Cheque of Rs. 25 Lacs on the spot in favour of the complainant which brought smile to the face of the complainant. He returned back home with a great relief and while going home he was heard telling the story to others who gathered in the National Lok Adalat.

B. A woman aged about 50 years met with an accident 15 years back. She is in coma stage and could not recover. She had filed CMA before the High Court of Madras. The matter was settled in the National Lok Adalat on 23/11/2013 with the Oriental Insurance for Rs. 74 Lakh and the cheque was given to her sister on the same day by Hon'ble Executive Chairman, T.N. SLSA.

C. A Partition Suit was pending for more than 26 years and it was remanded back twice from the appellate court. The partition suit involved partition of large property among 25 persons who were the parties to the suit including senior citizens and women. This matter was settled in the National Lok Adalat held on 23/11/2013 at Palamau District, Jharkhand after 3-4 sittings of negotiations.

10. Success Stories of Para-Legal Volunteers:

A. Shri B. Vijaya Sagar, from DLSA Prakasam District, Andhra Pradesh coordinated with the DLSA, CWC, Police and the rehabilitation agencies for protection of rights of children. On receiving information about a child married, he alerted the DLSA, CWC andPolice and accompanied them to the house of the girl where the marriage was going to be performed. He interacted with the girl and parents and counselled them about the consequences of child marriage including penal provisions under the enactment. The child was given protection through CWC and after completing all the formalities, she was sent with her parents. The girl was admitted in 7th standard at Kasturba Gandhi BalikaVidyala, Prakasam District for continuing her studies. He also helped a girl aged about 11 years whose parents left her because of their marital disputes and who was staying with an aged lady being a distant relative and assisting her in her small tea-bunk. He got the message published in the Hindu ad Sakshi newspapers about the child and the Headmaster of a school responding to the news came forward to provide education with hostel facility.

B. Shri Satya Vir, from Jhajjar, Haryana has not merely forwarded applications for old age and widow pensions or for disability or caste certificates but also ensured that the benefits reached the applicants. The applications for Haryana Residency certificates, new meter connections, ration cards etc. were also pursued by him and benefits reached to the applicants. 20 mutation applications ended up with entries in the Revenue record through his efforts. 145 accounts were opened in the office of Assistant Director Industrial Safety and Health for benefits under various Govt. Schemes.

C. Mr. H.Abdul Assis, PLV under TLSC, Kanjirappally in Kottayam District, Kerala has not only played a dominant role in organizing awareness classes in Kanjirappally Taluk Legal Services Committee but has contributed to the harmony in the family as 260 family disputes were settled at his instance with the help of the Legal Services Authorities. He has taken the initiative to register 46 DIR under the Protection of Women from Domestic Violence Act, thereby reaching legal aid to women for securing protection orders under the Act. He not only initiated steps to publish notice and pamphlets but distributed them among one lakh housing colony residents through a door to door campaign. About 66 pre-litigation matters relating to issues ranging from facilitating a Doctor's visit to the Sub-jail, to provision of civic amenities in the area were brought to the notice of the legal services authorities and out of which 47 cases were settled.

11. Uttarakhand SLSA provided legal aid and advice to 18 persons who were not appointed by M/s. Birla Tyres Ltd., after conducting written examination and interview. The application had been sent to Labour Commissioner, Haldwani and District Magistrate Haridwar and as per information received, the Deputy Labour Commission issued certain directions into the matter and inquiry was being conducted.

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Session – II

11.45 AM to 01.30 AM

Total time: 1 hr 45 min

Session – II
11.45 AM to 1.30 PM
Total Time: 1 hr 45 min

MODULE FOR TRAINING OF PANEL LAWYERS

I. ROLE AND RESPONSIBILITIES OF LEGAL SERVICES LAWYERS – DO'S AND DON'TS FOR A PANEL LAWYER

II. COMMUNICATION WITH CLIENTS AND COUNSELLING

Objective

— Inform the Panel Lawyers of their role and responsibilities.

— Sensitize the Panel Lawyers about the expectations of society from them.

Expected learning outcome

— The panel lawyers will have full understanding of their role and responsibilities.

— The Panel Lawyers will develop an appropriate attitude towards the work and client which will help them to discharge their duties better.

Training Method

1. Lecture
2. PowerPoint presentation
3. Role-Play

Programme:

Introduction — 05 Minutes

The programme coordinator/resource person will introduce the topic of role and responsibilities of panel lawyers with reference to the constitutional perspective discussed in the Session I.

Interactive lecture with PowerPoint presentation on Role and Responsibilities of Legal Services Lawyers —Do's and Don'ts for a Panel Lawyer — 40 Minutes

Interactive lecture with PowerPoint presentation on Communication with Clients and Counselling — 30 Minutes

Role - Play — 25 Minutes

The whole group will be divided in groups of 5. One of the members of the small group shall play the role of lawyer and a client on the given facts. The general facts are known. Another set of facts are confidential facts which should be given confidentially only to the member play the role of client. The role - play begins when the client entry into the lawyers office and ends with the 'lawyer' extracting all the confidential facts from the 'client' and finding answers to the issue mentioned in the exercise.

The feedback has to come on the following aspects:

(i) What was good and appropriate; and

(ii) What could have improved the performance.

Concluding Remarks — 05 Minutes

POWERPOINT PRESENTATION ON ROLE & RESPONSIBILITIES OF LEGAL AID PANEL LAWYERS - DO'S AND DON'TS

DR. BHARAT BHUSHAN PARSOON,
JUDGE, PUNJAB AND HARYANA HIGH COURT,
CHANDIGARH

BACKGROUND

- THE POOR, MARGINALIZED, DOWNTRODDEN AND WEAKER SECTIONS FORM LARGE PART OF OUR SOCIETY.
- DESPITE THERE BEING NUMEROUS LEGISLATIONS TO PROTECT THEIR RIGHTS, THEY SUFFER BECAUSE OF IGNORANCE OF THE LAWS, PROCEDURE TO ENFORCE THEM AND THE RIGHT FORUM TO APPROACH

THE ROLE OF LEGAL SERVICES AUTHORITIES CONSTITUTED UNDER THE LEGAL SERVICES AUTHORITIES ACT, 1987

- TO PROVIDE LEGAL SERVICES TO POOR, MARGINALIZED, DOWNTRODDEN AND WEAKER SECTIONS OF THE SOCIETY
- TO SPREAD LEGAL AWARENESS AMONGST THEM ABOUT THEIR LEGAL RIGHTS AND REMEDIES AVAILABLE TO THEM UNDER THE LAW.
- TO HELP THEM TO REAP THE FRUITS OF THE VARIOUS SCHEMES MEANT FOR THEIR WELFARE.

PANEL LAWYERS

- LAWYERS EMPANELLED BY THE LEGAL SERVICES AUTHORITIES HAVE PIVOTAL ROLE TO PLAY TO ACHIEVE THE OBJECTIVES.
- RESPONSIBILITY UPON THE PANEL LAWYERS TO RENDER COMPETENT AND QUALITY LEGAL SERVICES AND SPREAD LEGAL LITERACY EFFECTIVELY.
- THUS, PANEL LAWYERS CONSTITUTE ONE OF THE IMPORTANT PILLARS UPON WHICH REST THE ENTIRE EDIFICE OF THE LEGAL SERVICES AUTHORITIES.

ROLE OF THE PANEL LAWYER

- TO PROVIDE COURT BASED LEGAL SERVICES
- TO ACT AS RETAINER IN FRONT OFFICE
- TO ATTEND LEGAL SERVICES CLINIC/ VILLAGE LEGAL CARE & SUPPORT CENTERS IN JAILS, PROTECTION HOMES, OBSERVATION HOMES, VILLAGES, SLUMS IN URBAN AREAS ETC.
- TO ATTEND LEGAL LITERACY CAMPS
- TO ACT AS MENTOR TO PARA-LEGAL VOLUNTEERS

RESPONSIBILITIES OF THE PANEL LAWYER

- GENERAL RESPONSIBILITIES
- SPECIFIC RESPONSIBILITIES

GENERAL RESPONSIBILITIES

- TO COMPETENTLY PERFORM ALL TASKS ENTRUSTED TO HIM AND TO RENDER ALL LEGAL SERVICES EXPECTED OF HIM BY THE RESPECTIVE LEGAL SERVICES AUTHORITIES.
- TO PROVIDE QUALITY SERVICE EXPECTED OF A COMPETENT LAWYER IN A LIKE SITUATION.
- TO MAKE EVERY EFFORT TO PROVIDE COURTEOUS, THOROUGH AND PROMPT SERVICE TO THE CLIENT.
- TO PROVIDE SERVICE WITH COMPETENCE, CONSCIENTIOUSLY AND WITH DILIGENCE, EFFICIENCY AND CIVILITY.
- TO WORK FEARLESSLY FOR UPHOLDING THE INTEREST OF HIS CLIENT, OF COURSE, EMPLOYING FAIR AND HONORABLE MEANS, REMEMBERING THAT HIS LOYALTY IS TO THE LAW.

CONTD....

- TO HAVE RELEVANT KNOWLEDGE, SKILLS AND ATTRIBUTES.
- TO KEEP HIMSELF ABREAST OF THE LATEST AMENDMENTS IN LAW, LATEST RULINGS OF THE APEX
- COURT & THE HIGH COURTS.
- TO APPLY THEM IN A MANNER APPROPRIATE TO EACH MATTER AND WITHIN THE REASONABLE PARAMETERS OF THE LAWYER'S EXPERIENCE.
- TO KNOW THE GENERAL LEGAL PRINCIPLES AND PROCEDURES AND SUBSTANTIVE LAW AND PROCEDURE FOR THE AREAS OF LAW IN WHICH THE LAWYER SPECIALIZES.

TO APPLY HIS MIND WHILE INVESTIGATING FACTS, IDENTIFYING ISSUES, CONSIDERING POSSIBLE OPTIONS, AND DEVELOPING AND ADVISING THE CLIENT/ BENEFICIARY AS TO APPROPRIATE COURSES OF ACTION.

CONTD....

TO UNDERGO CONTINUOUS TRAINING FOR GETTING AND/OR ENHANCING APPROPRIATE SKILLS; TO ATTEND ALL THE TRAINING PROGRAMMES ORGANIZED BY THE LEGAL SERVICES AUTHORITY; AND PURSUE APPROPRIAT PROFESSIONAL DEVELOPMENT PROGRAMMES TO MAINTAIN AND ENHANCE LEGAL KNOWLEDGE AND SKILLS INCLUDING:

- LEGAL RESEARCH;
- ANALYSIS;
- APPLICATION OF THE LAW TO THE RELEVANT FACTS;
- WRITING AND DRAFTING;\NEGOTIATION;
- ADVOCACY;
- PROBLEM SOLVING; AND
- ADAPTING TO CHANGING PROFESSIONAL REQUIREMENTS, STANDARDS, TECHNIQUES, AND PRACTICES.

CONTD....

- TO COMMUNICATE EFFECTIVELY WITH THE CLIENT/ BENEFICIARY IN A TIMELY MANNER AT ALL STAGES TO ENABLE HIM TO TAKE EFFECTIVE STEPS OR GIVE THE LAWYER PROPER INSTRUCTIONS IN THE MATTER
- TO PERFORM ALL FUNCTIONS CONSCIENTIOUSLY AND DILIGENTLY.
- TO ENSURE THAT MATTERS ARE ATTENDED TO WITHIN A REASONABLE TIME FRAME.
- IF CAN REASONABLY FORESEE UNDUE DELAY IN PROVIDING ADVICE OR SERVICES, HE HAS A DUTY TO INFORM THE CLIENT AND THE LEGAL SERVICES AUTHORITY, SO THAT ALTERNATIVE ARRANGEMENTS CAN BE MADE

CONTD....

- TO INFORM THE LITIGANT ABOUT POSITIVE AS WELL AS NEGATIVE ASPECTS OF THE CASE, LIKELY TO BE CONSIDERED IN A COURT OF LAW.
- CANNOT WITHDRAW FROM SERVICE EXCEPT WHERE THE LITIGANT'S CONDUCT IS SUCH THAT IT CALLS FOR RECLUSION FOR THE PANEL LAWYER AND THAT TOO ONLY WITH THE APPROVAL OF THE LEGAL SERVICES AUTHORITY.
- ONCE EMPANELLED, NOT TO REFUSE TO APPEAR IN A CASE ASSIGNED TO HIM ON THE PLEA THAT HE HAS OTHER COMMITMENTS ARISING OUT OF PERSONAL BRIEFS

• CONTD....

- NOT TO GIVE PRIORITY TO HIS PERSONAL BRIEFS AND ASSIGNMENTS; AND TO TREAT LEGAL AID CASES WITH THE SAME SERIOUSNESS AND CONCERN AS IN CASES OF HIS PRIVATE CLIENTS.
- SINCE A PANEL LAWYER IS IN A FIDUCIARY RELATIONSHIP WITH THE LITIGANT, HE IS TO PROTECT THE INTEREST OF THE LITIGANT TO THE BEST OF HIS ABILITY AND COMPETENCE WHILE WORKING WITH SINCERITY, HONESTY AND DEVOTION.
- NOT TO DISCLOSE DIRECTLY OR INDIRECTLY CONTENTS OF COMMUNICATION MADE BY THE LITIGANT TO HIM. HE IS ALSO NOT TO DISCLOSE THE ADVICE GIVEN BY HIM DURING THE PROCEEDINGS.
- TO KEEP THE SECRETARY OF THE LEGAL SERVICES AUTHORITY CONCERNED INFORMED ABOUT THE PROGRESS OF THE CASE.
- TO MAINTAIN HIGHEST ETHICAL AND MORAL STANDARDS AT ALL TIMES, BEING CONSCIOUS OF HIS UNIQUE STATUS OF A LEGAL SERVICES LAWYER.

SPECIFIC RESPONSIBILITIES

CRIMINAL MATTERS:

- TO RESIST REMAND TO POLICE OR JUDICIAL CUSTODY;
- TO APPLY FOR GRANT OF BAIL;
- TO CLEARLY EXPLAIN TO HIM THE LEGAL CONSEQUENCES IN CASE HE INTENDS TO MAKE A CONFESSIONAL STATEMENT IN TERMS OF SECTION 164 CR.P.C. OR TO ENTER A PLEA BARGAIN;
- TO REPRESENT HIM WHEN THE COURT EXAMINES THE CHARGE SHEET SUBMITTED BY THE POLICE AND DECIDES UPON THE FUTURE COURSE OF PROCEEDINGS AND AT THE STAGE OF THE FRAMING OF CHARGES
- TO DEFEND, DURING TRIAL PROCEEDINGS
- TO REMAIN PRESENT DURING REMAND HOURS AND EFFECTIVELY PARTICIPATE IN THE REMAND PROCEEDINGS. IN CASE, HE FALLS ILL OR CANNOT REMAIN PRESENT FOR ANY PARTICULAR DAY DUE TO SOME INEVITABLE REASON, THEN HE MUST SEND PRIOR INTIMATION IN THIS REGARD TO THE CONCERNED LEGAL SERVICES AUTHORITY SO THAT ANOTHER PANEL LAWYER CAN BE ASSIGNED THE TASK WELL IN TIME.
- FURTHER, IF DURING REMAND OR TRIAL, IT COMES TO THE NOTICE OF THE PANEL LAWYER THAT THE ACCUSED IS A JUVENILE IN CONFLICT WITH LAW THEN HE MUST TAKE STEPS TO GET THE MATTER TRANSFERRED TO THE JUVENILE JUSTICE BOARD.
- A PANEL LAWYER, ASSIGNED THE TASK OF REPRESENTING AN ACCUSED DESIROUS OF MAKING A CONFESSION, MUST EXPLAIN THE LEGAL CONSEQUENCES OF MAKING SUCH CONFESSION. HE MUST ENSURE THAT THE ACCUSED UNDERSTANDS THE CONSEQUENCES OF CONFESSION CLEARLY.

CONTD....

- TO REMAIN VIGILANT THAT THE LEGAL AND HUMAN RIGHTS OF THE ACCUSED ARE NOT VIOLATED
- TO THAT THE ACCUSED IS NOT HANDCUFFED UNLESS THE HANDCUFFING IS PERMITTED BY THE COURT OF LAW FOR SPECIFIC REASONS. THE GUIDELINES GIVEN IN THE VARIOUS JUDGMENTS OF THE HON'BLE SUPREME COURT AND THE HIGH COURTS MUST BE BORNE IN MIND IN THIS REGARD.
- TO APPRISE HIMSELF ABOUT THE ALLEGATIONS AGAINST THE ACCUSED. UNTIL AND UNLESS HE APPRISES HIMSELF ABOUT THE FACTS HE WILL NOT BE IN A POSITION TO RESIST THE POLICE OR JUDICIAL REMAND EFFECTIVELY.

CONTD....

- TO APPLY FOR BAIL AND IN CASE THE BAIL IS GRANTED, TO FOLLOW UP AND HELP THE ACCUSED TO FURNISH THE BAIL/SURETY BONDS AND FULFILL THE REQUISITE FORMALITIES.
- NOT TO ALLOW THE BAIL ORDER TO BECOME A DEAD LETTER, IF THE ACCUSED IS UNABLE TO FURNISH BAIL/SURETY BONDS THE SAME DAY AND IS REMOVED TO JUDICIAL CUSTODY. TO KEEP IN MIND LATEST AMENDMENTS IN CR.P.C. IN THIS REGARD E.G. EXPLANATION TO SECTION 436 CR.P.C. & 436-A CR.P.C.
- NOT TO ALLOW THE BAIL ORDER TO BECOME A DEAD LETTER, IF THE ACCUSED IS UNABLE TO FURNISH BAIL/SURETY BONDS THE SAME DAY AND IS REMOVED TO JUDICIAL CUSTODY. TO KEEP IN MIND LATEST AMENDMENTS IN CR.P.C. IN THIS REGARD E.G. EXPLANATION TO SECTION 436 CR.P.C. & 436-A CR.P.C.
- TO ENSURE THAT THE ACCUSED HAS NOT BEEN TORTURED. IN CASE ACCUSED COMPLAINS OF TORTURE, THEN MUST TAKE APPROPRIATE STEPS AS PER LAW LIKE APPLYING ON BEHALF OF THE ACCUSED TO THE COURT FOR THE MEDICAL EXAMINATION OF THE ACCUSED ETC.

CONTD....

- AT THE STAGE OF CONSIDERING THE CASE FOR CHARGE IN WARRANT CASES, TO GO THROUGH THE REPORT FILED BY THE POLICE UNDER SECTION 173 CR. P.C.
- TO ANALYZE AS TO WHETHER ANY CASE IS MADE OUT OR NOT FOR FRAMING CHARGE AGAINST THE ACCUSED. TO SUBMIT ARGUMENTS EFFECTIVELY AND CLEARLY.
- DURING TRIAL, TO COME FULLY PREPARED AND CONDUCT THE CROSS EXAMINATION EFFECTIVELY. THE DEFENCE OF THE ACCUSED MUST BE PUT EFFECTIVELY AND CONVINCINGLY BEFORE THE COURT OF LAW.
- AT THE STAGE OF ARGUMENTS. TO HAVE A GRIP OVER THE FACTUAL MATRIX OF THE CASE AS REFLECTED FROM THE EVIDENCE AND ALL ASPECTS MUST BE ANALYZED IN THE CONTEXT OF THE RELEVANT LAW, INCLUDING THE CASE LAW.

II. REPRESENTING THE VICTIM:

- IT IS NOT THE ACCUSED ALONE WHOM THE PANEL LAWYER WOULD BE REPRESENTING.
- THE ROLE OF THE VICTIM'S ADVOCATE WOULD BE TO PREPARE VICTIM FOR THE CASE AND HER TESTIMONY AND TO ASSIST HER IN THE POLICE STATION AND IN COURT TO PURSUE THE CASE,
- TO PROVIDE HER WITH GUIDANCE AS TO HOW SHE MIGHT OBTAIN HELP OF A DIFFERENT NATURE FROM OTHER AGENCIES, E.G. MIND COUNSELING OR MEDICAL ASSISTANCE OR ACCESS REHABILITATION SCHEMES.
- KEEPING IN MIND THE PROVISIONS OF SECTION 357 & 357A CR.P.C. AND THE VICTIM COMPENSATION SCHEME, THE PANEL LAWYER MUST HELP THE VICTIM TO SEEK COMPENSATION FOR REHABILITATION.

III. CIVIL MATTERS:

- TO MAKE EFFORTS TO SETTLE DISPUTES BETWEEN THE PARTIES BY USING ALTERNATIVE DISPUTES RESOLUTION MECHANISM WITHIN THE LEGAL FRAMEWORK.
- TO ACT AS COUNSELOR TO HELP AND ADVISE THE PARTIES CHOSE THE RIGHT MODE OF DISPUTE RESOLUTION AND TO THEN SUPPORT THE PARTY IN FINALLY AND FAIRLY RESOLVING IT, BE IT THROUGH MEDIATION, CONCILIATION, ARBITRATION, LOK ADALATS OR OUT OF COURT SETTLEMENT.

IV. JAIL VISIT:

- AS A JAIL VISITING COUNSEL, TO BE AWARE OF THE JAIL MANUAL AND THE VARIOUS JUDGMENTS OF THE HON'BLE SUPREME COURT RELATING TO JAIL INMATES.
- TO LISTEN THE GRIEVANCES OF THE PRISONERS WITH PATIENCE AND TO BRING THE SAME AND ANY INFRINGEMENT OF THEIR RIGHTS TO THE NOTICE OF THE DLSA.
- TO ADVICE AND GUIDE THE PRISONERS PROPERLY ON THE LEGAL ASPECTS OF THEIR CASE AND ON ANY OTHER CIVIL OR LEGAL ISSUES THEY MAY HAVE.

IN THIS CONTEXT, TO BE AWARE OF THE RIGHTS OF THE PRISONERS.

V. LEGAL SERVICES CLINIC:

- TO ALWAYS ADHERE TO THE ROSTER AND MUST CONSCIENTIOUSLY ATTEND THE CLINIC/CENTERS EVEN WHEN FOOTFALLS ARE LOW JUST AS HE WOULD BE AVAILABLE AT HIS OWN OFFICE
- ANY DIFFICULTY IN ATTENDING MUST BE COMMUNICATED SO THAT THE SECRETARY OF THE LEGAL SERVICES AUTHORITY CAN MAKE ALTERNATIVE ARRANGEMENTS.
- TO KEEP ALL THE RECORDS AT THE FRONT OFFICE AND THE LEGAL SERVICES CLINICS AND MAINTAIN ALL THE REGISTERS AS REQUIRED BY THE LEGAL SERVICES INSTITUTIONS
- TO KEEP PROPER RECORD OF THE VISITORS AND THE DETAILS OF THE PROBLEMS DISCUSSED AND THE ADVICE GIVEN.

CONDT....

- EXPECTED TO ACT AS ADVISOR AND GUIDE AND ALSO AS THE EXPLORER OF POSSIBILITIES FOR AMICABLE OUT OF COURT SETTLEMENTS.
- IN CASE, FAILS TO REACH SUCH SETTLEMENTS, IN APPROPRIATE CASES SHOULD REFER THE PARTIES TO THE DLSA FOR ASSIGNMENT OF COUNSEL OR REFERENCE TO MEDIATION OR LOK ADALAT.
- WITH THE HELP OF PARA-LEGAL VOLUNTEERS, TO TRY TO IDENTIFY THE PROBLEMS OF VILLAGERS. MOST OF THE COMMON PROBLEMS OF VILLAGERS PERTAIN TO ELECTRICITY, HEALTH, SANITATION, WATER, TRANSPORT, POSTAL, TELEPHONE ETC. HE SHOULD GUIDE THEM TO GET THESE SETTLED THROUGH PRE-LITIGATION CONCILIATION PROCEEDINGS BEFORE PERMANENT LOK ADALAT FOR PUBLIC UTILITY SERVICES.

VI. LEGAL LITERACY CAMP:

VARIOUS LEGAL LITERACY CAMPS ARE ORGANIZED EVERY MONTH.

- TO PARTICIPATE IN THESE PROGRAMMES AS RESOURCE PERSONS IN VIEW OF THEIR EXPERTISE AND EXPERIENCE AND TO DELIVER LECTURES TO SPREAD LEGAL AWARENESS.
- TO HOLD LEGAL LITERACY CAMPS AND RENDER ON THE SPOT LEGAL ADVICE DURING SUCH CAMPS.
- TO ATTEND THE LEGAL LITERACY AND AWARENESS CAMPS AS AND WHEN REQUESTED TO DO SO.

CONTD....

- TO COME FULLY PREPARED WITH THE ASSIGNED TOPIC AND SHOULD BE ABLE TO ENCOURAGE THE VILLAGERS AND MARGINALIZED PEOPLE TO ASK QUESTIONS; AND ANSWER THEM EFFECTIVELY.
- TO SUBMIT REPORTS TO THE SECRETARY, DLSA IMMEDIATELY AFTER RETURN FROM THE CAMP.
- TO INFORM THE PEOPLE ABOUT ALL THE SERVICES, SCHEMES AND NATURE OF ASSISTANCE PROVIDED BY THE LEGAL SERVICES AUTHORITY, INCLUDING VARIOUS FORMS ADR MECHANISM AND ALSO ABOUT PERMANENT LOK ADALAT FOR PUBLIC UTILITY SERVICES.

VII. MENTOR FOR PLVS:

- UNDER THE NALSA SCHEME FOR PARA LEGAL VOLUNTEERS, THE PANEL LAWYER IS EXPECTED TO TAKE ON THE MANTLE OF A TEACHER AND MENTOR TO THE PLVS, WHO ARE WORKING IN THE FIELD AND TO HELP THEM WHILE THEY WORK IN THE COMMUNITY OR VILLAGE.

VIII. RETAINER:

SOME OF THE PANEL LAWYERS WILL ALSO WORK AS THE RETAINER LAWYERS FOR THE FRONT OFFICES.

- HERE THE ROLE OF THE LAWYER IS MORE ADVISORY, DEALING WITH PERSONS WHO COME TO THE FRONT OFFICE AND FORWARDING THEIR APPLICATIONS FOR LEGAL ASSISTANCE TO THE SECRETARY OR REQUESTING THE SECRETARY TO REFER THE CASE FOR CONCILIATION/ COUNSELING ETC FOR EVEN PRE-LITIGATION SETTLEMENT.
- TO ALSO RENDER SERVICES LIKE DRAFTING NOTICES, SENDING REPLIES TO LAWYERS' NOTICES AND DRAFTING SMALL AND MINOR APPLICATIONS, PETITIONS ETC. ALSO TO ATTEND TO URGENT MATTERS AS A RETAINER LAWYER.

DO'S AND DON'T'S

DO'S (GENERAL):

- TO KEEP THE CLIENT REASONABLY INFORMED;
- TO ANSWER REASONABLE REQUESTS FROM THE CLIENT FOR INFORMATION;
- TO RESPOND TO THE CLIENT'S TELEPHONE CALLS;
- TO KEEP APPOINTMENTS WITH THE CLIENT, OR PROVIDE TIMELY EXPLANATION OR APOLOGY IN CIRCUMSTANCES WHEN UNABLE TO KEEP SUCH AN APPOINTMENT;
- HAVING ACCEPTED A MATTER, TO SHOW HIS UTMOST COMMITMENT TO SEE THAT THE MATTER CONCLUDES AND AS FAR AS POSSIBLE IN LAW, FAVORABLY TO THE BENEFICIARY.

CONTD....

- ENTRUSTED WITH A MATTER BY LEGAL SERVICES INSTITUTION TO FILE OR DEFEND IN A COURT ON BEHALF OF A LEGAL AID SEEKER, IF IT COMES TO NOTICE THAT ANY OTHER CASE IS REQUIRED TO BE FILED OR DEFENDED ON BEHALF OF THAT CLIENT, THEN TO INFORM HIM IN THIS REGARD; TO TAKE APPLICATION FROM HIM TO BE PRESENTED IN DLSA TO PROVIDE LEGAL AID, INSTEAD OF GETTING HIMSELF ENGAGED AS A PRIVATE COUNSEL
- IF DURING VISIT TO ANY JAIL, PROTECTION HOME, LEGAL SERVICES CLINIC AS A PANEL COUNSEL, IT EMERGES THAT SOME CASE IS REQUIRED TO BE FILED OR DEFENDED ON BEHALF OF A LEGAL AID SEEKER, THEN TO INFORM HIM IN THIS REGARD, TAKE APPLICATION FROM HIM TO BE PRESENTED IN DLSA TO PROVIDE LEGAL AID, INSTEAD OF GETTING HIMSELF ENGAGED AS A PRIVATE COUNSEL.

CONDT....

- TO BE PROACTIVE WHEN NOTICE ANY VIOLATION OF HUMAN, FUNDAMENTAL OR OTHER LEGAL RIGHTS OF ANY PERSON OR PERSONS IN THE VILLAGE OR COMMUNITY AND TRY TO USE VARIOUS PROVISIONS IN THE CPC AND CR.P.C. TO REMEDY THE SITUATION AT THE DISTRICT COURTS ITSELF INSTEAD OF RUSHING WITH A PIL.
- TO ABIDE BY THE INSTRUCTIONS OF LEGAL SERVICE INSTITUTION, ISSUED FROM TIME TO TIME E.G. SUBMITTING BILLS IN TIME, REGULARLY INFORMING ABOUT PROGRESS OF CASE ETC.

DON'TS (GENERAL)

- CHARGING ANY FEE IN WHATSOEVER MODE FROM THE BENEFICIARY.
- COMMITTING, WHETHER PROFESSIONALLY OR IN THE LAWYER'S PERSONAL CAPACITY, ANY ACT OF FRAUD OR DISHONESTY, E.G. BY FALSIFYING A DOCUMENT, EVEN WITHOUT FRAUDULENT INTENTS;
- MAKING UNTRUE REPRESENTATIONS OR CONCEALING MATERIAL FACTS FROM THE CLIENT/LEGAL AID SEEKER WITH DISHONEST OR IMPROPER MOTIVES;
- TAKING IMPROPER ADVANTAGE OF THE YOUTH, INEXPERIENCE, LACK OF EDUCATION OR SOPHISTICATION, ILL HEALTH, OR UNBUSINESS-LIKE HABITS OF THE CLIENT/BENEFICIARY;

CONTD....

- RECEIVING MONEY FROM OR ON BEHALF OF THE CLIENT/BENEFICIARY FOR ANY PURPOSE AND UNDER ANY PRETEXT. THIS MUST BE STRICTLY AVOIDED BY THE PANEL ADVOCATE, BECAUSE NOT ONLY THE COUNSEL FEE BUT ALL OTHER EXPENSES SUCH AS COURT FEE, CLERKAGE, PROCESS FEE, EXPENSES OF WITNESSES ETC. ARE PAID BY THE STATE THROUGH THE LEGAL SERVICES AUTHORI
- FAILING TO DISCHARGE THE OBLIGATION TO THE COURT AS AN OFFICER OF THE COURT, AS EXPECTED TO BE ABSOLUTELY FRANK AND CANDID IN ALL DEALINGS WITH THE COURT, FELLOW LAWYERS AND OTHER PARTIES TO PROCEEDINGS, SUBJECT ALWAYS NOT TO BETRAY THE CLIENT/LEGAL AID SEEKER'S CAUSE, ABANDONING THE CLIENT'S LEGAL RIGHTS OR DISCLOSING THE CLIENT'S CONFIDENCES

CONTD....

- DEVELOPING A NETWORKING WITH THE PLV THAT HE IS MENTORING AND MONITORING, TO ENHANCE HIS PRIVATE PRACTICE
- TAKING UNDUE ADVANTAGE OF BEING A PANEL ADVOCATE, BEFORE ANY AUTHORITY.
- PROPAGATING HIS PRIVATE PRACTICE BY DISTRIBUTING HIS VISITING CARDS OR IN ANY OTHER MANNER, DURING VISITS TO JAILS, PROTECTION HOME OR LEGAL CARE & SUPPORT CENTER ETC.
- KNOWINGLY ASSISTING, ENABLING OR PERMITTING ANY PERSON TO ACT FRAUDULENTLY, DISHONESTLY OR ILLEGALLY TOWARD THE CLIENT/BENEFICIARY;

DO'S (IN CRIMINAL MATTERS):

- TO BE PRESENT IN THE COURT ASSIGNED DURING REMAND HOURS AND WHENEVER AN ASSIGNED CASE IS LISTED FOR HEARING.
- TO PREPARE THE CASE WELL, AS IF THE ACCUSED HAS ENGAGED HIM PRIVATELY
- MUST COMMUNICATE WITH THE ACCUSED/ HIS FAMILY MEMBERS.
- WHILE REPRESENTING A VICTIM OF A SEXUAL CRIME PARTICULARLY A WOMAN OR CHILD, TO ENSURE THAT THE NAME OF THE VICTIM IS NEVER DISCLOSED, THE VICTIM IS EXAMINED BY THE PROSECUTION AND THE DEFENCE WITH DUE SENSITIVITY AND RESPECT FOR DIGNITY AND THE MEDIA DOES NOT HARASS THEM.
- AT THE POLICE STATION, TO ENSURE THAT A LADY POLICE OFFICER RECORDS THE STATEMENT OR FIR WITH ALL RELEVANT DETAILS.

DON'TS (IN CRIMINAL MATTERS):

- USING UNFAIR MEANS, LIKE MAKING ATTEMPT TO WIN OVER THE WITNESSES OR TO INTIMIDATE THEM.
- USING INSULTING WORDS FOR A WOMAN WITNESS OR COMPLAINANT WHILE DEFENDING A MALE ACCUSED.

DO'S (IN CIVIL MATTERS):

- TO UNDERSTAND AND PREPARE THE CASE WELL BEFORE DRAFTING THE PLAINT OR WRITTEN STATEMENT SO THAT NO PRAYER OR DEFENCE IS MISSED.
- TO SEARCH THE RELEVANT LAW BEFORE DRAFTING PLAINT OR WRITTEN STATEMENT TO PRESENT THE CASE UNDER THE CORRECT LAW AND LEGAL PRINCIPLES
- TO PROMOTE SETTLEMENT THROUGH THE ADR MECHANISM, EVEN IF HIS FEES FOR THE CASE WOULD BE LESS THAN FOR A CONCLUDED TRIAL.
- CASES OF SENIOR CITIZENS MUST BE HANDLED WITH EXTRA CARE AND COMMUNICATION WITH SENIOR CITIZENS MUST BE POLITE.

DON'TS (IN CIVIL MATTERS):

THE PANEL LAWYER SHOULD ABJURE A CASUAL AND INDIFFERENT APPROACH IN ACCOMPLISHMENT OF THEIR TASKS ASSIGNED TO THEM SUCH AS FILING OF INCOMPLETE, ILLEGIBLE AND INACCURATE PLEADINGS WITHOUT PERSONAL CHECK AND VERIFICATION; BEING ABSENT WHEN THEIR MATTERS ARE CALLED AND TAKEN UP BY THE COURTS; NON-PAYMENT OF COURT FEE AND PROCESS FEE; FAILING TO REMOVE OFFICE OBJECTIONS; OR FAILING TO TAKE STEPS TO SERVE THE PARTIES, AND SO ON.

CONTD....

- THE PANEL LAWYER MUST NOT SEEK ADJOURNMENTS EXCEPT IN THE MOST UNAVOIDABLE CIRCUMSTANCES, AND EVEN THEN WITH ADEQUATE NOTICE TO THE SECRETARY OF THE LEGAL SERVICES AUTHORITY TO ENABLE SOME ALTERNATIVE ARRANGEMENT TO BE MADE.

THANK YOU

POWERPOINT PRESENTATION ON LEGAL SERVICES PANEL LAWYERS - COMMUNICATION WITH CLIENTS AND COUNSELLING

DR. BHARAT BHUSHAN PARSOON,
JUDGE, PUNJAB AND HARYANA HIGH COURT,
CHANDIGARH

BACKGROUND

- THE POOR, MARGINALIZED, DOWNTRODDEN AND WEAKER SECTIONS FORM LARGE PART OF OUR SOCIETY.
- DESPITE THERE BEING NUMEROUS LEGISLATIONS TO PROTECT THEIR RIGHTS, THEY SUFFER BECAUSE OF IGNORANCE OF THE LAWS, PROCEDURE TO ENFORCE THEM AND THE RIGHT FORUM TO APPROACH.

THE ROLE OF LEGAL SERVICES AUTHORITIES CONSTITUTED UNDE THE LEGAL SERVICES AUTHORITIES ACT, 1987

- TO PROVIDE LEGAL SERVICES TO POOR, MARGINALIZED, DOWNTRODDEN AND WEAKER SECTIONS OF THE SOCIETY.
- TO SPREAD LEGAL AWARENESS AMONGST THEM ABOUT THEIR LEGAL RIGHTS AND REMEDIES AVAILABLE TO THEM UNDER THE LAW.
- TO HELP THEM TO REAP THE FRUITS OF THE VARIOUS SCHEMES MEANT FOR THEIR WELFARE.

PANEL LAWYERS

- LAWYERS EMPANELLED BY THE LEGAL SERVICES AUTHORITIES HAVE PIVOTAL ROLE TO PLAY TO ACHIEVE THE OBJECTIVES.
- RESPONSIBILITY UPON THE PANEL LAWYERS TO RENDER COMPETENT AND QUALITY LEGAL SERVICES AND SPREAD LEGAL LITERACY EFFECTIVELY.
- THUS, PANEL LAWYERS CONSTITUTE ONE OF THE IMPORTANT PILLARS UPON WHICH REST THE ENTIRE EDIFICE OF THE LEGAL SERVICES AUTHORITIES.

ROLE OF THE PANEL LAWYER

- TO PROVIDE COURT BASED LEGAL SERVICES
- TO ACT AS RETAINER IN FRONT OFFICE
- TO ATTEND LEGAL SERVICES CLINIC/ VILLAGE LEGAL CARE & SUPPORT CENTERS IN JAILS, PROTECTION HOMES, OBSERVATION HOMES, VILLAGES, SLUMS IN URBAN AREAS ETC.
- TO ATTEND LEGAL LITERACY CAMPS
- TO ACT AS MENTOR TO PARA-LEGAL VOLUNTEERS

EXPECTATIONS FROM THE PANEL COUNSEL

- THAT THEIR CONDUCT AND ACTIONS WOULD HAVE THE CHARACTER OF NOBILITY REVOLVING AROUND THE OBJECT OF ESPOUSING THE CAUSE OF GENERAL PUBLIC GOOD

CLIENT COUNSELLING

- REQUIRED FOR GATHERING COMPLETE INFORMATION SO AS TO UNDERSTAND THE PROBLEM AND SUGGEST THE CORRECT REMEDIAL ACTION.

EMPATHY

- EVERY PROBLEM MANIFESTING IN ITS FACTUAL ROBES HAS SOCIAL, FAMILIAL OR EMOTIONAL DIMENSIONS
- WITHOUT LOSING ONE'S IDENTITY, THE PANEL LAWYER IS REQUIRED TO PUT HIMSELF IN THE FACT SITUATION IN WHICH HIS LITIGANT IS PLACED AND THEN HE IS TO EVALUATE THE FACTS AND CIRCUMSTANCES ATTENDING ON AND INCIDENTAL TO SUCH PROBLEM.
- TO EMPATHIZE WITH THE LITIGANT BY UNDERSTANDING THE PROBLEM FROM THE PERSPECTIVE OF THE LITIGANT.

LISTENING SKILLS HAVE TO BE ENHANCED:

- TO LISTEN TO THE LITIGANT CAREFULLY.
- TO LOOK FOR MATERIAL INFORMATION THAT WOULD HELP ESTABLISH A CASE FOR THE CLIENT.
- NOT BE DISMISSIVE IN HIS BODY LANGUAGE ONLY BECAUSE IT IS A POOR PERSON SITTING IN FRONT OF HIM.
- TO REMEMBER THAT IT IS BECAUSE THE PERSON IS MARGINALIZED, THAT ANY INFARCTION OF HIS LEGAL RIGHTS IS LARGER IN ITS IMPACT THAN FOR ORDINARY LITIGANTS.

CONTD....

- SUCH PERSONS ARE BOUND TO BE VERBOSE. THEREFORE, LISTENING CAREFULLY IS ABSOLUTELY ESSENTIAL.
- BY LISTENING CAREFULLY, THE PANEL LAWYER MAY GET A GOOD IDEA OF THE CONSEQUENCES OF AND SUFFERING DUE TO LITIGATION OF THE PERSON ON ACCOUNT OF FACTORS SUCH AS HIS ECONOMIC AND SOCIAL BACKGROUND AND WHICH WOULD BE VERY SIGNIFICANT IN DECIDING ON THE LEGAL PROCESSES INCLUDING ADRS TO BE ADOPTED IN A GIVEN CASE.

PATIENCE

- TO BE PATIENT WITH THE BENEFICIARY.
- IT MUST BE REMEMBERED THAT FOR THE MARGINALIZED PERSON, THE PANEL LAWYER MAY HAVE ACTUALLY BEEN THE FIRST PERSON TO SIT HIM DOWN AND ASK HIM ABOUT HIS PROBLEM. IN SUCH AN EVENT, NATURALLY HE WOULD VENT ALL HIS FEELINGS AND TROUBLES BEFORE COMING TO THE POINT.

COMPASSION & TOLERANCE:

- TOLERANCE, UNDERSTANDING AND PERSEVERANCE PUNCTUATED BY COMPASSION SO THAT COMMUNICATION BRINGS BALMING EFFECT FOR THE BATTERED AND BRUISED PERSON, IS THE ACHIEVEMENT OF A PANEL LAWYER.
- SUCH ATTITUDE WOULD BRING FOR HIM EXTRA FLOW OF CONFIDENCE FROM A LITIGANT, WHO WOULD REPOSE PROFOUND TRUST IN HIM WHICH IN TURN WILL ENTAIL COMPLETE DISCLOSURE OF MAIN AND INCIDENTAL MATTERS.

BEING ABLE TO FRAME THE RIGHT QUESTIONS:

- PANEL LAWYER SHOULD BE ABLE TO ELICIT ALL INFORMATION FROM AN INHIBITED BENEFICIARY WHO APPROACHES HIM FOR LEGAL ASSISTANCE.
- THE MANNER OF QUESTIONING WILL ENCOURAGE OR DISCOURAGE THE BENEFICIARY FROM CONTINUING WITH THE CONVERSATION WITH THE PANEL LAWYER.
- THEREFORE, QUESTIONS MUST REFLECT INTEREST.

CONTD....

- SHOULD NOT BE JUDGMENTAL OR CRITICAL OF THE ACTIONS. QUESTIONS SHOULD BE FRAMED NEUTRALLY AND POSED IN A NEUTRAL TONE
- QUESTIONS MUST BE OPEN ENDED TO ENCOURAGE THE PERSON TO REVEAL ALL DETAILS AND IS NOT FORCED TO GIVE A YES OR A NO FOR AN ANSWER.
- ESTABLISHING RAPPORT WITH THE CLIENT SO AS TO ENCOURAGE THE PERSON TO CONTINUE TO SPEAK TO DEVELOP BETTER UNDERSTANDING OF THE PROBLEM FACED BY HIM.

CONFIDENTIALITY

- A LITIGANT IN THE COURSE OF INTERACTION WITH A LAWYER MAY REVEAL VITAL INFORMATION ABOUT HIS CHARACTER, RELATIONSHIP WITH OTHERS, MATRIMONIAL ABRASIONS, BUSINESS LAPSES AND MANY MORE.
- THE LITIGANT MAY EVEN DISCLOSE SUCH INFORMATION WHICH MAY BE INCRIMINATING TOO PROFESSIONALLY AND IN CONFIDENTIALITY TO HIS LAWYER.

CONTD....

- SIMILARLY, THE PANEL LAWYER WILL NOT BE ABLE TO HELP A LITIGANT EFFECTIVELY UNLESS SUCH LITIGANT TRUSTS HIM WITH THE CERTAINTY THAT THE PANEL LAWYER WOULD NOT BETRAY HIM QUA HIS SECRETS.
- SUCH INBUILT TRUST OF CONFIDENTIALITY BY A LITIGANT REPOSED IN HIS LAWYER IF DILUTED MAY BRING SERIOUS DANGER OR HARM TO THE LITIGANT. HENCE MAINTAINING CONFIDENTIALITY OF DISCLOSURES IS IMPORTANT.

AN ATTITUDE OF RESPECT AND PROFESSIONAL RELATIONSHIPWITH THE BENEFICIARY

- PERSONAL PREDILECTIONS AND FEELINGS OF FEAR, LOVE, HATE, CRUELTY, ATTRACTION AND REPULSION ARE TO BE KEPT AT BAY.
- THERE SHOULD NEITHER BE AN ATTEMPT NOR POSSIBILITY OF EXPLOITING THE DOMINANT POSITION OF A PANEL LAWYER WHILE DEALING WITH THE BENEFICIARY.
- PANEL LAWYERS SHOULD NOT FALL PREY TO TEMPTATIONS OFFERED BY THE LITIGANTS.

CONTD....

- PANEL LAWYERS SHOULD NOT BE CONCERNED ABOUT PERSONAL DETAILS OF THE BENEFICIARIES SUCH RELATING TO THEIR FAMILIES, MARRIAGE PROFILE OR THEIR PRIVATE AND SOCIAL LIFE AS IT IS LIKELY TO DISTURB THEIR PRIVACY.
- THEY NEED TO REGULATE THEIR BEHAVIOR IN SUCH A WAY SO AS TO ACHIEVE ETHICAL DECISION MAKING.
- PANEL LAWYERS SHOULD NOT EXPLOIT THEIR RELATIONS WITH THEIR CLIENTS FOR THEIR PERSONAL ADVANTAGE BUT MUST DO EVERYTHING TO GET THE MAXIMUM BENEFITS TO THE CLIENT AS ARE HIS LEGAL ENTITLEMENTS

SERVE AS A GUIDE FOR THE BENEFICIARY:

- THE PANEL LAWYER MUST BE ABLE TO GUIDE THE PERSON TO TAKE THE RIGHT DECISION WITHOUT LOSING COOL.

SENSITIVE TO THE DOWNTRODDEN AND MEEK, PARTICULARLY SC/ST, WOMEN AND CHILDREN

- PANEL LAWYERS ARE TO REACH THE UNREACHED AND ARE REQUIRED TO DEAL WITH THE DISADVANTAGED AND SIDELINED SECTIONS OF THE SOCIETY AND TO WORK OUT RESOLUTIONS THROUGH CREATIVE THINKING, INCLUDING EXPLORING UNCHARTERED COURSES WHILE SUGGESTING LEGAL REMEDIES TO THE BENEFICIARIES. HROUGH CREATIVE THINKING, INCLUDING EXPLORING UNCHARTERED COURSES WHILE SUGGESTING LEGAL REMEDIES TO THE BENEFICIARIES.

TO MAINTAIN INTEGRITY & SET HIGH STANDARD:

- THE PANEL LAWYER OWES ABSOLUTE INTEGRITY TO THE CLIENT AND THE ORGANIZATION.
- THE PANEL LAWYER IS THE FACE OF THE LEGAL SERVICES AUTHORITY THAT HAS ENGAGED HIM AND THEREFORE, IS ITS PUBLIC FACE. INTEGRITY IS THE HALLMARK OF A PANEL/RETAINER LAWYER.

CONTD....

- LACK OF INTEGRITY BRINGS BAD NAME NOT ONLY TO THE LAWYER, BUT ALSO COMPROMISES THE REPUTATION OF THE LEGAL SERVICES AUTHORITY FOR WHICH HE IS EMPANELLED.
- NOTWITHSTANDING LEGAL COMPETENCY OF A LAWYER, DISHONORABLE OR QUESTIONABLE CONDUCT EITHER IN HIS PRIVATE LIFE OR IN HIS PROFESSIONAL PRACTICE REFLECTS ADVERSELY ON SUCH LAWYER, ON HIS PROFESSION OF LAW, ON THE LEGAL SYSTEM AS ALSO ON THE ADMINISTRATION OF JUSTICE AS A WHOLE.

THANK YOU

ACTIVITY FOR SESSION II

(ROLE-PLAY)

- Justice Manju Goel (Retd.)*

1. GENERAL FACTS ON THE FILE

The Secretary, District Legal Services Authority, has marked a file to the Panel lawyer. The facts on record are as under:

Promila, a lady of 30 years seeks redressal of her grievances against her husband. She is often physically abused by her husband. She has two children. The husband is not giving her enough money for the maintenance of the children and of herself.

2. INSTRUCTIONS FOR THE PARTICIPANTS PLAYING THE ROLE OF THE PANEL LAWYER INTERVIEWING AND COUNSELLING THE CLIENT.

The Panel Lawyer has to extract during the interview the confidential facts which are given to the participant who is playing the role of the client. He also has to counsel the client. He will consider for two minutes the following points before he starts intervening the client;

a) How he will receive the client?

b) How he will began his interview?

c) What are the different legal reliefs which are available to a woman with matrimonial/domestic problems of the above nature?

d) How much of the problem can be solved through courts and how much by other means?

3. CONFIDENTIAL FACTS FOR WOMAN

The woman was married when she was 19. The marriage was an arranged marriage. The husband, Umesh was then 25 years old. It was represented by his parents that Umesh was in Government service and was a graduate. After marriage the matrimonial family was kind and cooperative. Promila devoted herself wholeheartedly towards her family responsibilities. It turned out later that Umesh was merely a matriculate and that he was holding only an ad-hoc job with the loca self-government. His job came to an end after a year of marriage. Umesh looked for alternative employment but none of the option available compared favourably with the job that he had done. This made him frustrated and irritable. It was during that time that he started beating up Promila on one pretext or the other. Incidentally, Promila ignored the suggestions from the matrimonial family to bring money from her father. The children are school going and need money for books, stationary, uniforms and transport. The money in the hands Promila is not sufficient to run the household. The other members of the matrimonial family are tired of extending financial help to Umesh and Promila.

Promila is not sure whether divorce will bring her any relief. She has never tried to do a job and stand on her own legs. She still has a faint hope that Umesh may find a job which might bring some improvement in her life.

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*Member, NALSA

Promila enters the lawyer's room crying and sobbing. She is somewhat confused as to what she should actually do to come out of her agony. She is not sure what will happen to the children if divorce is granted. She does not want to part with the children and fears that if she separates from Umesh, the children may be given to the father. She is looking for advice from the Panel Lawyer.

SHORT NOTE ON
ROLE & RESPONSIBILITIES OF LEGAL SERVICES
LAWYERS - DO'S AND DON'TS FOR A PANEL LAWYER

— Dr. Bharat Bhushan Parsoon*

BACKGROUND

The poor, marginalized, downtrodden and weaker sections form large part of our society. Despite there being numerous legislations to protect their rights, they suffer because of ignorance of the laws, procedure to enforce them and the right forum to approach. Fear or distress etc. may be lurking heavy on their mind.

The Role of Legal Services Authorities constituted under the Legal Services Authorities Act, 1987 [hereinafter referred to as "the Act"] is to provide legal services to such poor, marginalized, downtrodden and weaker sections of the society. They are also required to spread legal awareness amongst these sections about their legal rights and remedies available to them under the law, besides helping them to reap the fruits of the various schemes meant for their welfare. To achieve these objectives, lawyers empanelled by the Legal Services Authorities under the Act have pivotal role to play. Responsibility rests upon a panel lawyers to render competent and quality legal services and spread legal literacy effectively. In that sense, A panel lawyers constitute one of the important pillars upon which rest the entire edifice of the Legal Services Authorities. It is expected of A panel lawyers that their conduct and actions would have the character of nobility revolving around the object of espousing the cause of general public good.

This Module is an attempt to deal with the topic of the role & responsibilities of a panel lawyers; what things they are expected to do and what actions they should avoid.

ROLE & RESPONSIBILITIES OF A PANEL LAWYER

- **To provide court based legal service**
- **In Front Office as Retainer**
- **Attending Legal Services Clinic/ Village Legal Care & Support Centers in Jails, Protection Homes, Observation Homes, Villages, Slums in Urban areas etc.**
- **Attending Legal Literacy Camps**
- **To act as Mentor to Para-legal Volunteers**

The role of a Panel Lawyer is no longer restricted to provide court based legal services by appearing in a court of law on behalf of a client referred to him by the legal services authority. The NALSA has drawn up several schemes for effectively reaching out to the common people to fulfill its mandate of access to justice for all. Therefore, a panel lawyer is expected to discharge several roles. His responsibilities have also increased. Some of the responsibilities are general in nature, expected from a panel lawyer, to be dischared in whatever situation, he represents the Legal Services Authorities. These are as on the next page :

*Judge, Punjab and Haryana High Court, Chandigarh

GENERAL RESPONSIBILITIES

- A panel lawyer has a duty to competently perform all tasks entrusted to him and to render all legal services expected of him by the respective Legal Services Authorities.
- A panel lawyer has the duty to provide quality service expected of a competent lawyer in a like situation. Such lawyer has a duty to make every effort to provide courteous, thorough and prompt service to the client. A panel lawyer is expected to provide service with competence, conscientiously and with diligence, efficiency and civility.
- It is expected of a panel lawyer to work fearlessly for upholding the interest of his client, of course, employing fair and honorable means. Panel lawyer is required to always remember that his loyalty is to the law.
- A competent lawyer should have relevant knowledge, skills and attributes.
- He should keep himself abreast of the latest amendments in law, latest rulings of the Apex Court & the High Courts.
- He should apply them in a manner appropriate to each matter, and within the reasonable parameters of the lawyer's experience and the nature and terms of the lawyer's engagement.
- He should know the general legal principles and procedures and substantive law and procedure for the areas of law in which the lawyer specializes.
- He should apply his mind while investigating facts, identifying issues, considering possible options, and developing and advising the client/ beneficiary as to appropriate courses of action.
- He should undergo continuous training for getting and/or enhancing appropriate skills and must attend all the training programmes organized by the legal services authority apart from pursuing appropriate professional development to maintain and enhance legal knowledge and skills including:
    - legal research;
    - analysis;
    - application of the law to the relevant facts;
    - writing and drafting;
    - negotiation;
    - advocacy;
    - problem solving; and,
    - adapting to changing professional requirements, standards, techniques and practices.
- A panel lawyer has a duty to communicate effectively with the client. He must communicate to his client/ beneficiary in a timely manner at all stages to enable him to take effective steps or give the lawyer proper instructions in the matter.
- He must perform all functions conscientiously and diligently. A panel lawyer should ensure that matters are attended to within a reasonable time frame. If the lawyer can reasonably foresee undue delay in providing advice or services, the lawyer has a duty to inform the client and the legal services authority, so that alternative arrangements can be made.

- A panel lawyer is expected to tell the litigant about positive as also negative aspects of the case, which would be considered in a Court of law.
- A panel lawyer should not withdraw from serving a litigant if once he has agreed to serve him. He cannot withdraw from service except where the litigant's conduct is such that it calls for reclusion for a panel lawyer and that too only with the approval of the Legal Services Authority.
- A panel lawyer after being empanelled should not refuse to appear in a case assigned to him on the plea that he has other commitments arising out of personal briefs.
- A panel lawyer cannot give priority to his personal briefs and assignments and must treat legal aid cases with the same seriousness and concern as in cases of his private clients.
- Since a panel lawyer is in a fiduciary relationship with the litigant, he is to protect the interest of the litigant to the best of his ability and competence while working with sincerity, honesty and devotion. A panel lawyer, by no means, has to disclose directly or indirectly contents of communication made by the litigant to him. He is also not to disclose the advice given by him during the proceedings.
- It is the responsibility of a panel lawyer to keep the Secretary of the legal services authority concerned informed about the progress of the case.
- A panel lawyer must maintain the highest ethical and moral standards at all times, being conscious of his unique status of a legal services lawyer.
- A panel lawyer is not to seek adjournment after adjournment in a nonchalant manner. It is the duty of the counsel as the officer of the court to assist the court in a properly prepared manner and not to seek unnecessary adjournments.[1]
- The litigant should not suffer due to strike of lawyer .The Supreme Court of India on dated 17 December, 2002[2], has held that lawyers have no right to go on strike or give a call for boycott, not even on a token strike. It is held that if a lawyer, holding a Vakalatnama of a client, abstains from attending Court due to a strike call, he shall be personally liable to pay costs which shall be addition to damages which he might have to pay to his client for loss suffered by him.

SOME RESPONSIBILITIES OF PANEL ADVOCATES ARE SPECIFIC, DEPENDING UPON FACT SITUATIONS. THESE MAY BE ENUMERATED AS UNDER:

I. Criminal Matters:

- In criminal cases, a panel lawyer must remember his role at various stages. Fundamentally it is to protect the legal and human rights of the person who is alleged to have violated the law. An accused would need a lawyer:
    - to resist remand to police or judicial custody and for grant of bail;
    - to clearly explain to him the legal consequences in case he intends to make a confessional statement in terms of Section 164 Cr.P.C. or to enter a Plea Bargain;
    - to represent him when the court examines the charge sheet submitted by the police and decides upon the future course of proceedings and at the stage of the framing of charges; and,
    - and beyond that, of course, for the trial which includes the recording of evidence, the statement of the accused under S.313 Cr. PC and the defence evidence and final arguments.

[1] Noor Mohammed Vs Jethanand and Anr. 2013(2)SCALE 94

[2] Ex-Capt. Harish Uppal vs Union Of India & Anr
2003(2)SCC45

- A Panel lawyer has to perform the functions of a Duty or Remand counsel as per the roster of the legal services authority. In such role, he must remain present during remand hours and effectively participate in the remand proceedings. In case he falls ill or cannot remain present for any particular day due to some inevitable reason then he must send prior intimation in this regard to the concerned legal services authority so that another panel lawyer can be assigned the task well in time. Further, if during remand or trial, it comes to the notice of a panel lawyer that the accused is a juvenile in conflict with law then he must take steps to get the matter transferred to the Juvenile Justice Board.
- A panel lawyer, assigned the task of representing an accused desirous of making a confession, must explain the legal consequences of making such confession. He must ensure that the accused understands the consequences of confession clearly.
- A panel lawyer must be vigilant that the legal and human rights of the alleged accused are not violated. He must ensure that the accused is not handcuffed unless the handcuffing is permitted by the court of law for specific reasons. This apart, the guidelines given in the various judgments of the Hon'ble Supreme Court and the High Courts must be borne in mind while representing the accused.
- A panel lawyer must apprise himself about the allegations against the accused. Until and unless he apprises himself about the facts, he will not be in a position to resist the police or judicial remand effectively.
- He must also apply for bail, and in case the bail is granted he must follow up and help the accused to furnish the bail/surety bonds and fulfill the requisite formalities. He must not allow the bail order to become a dead letter if the accused is unable to furnish bail/surety bonds the same day and is removed to judicial custody. If there are some difficulties in meeting the bail conditions, a panel lawyer must bring it to the notice of the Court and seek modification of the terms.
- He must also check that the accused has been produced in the court within 24 hours from the time of arrest.
- He must ensure that the accused has not been tortured. In case accused complains of torture then he must take appropriate steps as per law like applying on behalf of the accused to the court for the medical examination of the accused etc.
- At the stage of considering the case for charge in warrant cases, a panel lawyer should come prepared. He must go through the report filed by the police under section 173 Cr.P.C. He must analyze as to whether any case is made out or not for framing charge against the accused. He must submit arguments effectively and clearly.
- During trial, the legal aid counsel must come fully prepared. He must conduct the cross examination effectively. The defence of the accused must be put effectively and convincingly before the court of law. At the stage of arguments also he must have a grip over the factual matrix of the case as reflected from the evidence and all aspects must be analyzed by the counsel in the context of the relevant law, including the case law.

II. Representing the Victim:

- It is not the accused alone whom a panel lawyer would be representing. The role of the victim's advocate or a panel lawyer, if he/she has been assigned one, would be not only to explain to the victim, the nature of the proceedings, to prepare her for the case and for her

testimony and to assist her in the police station and in court to pursue the case, but also to provide her with guidance as to how she might obtain help of a different nature from other agencies, for example, counseling or medical assistance or access rehabilitation schemes. Legal assistance will 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 panel lawyer at this juncture while drawing up the FIR would be crucial for the trial.

- Keeping in mind the provisions of Section 357 & 357A Cr.P.C. and the victim Compensation Scheme, a panel lawyer must help the victim to seek compensation for rehabilitation.

III. Civil Matters:

- A panel lawyer must be open to and should make efforts to settle disputes between the parties by using alternative disputes resolution mechanism within the legal framework. The role of a panel lawyer is thus to be a counselor to help and advise the parties to choose the right mode of dispute resolution and then to support the party in finally and fairly resolving it, be it through mediation, conciliation, arbitration, Lok Adalats or out of court settlement. A panel lawyer should try his best to negotiate the matter between the parties to the litigation so that the settlement works to the best advantage of the beneficiary assigned to him.

IV. Jail Visit:

- As a jail visiting counsel, a panel lawyer must be aware of the Jail Manual and of the various judgments of the Hon'ble Supreme Court relating to jail inmates. He must listen to the grievances of the prisoners with patience and must bring to the notice of the DLSA the grievances of the prisoners and of any infringement of their rights.
- The jail visiting lawyer must advice and guide the prisoners properly on the legal aspects of their case and on any other civil or legal issues they may have.
- In this context a panel lawyers must be aware of the rights of the prisoners. (Annexure 'A').

V. Legal Services Clinic:

- While being assigned to the legal services clinics/ village legal care and support centers and the prisons as jail visiting counsel, a panel lawyers must always adhere to the roster and must conscientiously attend the clinic/centers even when footfalls are low just as he would be available at his own office. Any difficulty in attending must be communicated so that the Secretary of the legal services authority can make alternative arrangements.
- A panel lawyer must keep all the records at the front office and the legal services clinics and maintain all the registers as required by the legal services institutions. He must keep proper record of the visitors and the details of the problems discussed and the advice given.
- In the Village Legal Care and Support Centers and in the Legal Services Clinics, a panel lawyer is expected to act as advisor and guide and also as the explorer of possibilities for amicable out of court settlements. In case he fails to reach such settlements, in appropriate cases he should refer the parties to the DLSA for assignment of counsel or reference to Mediation or Lok Adalat.
- With the help of Para-legal volunteers, he should try to identify the problems of villagers. Most of the common problems of villagers pertain to electricity, health, sanitation, water, transport,

postal or telephone services etc. He should guide them to get those settled through pre-litigation conciliation proceedings before Permanent Lok Adalat for Public Utility Services.

VI. Legal Literacy Camp:

- Spreading legal literacy is one of the important functions of the legal Services Authority. Various legal literacy camps are organized every month. Panel advocates are required to participate in these programmes as resource persons in view of their expertise and experience and also deliver lectures to spread legal awareness. They may be called upon to hold legal literacy camps and render on the spot legal advice during such camps.
- A panel lawyer must attend the legal literacy and awareness camps when requested to do so. Once, he has agreed to participate, he must actively participate including in getting in touch with the Sarpanches etc to inform about the camp and co-ordinate in organizing the camp. He must come fully prepared with the assigned topic and should be ale to encourage the villagers and marginalized people to ask questions and answer them effectively. He must also submit reports to the Secretary immediately after return from the camp.
- A panel lawyer should inform the people about all the services, schemes and nature of assistance provided by the Legal Services Authority, including various forms of ADR mechanism and also about Permanent Lok Adalat for Public Utility Services.

VII. Mentor for Para Legal Volunteers (PLV's):

- Under the NALSA Scheme for Para Legal Volunteers, a panel lawyer is expected to take on the mantle of a teacher and mentor to the PLVs who are working in the field and to hand hold them while they work in the community or village. They must always be available and ready to provide immediate legal advice to the PLVs who are faced with a problem which they do not know how to address as it is legally complicated or difficult for them to resolve.

VIII. Retainer:

- Some of A panel lawyers will also work as the retainer lawyers for the Front Offices. Here the role of the lawyer is more advisory, dealing with persons who come to the front office and forwarding their applications for legal assistance to the Secretary or requesting the Secretary to refer the case for conciliation/counseling etc. for even pre-litigation settlement.
- A panel lawyer in the front office is also expected to render services like drafting notices, sending replies to lawyers' notices and drafting small and minor applications, petitions etc. He has to attend to urgent matters as a retainer lawyer.

DO's AND DON'T's FOR PANEL LAWYERS

When we talk about Do's and Don'ts for a panel lawyers, we mean all that is expected of them to be done and what they should not venture to do. While performing the expected roles as enumerated above, there are certain responsibilities and DO's & DON'Ts for a panel lawyers, which they need to know and keep in mind. A listing cannot be meant to be exhaustive, and would serve only as a guide. All that is required is to perform well and in the interest of the beneficiary and the legal services institutions and for furthering the legal services movement without compromising the reputation of the institutions involved.

The quality of service to a client can be measured by the extent to which a lawyer maintains certain standards in practice. The following list, which is illustrative and not exhaustive, provides key examples of expected practices in this area:

DO's (GENERAL):

- Keeping a client reasonably informed;
- Answering reasonable requests from a client for information;
- Responding to a client's telephone calls;
- Keeping appointments with a client, or providing a timely explanation or apology in circumstances when unable to keep such an appointment;
- Having accepted a matter, a panel lawyer must show his utmost commitment to see that the matter concludes and as far as is possible in law, favorably to the beneficiary.
- Entrusted with a matter by Legal Services Institution to file or defend in a court on behalf of a legal aid seeker, if it comes to notice that any other case is required to be filed or defended on behalf of that client, then to inform him in this regard, take application from him to be presented in DLSA to provide legal aid, instead of getting himself engaged as a private counsel.
- If during visit to any jail, protection home, Legal Services Clinic as a panel counsel, it emerges that some case is required to be filed or defended on behalf of a legal aid seeker, then to inform him in this regard, take application from him to be presented in DLSA to provide legal aid, instead of getting himself engaged as a private counsel.
- He must be proactive when he sees any violation of human fundamental or other legal rights of any person or persons in the village or community and try to use various provisions in the CPC and Cr.P.C. to remedy the situation at the District courts itself instead of rushing with a PIL.
- He should think of filing a PIL only after obtaining the approval of the Executive Chairman of the SLSA through the Member-Secretary.
- To abide by the instructions of Legal service Institution, issued from time to time e.g. submitting bills in time, regularly informing about progress of case etc.

DON'Ts (GENERAL)

- A panel lawyer should not charge any fee in whatsoever mode from the beneficiary.
- Committing, whether professionally or in the lawyer's personal capacity, any act of fraud or dishonesty, e.g. by falsifying a document, even without fraudulent intents;
- Making untrue representations or concealing material facts from the client/legal aid seeker with dishonest or improper motives;
- Taking improper advantage of the youth, inexperience, lack of education or sophistication, ill health, or unbusiness-like habits of the client/beneficiary;
- Receiving money from or on behalf of the client/beneficiary for any purpose and under any pretext. This must be strictly avoided by the panel advocate, because not only the counsel fee but all other expenses such as court fee, clerkage, process fee, expenses of witnesses etc. are paid by the State through the Legal Services Authority.
- Knowingly assisting, enabling or permitting any person to act fraudulently, dishonestly or illegally toward the client/beneficiary;
- Failing to discharge the obligation to the court as an officer of the court and rather to be absolutely frank and candid in all dealings with the Court, fellow lawyers and other parties to

proceedings, subject always to not betraying the client/legal aid seeker's cause, abandoning the client's legal rights or disclosing the client's confidence.

- A panel lawyer must not develop a networking with the PLV that he is mentoring and monitoring, to enhance his private practice.
- Not to take undue advantage of being a panel advocate, before any authority.
- Not to propagate his private practice by distributing his visiting cards or in any other manner, during visits to Jails, Protection Home or Legal Care & Support Center etc.

DO's (IN CRIMINAL MATTERS):

- He has to be present in the Court assigned during remand hours and whenever an assigned case is listed for hearing.
- To prepare the case well, as if the accused has engaged him privately.
- A panel lawyer must communicate with the accused/his family members.
- While representing a victim of a sexual crime particularly a woman or child, a panel lawyer must ensure that the name of the victim is never disclosed, the victim is examined by the prosecution and the defence with due sensitivity and respect for dignity and that the media does not harass them. At the police station, he must ensure that a lady police officer records the statement or FIR with all relevant details.

DON'Ts (IN CRIMINAL MATTERS):

- A panel lawyer must never use insulting words for a woman witness or complainant while defending a male accused or while appearing for a male in any matter.

DO's (IN CIVIL MATTERS):

- In civil matters, a panel lawyer must understand and prepare the case well before drafting the plaint or written statement so that no prayer or defence is missed. He must search the relevant law before drafting plaint or written statement to present the case under the correct law and legal principles.
- A panel lawyer should promote settlement through the ADR mechanism, even if his fees for the case would be less than for a concluded trial.
- Cases of senior citizens must be handled with extra care, and his communication with senior citizens must be polite.

DON'Ts (IN CIVIL MATTE=RS):

- A panel lawyer should abjure a casual and indifferent approach in accomplishment of their tasks assigned to them such as filing of incomplete, illegible and inaccurate pleadings without personal check and verification; being absent when their matters are called and taken up by the Courts; non-payment of court fee and process fee; failing to remove office objections; or failing to take steps to serve the parties, and so on.
- A panel lawyer must not seek adjournments except in the most unavoidable circumstances, and even then with adequate notice to the Secretary of the legal services authority to enable some alternative arrangement to be made

Annexure 'A'

IX. RIGHTS OF PRISONERS

1. Right to be lodged appropriately based on proper classification.
2. Special Right of young prisoners to be segregated from adult prisoners.
3. Rights of women prisoners.
4. Right to healthy environment.
5. Right to bail.
6. Right to speedy trial.
7. Right to free legal services.
8. Right to basic needs such as food, water and shelter
9. Right to have interviews with one's lawyer.
10. Right against being detained for more than the period of sentence imposed by the court.
11. Right to protection against being forced into sexual activities.
12. Right against arbitrary use of handcuffs and fetters.
13. Right against torture, cruel and degrading punishment.
14. Right not to be punished with solitary confinement for a prison offence.
15. Right against arbitrary prison punishment.
16. Right to air grievances and to effective remedy.
17. Right to evoke the writ of habeas corpus against prison authorities for excesses.
18. Right to be compensated for violation of human rights.
19. Right to visits and access by family members of prisoners.
20. Right to write letters to family and friends and to receive letters, magazines, etc.
21. Right to rehabilitation and reformative programmes.
22. Right in the context of employment of prisoners and to prison wages.
23. Right to information about prison rules.
24. Right to emergency and reasonable health care.

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SHORT NOTE ON COMMUNICATION AND CLIENT COUNSELLING

— Dr. Bharat Bhushan Parsoon*

BACKGROUND

The poor, marginalized, downtrodden and weaker sections form large part of our Society. Despite there being numerous legislations to protect their rights, they suffer because of ignorance of the laws, procedure to enforce them and the right forum to approach. Fear or distress etc. may be lurking heavy on their mind.

The Role of Legal Services Authorities constituted under the Legal Services Authorities Act, 1987 [hereinafter referred to as "the Act"] is to provide legal services to such poor, marginalized, downtrodden and weaker sections of the Society. They are also required to spread legal awareness amongst these sections about their legal rights and remedies available to them under the law, besides helping them to reap the fruits of the various schemes meant for their welfare. To achieve these objectives, lawyers empanelled by the Legal Services Authorities under the Act have pivotal role to play. In fact, the panel lawyers constitute one of the important pillars upon which rest the entire edifice of the Legal Services Authorities. It is expected of the panel lawyers that their conduct and their actions would have the character of nobility revolving around the object of espousing the cause of general public good.

This Module is an attempt to deal with the topic of communication of Panel counsels with legal aid seekers and client counseling.

CLIENT COUNSELLING

- **To have empathy**
- **To have enhanced listening skills**
- **To have patience**
- **To be tolerant and compassionate**
- **To frame the right questions**
- **To maintain Confidentiality**
- **To have an attitude of respect and professional relationship**
- **To serve as a guide**
- **To be more sensitive to the downtrodden and meek, particularly SCs/STs, women and children**
- **To maintain integrity & set high standard**

Section 12 of the Legal Services Authority's Act 1987 lays down the eligibility criteria for free legal assistance. A mere glance at that would establish the background of the eligible people, viz. that they all suffer from handicaps due to which they form the marginalized sections and groups

*Judge, Punjab and Haryana High Court, Chandigarh

in our society. Many beneficiaries may be ignorant of the laws, legal procedures as also of court working. Fear and distrust of symbols of State authority may be naturally in their mind. Such a person may not be very forthcoming with the facts of his case or about the circumstances leading to the violation of his rights. A litigant who lacks confidence in himself and his case may keep some information close to himself depriving his counsel of complete data necessary to understand the factual details of the case, resulting in misdirected legal remedies thereof.

Thus, client counseling is required for gathering complete information so as to understand the problem and suggest the correct remedial action. Understanding 'with' the client, rather than a diagnostic and evaluative understanding 'of' him is required to be developed by the panel lawyer. Good communication skills have to be developed by him. It would be far easier to interact with a regular client but special skills need to be cultivated by a lawyer if he desires to be a successful panel lawyer. Some of the qualities required of panel lawyers for successful counselling may be listed as under:

- **He must have empathy**: Every problem manifesting in its factual robes has social, familial or emotional dimensions. Without losing one's identity, a panel lawyer is required to put himself in the fact situation in which his litigant is placed and then he is to evaluate the facts and circumstances attending on and incidental to such problem. He is to empathize with the litigant by understanding the world of the problem from the perspective of the litigant.
- **Listening skills have to be enhanced**: He is to listen to his litigant carefully. He should not try to give a running commentary of the events related by the client. He should look out for material information that would help establish a case for the client. He should not be dismissive in his body language only because it is a poor person sitting in front of him. Rather, a panel lawyer must remember that it is because the person is marginalized, that any infraction of his legal rights is larger in its impact than for ordinary litigants. Such persons are bound to be verbose. Therefore listening carefully is absolutely essential. By listening carefully a panel lawyer may get a good idea of the consequences of and suffering due to litigation of the person on account of factors such as his economic and social background and which would be very significant in deciding on the legal processes including ADRs to be adopted in a given case.
- **Patience**: A panel lawyer has to be patient with the beneficiary. If a person is a rustic or illiterate person, he may be slow in his speech. He may be talking in a roundabout manner. He may refer to facts that may have no direct bearing on the legal issue. But it must be remembered that for the marginalized person, the Panel Lawyer may have actually been the first person to sit him down and ask him about his problem. In such an event, naturally he would vent all his feelings and troubles before coming to the point.
- **Compassion and Tolerance:** A panel lawyer has no temperament to lose. It is his stock-in-trade. If he loses it, he loses his avocation of lawyering. Tolerance, understanding and perseverance punctuated by compassion so that communication brings balming effect for the battered and bruised person, is the achievement of a panel lawyer. Such attitude would bring for him extra flow of confidence from a litigant, who would repose profound trust in him which in turn will entail complete disclosure of main and incidental matters. At times, understanding of such peripheral matters results in solution of main issues because when genesis lies outside the evident area of dispute their resolution also calls for wider enquiry.
- **Being able to frame the right questions: A** panel lawyer should be able to elicit all

information from an inhibited beneficiary who approaches him for legal assistance. The manner of questioning will encourage or discourage the beneficiary from continuing with the conversation with the panel lawyer. Therefore, questions must reflect interest. They should not be judgmental or critical of the actions. Questions should be framed neutrally and posed in a neutral tone. Questions must be open ended to encourage the person to reveal all details and is not forced to give a yes or a no, for an answer. Establishing rapport with him, he is to encourage the person to continue to speak so as to develop better understanding of the problem faced by him.

- **Confidentiality**: A litigant in the course of interaction with a lawyer may reveal vital information about his character, relationship with others, matrimonial abrasions, business lapses and many more. The litigant may even disclose such information which may be incriminating too professionally and in confidentiality to his lawyer. Similarly, a panel lawyer will not be able to help a litigant effectively unless such litigant trusts him with the certainty that a panel lawyer would not betray him qua his secrets. Such inbuilt trust of confidentiality by a litigant reposed in his lawyer if diluted may bring serious danger or harm to the litigant. Hence, maintaining confidentiality of disclosures is important.

- **A panel lawyer must have an attitude of respect and professional relationship with the beneficiary**: Conversation of a litigant with a panel lawyer may be more informal than usual in view of the greater efforts to be put in by a panel lawyer in understanding the issues of the marginalized person. Nevertheless, a panel lawyer is not to lose his professionalism even if he may for instance, belong to the same social or community circle as of the litigant. Personal predilections and feelings of fear, love, hate, cruelty, attraction and repulsion are to be kept at bay. A litigant to a lawyer is in a vulnerable position. There should neither be an attempt nor possibility of exploiting this dominant position of a panel lawyer while dealing with the beneficiary. In short, off the duty relationship is also to be chartered in a decent manner to keep off abrasions viz. romance, sex etc. of such relationship. A panel lawyer must always have a mutually respectful and trusting relationship with the beneficiary, whether male or female. Panel lawyers should not fall prey to temptations offered by the litigants. Panel lawyers should not be concerned about personal details of the beneficiaries such relating to their families, marriage profile or their private and social life as it is likely to disturb their privacy. They need to regulate their behavior in such a way so as to achieve ethical decision making. Panel lawyers should not exploit their relations with their clients for their personal advantage but must do everything to get the maximum benefits to the client as are his legal entitlements.

- **He must serve as a guide for the beneficiary**: It is possible that a head strong beneficiary insists on doing things his way. In such situations, while respecting the autonomy of the person, a panel lawyer must tactfully point out the fallacies in taking such a stand and must be able to guide the person to take the right decision without losing his cool.

- **He must be more sensitive to the downtrodden and meek, particularly SCs/STs, women and children**: Panel lawyers need to put off their arrogance, egos and superiority for ushering in themselves an attitude which is congenial for juveniles and children to come out with their problems. They also need to be patient listeners to the old and infirm. Sympathetic disposition needs to be manifest for women as well. There are downtrodden and marginalized people in the society. They are not lucky enough to have social and familial warmth flowing for them. Their problems are peculiar, which require tailor-made solutions. Panel lawyers are to reach

the unreached and are required to deal with the disadvantaged and sidelined sections of the society and to work out resolutions through creative thinking, including exploring unchartered courses while suggesting legal remedies to the beneficiaries.

- **To maintain integrity & set high standard:** A panel lawyer owes absolute integrity to the client and the organization. It is only when a panel lawyer feels committed that he will do his best. The panel lawyer is the face of the Legal Services Authority that has engaged him and therefore, is its public face. Integrity is the hallmark of a panel/retainer lawyer. Lack of integrity brings bad name not only to the lawyer, but also compromises the reputation of the Legal Services Authority for which he is empanelled. Notwithstanding legal competency of a lawyer, dishonorable or questionable conduct either in his private life or in his professional practice reflects adversely on such lawyer, on his profession of law, on the legal system as also on the administration of justice as a whole. In the handling of the beneficiary, he must therefore set very high standards for himself. In short, the panel lawyer must ensure provision of top class service so that the beneficiary feels that though it is free for her she is getting the best! And thus reinforcing the faith of the most vulnerable people in the legal system and the legal services authorities.

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Session – III

02.00 AM to 03.30 AM

Total time: 1 hr 30 min

Session – III
2.00 PM to 3.30 PM
Total time: 1 hr 30 min

MODULE FOR TRAINING OF PANEL LAWYERS ON BASIC KNOWEDGE IN CRIMINAL LAW

Objective

- To give the Panel Lawyers information on the law relating to
  - (a) Plea Bargaining
  - (b) Rights of an arrested person
  - (c) Bail

Expected learning outcome

- The panel lawyers will know his role in defending an arrested person from the very beginning.
- The Panel Lawyer will know different situations in which bail can be sought and will be better equipped to serve his clients.
- The Panel Lawyers will be able to seek plea bargaining in appropriate cases.

Training Method

1. Lecture
2. PowerPoint presentation

Programme:

Introduction	-	05 Minutes
Group discussion on plea bargaining	-	25 Minutes
Presentation and discussion	-	35 Minutes
Interactive lecture with PowerPoint presentation on rights of an arrested person	-	15 Minutes
Interactive lecture with PowerPoint presentation on bail	-	10 Minutes

ACTIVITY FOR SESSION III
(PLEA BARGAINING)

- Justice Manju Goel*

Reading for group discussion – Plea bargaining

- Cross FIRs were registered under Sections 308/325 read with Section 34 IPC on a fight between two groups in a village. The groups of men and women had come to clash over the marriage of a girl from one community with a boy of the other community. By the time the accused persons appeared before the Court of Sessions, the boy and the girl were already married and both the communities had accepted the marriage.

Activity (1)

- **Discuss in small group and find answer to the following questions:**
  - i. Can an application for plea-bargaining be filed?
  - ii. If so, who should file the application?
  - iii. What should be the contents of the application?
  - iv. What are the factors to be considered by the Court before an application for pleas-bargaining is allowed?
  - v. What is the role of prosecutor in plea-bargaining?
  - vi. At what stage of the proceedings can an application for plea bargaining be filed?
  - vii. Suppose Section 307 IPC was also included in the charge, could an application for pleas bargaining be filed?
  - viii. Can an application for plea bargaining be maintained in the appellate court.

Activity (2)

- **In which of the following cases is plea-bargaining not permissible?**
  - i. Offences u/S 304A IPC
  - ii. Offences u/S 354 IPC
  - iii. Offences under the Wilf Life Act.
  - iv. Offences under the Immoral Traffic (Prevention) Act.
  - v. Offences u/S 392 IPC.
  - vi. Offences u/S 452 IPC.

*Former Judge, Delhi High Court

POWERPOINT PRESENTATION ON CRIMINAL JURISPRUDENCE ON BAIL

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LAW RELATING TO BAILS

DR. BHARAT BHUSHAN PARSOON
JUDGE, PUNJAB AND HARYANA HIGH COURT,
CHANDIGARH

- THE LAWS OF BAIL BALANCES TWO CONFLICTING DEMANDS:
- THE REQUIREMENTS OF THE SOCIETY FOR BEING SHIELDED FROM THE MISADVENTURES OF ACCUSED PERSON; AND
- INDIVIDUAL FREEDOM.

ARTICLE 21 OF THE CONSTITUTION OF INDIA GUARANTEES FUNDAMENTAL RIGHT TO LIFE AND PERSONAL LIBERTY.

CARDINAL PRINCIPLES WHICH FLOW FROM THIS FUNDAMENTAL RIGHT : -

(I) EVERYONE IS PRESUMED TO BE INNOCENT UNTIL PROVED GUILTY; AND,

(II) GRANT OF BAIL IS THE RULE AND ITS DENIAL, IS AN EXCEPTION.

ARREST DOES NOT VIOLATE ARTICLE 21 OF THE CONSTITUTION OF INDIA

KALYAN CHANDRAN SARKAR VERSUS RAJESH RANJAN, 2005(1) RCR (CRIMINAL) 703,

"UNDER THE CRIMINAL LAWS OF THIS COUNTRY, A PERSON ACCUSED OF OFFENCES WHICH ARE NON-BAILABLE, IS LIABLE TO BE DETAINED IN CUSTODY DURING THE PENDENCY OF TRIAL UNLESS HE IS ENLARGED ON BAIL IN ACCORDANCE WITH LAW. SUCH DETENTION CANNOT BE QUESTIONED AS BEING VIOLATIVE OF ARTICLE 21 OF THE CONSTITUTION, SINCE THE SAME IS AUTHORIZED BY LAW."

- THE TERM 'BAIL' DOES NOT FIND ITS DEFINITION IN THE CODE BUT CHAPTER XXXIII OF THE CODE OF CRIMINAL PROCEDURE, 1973 TITLED “PROVISIONS AS TO BAIL AND BONDS” DEALS WITH BAIL.

BAILABLE OFFENCES

- SECTION 436 CR.P.C. DEALS WITH 'BAILABLE OFFENCES' WHERE BAIL CANNOT BE REFUSED. RATHER, EVEN THE ARRESTING OFFICER HIMSELF MAY RELEASE SUCH AN ACCUSED ON BAIL.
- ACCUSED MAY SEEK BAIL AS A MATTER OF RIGHT IN BAILABLE OFFENCE U/S 436 CR.P.C.

SUBSEQUENT ABSENCE OF ACCUSED

- IN CASE THE ACCUSED FAILS TO APPEAR AS PER THE TERMS OF THE BAIL BOND, THE MAGISTRATE MAY REFUSE HIM BAIL WHEN HE APPEARS SUBSEQUENTLY. (SECTION 436(2) CR.P.C.)
- IN BAILABLE OFFENCES INDIGENT PERSONS CAN BE RELEASED WITHOUT SURETIES. PROVISO AND RELEVANT EXPLANATION TO SECTION 436(1) CR.P.C., *IN THIS REGARD, ARE AS UNDER:*

"PROVIDED THAT SUCH OFFICER OR COURT, IF HE OR IT THINKS FIT, MAY, AND SHALL, IF SUCH PERSON IS INDIGENT AND IS UNABLE TO FURNISH SURETY, INSTEAD OF TAKING BAIL] FROM SUCH PERSON, DISCHARGE HIM ON HIS EXECUTING A BOND WITHOUT SURETIES FOR HIS APPEARANCE AS HEREINAFTER PROVIDED".

EXPLANATION TO PROVISION OF SECTION 436(1) CR. P.C.-

"WHERE A PERSON IS UNABLE TO GIVE BAIL WITHIN A WEEK OF THE DATE OF HIS ARREST, IT SHALL BE A SUFFICIENT GROUND FOR THE OFFICER OR THE COURT TO PRESUME THAT HE IS AN INDIGENT PERSON FOR THE PURPOSES OF THIS PROVISO".

RIGHT TO SEEK BAIL ON SERVING MORE THAN ONE HALF OF THE MAXIMUM POSSIBLE SENTENCE

- UNDER SECTION 436A CR. P.C AN UNDER TRIAL PRISONER (UTP) HAS THE RIGHT TO SEEK BAIL ON SERVING MORE THAN ONE HALF OF THE MAXIMUM POSSIBLE SENTENCE ON THEIR PERSONAL BOND.
- NO PERSON CAN BE DETAINED IN PRISON AS AN UNDER TRIAL FOR A PERIOD EXCEEDING THE MAXIMUM POSSIBLE SENTENCE.
- THIS PROVISION IS, HOWEVER, NOT APPLICABLE FOR THOSE WHO ARE CHARGED WITH OFFENCES PUNISHABLE WITH THE DEATH SENTENCE.

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NON-BAILABLE OFFENCES

- MERELY BECAUSE AN OFFENCE COMES IN THE CATEGORY OF NON- BAILABLE OFFENCES WOULD NOT MEAN THAT BAIL CANNOT BE GRANTED IN SUCH OFFENCE.
- UNDER SECTION 437 AND 439 OF THE CODE, IT IS DISCRETION OF THE COURT TO GRANT OR NOT TO GRANT BAIL IN NON BAILABLE OFFENCES.
- SUCH DISCRETION IS BASED UPON VARIOUS PARAMETERS WHICH HAVE BEEN LAID DOWN BY THE SUPREME COURT OF INDIA IN VARIOUS JUDGMENTS RENDERED BY IT DEFINING THE ELIGIBILITY OF A PERSON TO BE GRANTED THE CONCESSION OF REGULAR BAIL.

DIFFERENCE BETWEEN SECTION 437 AND 439 OF THE CODE OF CRIMINAL PROCEDURE

- SECTION 437 OF THE CODE PUTS EMBARGO ON GRANT OF BAIL IN CASES OF OFFENCES PUNISHABLE WITH DEATH OR IMPRISONMENT FOR LIFE UNLESS IT IS INCREDIBLE THAT THE ACCUSED IS GUILTY.
- SECTION 439 EMPOWERS THE SESSIONS COURT OR HIGH COURT TO GRANT BAIL EVEN IN SUCH CASES.

CONSIDERATIONS FOR GRANT OF BAIL

- NATURE AND GRAVITY OF THE CIRCUMSTANCES IN WHICH THE OFFENCE IS COMMITTED;
- POSITION AND STATUS OF THE ACCUSED WITH REFERENCE TO THE VICTIM OF THE OFFENCES;
- THE LIKELIHOOD, OF THE ACCUSED OF FLEEING FROM JUSTICE, OF REPEATING THE OFFENCE

,CONTD....

- OF JEOPARDIZING HIS OWN LIFE WHILE FACED WITH A GRIM PROSPECT OF POSSIBLE CONVICTION IN THE CASE;
- OF TAMPERING WITH WITNESSES; AND,
- THE CONSIDERATION OF HISTORY OF THE CASE AS WELL AS OF ITS INVESTIGATION.

SOME OTHER FACTORS:

- THE NATURE OF ACCUSATION;
- THE NATURE OF EVIDENCE IN SUPPORT THEREOF;
- THE SEVERITY OF THE PUNISHMENT WHICH CONVICTION WILL ENTAIL;

THE CHARACTER, BEHAVIOR, MEANS AND STANDING OF THE ACCUSED;

V) CIRCUMSTANCES WHICH ARE PECULIAR TO THE ACCUSED;

VI) REASONABLE POSSIBILITY OF SECURING THE PRESENCE OF THE ACCUSED AT THE TRIAL;

VII) REASONABLE APPREHENSION OF THE WITNESSES BEING TAMPERED; AND

,VIII) THE LARGER INTERESTS OF THE PUBLIC OR STATE AND SIMILAR OTHER CONSIDERATIONS

POWERPOINT PRESENTATION ON RIGHTS OF AN ARRESTED PERSON

DR. BHARAT BHUSHAN PARSOON
JUDGE, PUNJAB AND HARYANA HIGH COURT,
CHANDIGARH

BACKGROUND

- THE CONSTITUTION OF INDIA GUARANTEES SEVERAL RIGHTS, INCLUDING HUMAN AND FUNDAMENTAL, TO EVERY CITIZEN.
- VIOLATIONS MADE BY THE POLICE MACHINERY IN EFFECTING ARRESTS.
- INTERVENTIONS REQUIRED BY THE COURTS. MATTERS EVEN REACH THE HIGH COURTS & ALSO THE SUPREME COURT OF INDIA.

ARTICLE 22 (1) AND (2) OF THE CONSTITUTION

- RIGHT TO BE INFORMED, AS SOON AS MAY BE, OF THE GROUNDS FOR SUCH ARREST;
- RIGHT TO CONSULT AND TO BE DEFENDED BY A LEGAL PRACTITIONER OF HIS CHOICE;
- RIGHT TO BE PRODUCED BEFORE THE NEAREST MAGISTRATE WITHIN TWENTY FOUR HOURS OF HIS ARREST EXCLUDING THE TIME NECESSARY FOR THE JOURNEY FROM THE PLACE OF ARREST TO THE COURT OF MAGISTRATE; AND
- RIGHT NOT BE DETAINED IN CUSTODY BEYOND THE PERIOD OF TWENTY FOUR HOURS WITHOUT THE AUTHORITY OF THE MAGISTRATE.

RIGHT TO KNOW THE GROUNDS OF INTEREST

- TIMELY INFORMATION OF THE GROUNDS OF ARREST IS THE LEGAL REQUIREMENT.
- ENABLES THE ARRESTEE TO MOVE PROPER COURT FOR BAIL OR A WRIT OF HABEAS CORPUS OR TO MAKE EXPEDITIOUS ARRANGEMENT FOR HIS DEFENCE.
- THIS RIGHT NOT APPLICABLE TO CASES, WHERE A PERSON IS PLACED UNDER PREVENTIVE DETENTION IN RESPECT WHEREOF MANDATE OF OTHER PROVISIONS OF THE CONSTITUTION OF INDIA COMES INTO PLAY.

- CONTD....

- SECTION 50 (1) CR.P.C.:- “EVERY POLICE OFFICER OR OTHER PERSON ARRESTING ANY PERSON WITHOUT WARRANT SHALL FORTHWITH COMMUNICATE TO HIM FULL PARTICULARS OF THE OFFENCE FOR WHICH HE IS ARRESTED OR OTHER GROUNDS FOR SUCH ARREST.”
- WHEN A SUBORDINATE OFFICER IS DEPUTED BY A SENIOR POLICE OFFICER TO ARREST A PERSON UNDER SECTION 55 CR.P.C., SUCH SUBORDINATE OFFICER SHALL, BEFORE MAKING THE ARREST, NOTIFY TO THE PERSON TO BE ARRESTED THE SUBSTANCE OF THE WRITTEN ORDER GIVEN BY THE SENIOR POLICE OFFICER SPECIFYING THE OFFENCE OR OTHER CAUSE FOR WHICH THE ARREST IS TO BE MADE. NON-COMPLIANCE WITH THIS PROVISION WILL RENDER THE ARREST ILLEGAL.

- SECTION 75 CR.P.C.:- “THE POLICE OFFICER OR OTHER PERSON EXECUTING A WARRANT OF ARREST SHALL NOTIFY THE SUBSTANCE THEREOF TO THE PERSON TO BE ARRESTED, AND IF SO REQUIRED, SHALL SHOW HIM THE WARRANT.”

DIRECTIONS OF SUPREME COURT IN D.K. BASU'S CASE

- THE POLICE PERSONNEL CARRYING OUT THE ARREST AND HANDLING THE INTERROGATION OF THE ARRESTEE:
- TO BEAR ACCURATE, VISIBLE AND CLEAR IDENTIFICATION AND NAME TAGS WITH THEIR DESIGNATIONS
- PREPARE A MEMO OF ARREST AT THE TIME OF ARREST TO BE ATTESTED BY AT LEAST ONE WITNESS
- TO NOTIFY TIME, PLACE OF ARREST AND VENUE OF CUSTODY OF THE ARRESTEE TO RELATIVE OR FRIEND

CONTD....

- TO MAKE THE ARRESTEE AWARE OF THIS RIGHT TO HAVE SOMEONE INFORMED OF HIS ARREST.
- TO MAKE ENTRY IN THE DIARY REGARDING THE ARREST AND ALSO DISCLOSE THE NAME OF HE 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.
- AT THE REQUEST OF THE ARRESTEE TO EXAMINE AT THE TIME OF HIS ARREST AND RECORD MAJOR AND MINOR INJURIES, IF ANY AT THAT TIME; AND TO PREPARE "INSPECTION MEMO" IN THIS REGARD TO BE SIGNED BOTH BY THE ARRESTEE AND THE POLICE OFFICER.
- MEDICAL EXAMINATION OF ARRESTEE BY TRAINED DOCTOR EVERY 48 HOURS

CONTD....

- COPIES OF ALL THE DOCUMENTS INCLUDING THE MEMO OF ARREST TO BE SENT TO THE ILLAQA MAGISTRATE.
- PERMISSION TO MEET HIS LAWYER DURING INTERROGATION
- POLICE CONTROL ROOM TO BE INFORMED AT ALL DISTRICT AND STATE HEADQUARTERS REGARDING THE ARREST AND THE PLACE OF CUSTODY.

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Safeguards regarding arrest and detention:

- POLICE OFFICERS NOT TO AUTOMATICALLY ARREST.
- TO FORWARD THE CHECK LIST DULY FILED AND FURNISH THE REASONS AND MATERIALS WHICH NECESSITATED THE ARREST.
- MAGISTRATE TO PERUSE THE REPORT FURNISHED BY THE POLICE OFFICER AND ONLY AFTER RECORDING ITS SATISFACTION, TO AUTHORIZE DETENTION;
- FAILURE TO COMPLY WITH THE DIRECTIONS RENDER THE POLICE OFFICERS CONCERNED LIABLE FOR DEPARTMENTAL ACTION.

RIGHT TO BE INFORMED OF RIGHT TO BAIL

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SECTION 50(2) OF CR.P.C

- "WHERE A POLICE OFFICER ARRESTS WITHOUT WARRANT ANY PERSON OTHER THAN A PERSON ACCUSED OF A NON-BAILABLE OFFENCE, HE SHALL INFORM THE PERSON ARRESTED THAT HE IS ENTITLED TO BE RELEASED ON BAIL AND THAT HE MAY ARRANGE FOR SURETIES ON HIS BEHALF."

RIGHT TO BE TAKEN BEFORE A MAGISTRATE WITHOUT DELAY

- "56. PERSON ARRESTED TO BE TAKEN BEFORE MAGISTRATE OR OFFICER IN CHARGE OF POLICE STATION- A POLICE OFFICER MAKING AN ARREST WITHOUT WARRANT SHALL, WITHOUT UNNECESSARY DELAY AND SUBJECT TO THE PROVISIONS HEREIN CONTAINED AS TO BAIL, TAKE OR SEND THE PERSON ARRESTED BEFORE A MAGISTRATE HAVING JURISDICTION IN THE CASE, OR BEFORE THE OFFICER IN CHARGE OF A POLICE STATION."

CONTD....

- "76. PERSON ARRESTED TO BE BROUGHT BEFORE COURT WITHOUT DELAY- THE POLICE OFFICER OR OTHER PERSON EXECUTING A WARRANT OF ARREST SHALL (SUBJECT TO THE PROVISIONS OF SECTION 71 AS TO SECURITY) WITHOUT UNNECESSARY DELAY BRING THE PERSON ARRESTED BEFORE THE COURT BEFORE WHICH HE IS REQUIRED BY LAW TO PRODUCE SUCH PERSON PROVIDED THAT SUCH DELAY SHALL NOT, IN ANY CASE, EXCEED TWENTY-FOUR HOURS EXCLUSIVE OF THE TIME NECESSARY FOR THE JOURNEY FROM THE PLACE OF ARREST TO THE MAGISTRATE'S COURT."

RIGHT OF NOT BEING DETAINED FOR MORE THAN 24 HOURS WITHOUT JUDICIAL SCRUTINY

ARTICLE 22(2) OF THE CONSTITUTION PROVIDES THAT:-

- "(2) EVERY PERSON WHO IS ARRESTED AND DETAINED IN CUSTODY SHALL BE PRODUCED BEFORE THE NEAREST MAGISTRATE WITHIN A PERIOD OF TWENTY FOUR HOURS OF SUCH ARREST EXCLUDING THE TIME NECESSARY FOR THE JOURNEY FROM THE PLACE OF ARREST TO THE COURT OF THE MAGISTRATE AND NO SUCH PERSON SHALL BE DETAINED IN CUSTODY BEYOND THE SAID PERIOD WITHOUT THE AUTHORITY OF A MAGISTRATE."
- SECTION 57 CR.P.C.

REASONS TO PRODUCE ACCUSED BEFORE A MAGISTRATE WITHIN A PERIOD OF NOT MORE THAN 24 HOURS OF ARREST :-

- TO PREVENT ARREST AND DETENTION FOR THE PURPOSE OF EXTRACTING CONFESSIONS, OR AS A MEANS OF COMPELLING PEOPLE TO GIVE INFORMATION;
- TO PREVENT POLICE STATIONS BEING USED AS THOUGH THEY WERE PRISONS – A PURPOSE FOR WHICH THEY ARE UNSUITABLE; AND
- TO AFFORD TO AN EARLY RECOURSE TO A JUDICIAL OFFICER INDEPENDENT OF THE POLICE ON ALL QUESTIONS OF BAIL OR DISCHARGE.

MEDICAL EXAMINATION OF ARRESTED PERSONS, INCLUDING THE INJURED AMONG THE ARRESTED

SECTION 54 CR.P.C.

- MEDICAL EXAMINATION OF ALL ARRESTED PERSONS IS COMPULSORY AND THE POLICE HAS NO DISCRETION IN THIS REGARD.
- IF THE ARRESTED PERSON IS A FEMALE, THE DOCTOR IN QUESTION HAS TO BE A FEMALE.

CONTD....

- THE DOCTOR CONDUCTING THE MEDICAL EXAMINATION HAS TO PREPARE A RECORD OF SUCH EXAMINATION, MENTIONING ANY INJURIES OR MARKS OF VIOLENCE FOUND ON THE ARRESTED PERSON AND ALSO RECORD THE APPROXIMATE TIME WHEN SUCH INJURIES OR MARKS MAY HAVE BEEN INFLICTED. THE DOCTOR SHALL ALSO FURNISH A COPY OF THAT RECORD TO THE ARRESTED PERSON OR HIS NOMINEE.

HEALTH AND SAFETY OF ARRESTED PERSON

Section 55-A Cr.P.C.

- IT IS THE DUTY OF THE PERSON HAVING THE CUSTODY OF AN ACCUSED TO TAKE REASONABLE CARE OF THE HEALTH AND SAFETY OF THE ACCUSED.

RIGHT TO SILENCE:

ARTICLE 20(3) OF THE CONSTITUTION OF INDIA:-

- "NO PERSON ACCUSED OF ANY OFFENCE SHALL BE COMPELLED TO BE A WITNESS AGAINST HIMSELF."
- RIGHT TO SILENCE IS MAINLY CONCERNED ABOUT CONFESSION. BREAKING OF SILENCE BY THE ACCUSED CAN BE BEFORE A MAGISTRATE BUT SHOULD BE VOLUNTARY AND WITHOUT ANY DURESS OR INDUCEMENT SO AS TO ENSURE THE TRUTHFULNESS AND RELIABILITY OF THE FACTS HE HAS STATED, THE MAGISTRATE IS REQUIRED TO TAKE SEVERAL PRECAUTIONS.

OTHER RIGHTS :

- RIGHT TO CONSULT AND TO BE DEFENDED BY A LEGAL PRACTITIONER
- RIGHT TO FAIR TRIAL
- RIGHT OF SPEEDY TRIAL
- RIGHT TO SET UP HIS CASE IN DIRECT COMMUNICATION WITH THE COURT
- RIGHT TO PRODUCE EVIDENCE IN HIS DEFENCE
- ACCUSED PERSON TO BE COMPETENT WITNESS
- RIGHT TO PRIVACY
- RIGHT TO LIFE OF DIGNITY

RIGHTS OF WOMEN ACCUSED:

SECTION 46 (4) CR.P.C. –

- NO WOMAN SHALL BE ARRESTED AFTER SUNSET AND BEFORE SUNRISE SAVE IN EXCEPTIONAL CIRCUMSTANCES
- IN CASE EXCEPTIONAL CIRCUMSTANCES EXIST, WOMAN POLICE OFFICER TO ARREST AFTER OBTAINING PRIOR PERMISSION OF THE MAGISTRATE
- "ACT OF POLICE OFFICER DIRECTING A WOMAN TO APPEAR IN POLICE STATION IS VIOLATIVE OF SECTION 160(1) CR.P.C." [NANDINI SATPATHY V. P.L. DHANI, (1978)2 SCC 424]

SHEELA BARSE'S CASE

- FEMALE SUSPECTS MUST BE KEPT IN SEPARATE LOCK-UPS UNDER THE SUPERVISION OF FEMALE CONSTABLES;
- INTERROGATION OF FEMALES MUST BE CARRIED OUT IN THE PRESENCE OF FEMALE POLICE PERSONS;
- A PERSON ARRESTED WITHOUT A WARRANT MUST BE IMMEDIATELY INFORMED ABOUT THE GROUNDS OF ARREST AND THE RIGHT TO OBTAIN BAIL;

CONTD....

- AS SOON AS AN ARREST IS MADE, THE POLICE SHOULD OBTAIN FROM THE ARRESTED PERSON, THE NAME OF A RELATIVE OR FRIEND WHOM SHE WOULD LIKE TO BE INFORMED ABOUT THE ARREST. THE RELATIVE OR FRIEND MUST THEN BE INFORMED BY THE POLICE; AND
- THE POLICE MUST INFORM THE NEAREST LEGAL AID COMMITTEE AS SOON AS AN ARREST IS MADE AND THE PERSON IS TAKEN TO THE LOCK-UP.

THANK YOU

THE COURT GRANTING BAIL IS TO EXERCISE ITS DISCRETION IN A JUDICIOUS MANNER AND NOT AS A MATTER OF COURSE.

- SECTION 439 OF THE CODE USES THE WORD 'CUSTODY'. THUS WE NEED TO UNDERSTAND THE MEANING OF THE WORD 'CUSTODY'.
- A PERSON CAN BE STATED TO BE IN CUSTODY EVEN WHEN HE SURRENDERS BEFORE A COURT OF LAW AND SUBMITS TO ITS JURISDICTION.
- CUSTODY IN THE CONTEXT OF SECTION 439 OF THE CODE IS PHYSICAL CONTROL OR AT LEAST PHYSICAL PRESENCE OF THE ACCUSED IN THE COURT COUPLED WITH SUBMISSION TO THE JURISDICTION AND ORDERS OF THE COURT.

BAIL AFTER CONVICTION

IF THE CONVICTED PERSON WANTS TO APPEAL AGAINST THE ORDER OF HIS SENTENCE IN A HIGHER COURT, THE COURT WHICH PASSED THE SENTENCE MUST RELEASE HIM ON BAIL IN FOLLOWING CONDITIONS:

I) WHEN THE SENTENCE IS FOR IMPRISONMENT FOR A TERM NET EXCEEDING 3 YEARS; OR,

II) WHEN THE OFFENCE FOR WHICH THE PERSON IS CONVICTED IS A BAILABLE ONE AND THE PERSON IS ALREADY ON BAIL.

CAN BAIL ONCE GRANTED BECANCELLED AND IF SO ON WHAT GROUNDS

CONCESSION OF BAIL CAN BE WITHDRAWN ON THE FOLLOWING GROUNDS:-

I) THE ACCUSED MISUSES HIS LIBERTY BY INDULGING IN SIMILAR CRIMINAL ACTIVITY;

II) INTERFERES WITH THE COURSE OF INVESTIGATIONS;

III) ATTEMPTS TO TAMPER WITH EVIDENCE OR WITNESSES;

IV) THREATENS WITNESSES OR INDULGES IN SIMILAR ACTIVITIES WHICH WOULD HAMPER SMOOTH INVESTIGATIONS;

CONTD....

V) THERE IS LIKELIHOOD OF HIS FLEEING TO ANOTHER COUNTRY;

VII) ATTEMPTS TO PLACE HIMSELF BEYOND THE REACH OF HIS SURETY ETC.

THESE GROUNDS ARE MERELY ILLUSTRATIVE AND NOT EXHAUSTIVE.

INTERIM BAIL

- Power to grant of interim bail is inherent in the power to grant regular bail.
- Interim bail can be granted to an under trial in custody if eventuality like natural calamities viz. flood or drought visit his native village threatening his kith and kin.

COMPULSIVE BAIL

- UNDER SECTION 167(2) OF THE CODE, AN ACCUSED GETS BAIL AS A MATTER OF RIGHT IF INVESTIGATIONS ARE NOT COMPLETED WITHIN STATUTORILY FIXED TIME AND CHARGE-SHEET HAS NOT BEEN FILED BY THE INVESTIGATING POLICE.
- TOTAL PERIOD OF DETENTION IS NOT TO EXCEED 90 DAYS IN CASES WHERE THE INVESTIGATIONS RELATE TO SERIOUS OFFENCES MENTIONED THEREIN. IN SOME LESS SERIOUS OFFENCES IT IS 60 DAYS.

SOME OTHER POINTS OF COMPULSIVE BAIL

- THE RELEVANT DATE OF COUNTING 60 OR 90 DAYS OR 180 DAYS, AS APPLICABLE, FOR FILING CHARGE-SHEET IS THE DATE OF FIRST ORDER OF THE REMAND AND NOT THE DATE OF ARREST.
- IF CHARGE SHEET IS FILED BEFORE THE CONSIDERATION OF THE SAME AND BEFORE THE ACCUSED IS RELEASED ON BAIL THEN THE RIGHT OF COMPULSIVE BAIL IS LOST.

ANTICIPATION BAIL

- A PERSON, ACCUSED OF COMMISSION OF A NON-BAILABLE OFFENCE HAVING REASONS TO BELIEVE THAT HE MAY BE ARRESTED IN SUCH CASE CAN APPLY TO THE COURT OF SESSIONS OR TO THE HIGH COURT FOR GRANT OF PRE-ARREST BAIL.
- THE IMMINENCE OF A LIKELY ARREST ON A REASONABLE BELIEF CAN BE SHOWN TO EXIST EVEN IF THE FIR IS YET NOT FILED.
- THE GROUNDS ON WHICH HIS BELIEF IS BASED MUST BE CAPABLE OF BEING EXAMINED BY THE COURT OBJECTIVELY.
- SECTION 438 CANNOT BE INVOKED ON THE BASIS OF VAGUE AND GENERAL ALLEGATIONS AS IF TO GET RELIEF OF PRE-ARREST BAIL TILL PERPETUITY AGAINST A POSSIBLE ARREST.

THE SCOPE AND AMBIT OF ANTICIPATORY BAIL WAS CONSIDERED BY A CONSTITUTION BENCH OF THE HON'BLE SUPREME COURT OF INDIA IN *GURBAKSH SINGH SIBBIA V. STATE OF PUNJAB (1980) 2 SCC 565* AND THE FOLLOWING PRINCIPLES WITH REGARD TO ANTICIPATORY BAIL WERE LAID DOWN:-

A) SECTION 438(1) IS TO BE INTERPRETED IN THE LIGHT OF ARTICLE 21 OF THE CONSTITUTION OF INDIA

B) FILING OF FIR IS NOT A CONDITION PRECEDENT TO EXERCISE OF POWER UNDER SECTION 438;

C) ORDER UNDER SECTION 438 WOULD NOT AFFECT THE RIGHT OF POLICE TO CONDUCT INVESTIGATION;

CONTD....

D) CONDITIONS MENTIONED IN SECTION 437 CANNOT BE READ INTO SECTION 438;

E) ALTHOUGH, THE POWER TO RELEASE ON ANTICIPATORY BAIL CAN BE DESCRIBED TO BE OF AN "EXTRAORDINARY" CHARACTER, THIS WOULD "NOT JUSTIFY THE CONCLUSION THAT THE POWER MUST BE EXERCISED IN EXCEPTIONAL CASES ONLY.

F) INITIAL ORDER CAN BE PASSED WITHOUT NOTICE TO THE PUBLIC PROSECUTOR. THEREAFTER, NOTICE MUST BE ISSUED FORTHWITH AND QUESTION OUGHT TO BE RE-EXAMINED AFTER HEARING.

SIDDHARAM SATINGAPPA MHETRE V. STATE OF MAHARASHTRA & ORS. (2011) 1 SCC 694:

FACTORS AND PARAMETERS TO BE TAKEN INTO CONSIDERATION WHILE DEALING WITH AN APPLICATION FOR ANTICIPATORY BAIL.

(I) THE NATURE AND GRAVITY OF THE ACCUSATION AND THE EXACT ROLE OF THE ACCUSED;

(II) THE ANTECEDENTS OF THE APPLICANT INCLUDING THE FACT AS TO WHETHER THE ACCUSED HAS PREVIOUSLY UNDERGONE IMPRISONMENT ON CONVICTION BY A COURT IN RESPECT OF ANY COGNIZABLE OFFENCE;

CONTD....

(III) THE POSSIBILITY OF THE APPLICANT TO FLEE FROM JUSTICE

(IV) THE POSSIBILITY OF THE ACCUSED 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 COURTS 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 MATER OF COMMON KNOWLEDGE AND CONCERN;

CONTD....

(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 WITNESS OR APPREHENSION OF THREAT TO THE COMPLAINANT; AND,

(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 BE GENUINENESS OF THE PROSECUTION, IN THE NORMAL COURSE OF EVENTS, THE ACCUSED IS ENTITLED TO AN ORDER OF BAIL.

DURATION OF AN ORDER GRANTING ANTICIPATORY BAIL

THE HON'BLE SUPREME COURT OF INDIA IN MHETRE'S CASE (SUPRA) HAS HELD THAT WHEN THE ANTICIPATORY ORDER IS CONFIRMED BY THE COMPETENT COURT WHILE EXERCISING ITS JURISDICTION UNDER SECTION 438 CR.P.C., THEN THE BENEFIT OF THE GRANT OF BAIL SHOULD CONTINUE TILL THE END OF THE TRIAL OF THAT CASE.

THANK YOU

SHORT NOTE ON PLEA BARGAINING

- Dr. Bharat Bhushan Parsoon*

Plea Bargaining is a form of negotiations. In the context of criminal proceedings, it is a mode of settlement between the complainant through the prosecution and the accused through his lawyer which results in putting forth of plea of guilt by the accused with an eye on reduction of the punishment. In other words, plea of guilt is made by an accused for a promise of reduction of the punishment. In common parlance, it may be taken to be a barter for reduced sentence from the court which is facilitated by the prosecution for a guilty plea made by the accused.

In this sense, it refers to pre-trial or during trail negotiations between the two rivals i.e. the prosecution and the defence, wherein the defence agrees to plead guilty presumably in bartering for certain concessions to be granted by the prosecution which are authorized by law.

154th report (1996) of the Law Commission had first of all recommended the introduction of plea bargaining as an effective method to lower down the huge arrears of criminal cases. Though this concept found reiteration in Justice Malimath Committee Report, it had found resistance from the Indian Supreme Court. Plea was examined in ***MurlidharMeghrajLoyat v. State of Maharashtra AIR 1976 SC 1929***[1] and was resisted in ***Kasambhai v. State of Gujarat AIR 1980 SC 854*** as it would oppose to public policy if an accused was to be convicted by inducing him to plead guilty by promising him reduced sentence for extraction of his plea of guilt.

Having made its perceptible impact in the criminal justice system of the United States, the concept of plea bargaining in our criminal judicial system comes from there. Success of plea bargaining system in US had specifically been referred to by Justice Malimath Committee to strengthen the case for introduction of this concept in the Indian criminal judicial system. While recommending introduction of the plea bargaining, Justice Malimath Committee in its report had given the following reasons:

(i) It would facilitate early disposal of criminal cases;and,

(ii) It will reduce the burden of the courts.

In India, Plea bargaining as a concept got official acceptance in the Criminal Justice system as a result of criminal law reforms introduced in Criminal Law (Amendment Act, 2005) (2 of 2006). Section 265-A to Section 265-L have been introduced as part of Chapter XXI-A to the Code of Criminal Procedure, 1973. Though the amendment Act was passed on 11.1.2006, the provisions were notified and came into effect from 5.7.2006 only.[2]

So far as other features of the concept are concerned, accused may file an application for plea bargaining before the trial court. It should be voluntarily made. Notice is issued to the complainant

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*Judge, Punjab and Haryana High Court, Chandigarh

[1]In the case of ***Murlidhar Meghraj Loyat v. State of Maharashtra***, the Supreme Court observed as under:

"We are free to confess to a hunch that the appellants had hastened with their pleas of guilty hopefully, induced by an informal, tripartite understanding of light sentence in lieu of nolo contendere stance. Many economic offenders resort to practices the Americans call 'plea bargain', 'plea negotiation', by a docket burden nods assent to the sub rosa anteroom settlement. It is idle to speculate on the virtue of negotiated settlements of criminal cases, as obtained in the United States but in our jurisdiction, especially in the area of dangerous economic crimes and food offences, this practice intrudes on society's interests by opposing society's decision expressed through predetermined legislative fixation of minimum sentences and by subtly subverting the mandate of the law."

[2]12th Law Commission of India, 1991, 142nd report on concessional treatment for offenders who on their own initiative plead guilty without any bargaining.

through the prosecution. Camera proceedings are conducted by the trial court. Time is given to the accused as also to the complainant for a mutually satisfactory settlement which includes expenses, compensation etc. Confidentiality of the negotiations between the two warring stakeholders is maintained.

APPLICABILITY:

The new chapter in the statute, Chapter XXI A, allows plea bargaining to be used in criminal cases where:

1. Plea bargaining can be claimed only for offences that are penalized by imprisonment **not exceeding** seven years;
2. If the accused has been previously convicted of a similar offence by any court, then he/she will not to be entitled to plea bargaining;
3. Plea bargaining is not available for offences which might affect the socio-economic conditions of the country; and,
4. Also, plea bargaining is not available for an offence committed against a woman or a child below fourteen years of age.
5. In case few offences carry the punishment for more than seven years or not fit for plea-bargaining, then still applicant can move an application under plea-bargaining for those offences which come within the ambit of plea-bargaining**.**

The opportunity of plea bargaining is not acceptable for accused in serious crimes such as murder, rape etc. It does not apply to serious cases wherein the punishment is death or life imprisonment or a term exceeding seven years or offences committed against a woman or a child below the age of 14 years.[Section 265-A]

The Code of Criminal Procedure Act,1973 under Sections 206(1) & 206(3) and the Motor Vehicle Act,1988 under Section 208(1) having the shadow or seed of the said plea of bargaining. Under these provision the accused can plead guilty of petty offences or less grave offences and settle with penalties for small offences to close the cases.

In petty cases, resort to plea bargaining saves the accused from harassment and saves a lot of court's time and energy.

WHEN IS PLEA - BARGAINING MADE ?

The plea bargain may be made by an accused [as per Section 265-A] when:

(a) The report has been forwarded by the officer in charge of the police station under Section 173 Cr.P.C. alleging therein that an offence appears to have been committed by him other than an offence for which the punishment of death or of imprisonment of life or of imprisonment for a term exceeding seven years has been provided under the law for the time being in force; or

(b) A Magistrate has taken cognizance of an offence on complaint, other than an offence for which the punishment of death or of imprisonment for life or of imprisonment for a term exceeding seven years, has been provided under the law for the time being in force, and after examining complaint and witnesses under Section 200, issued the process under Section 204.

WHO CAN FILE AN APPLICATION FOR PLEA BARGAINING ?

Any accused person above the age of 18 years and against whom a trial is pending, can file an application for plea bargaining. But, there are some exceptions to this general rule are as under:

i. The offence against the accused should carry a maximum sentence **not exceeding** 7 years.[Section 265-A]

ii. The offence should not have been committed by the accused against a woman or a child below the age of 14 years.[Section 265-A]

iii. The accused should not have been covered under Section 2(k) of the Juvenile Justice (Care and Protection of Children) Act, 2000. [Section 265-L]

iv. The accused should not have earlier been convicted for the same offence.[Section 265-B]

v. The offence should not affect the socio-economic condition of the country.[Section 265-A]

WHAT OFFENCES AFFECT THE SOCIO-ECONOMIC CONDITION OF THE COUNTRY ?

As per the Section 265-A clause (2): For the purpose of Sub-Section (1) the Central Government shall by notification determine the offences under the law for the time being in force which shall be the offences affecting the socio-economic condition of the country.

No plea bargaining is permitted in respect of the following:

- The Dowry Prohibition Act, 1961.
- The Commission of Sati Prevention Act, 1987.
- The Indecent Representation of Women (Prohibition) Act, 1986.
- The Immoral Traffic (Prevention) Act, 1956.
- The Protection of Women from Domestic Violence Act, 2005.
- The Infant Milk Substitutes, Feeding Bottles and Infant Foods (Regulation of Production, Supply and Distribution) Act, 1992.
- Provisions of the Fruit Products Order, 1955 (issued under the Essential Commodities Act, 1955).
- Provisions of the Meat Food Products Order, 1973 (issued under the Essential Commodities Act, 1955).
- Offences with respect to animals that find place in Schedule I and Part II of the Schedule II as well as offences related to altering of boundaries of protected, areas under the Wildlife (Protection) Act, 1972.
- The SC and ST (Prevention of Atrocities) Act, 1989.
- Offences mentioned in the Protection of Civil Rights Act, 1955.
- Offences listed in Sections 23 to 28 of the Juvenile Justice (Care and Protection of Children) Act, 2000.
- The Army Act, 1950.
- The Air Force Act, 1950.

- The Navy Act, 1957.
- Offences specified in Sections 59 to 81 and 83 of the Delhi Metro Railway (Operation and Maintenance) Act, 2002.
- The Explosives Act, 1884.
- Offences specified in Sections 11 to 18 of the Cable Television Networks (Regulation) Act, 1955.
- The Cinematograph Act, 1952.

WHAT IS THE PROCEDURE TO BE FOLLOWED IN PLEA BARGAINING CASES?

Section 265-A to Section 265-L of Criminal Procedure Code, 1973 tells about the same as under:

1. ***Application for plea –Bargaining*** must be filed in the Court where such offence is pending for trial.

It must contain a ***brief description of the case*** including the offence to which the case relates.

It must be accompanied ***by an affidavit*** of the accused stating therein that he has *voluntarily preferred Plea Bargain in his case after understanding the nature and extent of punishment provided by law for the offence and that he has not previously been convicted by a Court for the same offence*.

2. ***Procedure on filing of the application*** The Court will issue notice to the Public Prosecutor or the Complainant and to the accused for appearance on the date fixed for the case.

The Court will ***examine the accused in camera*** to satisfy itself that the accused has filed the application voluntarily and the other party in the case shall not be present.

If the Court is satisfied that the application was filed involuntarily or the accused was previously convicted by a Court for the same offence, it shall proceed further with the case according to the law from the stage of filing of the application.

3. ***To provide time for mutually satisfactory settlement*****.** Where the Court is satisfied that the application was filed by the accused voluntarily, it will provide time to the Public Prosecutor or the complainant and the accused to work out a mutually satisfactory disposition of the case and fix the date for further hearing of the case.

Mutually satisfactory disposition may include compensation to the victim and other expenses incurred in connection with the case.

4. ***Procedure for working out mutually satisfactory disposition*****:** a police case, the Court will issue notice to the Public Prosecutor, Investigating Officer, the accused and the victim of the case for participation in the meeting to work out a satisfactory disposition of the case.

In a complaint case, the Court will issue notice to the accused and the victim of the case for participation in the meeting to work out a satisfactory disposition of the case.

5. ***Representation by a Pleader/Advocate*****:** In a case instituted on a police report, the accused can participate in such meeting with his pleader/Advocate.

In a case instituted on a complaint, the accused or the victim can participate in such meeting with his pleader/Advocate.

6. ***Duty of the Court while proceeding under Plea –Bargaining*:**

To ensure that the accused has preferred Plea Bargaining voluntarily.

To examine the accused in camera where the other party shall not be present.

To ensure that the accused has filed the application for Plea Bargaining after understanding the nature and extent of punishment provided by law for the offence.

To ensure that the entire process of working out a satisfactory disposition of the case is voluntary.

7. ***Report of mutually satisfactory disposition*:** The mutual acceptable settlement of the case is reached between the parties participating in the meeting.

The Court will prepare a report of such disposition and it will be signed by the Presiding Officer of the Court and the participating parties.

If mutually satisfactory disposition could not be worked out, the Court will record its observation and proceed further with the case from the stage of filing of the application.

8. ***Award of compensation and hearing the parties on the quantum of punishment*:** The Court will award compensation to the victim in accordance with the disposition and hear the parties on the quantum of the punishment, releasing of the accused on probation of good conduct or after admonition under Section 360, Cr.P.C. or dealing with the accused under the provisions of the Probation of Offenders Act, 1958.

NOTE: The application of Section 360 of Criminal Procedure Code is subject to enforcement of Probation of Offenders Act, 1958.

9. ***Mode of disposal of the case [Section 265-E]:*** Where Section 360, Cr.P.C. or the Probation of Offenders Act, 1958 is attracted; the Court may release the accused on probation of good conduct or after admonition under Section 360, Cr.P.C. or the Probation of Offenders Act, 1958.

Where minimum punishment has been prescribed by law for the offence committed by the accused, it may sentence the accused to half of such minimum punishment.

In any other case, it may sentence the accused to one-fourth of the punishment prescribed or extendable for such offence.

NOTE: The application of Section 360 of Criminal Procedure Code is subject to enforcement of Probation of Offenders Act, 1958.

In United States, plea bargaining as a concept is widely prevalent in its various manifestation but in India, it is of recent origin and is in the testing and trial stage. Notwithstanding the fact that reduction of massive load of pending cases has served as a temptation with the legislature to incorporate the concept of plea bargaining in India in the Criminal Procedure Code, 1973, introduction of the concept in Indian criminal judicial system is only related to 'sentence bargaining' leaving its wider application in 'charge bargaining' and 'fact bargaining'. Whereas in charge bargaining, accused pleads guilty for reduction of charges and in 'fact bargaining', accused submits to truth and admits existence of certain facts whereby need for the prosecution to prove those facts is eliminated. This is in return for an agreement not to introduce certain facts which otherwise would have required evidence by the prosecution to prove the same.

So far as benefits of the concept of plea bargaining areconcerned, the following points are noteworthy:

PLEA BARGAINING -VICTIMS

Notwithstanding the fact that the crime is against the State and the society but main stakeholder is the victim, whose satisfaction is necessary. In fact, stand of the victim is accepted by the accused and the accused also receives the sentence though less than what is prescribed. It is, thus, a systemic tilt towards respect and stand of the victim and their rights. Compensation and early disposition of the case to the satisfaction of the victim thus is assured. In that sense, victim plays a key role in the working of the entire concept of plea bargaining as introduced in the Criminal Procedure Code. The victim has bargaining power which rather precedes decision of the court. It also lessens burden of the victim to produce evidence and ultimately reduces the hassles and anxiety as also unpleasantness of details of the proceedings in public view.

WHAT INCENTIVE DOES AN ACCUSED GET TO ENTER INTO A PLEA BARGAINING:

The principal benefit of plea bargaining, for most of the accused, is to receive a lighter sentence for a less severe charge than what might result from taking the case to trial and losing.

Another fairly obvious benefit that accused can reap from plea bargaining is that they can save on advocates' fees. It almost always takes more time and effort to bring a case to trial than to negotiate and handle a plea bargain. There may be other benefits as well such as:

1. ***Getting Out of Jail*:** An accused who is held in custody and does not qualify for release on his own recognizance or who either does not have the right to bail or cannot afford bail may get out of jail immediately following the judge's acceptance of a plea. Depending on the offence, the accused may get out altogether, on probation, with or without some community service obligations. The accused may have to serve more time, but will still get out much sooner than if he or she insisted on going to trial.

2. ***Resolving the Matter Quickly*:** A trial is usually requires a much longer wait and causes much more stress than taking a plea bargain.

3. ***Having Fewer or Less Serious Offences on One's Record*:** Pleading guilty or no contest in exchange for a reduction in the number of charges or the seriousness of the offences looks a lot better on an accused person's record than the convictions that might result following trial. This can be particularly important if the accused is ever convicted in the future.

4. ***Avoiding Hassles*:** Some people plead guilty especially to routine, minor first offences without engaging a lawyer. If they waited to go to trial, they would have to find a good lawyer and spend both time and money preparing for trial.

   Avoiding Publicity: All persons who depend on their reputation in the community to earn a living and people who don't want to bring further embarrassment to their families may chose to plead guilty to keep their names out of the public eye. While news of the plea itself may be public, the news is short lived compared to news of a trial. And rarely is an accused person's background explored in the course of a plea bargain to the extent it may be done at trial.

QUES: WHAT ARE THE ADVANTAGES OF "PLEA BARGAINING ?

1. ***Time saving***: Examining possible plus points of Plea bargaining in India, it will help in cutting short the delay, backlogs of cases and speedy disposal of criminal cases, saving the courts time, which can be used for hearing the serious criminal cases, putting a certain end to uncertain life of a criminal case from the point of view of giving relief to victims and witnesses of crime, saving a lot of time, money and energy of the accused and the state, reducing the congestion in prisons, raising the number of convictions from its present low to a fair level to create some sort of credibility to the system, not to facilitate making of criminals by allowing innocents or unproven accused to live with the company of hard core criminals during the trial and after conviction through making guilty plea.

2. ***Compensation to victims*:** The victims of crimes might be benefited as they could get the compensation. They need not get implicated or involved either as witness or seeker of compensation or justice any longer than required for acceptance of plea bargaining. Whether they get money or not their time might be saved.

3. ***Benefits for Accused:*** The accused might be a beneficiary as he might get half of minimum prescribed punishment. If no such minimum is prescribed, accused might get one fourth of punishment prescribed, or released on probation or after admonition or get concession of considering the period of undergone in custody as suffering the sentence under section 428 of Cr.P.C. He will be relieved of extended trial i.e, appeals consuming unending time. Accused is also benefited even when plea bargaining fails as his admission cannot be used for any other purpose. Ultimate benefit for him is that his time and money are saved.

To ensure fair justice, plea bargaining must encompass the following minimum requirements:

A) The hearing must take place in court.

B) The court must satisfy itself that the accused is pleading guilty knowingly and voluntarily.

C) Any court order rejecting a plea bargaining application must be kept confidential to prevent prejudice to the accused.

CONCLUSION:

This concept of "Plea Bargaining" is more a mechanism of convenience and mutual benefit than an issue of morality, legality or constitutionality.

There is an inevitable need for a radical change in criminal justice mechanism. It may be a welcome change but only when there is possibility of swift and inexpensive resolution of cases. If the sole purpose of criminal justice system is to rehabilitate criminals into society, by making them undergo specified sentences in prison, then plea bargaining looses most of its charm. Whether it is known or not, plea bargaining is being practiced by the various stakeholders of crime and criminal justice system. Putting this process under judicial scrutiny opens up the possibility of fair dealings in these bargaining. In the present atmosphere plea bargaining is inevitable component of adversarial system.

However, to make use of the available process and to secure the gains from these reforms, the plea bargaining process could be successfully used, for which the police, judiciary and the bar need to understand it in first place, and try to adopt. Defending Advocates should encourage the litigant to opt for the plea bargaining rather than to treat the plea bargaining as threat to their profession. It is obvious that the capacity building of police and judges should be the high priority and a pre-requisite for experimenting the plea bargaining. It can be given a chance of survival.

From the experience in US it can be said that the plea bargaining remains a disputed concept and a doubtful practice. As the overloading of courts with piling up of criminal cases is threatening the foundations of the system, the plea bargaining may be accepted as one of the required measures for speeding up caseload disposition. After giving a rigorous trial to this mechanism, there should be a thorough study of its working, its impact on crime rate, conviction rate, and ultimately how the rule of law is affected.

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SHORT NOTE ON RIGHTS OF AN ARRESTED PERSON

- Dr. Bharat Bhushan Parsoon*

The Constitution of India guarantees several rights, including human and fundamental, to every citizen. It is not because of the Constitution of India that these fundamental rights are conferred on the citizens but in fact the Constitution confirms their existence and gives them protection. Despite the protection and safeguards provided in the Constitution of India inter-alia for fundamental rights, violations at times even then are made by the police machinery in effecting arrests. Interventions are then made by the Courts. Matters even reach the High Courts as also the Supreme Court of India.

The Constitution of India has guaranteed several rights to an arrested person. Article 22(1) and (2) confers the following rights upon a person who has been arrested:-

i) Right to be informed, as soon as may be, of the grounds for such arrest;

ii) Right to consult and to be defended by a legal practitioner of his choice;

iii) Right to be produced before the nearest magistrate within twenty four hours of his arrest excluding the time necessary for the journey from the place of arrest to the court of Magistrate; and,

iv) Right not be detained in custody beyond the period of twenty four hours without the authority of the magistrate.

DETAILS FOLLOW :-

(I) Right to know the grounds of arrest:-

Right to be informed of the grounds of arrest is a precious right of an arrested person. Since the arrest impinges upon his right to life and liberty, a fundamental right confirmed and protected by the Constitution of India, it is legitimately expected that no infringement of such right would come except in accordance with the procedure established by law. To avoid camouflage and manipulations qua time and contents of grounds of arrest later, timely information of the grounds of arrest is the legal requirement. It enables the arrestee to move proper court for bail or in appropriate circumstances for a writ of *habeas corpus* or to make expeditious arrangement for his defence. This right, however, is not applicable to cases where a person is placed under preventive detention in respect whereof mandate of other provisions of the Constitution of India comes into play.

Any person when arrested without warrants from a competent authority is required to be communicated the grounds of his arrest. *Firstly*, according to **Section 50(1) Cr.P.C.**:-

> *"every police officer or other person arresting any person without warrant shall forthwith communicate to him full particulars of the offence for which he is arrested or other grounds for such arrest."*

Secondly,

when a subordinate officer is deputed by a senior police officer to arrest a person under Section 55 Cr.P.C., such subordinate officer shall, before making the arrest, notify to the person to be arrested the substance of the written order given by the senior police officer specifying the offence or other cause for which the arrest is to be made. Non-compliance with this provision will render the arrest illegal.

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Thirdly, in case of arrest to be made under a warrant, **Section 75 Cr.P.C.**, provides that:-

> *"the police officer or other person executing a warrant of arrest shall notify the substance thereof to the person to be arrested, and if so required, shall show him the warrant."*

If the substance of the warrant is not notified, the arrest would be unlawful.

Giving of information about grounds of arrest is also in compliance with the principles of natural justice. When this aspect is viewed in its broader perspective, there are yet other legal obligations which need to be performed by the arresting officer as also by the concerned authorities.

(a) Obligation of person making arrest to inform about the arrest etc. to a nominated person:-

Section 50-A Cr.P.C.-

(1) Every police officer or other person making any arrest under this Code shall forthwith give the information regarding such arrest and place where the arrested person is being held to any of his friends, relatives or such other persons, as may be disclosed or nominated by the arrested person for the purpose of giving such information.

(2) The police officer shall inform the arrested person of his rights under sub-section (1) as soon as he is brought to the police station.

(3) An entry of the fact as to who has been informed of the arrest of such form as may be prescribed in this behalf by the State Government.

(4) It shall be the duty of the Magistrate before whom such arrested person produced, to satisfy himself that the requirements of sub-section (2) and sub-section (3) have been complied with in respect of such arrested person."

In **D.K. Basu v. State of West Bengal, AIR 1997 SC 610**, the Hon'ble Supreme Court had issued many directions, which for ready reference are appended as follows:-

(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 designations. 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 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 a 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 Organization 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 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 he next friend of the person who has been informed of the arrest an 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 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 Stare or Union Territory. Director, Health Services should prepare such a penal 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 throughout the interrogation, and,

(11) A police control room should be provided at all district 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 control room it should be displayed on a conspicuous notice board.

(b) Safeguards regarding arrest and detention

The Supreme Court of India has issued many directions in Arnesh Kumar Versus State of Bihar & Anr. 2014(3) R.C.R. (Criminal) 527 regarding arrest and detention. The said guidelines are as under:

(1) Police officers not to automatically arrest when a case under Section of the IPC is registered but to satisfy themselves about the necessity for arrest under the parameters laid down above flowing from Section 41, Cr.P.C.;

(2) All police officers be provided with a check list containing specified sub- clauses under Section 41(1) (b) (ii);

(3) The police officer shall forward the check list duly filed and furnish the reasons and materials which necessitated the arrest, while forwarding/producing the accused before the Magistrate for further detention;

(4) The Magistrate while authorizing detention of the accused shall peruse the report furnished by the police officer in terms aforesaid and only after recording its satisfaction, the Magistrate will authorize detention;

(5) The decision not to arrest an accused, be forwarded to the Magistrate within two weeks from the date of the institution of the case with a copy to the Magistrate which may be extended by the Superintendent of police of the district for the reasons to be recorded in writing;

(6) Notice of appearance in terms of Section 41A of Cr.P.C. be served on the accused within two weeks from the date of institution of the case, which may be extended by the Superintendent of Police of the District for the reasons to be recorded in writing;

(7) Failure to comply with the directions aforesaid shall apart from rendering the police officers concerned liable for departmental action, they shall also be liable to be punished for contempt of court to be instituted before High Court having territorial jurisdiction;

(8) Authorizing detention without recording reasons as aforesaid by the judicial Magistrate concerned shall be liable for departmental action by the appropriate High Court.

These directions shall not only apply to the cases under Section of the IPC or Section of the Dowry Prohibition Act, the case in hand, but also such cases where offence is punishable with imprisonment for a term which may be less than seven years or which may extend to seven years; whether with or without fine.

(c) Right to be informed of right to bail

Section 50(2) of Cr.P.C reads as under-

> *"Where a police officer arrests without warrant any person other than a person accused of a non-bailable offence, he shall inform the person arrested that he is entitled to be released on bail and that he may arrange for sureties on his behalf."*

(d) Right to be taken before a Magistrate without delay

Whether the arrest is made without warrant by a police officer, or whether the arrest is made under a warrant by any person, the person making the arrest must bring the arrested person before a judicial officer without unnecessary delay. It is also provided that the arrested person should not be confined in any place other than a police station before he is taken to the magistrate. These matters have been provided under Sections 56 and 76 Cr.P.C. which read as under:-

> *"56. Person arrested to be taken before Magistrate or officer in charge of police station- A police officer making an arrest without warrant shall, without unnecessary delay and subject to the provisions herein contained as to bail, take or send the person arrested before a Magistrate having jurisdiction in the case, or before the officer in charge of a police station."*
>
> *"76. Person arrested to be brought before Court without delay- The police officer or other person executing a warrant of arrest shall (subject to the provisions of section 71 as to security) without unnecessary delay bring the person arrested before the Court before which he is required by law to produce such person:*
>
> *Provided that such delay shall not, in any case, exceed twenty-four hours exclusive of the time necessary for the journey from the place of arrest to the Magistrate's Court."*

***(e)* Right of not being detained for more than 24 hours without judicial scrutiny**

Whether the arrest is without warrant or under a warrant, the arrested person must be brought before the magistrate or court within 24 hours. In this regard, Section 57 Cr.P.C. reads as under:-

"57. Person arrested not to be detained more than twenty-four hours- No police officer shall detain in custody a person arrested without warrant for a longer period than under all the circumstances of the case is reasonable, and such period shall not, in the absence of a special order of a Magistrate under section 167, exceed twenty-four hours exclusive of the time necessary for the journey from the place of arrest to the Magistrate's Court."

The right has been further strengthened by its incorporation in the Constitution of India as fundamental right. Article 22(2) of the Constitution provides that:-

"(2) Every person who is arrested and detained in custody shall be produced before the nearest magistrate within a period of twenty four hours of such arrest excluding the time necessary for the journey from the place of arrest to the court of the magistrate and no such person shall be detained in custody beyond the said period without the authority of a magistrate."

The right to be brought to a magistrate within a period of not more than 24 hours of arrest has been created for the following reasons:-

(i) To prevent arrest and detention for the purpose of extracting confessions, or as a means of compelling people to give information;

(ii) To prevent police stations being used as though they were prisons – a purpose for which they are unsuitable; and,

(iii) To afford to an early recourse to a judicial officer independent of the police on all questions of bail or discharge.

In a case of **Khatri (II) v. State of Bihar, AIR 1981 SC 928**, the Supreme Court has strongly called upon the State and its police authorities to ensure that this constitutional and legal requirement to produce an arrested person before a Judicial Magistrate within 24 hours of the arrest be scrupulously observed.

If the police officer fails to produce an arrested person before a magistrate within 24 hours of the arrest, he shall be held guilty of wrongful detention.

Whenever a complaint is received by a magistrate that a person is arrested within his jurisdiction but has not been produced before him within 24 hours or a complaint has been made to him that a person is being detained within his jurisdiction beyond 24 hours of his arrest, he can and should call the police officer concerned, to state whether the allegations are true and if so; on what and under whose custody, he is being so held. If officer denies the arrest, the magistrate can make an inquiry into the issue and pass appropriate orders.

(f) Medical Examination of Arrested Persons, including the injured among the arrested:

As per section 54 Cr.P.C. as amended now, medical examination of all arrested persons is compulsory and the Police has no discretion in this regard. Soon after the arrest is made, the arrested person has to be examined by a medical officer in the service of Central or State Government. If a Government doctor is not available, a registered medical practitioner can also conduct the examination.

If the arrested person is a female, the doctor in question has to be a female. The doctor conducting the medical examination has to prepare a record of such examination, mentioning any injuries or marks of violence found on the arrested person and also record the approximate time when such injuries or marks may have been inflicted. The doctor shall also furnish a copy of that record to the arrested person or his nominee.

(g) Health and safety of arrested person

Under section 55-A Cr.P.C. it is the duty of the person having the custody of an accused to take reasonable care of the health and safety of the accused.

(h) The right to treatment with humanity while in detention:[1]

Everyone deprived of liberty shall be treated with humanity and with respect for the inherent dignity of the human person. Sexual orientation and gender identity are integral to each person's dignity.

States shall:

A. Ensure that placement in detention avoids further marginalising persons on the basis of sexual orientation or gender identity or subjecting them to risk of violence, ill-treatment or physical, mental or sexual abuse;

B. Provide adequate access to medical care and counselling appropriate to the needs of those in custody, recognising any particular needs of persons on the basis of their sexual orientation or gender identity, including with regard to reproductive health, access to HIV/AIDS information and therapy and access to hormonal or other therapy as well as to gender-reassignment treatments where desired;

C. Ensure, to the extent possible, that all prisoners participate in decisions regarding the place of detention appropriate to their sexual orientation and gender identity;

D. Put protective measures in place for all prisoners vulnerable to violence or abuse on the basis of their sexual orientation, gender identity or gender expression and ensure, so far as is reasonably practicable, that such protective measures involve no greater restriction of their rights than is experienced by the general prison population;

E. Ensure that conjugal visits, where permitted, are granted on an equal basis to all prisoners and detainees, regardless of the gender of their partner;

F. Provide for the independent monitoring of detention facilities by the State as well as by non-governmental organisations including organisations working in the spheres of sexual orientation and gender identity;

G. Undertake programmes of training and awareness-raising for prison personnel and all other officials in the public and private sector who are engaged in detention facilities, regarding international human rights standards and principles of equality and non- discrimination, including in relation to sexual orientation and gender identity.

(II) Right to Silence:

The **'right to silence'** is a principle of common law and it means that normally courts or tribunals of fact should not be invited or encouraged to conclude, by parties or prosecutors, that a suspect or an accused is guilty merely because he has refused to respond to questions put to him by the police or by the Court. The Right to Silence and the accompanying right against self-incrimination are the two aspects of fair trial and therefore, cannot be made a subject matter of legislation. Right to fair trial is the basic premise of all procedural laws. The very prescription of procedure and the evolution of procedural law have to be understood in the historical context of the anxiety to substitute rule of men by rule of law. In law, any statement or confession made to a police officer is not admissible.

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[1] National Legal Services Authority v. Union of India (SC), 2014(5) SCC 438{regarding the Transgender community}

Right to silence is mainly concerned about confession. Breaking of silence by the accused can be before a magistrate but should be voluntary and without any duress or inducement so as to ensure the truthfulness and reliability of the facts he has stated, the magistrate is required to take several precautions.

The Constitution of India guarantees every person right against self incrimination under Article 20(3) which states that:-

"No person accused of any offence shall be compelled to be a witness against himself."

The supreme Court in Nandini Satpathy v. P.L. Dhani, (1978)2 SCC 424, while interpreting the provisions of Section 160, 161 and 162 Cr.P.C. in the light of Constitutional safeguards enshrined in Article 20(3) and 22(1) held as under:-

> *"We have explained elaborately and summed up, in substance, what is self-incrimination or tendency to expose oneself to a criminal charge. It is less than 'relevant' and more than 'confessional. Irrelevance is impermissible but relevance is licit but when relevant questions are loaded with guilty inference in the event of an answer being supplied, the tendency to incriminate springs into existence. We hold further that the accused person cannot be forced to answer questions merely because the answers thereto are not implicative when viewed in isolation and confirmed to that particular case. He is entitled to keep his mouth shut if the answer sought has a reasonable prospect of exposing him to guilt in some other accusation actual or imminent, even though the investigation underway is not with reference to that. We have already explained that in determining the incriminatory character of an answer the accused is entitled to consider - and the Court while adjudging will take note of-the setting, the totality of circumstances, the equation, personal and social, which have a bearing on making an answer substantially innocent but in effect guilty in import. However, fanciful claims, unreasonable apprehensions and vague possibilities cannot be the hiding ground for an accused person. He is bound to answer where there is no clear tendency to criminate."*

The principle of law enunciated hereinabove later became the basis for the Supreme Court to declare brain-mapping, nacro-analysis and other tests involving forcible intrusion into one's mind as illegal and violative of Article 20(3) of the Constitution.

In **Mohammed Ajmal Mohammad Amir Kasab v. State of Maharashtra**, 2012(4) RCR (Criminal) 417, the Supreme Court has held as under:

"467. ... The true test is whether or not the confession is voluntary. If a doubt is created regarding the voluntariness of the confession, notwithstanding the safeguards stipulated in Section 164 it has to be trashed; but if a confession is established as voluntary it must be taken into account, not only constitutionally and legally but also morally."

But at the same time, any statement voluntarily made out of free will by the accused would not be hit by this principle. It was held further as under:-

"468. ... We accept that the right against self-incrimination under Article 20(3) does not exclude any voluntary statements made in exercise of free will and volition. We also accept that the right against self-incrimination under Article 20(3) is fully incorporated in the provisions of the Cr.P.C. (Sections 161, 162, 163 and 164) and the Evidence Act, 1872, as manifestations of enforceable due process, and thus compliance

with these statutory provisions is also equal compliance with the Constitutional guarantees."

(III) Right to consult and to be defended by a legal practitioner

As regards the entitlement of an accused to consult and to be defended by a legal practitioner, the Supreme Court in **Janardhan Reddy v. State of Hyderabad**, AIR 1951 SC 217 laid down the following two principles:-

i. It cannot be laid down as a rule of law that in every capital case where the accused is unrepresented, the trial should be held to be vitiated; and

ii. A court of appeal or revision is not powerless to interfere if it is found that the accused was so handicapped for want of legal aid that the proceedings against him may be said to amount to negation of fair trial.

The Supreme Court, while reiterating the principles of law laid down in **Nandini Satpathy's** case and **Hussainara Khatoon** to the effect that the right to consult an advocate of his choice could not be denied to any person who is arrested, in **Kasab's case** (supra) observed as under:-

> *"487. Every accused unrepresented by a lawyer has to be provided a lawyer at the commencement of the trial, engaged to represent him during the entire course of the trial. Even if the accused does not ask for a lawyer or he remains silent, it is the Constitutional duty of the court to provide him with a lawyer before commencing the trial. Unless the accused voluntarily makes an informed decision and tells the court, in clear and unambiguous words, that he does not want the assistance of any lawyer and would rather defend himself personally, the obligation to provide him with a lawyer at the commencement of the trial is absolute, and failure to do so would vitiate the trial and the resultant conviction and sentence, if any, given to the accused (see* ***Suk Das v. UT of Arunachal Pradesh, 1986(2) RCR (Criminal) 132).***
>
> *488. But the failure to provide a lawyer to the accused at the pre-trial stage may not have the same consequence of vitiating the trial. It may have other consequences like making the delinquent magistrate liable to disciplinary proceedings, or giving the accused a right to claim compensation against the State for failing to provide him legal aid. But it would not vitiate the trial unless it is shown that failure to provide legal assistance at the pre-trial stage had resulted in some material prejudice to the accused in the course of the trial. That would have to be judged on the facts of each case."*

As at the time of arrest, the accused is possessed of multiple rights to protect his life and liberty and to challenge his arrest, if wrongful. In the same way, at the time of trial, such arrestee has several rights. These may be recapitulated hereunder:-

(IV) Right to fair trial

Fairness is not only in the procedure but also in his participation and presentation of his defence. If the accused is unrepresented, the trial cannot be said to be free. Sequelly, the right to consult a legal practitioner and to avail free legal aid irrespective of his income and other stipulations is available to him by the very fact of his being an under-trial in custody. The Supreme Court of India in **Rajoo @ Ramakant Versus State of Madhya Pradesh 2012(3) R.C.R. (Criminal) 1005,** interalia held as follows:

..an eligible person is entitled to legal services at any stage of the proceedings which he or she is prosecuting or defending. In fact the Supreme Court Legal Services Committee provides legal assistance to eligible persons in this Court. This makes it abundantly clear that legal services shall be provided to an eligible person at all stages of the proceedings, trial as well as appellate. It is also important to note that in view of the constitutional mandate of Article 39-A, legal services or legal aid is provided to an eligible person free of cost. (Emphasis added)

The Legal Services Authorities Act, 1987 has its machinery even up to the Sub-Divisional Judicial courts' level. If the arrested accused goes undefended during the trial, the trial is held to be not fair because there was no legal representation. The trial thus is not to be a monologue between the prosecution and the court but is required to be participatory to be termed as fair with representation from the accused in custody as well.

(V) Speedy trial

Delay in trial also impinges upon fairness of trial. As per **Section 309 Cr.P.C.**, the trial once started is to continue on day-to-day basis. If it has to be adjourned to another date, then reasons have to be stated. For ready reference, this provision is appended as below:-

"309. Power to postpone or adjourn proceedings.

(1) In every inquiry or trial the proceedings shall be held as expeditiously as possible, and in particular, when the examination of witnesses has once begun, the same shall be continued from day to day until all the witnesses in attendance have been examined, unless the Court finds the adjournment of the same beyond the following day to be necessary for reasons to be recorded.

(2) If the Court after taking cognizance of an offence, or commencement of trial, finds it necessary or advisable to postpone the commencement of, or adjourn, any inquiry or trial, it may, from time to time, for reasons to be recorded, postpone or adjourn the same on such terms as it thinks fit, for such time as it considers reasonable, and may by a warrant remand the accused if in custody:

Provided that no Magistrate shall remand an accused person to custody under this section for a term exceeding fifteen days at a time:

Provided further that when witnesses are in attendance no adjournment or postponement shall be granted, without examining them, except for special reasons to be recorded in writing:

Provided also that no adjournment shall be granted for the purpose only of enabling the accused person to show cause against the sentence proposed to be imposed on him.

Explanation 1 —*If sufficient evidence has been obtained to raise a suspicion that the accused may have committed an offence, and it appears likely that further evidence may be obtained by a remand, this is a reasonable cause for a remand.*

Explanation 2 —*The terms on which an adjournment or postponement may be granted include, in appropriate cases, the payment of costs by the prosecution or the accused."*

(VI) Right to set up his case in direct communication with the court

At the stage of framing of the charge, the accused in custody is in direct communication with the court which is obliged to explain the contents of charge against the accused and then he is to come out with his stand as to whether he accepts the charge or denies the same. He is to make an informed decision. The opportunity to come into direct communication with the court comes when his statement under **Section 313 Cr.P.C.** is to be recorded.

On conclusion of evidence by the prosecution when the incriminating material is put to the accused, even without support of his counsel assisting him, he has a right to set up his own case in his own style and in his own environment. His statement under **Section 313 Cr.P.C.** is to be recorded thereafter setting out his defence, he may furnish his statement of defence as also memorandum of arguments in terms of **Section 314 Cr.P.C.**, which provisions is reproduced below for ready reference:-

> *"**314. Oral arguments and memorandum of arguments.***
>
> *(1) Any party to a proceeding may, as soon as may be after the close of his evidence, address concise oral arguments, and may, before he concludes the oral arguments, if any, submit a memorandum to the Court setting forth concisely and under distinct headings, the arguments in support of his case and every such memorandum shall form part of the record.*
>
> *(2) A copy of every such memorandum shall be simultaneously furnished to the opposite party.*
>
> *(3) No adjournment of the proceedings shall be granted for the purpose of filing the written arguments unless the Court, for reasons to be recorded in writing, considers it necessary to grant such adjournment.*
>
> *(4) The Court may, if it is of opinion that the oral arguments are not concise or relevant, regulate such arguments."*

(VII) Right to produce evidence in his defence

The accused is to be called upon to enter his defence after his statement under **Section 313 Cr.P.C.** is recorded wherein he already sets up his legal defence. He may get the witnesses summoned through the court or may even produce all by himself.

Accused can be a competent witness for himself. In this regard, **Section 315 Cr.P.C.** stipulates that:-

> *"315. Accused person to be competent witness.*
>
> *(1) Any person accused of an offence before a Criminal Court shall be a competent witness for the defence and may give evidence on oath in disproof of the charges made against him or any person charged together with him at the same trial:*
>
> *Provided that—*
>
> *(a) he shall not be called as a witness except on his own request in writing;*
>
> *(b) his failure to give evidence shall not be made the subject of any comment by any of the parties or the Court or give rise to any presumption against himself or any person charged together with him at the same trial.*

(2) Any person against whom proceedings are instituted in any Criminal Court under section 98, or section 107, or section 108, or section 109, or section 110, or under Chapter IX or under Part B, Part C or Part D of Chapter X, may offer himself as a witness in such proceedings:

Provided that in proceedings under section 108, section 109 or section 110, the failure of such person to give evidence shall not be made the subject or any comment by any of the parties or the Court or give rise to any presumption against him or any other person proceeded against together with him at the same inquiry.

(VIII) Right to privacy

Neither phones nor written communications addressed to the accused can be subjected to scrutiny. In **People's Union for Civil Liberties v. Union of India**, (1996GG) Supp 10 SCR 321, it was held by the Apex Court that:-

"Right to privacy would certainly include telephone – conversion in the privacy of one's home or office. Telephone-tapping would, thus, infract Article 21 unless it is permitted under the procedure established by law."

(IX) Right to life and dignity

When an accused in custody has a right to be produced before the magistrate without handcuffs, which practice even otherwise has been labeled as inhuman. There are decisions of the Supreme Court which hold the field.In **Prem Shankar Shukla v. Delhi Admn.**,(1980)3 SCR 855, it was held as under:-

"Handcuffing is prima facie inhuman and, therefore, unreasonable, is over harsh and at the first blush, arbitrary. Absent fair procedure and objective monitoring to inflict "irons" is to resort to zoological strategies repugnant to Article 21. Surely, the competing claims of securing the prisoner from fleeing and protecting his personality from barbarity have to be harmonized. To prevent the escape of an under-trial is in public interest, reasonable, just and cannot, by itself be castigated. But to bind a man hand and foot, fetter his limbs with hoops of steel, shuffle him along in the streets and stand him for hours in the courts is to torture him, defile his dignity, vulgarise society and foul the soul of our Constitutional culture.... Iron straps are insult and pain writ large, animalising victim and keeper."

In **Citizens for Democracy v. State of Assam**, (1995)3 SCR 943, it was held as under:-

"handcuffs or other fetters shall not be forced on a prisoner convicted or under-trial while lodged in a jail any where in the country or while transporting or in transit from one jail to another or from jail to court and back. The police and the jail Authorities, on their own, shall have no authority to direct the handcuffing of any inmate of a jail in the country or during transport from one jail to another jail or to court and back."

(X) Rights of women accused

(a) The Apex Court in **Nandini Satpathy v. P.L. Dhani**, (1978)2 SCC 424, has held that:-

"act of police officer directing a woman to appear in police station is violative of Section 160(1) Cr.P.C."

(b) A woman accused has to be arrested by a female police officer only. Provisions of sub-section (4) of Section 46 of Code, further mandate that no woman shall be arrested after sunset and before sunrise save in exceptional circumstances, without the prior permission of Judicial Magistrate, First Class, in whose local jurisdiction offence is committed or arrest is to be made.

In **Sheela Barse v. State of Maharashtra**, AIR 1983 SC 96, the Supreme Court directives are as under:-

i. Female suspects must be kept in separate lock-ups under the supervision of female constables;

ii. Interrogation of females must be carried out in the presence of female police persons;

iii. A person arrested without a warrant must be immediately informed about the grounds of arrest and the right to obtain bail;

iv. As soon as an arrest is made, the police should obtain from the arrested person, the name of a relative or friend whom she would like to be informed about the arrest. The relative or friend must then be informed by the police; and

v. The police must inform the nearest Legal Aid Committee as soon as an arrest is made and the person is taken out of the lock-up.

(XI) Rights of a juvenile in conflict with law

The Juvenile Justice (Care and Protection of Children) Act, 2000 is the primary legal framework for Juvenile justice in India. The Act provides for a special approach towards the prevention and treatment of Juvenile delinquency and provides a framework for the protection, treatment and rehabilitation of children in the purview of the juvenile justice system.

Section 10 of the act in clear and unambiguous terms stipulates that a Juvenile child who is in conflict with law once apprehended should be immediately produced before the Juvenile Justice Board. Section 10(1) requires that Juvenile after being apprehended should be placed under the charge of special Juvenile police unit or the designated police officer and thereafter "without loss of time" produced before the Juvenile Justice Board. The expression "without loss of time" indicates the urgency and the requirement to immediately produce the Juvenile before the Juvenile Justice Board. The period of 24 hours mentioned in the latter part of section 10(1) is the outer limit. The requirement of section 10(1), is immediate production of the Juvenile before the Juvenile Justice Board and not mere production within 24 hours. Both parts of hours is not sufficient.

As and when a young person is apprehended/arrested and he is produced before the Magistrate, it will be the duty of the Magistrate also to order ascertainment of age of such a person. The Magistrate shall, in all such cases, undertake this exercise wherefrom the young person from his/her looks appears to be below 18 years of age and also in all those cases where in the arrest memo age is stated to be 18-21 years. A preliminary enquiry in this behalf shall be undertaken of all these young persons whose age is stated to be up to 21 years on the lines of judgment of the Supreme Court in **Gopinath v. State of West Bengal[2].**

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[2]AIR 1984 SC 237

SHORT NOTE ON CRIMINAL JURISPRUDENCE ON BAIL

— Dr. Bharat Bhushan Parsoon*

LAW RELATING TO BAILS[1]

The society has a vital interest in grant or refusal of bail to an accused under arrest because every criminal offence is the offence against the State. Opposite to the interest of the society, is personal liberty of an individual. Individual liberty is valued highly by everyone. In short, there are conflicting interests. On the one hand, the law needs to shield the society from the hazards of those accused of committing crimes; some even have potentiality of repeating the same crime while on bail. On the other hand, there is the other extreme of fundamental principle of criminal jurisprudence regarding presumption of innocence of an accused until he is proved guilty; there is concomitant sanctity of individual liberty to which also adherence of law is legitimately expected. Grant or refusal of bail to an individual is primarily dependent upon balancing of these two competing interests.

Right to 'life and liberty' is guaranteed under Constitution of India as enshrined in Article 21. It reads as under: -

"No person shall be deprived of his life and personal liberty except according to procedure established by law."

In the context of criminal jurisprudence on bail, cardinal principles which flow from this fundamental right are as follows:

(i) Everyone is presumed to be innocent until proved guilty; and,

(ii) Grant of bail is the rule and its denial, is an exception.[2]

Chapter V containing Sections 41 to 60A of the Code of Criminal Procedure, 1973 (hereinafter referred to as Code or Cr.P.C.) pertains to arrest of the persons under various circumstances and in the manner prescribed therein.

Considering the Fundamental Right on life and personal liberty as noticed above, the question arises.

Q. Whether the power to arrest a person is not in violation of the fundamental right of life and personal liberty guaranteed under Article 21 of the Constitution?

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*Judge, Punjab and Haryana High Court, Chandigarh

[1] The concept and philosophy of bail has very articulatively been expressed by the Hon'ble Apex Court in ***Vaman Narain Ghiya Versus State of Rajasthan, 2009(1) RCR(Criminal) 473*** as under:- "Personal liberty is fundamental and can be circumscribed only by some process sanctioned by law. Liberty of a citizen is undoubtedly important but this is to balance with the security of the community. A balance is required to be maintained between the personal liberty of the accused and the investigational right of the police. It must result in minimum interference with the personal liberty of the accused and the right of the police to investigate the case. It has to dovetail two conflicting demands, namely, on the one hand the requirements of the society for being shielded from the hazards of being exposed to the misadventures of a person alleged to have committed a crime; and on the other hand, the fundamental canon of criminal jurisprudence viz. the presumption of innocence of an accused till he is found guilty. Liberty exists in proportion to wholesome restraint, the more restraint on others to keep off from us, the more liberty we have.

The law of bail, like any other branch of law, has its own philosophy and occupies an important place in the administration of justice and the concept of bail emerges from the conflict between the police power to restrict liberty of a man who is alleged to have committed a crime and presumption of innocence in favour of the alleged criminal. An accused is not detained in custody with the object of punishing him on the assumption of his guilt."

[2] **Sanjay Chandra v. C.B.I. (SC), 2011(4) R.C.R.(Criminal) 898**

Ans. Constitution holds right to life and liberty of every citizen very dearly but one has to suffer deprivation of it, if the same has emerged after following the procedure established by law. Sequelly, arrest of a person suffers from illegality, if the procedure followed in effecting arrest is not fair and formally explained, but is rather fanciful or flimsy.

In ***Kalyan Chandran Sarkar Versus Rajesh Ranjan,***[3] it was held as under:

"Under the criminal laws of this country, a person accused of offences which are non-bailable, is liable to be detained in custody during the pendency of trial unless he is enlarged on bail in accordance with law. Such detention cannot be questioned as being violative of Article 21 of the Constitution, since the same is authorized by law. But even persons accused of non-bailable offences are entitled to bail if the Court concerned comes to the conclusion that the prosecution has failed to establish a prima-facie case against him and/or if the Court is satisfied by reasons to be recorded that in spite of the existence of prima-facie case, there is need to release such accused on bail, where fact situations required it to do so."

Thus, personal liberty cannot be curtailed except as per legal procedure.

BAIL UNDER THE CODE OF CRIMINAL PROCEDURE, 1973

The term 'bail' does not find its definition in the Code but Chapter XXXIII titled "Provisions as to bail and bonds" deals with it. To understand the term 'bail' in its different hues and shades, firstly, we need to understand the prominent features of the term 'bail' and the following terms:

Section 2(a) of Criminal Procedure Code, 1973

"bailable offence" means an offence which is shown as bailable in the First Schedule, or which is made bailable by any other law for the time being in force; and **"non-bailable offence"** means any other offence.

Section 2(c) of the same Code

"cognizable offence" means an offence for which and **"cognizable case"** means a case in which, a police officer may, in accordance with the First Schedule or under any other law for the time being in force, arrest without warrant;

Section 2(l) of the same Code

"Non-Cognizable offence" means an offence for which and **"non-cognizable case"** means a case in which, a police officer has no authority to arrest without warrant;

Having understood these terms, to better appreciate the term **'bail'** we need to study its relationship with different kind of offences.

Bail in bailable Offence:

Section 170(1) of the Code of Criminal Procedure, 1973 enables the station house officer / investigating officer to admit an accused person, under arrest for committing a bailable offence, to bail, if he's able to give security for his appearance before the Magistrate.

Section 436 deals with situations as also with those kind of cases, where bail may be sought by the accused as a matter of right and is concomitantly granted to the arrested person. This Section deals with 'bailable offences', where bail cannot be refused. Rather, even the arresting officer himself may release such an accused on bail.

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[3] **2005(1) RCR (Criminal) 703**

Accused may seek bail as a matter of right in bailable offence u/s 436 Cr.P.C. The Magistrate may release the accused with or without surety. In case the accused fails to appear as per the terms of the bail bond, the Magistrate may refuse him bail when he appears subsequently. **(Section 436(2) Cr.P.C.)**

In bailable offences indigent persons can be released without sureties. Proviso and relevant explanation to section 436(1) Cr.P.C. in this regard are as under:

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

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

Right to seek bail on serving more than one half of the maximum possible sentence:

Under section 436A Cr.P.C. an under trial prisoner (UTP) has the right to seek bail on serving more than one half of the maximum possible sentence on his personal bond. No person can be detained in prison as an undertrial for a period exceeding the maximum possible sentence. This provision is, however, not applicable for those who are charged with offences punishable with the death sentence. Section 436-A Cr.P.C. reads as under:

> *'Where a person has, during the period of investigation, inquiry or trial under this Code of an offence under any law (not being an offence for which the punishment of death has been specified as one of the punishments under that law) undergone detention for a period extending up to one-half of the maximum period of imprisonment specified for that offence under that law, he shall be released by the Court on his personal bond with or without sureties:*
>
> *Provided that the Court may, after hearing the Public Prosecutor and for reasons to be recorded by it in writing, order the continued detention of such person for a period longer than one-half of the said period or release him on bail instead of the personal bond with or without sureties:*
>
> *Provided further that no such person shall in any case be detained during the period of investigation, inquiry or trial for more than the maximum period of imprisonment provided for the said offence under that law.*
>
> ***Explanation**.-In computing the period of detention under this Section for granting bail the period of detention passed due to delay in proceeding caused by the accused shall be excluded.'*

Section 437 Cr.P.C. deals with bail in case of non-bailable offence; whereas, Section 439 Cr.P.C. deals with special powers of the High Court or the Court of Sessions regarding grant of bail. Under Sections 437 and 439, bail is granted when the accused or the detenue is in jail or under detention.

Since individual liberty is a prized possession of everyone, following questions spring up for an answer:

Q. Can bail be sought by an arrestee as a matter of right?

Ans. In matters of bailable offences in terms of Section 436 of the Code, bail can be sought as a matter of right.

There is yet another provision. It is called Compulsive bail under Section 167(2) of the Code, where an accused gets bail as a matter of right because investigations are not completed within statutorily fixed time and charge-sheet has not been filed by the investigating Police.

In other cases of 'cognizable offences' as also 'non-cognizable offences' in terms of Section 437 and 439 of the Code, it is discretion of the Court to grant or not to grant bail. Such discretion is based upon various parameters which have been laid down by the Supreme Court of India in various judgments rendered by it defining the eligibility of a person to be granted the concession of regular bail. In short, even if grant of bail is a rule while its denial is an exception, grant of bail is based upon number of factors which vary from case to case.

Q. Whether bail can be refused on the ground of seriousness of crime?

Ans. No. Only in cases of commission of offences punishable with death or imprisonment, Court of a Magistrate is not competent to grant bail but in terms of first proviso to Section 437(1) of the Code, even Court of a Magistrate may grant bail in such cases where the Magistrate entertains a reasonable belief on the material available that the accused is not guilty of commission of such an offence. This will of course be an extra-ordinary occasion because normally there will be some material or the other at the stage of initial arrest for the accusation or strong suspicion of commission of such an offence by the person detained.

Unless exceptional circumstances have been brought to the notice of the Court which may defeat proper investigation and a fair trial, the Court normally will not decline grant of bail to a person who is not accused of an offence punishable with death or imprisonment for life. Even in cases where punishment is for life or death, there is no absolute rule that no bail in any circumstance can be granted but in such a case, the bail application would lie before a Court of Sessions.

Q. What is the difference between provisions of Sections 437 and 439 of the Criminal Code?

Ans. Section 437 of the Code puts embargo on grant of bail in cases of offences punishable with death or imprisonment for life unless it is incredible that the accused is guilty. Thus Court puts restrictions on the exercise of power of bail by a Magistrate, thus leaving this field for the Court of Sessions and the High Court under Section 439 of the Code. In short, when Section 437 contemplates that a person has to be accused or suspect of a non-bailable offence and consequently arrested or detained without warrant, Section 439 empowers the Sessions Court or high Court to grant bail if such a person is in custody. [4]

Q. Whether in non-bailable offences, there is complete bar in granting of bail?

Ans. No. Merely because an offence comes in the category of non- bailable offences would not mean that bail cannot be granted in such a offence. There is no complete embargo in grant of bail in non- bailable offences.

Now next question posing for answer is:-

Q. What are the considerations for grant of bail?

Ans. (i) Nature and gravity of the circumstances in which the offence is committed;

(ii) Position and status of the accused with reference to the victim of the offences;

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[4] ***Sundeep Kumar Bafna Versus State of Maharashtra & Another, AIR 2014 SC 1745.***

(iii) The likelihood, of the accused of fleeing from justice, of repeating the offence,

(iv) Of jeopardizing his own life while faced with a grim prospect of possible conviction in the case;

(v) Of tampering with witnesses; and,

(vi) The consideration of history of the case as well as of its investigation.[5]

Demonstratively, dealing with the grounds wherein bail could be granted in ***Prahlad Singh Bhati Versus NCT, Delhi (2001) 4 SCC 280***, the Hon'ble Apex Court observed as under:-

> *"It has also to be kept in mind that for the purposes of granting the bail the legislature has used words "reasonable grounds for believing" instead of "the evidence" which means the court dealing with the grant of bail can only satisfy it (sic itself) as to whether there is a genuine case against the accused and that the prosecution will be able to produce prima-facie evidence in support of the charge. It is not expected, at this stage, to have the evidence establishing the guilt of the accused beyond reasonable doubt."*

In addition to the grounds already mentioned, the following grounds, for consideration in matter of grant or refusal of bail, had also been highlighted:-

i) The nature of accusation;

ii) The nature of evidence in support thereof;

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

iv) The character, behavior, means and standing of the accused;

v) Circumstances which are peculiar to the accused;

vi) Reasonable possibility of securing the presence of the accused at the trial;

vii) Reasonable apprehension of the witnesses being tampered; and,

viii) The larger interests of the public or State and similar other considerations.[6]

It thus follows that the Court granting bail is to exercise its discretion in a judicious manner and not as a matter of course. Reasons for prima-facie conclusion, as to why bail was being granted, whereas the accused is charge-sheeted of having committed a serious offence, are to be given.[7]

Custody: Section 439 of the Code uses the word 'custody'. Thus, we need to understand the meaning of the word 'custody'.

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[5] ***Gurcharan Singh Versus State (Delhi Admn.) (1978) 1 SCC 118***, the Hon'ble Supreme Court mentioned that their can be other relevant grounds which in view of so many valuable factors, cannot be exhaustively set out.

[6] The Hon'ble Apex Court had again an occasion to deal with grounds for grant or refusal of bail in *State of UP Vs Amarmani Tripathi (2005) 8 SCC 21* wherein the following grounds had been highlighted:-

(i) Whether there is any prima-facie or reasonable ground to believe that the accused had committed theoffence;
(ii) nature and gravity of the charge;
(iii) severity of the punishment in the event of conviction;
(iv) danger of the accused absconding or fleeing, if released on bail;
(v) character, behaviour, means, position and standing of the accused;
(vi) likelihood of the offence being repeated;

[7] In ***Kalyan Chandran Sarkar's*** case the Hon'ble Apex Court following factors at the time of consideration of matter of granting or refusing bail, were detailed:-

(a) The nature of accusation and the severity of punishment in case of conviction and the nature of supporting evidence;
(b) Reasonable apprehension of tampering with the witnesses or apprehension of threat to the complainant; and,
(c) Prima-facie satisfaction of the court in support of the charge.
(vii) reasonable apprehension of the witnesses being tampered with; and,
(viii) danger, of course, of justice being thwarted by grant of bail.

Custody in terms of Section 439 of the Code means physical control or physical appearance of the accused in Court added with submission to the jurisdiction and order of the Court. Thus, it follows that no person/accused of an offence can move the Court for bail under Section 439 of the Code unless he is in custody. A person can be in custody not merely when the police arrest him for production before a Magistrate for the purpose of police or judicial remand but rather he can be stated to be in custody even when he surrenders before a Court of law and submits to its jurisdiction. Custody in the context of Section 439 of the Code is physical control or at least physical presence of the accused in the Court coupled with submission to the jurisdiction and orders of the Court.

Bail after conviction (S.389 Cr.P.C.)

If an accused person on conclusion of trial against him is found guilty, the trial Court will pronounce the sentence after considering his past record. If the convicted person wants to appeal against the order of his sentence in a higher court, the Court which passed the sentence must release him on bail.

i) When the sentence is for imprisonment for a term net exceeding 3 years; or,

ii) When the offence for which the person is convicted is a bailable one and the person is already on bail.

The release will be for a period that will enable the convict to present the appeal and get the orders of the appellate Court.

Once a person files an appeal against his conviction, the appellate Court may suspend the sentence and release him on bail or on personal bond,[8] as the case may be.

The question which poses for answer now is:-

Q. Can bail once granted be cancelled and if so, on what grounds?

Ans. Once order of release of bail has been passed under Section 437(1), 437(2) or 439(1) of the Criminal Procedure Code, cancellation of bail can be ordered under Section 437(5) or 439(2) of the Code. Perusal of the provisions of Section 437(5) and 439(2) Cr.P.C. reveals that concession of bail can be withdrawn on the following grounds:-

i) The accused misuses his liberty by indulging in similar criminal activity;

ii) Interferes with the course of investigations;

iii) Attempts to tamper with evidence or witnesses;

iv) Threatens witnesses or indulges in similar activities would hamper smooth investigations;

v) There is likelihood of his fleeing to another country;

vi) Attempts to make himself scarce by going underground and not available to the investigating agency; and,

vii) Attempts to place himself beyond the reach of his surety etc.

These grounds are merely illustrative and not exhaustive. It may be noticed that cancellation of bail cannot be equated with rejection of bail. Both are not on the same footing. Having once been

[8] It was held in ***Niranjan Singh Versus Prabhakar Raja Ram Kharote, (1980) 2 SCC 559***. This law was subsequently followed and reiterated in various judgments titled ***Nirmaljeet Kaur Versus Sate of M.P., 2004(4) RCR(Criminal) 376, Sunita Devi Versus State of Bihar, 2005(1) RCR(Criminal) 410, Adri Dharan Das Versus State of West Bengal, 2005(2) RCR(Criminal) 32, State of Haryana Versus Dinesh Kumar, 2008(1) RCR(Criminal) 725, Sundeep Kumar Bafna Versus State of Maharashtra & Another, AIR 2014 SC 1745*** *and* ***Raghubir Singh Versus State of Bihar, (1986) 4 SCC 481***.

granted bail on disclosable considerations, cancellation of bail should not be lightly resorted to. Only indulgence in similar activities by the accused while on bail, which would hamper investigations or trial, there may be order of cancellation of bail which is to be preceded by hearing of the accused on bail as also of the prosecution. There is a caveat as well that the bail granted is not to be cancelled by way of re-appreciating evidence.

It thus follows that parameters for grant of bail and cancellation of bail are entirely different.

INTERIM BAIL

Q. Whether an accused during pendency of his regular bail application under Section 439 Cr.P.C. is entitled for interim bail?

Ans. Yes. Power of grant of interim bail inheres power to grant regular bail. During pendency of an application for regular bail in the event of any urgency averred and established by an accused in custody whose application for grant of regular bail under Section 439 of the Code is pending, the Court of Sessions and the High Court have powers to grant interim bail pending disposal of the regular bail application. Interim bail would also be available to an under trial in custody if eventuality like natural calamities viz. flood or drought visit his native village threatening his kith and kin. It may also be applied by him in case of serious illness of spouse or close blood relations. Similarly, death of spouse, parents or any one of close relations may also be offering circumstances for making application for interim bail in special circumstances. These circumstances have been given only demonstratively but there may be many more such like circumstances and the trial Court would be required to weigh the same.[9]

COMPULSIVE BAIL UNDER SECTION 167(2) Cr.P.C.

Having been arrested for commission of an offence, the accused cannot be allowed to continue in detention for an unlimited period. Total period of detention is not to exceed 90 days in cases where the investigations relate to serious offences mentioned therein and 180 days in cases under the Narcotic Drugs and Psychotropic Substances Act, 1985, while in other cases such detention would be for a maximum period only of 60 days. If by that time, cognizance is not taken and the report under Section 173 Cr.P.C. is not filed, the accused is entitled to be released on bail in terms of proviso to Section 167(2) of the Code of Criminal Procedure.

Some questions, which prop up in mind in this regard are:

Q. What is the relevant date of counting 60 or 90 days or 180 days, as the case may be for filing charge-sheet beyond which an accused acquires a right to be released on bail?

Ans. The relevant date of counting 60 or 90 days or 180 days, as applicable, for filing charge-sheet is the date of first order of the remand and not the date of arrest.[10]

Q. What happens in case an application for bail is filed under Section 167(2) Cr.P.C. and is pending where a charge-sheet is filed even though it was filed beyond the period of 60/90/180 days?

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[9] Reference may be made to ***Mukesh Kishanpuriya Versus State of West Bengal 2010(2) RCR (Criminal) 830***.

[10] The law to this effect has been propounded by the Hon'ble Apex Court in ***Chaganti Satyanarayana & Ors. Vs. State of Andhra Pradesh, (1986) 3 SCC 141, CBI, Special Investigation Cell-1, New Delhi V. Anupam J. Kulkarni (1992) 3 SCC 141, State through CBI V. Mohd. Ashraft Bhat & Another, (1996) 1 SCC 434, State of Maharashtra V. Bharati Chandmal Varma (Mrs.) (2002) SCC 1211, State of Madhya Pradesh V. Rustom & Ors. 1995 Supp (3) SCC 221***.

Ans. The right under Section 167(2) of the Code of Criminal Procedure is of release on bail on default if a charge-sheet is not filed within 90 days from the date of first remand is not an absolute or indefeasible right. The said right would be lost if charge-sheet was not filed within 90 days, but before the consideration of the same and before being released on bail, if charge-sheet is filed, the said right to be released on bail would be lost. After filing of the charge-sheet, if the accused is to be released on bail, it can be only on merits. [11]

ANTICIPATORY BAIL

A person, accused of commission of a non-bailable offence having reasons to believe that he may be arrested in such case can apply to the Court of Sessions or to the High Court for grant of pre-arrest bail. Unless there are special or extra-ordinary circumstances, normally one cannot directly approach the High Court and is rather required to approach the Court of Sessions in the first instance. The imminence of a likely arrest on a reasonable belief can be shown to exist even if the FIR is yet not filed. The use of expression "reasons to believe" show that the belief that the applicant may be so arrested must be founded on reasonable ground. Mere fear is not belief. The grounds on which his belief is based must be capable of being examined by the Court objectively.

Section 438 cannot be invoked on the basis of vague and general allegations as if to get relief of pre-arrest bail till perpetuity against a possible arrest.

Anticipatory bail is a device to secure liberty of an individual; it is neither a permit to the commission of crime nor a protective shield against any kind of accusations to be made by the prosecution. The applicant in such cases may be directed to obtain an order of bail under Sections 437 or 439 within reasonable short period after filing of the FIR as aforesaid but this need not be followed as an invariable rule.

The provisions of anticipatory bail were introduced for the first time in the Code of Criminal Procedure in 1973. It is clear from the statement of objects and reasons that the purpose of incorporating Section 438 in the Code of Criminal Procedure was to *recognize the importance of personal liberty and freedom in a free and democratic country*. From a careful analysis of this Section, the wisdom of the legislature becomes quite evident and clear that the legislature was keen to ensure respect for the personal liberty and to achieve that end he also pressed in service the age-old principle that an individual is presumed to be innocent till he is found guilty by the Court. The scope and ambit of anticipatory bail was considered by a Constitution Bench of the Hon'ble Supreme Court of India in ***Gurbaksh Singh Sibbia V. State of Punjab (1980) 2 SCC 565*** and the following principles with regard to anticipatory bail were laid down:-

a) Section 438(1) is to be interpreted in the light of Article 21 of the Constitution of India;

b) Filing of FIR is not a condition precedent to exercise of power under Section 438;

c) Order under Section 438 would not affect the right of police to conduct investigation;

d) Conditions mentioned in Section 437 cannot be read into section 438;

e) Although, the power to release on anticipatory bail can be described to be of an "extraordinary" character, this would "not justify the conclusion that the power must be exercisedin exceptional cases only. Powers are discretionary to be exercised in

[11] This view has been espoused by the Hon'ble Apex Court in a Constitution Bench Judgment rendered in Sanjay Dutt V. State, (1994) 5 SCC 410 which has been consistently followed till date. The recent judgment of the Hon'ble Supreme Court of India in ***Sadhwi Pragya Singh Thakur Vs. State of Maharashtra, 2012 (1) RCR (Criminal) 302*** also reiterates the aforementioned principle of law.

light of the circumstances of each case; and,

f) Initial order can be passed without notice to the public prosecutor. Thereafter, notice must be issued forthwith and question ought to be re-examined after hearing. Such ad- interim order must conform to requirements of the Section and suitable conditions should be imposed on the applicant.

In a recent landmark judgment rendered by the Hon'ble Apex Court in ***Siddharam Satingappa Mhetre v. State of Maharashtra & Ors. (2011) 1 SCC 694***, the following factors and parameters were prescribed to be taken into consideration while dealing with an application for 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 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 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 Courts 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 mater 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 witness or apprehension of threat to the complainant; and,

(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 be genuineness of the prosecution, in the normal course of events, the accused is entitled to an order of bail.

Q. Is the power exercised by the Court of Sessions or the High Court under Section 438 Cr.P.C. subject to the limitation of Section 437 Cr.P.C?

Ans. No. The Constitution Bench is Sibbia's case (supra) has already observed that there is no justification for reading into Section 438 Cr.P.C. the limitations mentioned in Section 437 Cr.P.C. The Court further observed that the plentitude of the section must be given its full play. The Constitution Bench has also observed that the High Court is not right in observing

that the accused must make out a "special case" for the exercise of the power to grant anticipatory bail. This virtually, reduces the salutary power conferred by Section 438 Criminal Procedure Code to a dead letter.

Q. What is the duration of an order granting anticipatory bail?

Ans. The Hon'ble Supreme Court of India in Mhetre's case (supra) has held that when the anticipatory order is confirmed by the competent Court while exercising its jurisdiction under Section 438 Cr.P.C., then the benefit of the grant of bail should continue till the end of the trial of that case. In Para 117 of the aforesaid judgment, the following observations have been recorded:-

> *"117. The view expressed by this Court in all the above referred judgments have to be reviewed and once the anticipatory bail is granted then the protection should ordinarily be available till the end of the trial unless the interim protection by way of the grant of anticipatory bail is curtailed when the anticipatory bail granted by the Court is cancelled by the Court on finding fresh material or circumstances or on the ground of abuse of the indulgence by the accused."*

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Session – IV

3.45 PM to 5.15 PM

Total time: 1 hr 30 min

Session – V

9.30AM to 11.00 AM

Total time: 1 hr 30 min

Session – IV
3.45 PM to 5.15 PM
Total time: 1 hr 30 min

Session – V
9.30AM to 11.00 AM
Total time: 1 hr 30 min

MODULE FOR TRAINING OF PANEL LAWYERS ON LAWYERING SKILL – CRIMINAL

- **Drafting**
- **Witness Examination**
- **Argument**

Objectives:

— To provide the young lawyers grounding in basic lawyering skills in the area of criminal law.

— To give them exposures to the areas of drafting, witness examination and arguments.

Expected Learning Outcome:

— The participants will be able to draft pleadings in accordance with substantive and procedural law.

— The participants will be able to competently understand the purpose of examination-in-chief and re-examination and will be able to examine their witnesses, if they are representing the complainant and would also be able to effectively cross-examine the witnesses, if they are for the accused.

— The participants will be able to argue the case of their clients efficiently, competently and effectively.

Training Method

1. Brain Storming
2. Lecture
3. Group Discussion
4. Exercise

Programme:

Session - IV

Introduction: — 05 Minutes

The resource person will speak for 05 minutes introducing the subject, giving the scheme of the two sessions as also the importance of learning the skills along with the operationalisation of substantive as well as procedural laws.

Brain storming - I — 20 Minutes

The participants will try to find the answer to the brain storming questionnaire. For this the participants sitting next to each other will confer and write the answers in the space provided in the questionnaire.

Whole group discussion led by the
resource rerson on brain storming questions — 20 Minutes

Exercise on drafting — 20 Minutes

Discussion on drafting led by the resource person — 20 Minutes

Concluding remarks — 05 Minutes

Session - V

Introduction — 05 Minutes

Brain storming – II — 20 Minutes

Whole group discussion led by the
resource person on brain storming questions — 20 Minutes

Group discussion — 20 Minutes

Presentation and discussion led by the
resource person — 20 Minutes

Concluding remarks — 05 Minutes

ACTIVITY FOR SESSION IV

- Justice Manju Goel (Retd.) *

Session-IV

Questions for brain storming - I

1. What are the aims and objects of cross-examination?
2. What are the useful questions to challenge the veracity of a witness?
3. What are the questions which are not legally permissible to be put to a victim or a prosecution witness?
4. What is the appropriate stage to introduce the defence case (particularly that of alibi)?
5. What is the appropriate stage to study the law in respect of the offence alleged against your client?
6. On non-registration of an FIR for an offence under Section 376 IPC, what steps will you take for legally helping the female victim?
7. Before whom you, as a counsel for the mother of minor victim of rape, apply for custody?
8. What steps you would take for enhancement of compensation for the victim if you find the compensation allowed by the trial court to be inadequate or disproportionate to the crime?
9. What steps will you take for assuring compensation for your victim in a situation where the case is likely to result in cancellation of the FIR or acquittal of the accused?

Exercise on Drafting.

1. Your client "C" is resident of ground floor of a house. The brother of 'C' lived on the first floor but has shifted to some other house leaving behind some household goods. Relations between the brothers being strained, the brother of C filed a complaint with the police alleging that C broke into his flat and removed the cooking gas cylinder and some Kitchen appliances. The FIR was registered on order of the concerned Magistrate on a complaint under Section 156(3) Cr. P.C. Charge sheet was filed and Charges under Sections 379, 308 and read with 34 IPC have been framed.

   Draft a Revision Petition against the order of framing of the charge and the charge against the accused.

2. What are the important aspects you will keep in view for drafting a criminal complaint for a victim of rape whose FIR has not been recorded by the police?
3. Your client is co-accused in a case of fraud and embezzlement. The principal accused is the employer of your client. Draft an application for bail.

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*Member, NALSA

ACTIVITY FOR SESSION V

- Justice Manju Goel (Retd.) *

Session-V

Questions for brain storming – II

Arguments

1. What preparation will you make on the eve of final argument?
2. What is the right way of presenting to the court the evidence on record?
3. What are the things to remember when you cite a judgment?
4. What should be the structure of your arguments?

Group Discussion

Reading-I

- Your client is accused of having received a bribe and is charged under Section 7 of Prevention of Corruption Act, 1988. On interviewing your client, you learn that he actually received a petty amount from the contractor engaged by the Government for building a School. About the time the building was scheduled to be inaugurated, he found that the staircase needs polishing and due to urgency, he engaged a petty contractor for this purpose and paid him some amount on behalf of the contractor. The contractor reimbursed the said amount to him when the eyewitness was present. Your client further tells you that all the bills of the contractor had been paid and there was no reason why the contractor should bribe him.

Activity

- **Discuss with in your group and find answers to the following questions:**

(i) Will you advice your client to admit having received the money?

(ii) If so, what questions will you put to the complainant/eyewitness set up by the prosecution?

(iii) How will you build a defence and what evidence will you look for?

(iv) Will you put the accused in the box?

(v) Will you produce any evidence in support of your defence?

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*Member, NALSA

SHORT NOTE ON LEGAL DRAFTING (CRIMINAL)

— Rebecca M. John*

LEGAL DRAFTING

On the criminal side the value of pleadings is often overlooked. Criminal Law is no less precise and technical than any other branch of law, and as such pleadings should be drafted carefully and concisely. For the purposes of this topic, I propose to divide drafting into two segments.

TRIAL COURTS

1. Miscellaneous Applications

a) Applications under Section 207 of the Code of Criminal Procedure seeking copies of the documents filed along with the charge sheet

b) Exemption Applications under Sections 205/317of the Code of CriminalProcedure

c) Applications for Superdari under Sections 451 & 457 of the Code of Criminal Procedure

d) Applications for Plea Bargaining under Section 265B of the Code of Criminal Procedure

e) Applications opposing remand and seeking bail and anticipatory bail

f) Application for Legal Interviews with clients in custody

g) Applications for compliance of provisions of the Jail Manual

2. Appeals to the Sessions Court from an order of conviction and sentence passed by the Magistrate

3. Revisions to the Sessions Court from an order passed by the Magistrate

4. Drafting of complaints for which cognizance is taken under Section 190 (1)(a) of the Code of Criminal Procedure

HIGH COURT

1. Writs

   - Habeas Corpus
   - Mandamus
   - Certiorari

2. Petitions under Section 482 of Code of Criminal Procedure

3. Revisions

4. Appeals

5. Bails

a. Bail Applications underSections 437 & 439 of the Code of CriminalProcedure

b. Anticipatory Bail Application under Section 438 of the Code of Criminal Procedure

TRIAL COURTS:

1. Miscellaneous Applications:

   Every application should in so far as may be possible, specify the section whereunder the application is being preferred, and the prayer must accurately lay out the relief sought.

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*Senior Advocate, Supreme Court of India

a) Applications under Section 207 of the Code of Criminal Procedure seeking copies of the documents filed along with the charge sheet

The stage of compliance of the provisions of Section 207 of the Code of Criminal Procedure is a critical stage in any criminal trial. Scrutiny of the Charge Sheet/ Complaint along with accompanying statements and documents must be done with great care. Ideally the application under Section 207 of the Code of Criminal Procedure should indicate all the statements of witnesses and documents relied upon and received by the accused. Similarly, but separately, the application should also indicate the statements and documents relied upon by the prosecution but not received by the accused. Another paragraph should highlight the statements and documents received but not legible. Likewise, the prosecution very often relies upon the seizure of documents through seizure memos and while supplying a copy of the seizure memo, fails to supply the documents seized under the memo. The applicant must endeavour to seek the documents mentioned in various seizure memos, not supplied by the prosecution.

In a separate paragraph, all electronic records in the form of CDs, computer printouts should be separately examined to ensure that the material ostensibly being supplied has in fact been supplied. Typically the applicant must conclude his application by seeking a statement from the prosecution that no other or further document/ statements are sought to be relied upon by them.

A sample application under Section 207 is given in the CD.

b) Exemption Applications under Sections 205/317of the Code of CriminalProcedure

Applications for exemption from personal appearance of an accused can be moved before a court of a Magistrate under Sections 205 read with 317 of the Code of Criminal Procedure and before a Court of Sessions under Section 317 of the Code of Criminal Procedure. The application must clearly state the reason as to why the accused is unable to attend the proceedings before the Court on any given date, and in appropriate cases must be supported by relevant documents.

The application must also, if possible, set out the bona fides of the applicant, by stating the number of times he or she has appeared before the Court, the stage of proceedings, etc. The application if moved at the stage of evidence must clearly contain an undertaking that the applicant does not dispute his identity and will not claim any prejudice with respect to proceedings undertaken in his absence, and that he has no objection with proceedings continuing in his absence. The application must clearly state that the applicant be exempted from personal appearance through his counsel who will appear on the relevant dates of hearing. Care must be taken that the counsel holding a power of attorney in the case moves the application on the applicant's behalf and remains present in the Court.

Applications are sometimes moved for longer periods of time or till the courts pass any further orders on the same. Such applications, colloquially called applications for permanent exemptions, must be more exhaustive in nature and must contain detailed reasons for the invocation of Sections 205 and/or 317 of the Code of Criminal Procedure. Such applications must contain an undertaking of counsel who will appear on behalf of the applicant on each date of hearing.

Sample applications under Section 205/317 are given in the CD.

c) Applications under Sections 451 and 457 of the Code of Criminal Procedure

Commonly known as superdari applications, the application must set out the connection

between the applicant and the property in question and it must be supported with documentary evidence which will substantiate the claim of the applicant. In the case of a motor vehicle, the applicant must annex copies of the registration certificate, and or any other document which will show him to be the rightful owner of the said motor vehicle.

A sample application under Section 451 and 457 is given in the CD.

d) Plea bargaining under Section265B of the Code of Criminal Procedure

For an application for plea bargaining to be moved under Section 265B of the Code of Criminal Procedure, it must be kept in mind that the offence complained of is not an offence punishable with death, imprisonment for life or imprisonment for a term exceeding seven years. A person accused of an offence, not being the above mentioned offences, may file an application for plea bargaining under Section 265B of the Code of Criminal Procedure. The application must contain a brief description of the case including the offence to which the case relates. It must be accompanied by an affidavit sworn by the accused stating that he has voluntarily preferred the application, he has not been previously convicted by a court for the same offence and that he has understood the nature and extent of punishment provided by the law for the said offence.

A sample application under Section 265A/265B is given in the CD.

e) Applications opposing remand and seeking bail and anticipatory bail

When an accused is arrested and his remand is sought by the prosecuting agency, the accused has the right to oppose such remand and seek bail. Unless otherwise specifically provided by a special enactment, an accused is produced for his remand before a Metropolitan Magistrate. An application can be moved at this stage, opposing remand, with a consequential prayer for bail on the ground that no case is made out against the accused, that all recoveries of the case have been effected, that the accused has no criminal antecedents, that the accused is ready and willing to abide by any of the conditions that the court may impose upon him and that the case against him is motivated and is unsustainable in law or in fact.

Alternatively, an application under Section 437 of the Code of Criminal Procedure can be moved before a Magistrate before whom the accused appears or is brought. In the application for bail so moved, the applicant must clearly set out the allegations against him, as narrated in the First Information Report and thereafter, set out the grounds for which he is seeking bail. It must be borne in mind that the Magistrate's power to release a person on bail, if the offence complained of, is death or imprisonment for life, is limited and conditioned upon the requirements of Section 437 itself. In these cases, an application must be moved under Section 439 of the Code of Criminal Procedure: first before the Court of Sessions and if dismissed, then before the High Court. Although the powers of the High Court and the Court of Sessions are concurrent in nature, the practice developed so far has been to first move the application before the Court of Sessions and then before the High Court.

In order to move an application for bail in the High Court, the order under challenge along with a copy of the First Information Report must be annexed. An endeavour must be made to bring to the notice of the court why the order under challenge needs to be set aside,e.g., on account of its failure to appreciate the law and the facts of the case in proper perspective. A brief description of the accused, his occupation, and other achievements if any must be given to highlight the fact that he has deep roots in society and will not flee from justice. Further, an undertaking must be made that the accused, if released on bail, will not tamper with the evidence of the case or otherwise subvert the cause of justice.

Applications under Section 438 of the Code of Criminal Procedure can only be moved before the Court of Sessions and/or the High Court. The application must be styled in the following manner:-

"An application under Section 438 of the Code of Criminal Procedure seeking directions from this Honorable Court that in the event of the arrest of the petitioner in case FIR No.____, registered atpolice station ____ under Sections _____, the Investigating Officer/Station House Officer be directed to release him on bail."

Section 438 of the Code of Criminal Procedure has been amended extensively by Act 25 of 2005 and an application under the said section must be in compliance with the said amendment and must clearly set out the nature of the accusation, the antecedents of the applicant including the fact as to whether he has previously undergone imprisonment on conviction with respect to a cognizable offence, his undertaking not to flee from justice and his undertaking to abide by any of the conditions that may be imposed upon him in terms of Section 438(2) of the Code of Criminal Procedure. The prayer clause must also specify that directions be given to the Station House Officer/Investigating Officer to release the applicant/petitioner on bail in the event of an arrest in FIR No. _____ under sections _____ in police station _____.

While drafting applications for bail and anticipatory bail, care must be taken to place on record evidence of an unimpeachable nature that may help to prove the applicant's innocence. Additionally, the applicant must state either in the title or the body of the petition the number of times he has previously moved similar applications under the sections above noted and give details of previous orders passed by the different courts in this regard. While drafting applications, lawyers must always keep in mind the principle of fair and absolute disclosure and must as far as possible, endeavour to place on record all previous orders of the court so that a court dealing with a subsequent bail application is not misled in any manner.

Sample copies of an application opposing remand, application under Sections 437 and Sections 439 and Section 438 of the Code of Criminal Procedure are given in the CD.

e) Application for Legal Interviews with clients in custody

An accused when produced from custody(police or judicial) is entitled to legal representation in court. Very often, the accused has critical information which he needs to pass over to his lawyer and therefore, the presence of a lawyer at this stage in the Court is of critical importance. Additionally, a lawyer must move an application for legal interview within the confines of the Court room. The application must set out the reasons for such interview.

A sample copy of an application for a legal interview is given in the CD.

f) Applications for compliance of provisions of the Jail Manual

An undertrial prisoner is entitled to receive basic amenities such as food, water, medicines and clothing at the jail. These are granted to him both underthe Constitution of India and the various jail manuals. An application for compliance of provisions of the jail manual may be filed in cases where there is a violation of rights of the prisonergiven by the jail manual.

2. Appeals to the Sessions Courtfrom an order of conviction and sentence passed by the Magistrate

An appeal from an order of the Magistrate, not being an order of acquittal, to the court of Sessions must be filed within 30 days. The order of conviction and sentence passed by the Magistrate appeal must be annexed with the appeal. The appeal must set out the grounds of

challenge based on non-application of the mind to the facts of the case, failure to properly appreciate evidence and/or any legal infirmity that may arise from the order or the proceedings that culminated in the order under challenge. The grounds of appeal must be clear and brief. Every effort must be taken to confine one ground to one paragraph. Jumbling or mixing of grounds makes for poor drafting and often confuses the superior court. The appeal must be combined with an application for suspension of sentence, if the appellant has been sentenced to a term of imprisonment. In the application for suspension of sentence, an endeavour must be made to state that the appellant has a good prima facie case in his favour, that the applicant was on bail during trial(if he was), that the applicant has good antecedents, etc.

A sample copy of an appeal to the Sessions Court is given in the CD.

3. Revisions to the Sessions Court from an order passed by the Magistrate

The Sessions Court's power of revision is contained in Section 397 of the Code of Criminal Procedure. A revision is preferred against an order where the challenge is to its correctness, legality or propriety, However, while filing a revision petition, care must be taken to ensure that the revision is not being preferred against an interlocutory order. As the scope of the revision is limited to the correctness, legality and propriety of a finding, the pleadings must consequently lay challenge to the correctness, legality and propriety of the finding, arrived at by the Court below. An attempt must be made to make as many legal points as possible. While drafting a revision petition, the provisions of Section 401(2) should be kept in mind and any accused or other person who is likely to be prejudiced by the order must be made a necessary party to the revision petition. Hence, if the Magistrate has dismissed a complaint under Section 203 of the Code of Criminal Procedure, the revisionist must make the proposed accused a party to his revision petition, as prejudice would be otherwise caused to him in the event the order under Section 203 of the Code of Criminal Procedure is overturned by the Court of Sessions.

A sample copy of an application for revision is given in the CD.

4. Drafting of complaints for which cognizance is taken under Section 190 (1)(a) of the Code of Criminal Procedure

Complaints filed before a Metropolitan Magistrate must be carefully drafted. It must be remembered that a complaint is filed against an accused or set of accused for having committed specific offences. The complaint must bring out the necessary elements of the crime qua each individual accused and must be accompanied by such evidence, documentary or otherwise, that will help the complainant prove those elements forthe crime against the named accused. Cognizance of a complaint is always taken under Section 190(1)(a) and the complainant is thereafter asked to prove his case by recording his evidence and those of his witnesses, if any. Keeping this requirement in mind, the complaint drafted in terms of Section 2(d) must contain a narrative which will later be corroborated through oral evidence. Every attempt must be made to crystalize the allegations against the proposed accused in a lucid, systematic and focused manner. The allegations must thereafter make out specific offences for which the accused would be ultimately summoned. A complaint must be accompanied by a list of witnesses and a list of documents that the complainant seeks to reply upon. The complaint must also set out necessary paragraphs with respect to jurisdiction, date and manner in which the offence was committed and the offences for which the accused must be summoned.

In the event that the complainant wishes to seek an investigation in terms of Section 156(3) of the Code of Criminal Procedure, a practice has now developed in Trial Courts to file a

separate application, with the complaint, seeking an order from the magistrate under Section 156(3) of the Code of Criminal Procedure. Such an application must set out grounds that necessitates a police investigation, including the seriousness of the crime, the inability of the complainant to access evidence which is in the control of the accused and the need for forensic and other investigation, if so required.

A sample copy of an application is given in the CD.

HIGH COURTS

1. Writs

- Habeas Corpus - On the criminal side, a writ of habeas corpus may be filed under Article 226 of the Constitution of India for the release of an individual kept in illegal detention either by a state agency or by another individual. The writ is most frequently used to secure the fundamental life and liberty of a person which cannot be taken away except in accordance with law. While drafting a writ of habeas corpus, effort must be made to bring to the notice of the court that the person concerned is not in the lawful custody of the state or any private individual. The writ petitioner must clearly disclose his identity, the fact that he is a citizen of India and has the right to constitutional remedies and then make out a case through a factual narrative as to how the fundamental right of a citizen has been violated through his illegal detention. The writ of habeas corpus or any other writ is always addressed to the Honorable Chief Justice and his companion judges of the court in question. The writ must be accompanied by an affidavit of the petitioner.

- Mandamus and Certiorari - Challenges to the constitutional validity of various provisions in statutes or other proceedings can be made through writs of mandamus and/or certiorari. A writ of mandamus is used to compel a public functionary to carry outduties that he is refusing to do. A writ of certiorari is extended to public functionaries from exceeding their power. In such cases, the provision under challenge must be clearly stated and the reasons for its unconstitutionality must be carefully drafted. Relevant notifications may be relied upon to highlight the petitioner's plea.

2. Petitions under Section 482 of Code of Criminal Procedure

Petitions under Section 482 of the Code of Criminal Procedure can be drafted challenging any order of an inferior court which needs to be set aside for the purpose of giving effect to any order under the Code of Criminal Procedure or to prevent the abuse of the process of any court or to otherwise secure the ends of justice. Section 482 of the Code of Criminal Procedure being an inherent power of the High Court has wide application. The petitioner while drafting a petition under Section 482 of the Code of Criminal Procedure must highlight the abuse that has taken place and the needs to secure the ends of justice. Once again, the order under challenge must accompany the petition as well as all such materials of an unimpeachable nature that can be relied upon by the petitioner to plead his point. While drafting a petition under Section 482, care must be taken to bring out the factual background of the case with clarity and the challenge to the impugned order can be established by relying on facts, as well as law.

A sample copy of an application under Section 482 of the Code of Criminal Procedure isgiven in the CD.

3. Revisions

Revisions from an order passed by a Court of Sessions can be made to the High Court. The order on charge is a revisable order and while impugning the same, the correctness, legality and propriety of the order must be challenged. Revision petitions can also be filed after a petitioner, who was convicted by a Magistrate and lost his appeal in the Court of Sessions. Under the High Court rules and orders, such revision petition must be accompanied by the judgment and order on sentence of the Magistrate, judgment of the Sessions Court, as well as a copy of the appeal field in the Sessions Court. Care must be taken to challenge the orders of the court below strictly on legal grounds as it is unlikely that the High Court will disturb concurrent findings of fact.

A sample copy of a revision is given in the CD.

4. Appeals

Under Section 374 of the Code of Criminal Procedure, any person convicted on a trial held by a Sessions judge may appeal to the High Court. The period of limitation to file such appeals is 60 days. The appeal must contain grounds that are relevant to highlight the non-application of mind by the court below. While drafting such appeals, counsel must have a complete understanding of the facts of the case and the facts that have been proved in trial. Specific grounds can be taken with relation to the evidence of specific witnesses that have not been properly appreciated by the trial court. If the appellant was not identified as a person who committed the crime in question, the grounds of appeal must make mention of the witness(es) who failed to identify him and if necessary, relevant portions of the evidence may be quoted. Grounds such as failure of the prosecution to adequately explain the injuries on the accused person, failure of the prosecution to prove recovery, failure of the prosecution to prove the chain of circumstances in a case of circumstantial evidence, etc. must be individually taken as grounds in the appeal. Failure of the trial court to put relevant questions to the accused in the Section 313 statement, which subsequently formed the basis of his conviction, must also be highlighted as a separate ground in the appeal. Additionally, the severity of the sentence can be challenged on the grounds of its disproportionality to the crime, the accused not being a previous offender, the advancing years and health of the accused, etc.

A sample copy of an appeal is given in the CD.

5. Bails

The drafting of applications for bails under Section 439 of the Code of Criminal Procedure and those of anticipatory bail under Section 438 of the Code of Criminal Procedure in the High Court is pretty much on the same lines as the ones drafted in the Court of Sessions. However, while drafting these applications in the High Court, all previous orders passed in the case relevant for the adjudication of the petition must be filed along with the petition. The petition must contain a statement that the petitioner has not filed a similar petition before the Honorable High Court or the Honorable Supreme Court and in the event a previous petition has been filed and dismissed, the petitioner must make a fair disclosure of the same. If bail is sought on medical grounds, the application must contain the nature of ailment, the seriousness of the same, the failure of the jail authorities to adequately treat the applicant and urgent need for his release sothat he may be treated in a hospital of his choice in a supervised manner. Relevant documents must be annexed with the petition.

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SHORT NOTE ON CROSS – EXAMINATION (CRIMINAL)

— Rebecca M. John*

The main purpose of cross-examination (as per Section 138 of the Evidence Act, 1872), is to find out the truth and detect falsehood in the testimony of prosecution witnesses after his examination in chief.The following tips may prove useful for preparation of a case for purposes of cross-examination.

GENERAL INSTRUCTIONS

1. Study the charge-sheet/complaint carefully and understand the nature of allegations made and the case of the prosecution.
2. Analyse the First Information Report, statements of witnesses, the delay ifany, in making them, the role assigned to each accused, the medical report and the post-mortem report, recoveries, if any, made from an accused, study the time and place of occurrence, chemical examiner's report and all other documents that are relied upon by the prosecution.
3. Where the case of the prosecution relates to an occurrencehaving taken place at a particular spot, lawyers must inspect the scene of crime and make notes on points of interest of the scene of crime, after analyse of site-plan prepared by Police for the said occurrence.He is also required to examine location of a particular accused vis-à-vis the victim or the deceased or location of other eye witness.
4. Find out the witnesses who have been summoned for a particular day of hearing, well in advance.
5. Separate the statements made under Section 161 Cr.PC [examination of witness by police] or any previous statements made by the witnesses along with the document/documents that they seek to prove.
6. Understand how the witness/witnesses fit into the broader prosecution case.
7. Have extensive meetings with your client or the representative of you client to understand the factual matrix of his defence. Also, if the witness is known to your client, your endeavour should be to understand the witness's past, the reason for deposing against your client and to ascertain whether there is any evidence to undermine his testimony and credibility, including past or present cases against him or any observation made by a Court against him. Question of character [in terms of Section 54 of the Evidence Act, 1872] can be asked only when character is in question.

INADMISSIBLE EVIDENCE

While examining the previous statements and documents, separate the admissible from the inadmissible e.g.

a. "I was told by Reena that her mother-in-law was taunting her."

This statement is clearly hit by the *rule of hearsay*.[1]

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*Senior Advocate

[1] Please examine in terms of Section 8 of the Evidence Act, 1872.

b. "The accused was apprehended by the police team and when confronted, he confessed to his crime."

This statement being a *confession made to a police officer is inadmissible* in evidence as per Sections 25 and 26 of the Indian Evidence Act.

c. "The photocopy of my daughter's previous complaint is being produced by me".

This *cannot be exhibited as it is a photocopy* and is not therefore, primary evidence and is not to be read at the time of arguments.

d. If the prosecutor was to ask the witness the following question,"Is it correct that K is the active brain behind the business?" this being a *leading question*as defined under Section 141 of the Indian Evidence Act, must be objected to and cannot form part of the evidence, as per Section 142 of the Indian Evidence Act.

9. Prepare a proposed list of questions to be asked to the witness under examination, keeping in mind your overall defence.

CASE OF ALIBI [means the accused was elsewere]

If an accused was not present at the time of thecommission of the offence, then the witness making the allegation must be cross-examined to establish the alibi of the accused e.g.

The case against Accused A is that he went to the parental home of his daughter- in –law R, situated in Malviya Nagar, New Delhi, on 1.1.2000 at 4 pm and demanded that her parents give a Honda City car and an MIG flat as dowry.

'A' was in Kolkata from 30.12.1999 to 5.1.2000. Clearly he was not in a position to visit R's parents in Delhi on 1.1.2000 and make a demand for dowry.

Cross examination of (X), father of R who made this allegation

1. *You had stated that A came to your house on 1.1.2000 at 4pm and made the aforesaid demand for dowry. I put it to you that you are making a false statement.*
2. *I further put it to you that 'A' was in Kolkata from 30.12.1999 to 5.1.2000 attending an International Jewellers' Conference.*
3. *Mr X,you have fabricated a story pertaining to 1.1.2000,to set up a false case of demand of dowry ,at a time when A was not in Delhi to make any such demand.*

QUESTIONS RELATING TO CREDIBILITY OF A WITNESS

1. *Mr X, is it correct that you were a Junior Engineer in the NDMC between 1985 to 1994?*
2. *Mr X, is it correct that you were arrested by the CBI in RC No xx/1994 for demanding and accepting a bribe of Rs. 15,000/- from one Yashpal, whose building plans you were deliberately not sanctioning?*
3. *Mr X, is it correct that the following is the certified copy of the RC in said case? (Copy to be placed on record and Exhibited)*
4. *Mr X, is it correct that you were convicted under Sections 7 and 13 (1) (d) read with 13(2) of the Prevention of Corruption Act, 1988, by the Court of the Special Judge, Delhi on 04.04.1997 and you were sentenced to undergo imprisonment of 2 years?*
5. *Mr X, is this the certified copy of the Judgement dated 04.04.1997? (to be exhibited)*

6. *It is correct that in Para 39 of the said judgement you have been indicted for setting up a false defence?*

7. *Is it correct, that a departmental enquiry was instituted in the case against you and you were found to be guilty of having committed gross misconduct and your employment was terminated?*

CROSS EXAMINATION ON TECHNICAL POINTS

Sanction:

A) In some penal statutes, there is a mandatory requirement,for a prior sanction for prosecution, of an accused,from the Competent Authority, and failure to obtain a valid sanction from the Competent Authority, vitiates the whole trial.

Forexample, a case was registered against an accused under Sections 10, 13, 18 and 20 of the Unlawful Activities Prevention Act, 1967 on 20.09.2009, and charge-sheet was filed on 18.02.2010 alongwith a Sanction Order dated 10.02.2010, which was not in compliance with the newly amended Section 45 of the said Act and the rules framed under the Act. Upon the accused raising an objection with respect to its legal validity,a supplementary charge-sheet was filed on 23.03.2012, alongwith a new, corrected, sanction order, dated 23.03.2012 which was ostensibly passed in compliance with the Act. The Court, however, found that the cognizance of the offence was taken on the basis of the first sanction order dated 10.02.2010, which being invalid, the accused was discharged on 28.03.2012. Subsequently, a fresh Charge Sheet was filed on 30.03.2012 along with the corrected sanction order dated 23.03.2012.

Cross examination of sanctioning authority in this case

1. *Are you aware that the Lt. Governor of the NCT of Delhi had granted sanction under Section 45 read with clause (j) of Section 2 of the UAPA Act to prosecute accused for offences under Sections 10, 13, 18 and 20, of the said Act, on 10.02.2010? (Note: Please try and exhibit this sanction order).*

2. *Are you aware that pursuant to the grant of sanction for, and on behalf of, the Lt. Governor of the NCT of Delhi, a charge sheet in the said case, arising out of FIR No. xx/2009, registered at P.S. , L C, New Delhi, was filed in the court of competent jurisdiction?*

3. *Are you aware that the sanction dated 10.02.2010 granted in this case was declared non est and void by the Court of Sh. AAA, ASJ, Delhi, on the ground of its non-compliance with the letter and spirit of Section 45(2) of the UAPA Act?*

4. *I put it to you that pursuant to the defect in the sanction order being brought to the notice of the Hon'ble Trial Court, the prosecuting agency endeavoured to correct the same, in terms of the amended Section 45 of the Act.*

5. *Is it correct that Ex. PW 20/A, is the corrected sanction order dated 23.03.2012?*

6. *Is it correct that as per this sanction order, an Authority was appointed in terms of Section 45(2) of the UAPA Act, for making an independent review of the evidence, gathered during the course of investigation?*

7. *When was this Authority set up (exact date)?*

8. *Who were the members of this Authority?*

9. *Have you brought any Gazette Notification, with regard to the appointment of this Authority and its members thereof?*

10. *When was the case file and material forwarded to this Authority?*

11. *Did they deliberate individually or collectively?*

12. *When and where? (Note: The idea is to see the time taken by them to make and forward their recommendations)*

13. *Was it brought to the knowledge of the members of the Authority that a previous defective sanction was on record?*

14. *I put it to you that the Authority was set up in haste, to defeat the legal objection taken by the accused in the case, during arguments on charge, about the validity of the existing sanction order dated 10.02.2010?*

15. *I put it to you that between 10.02.2010 and 23.03.2012, the Sanctioning Authority was not even aware of the amendments brought to Section 45 of the UAPA Act, as also the rules made thereunder.*

16. *Are you aware that the sanction dated 23.03.2012 was surreptitiously sneaked in by virtue of a supplementary charge sheet dated 23.03.2012, while the issue of validity of the original sanction order dated 10.02.2010 was being adjudicated in the court of Sh. AAA, ASJ, Delhi?*

17. *I put it to you that between the first sanction order dated 10.02.2010 and the second sanction order 23.03.2012, there was no fresh material before the sanctioning Authority to warrant the grant of a fresh sanction.*

18. *Are you aware that the accused was discharged under the UAPA Act vide order dated 28.03.2012 by the court of Sh. AAA, ASJ, Delhi?*

19. *Was it brought to your knowledge that the sanction dated 23.03.2012, purportedly passed under Section 45(2) of the UAPA Act, was considered and rejected by the court of Sh. AAA, ASJ, Delhi, on the ground that this sanction order could not validate the proceedings against the accused, conducted thus far?*

20. *In the sanction order dated 23.03.2012, Ex. PW 20/A, it is mentioned that the 'Authority' was constituted to make an independent review of the evidence gathered. Can you specify the nature and content of the independent review made by the Authority?*

21. *Can you, show any correspondence/communication between the members of the Authority with respect to the evaluation of the case in question?*

22. *I put it to you that there is no such communication because no evaluation or appraisal of material ever took place?*

23. *I put it to you that the so-called Authority appointed, was given a mandate to grant sanction, and there was no independent review of the evidence gathered during the course of investigation and a recommendation made by it was a copy of the original sanction order.*

24. *I put it to you that sanction dated 23.03.2012, Ex. PW 20/A was mechanically passed, without due application of judicial mind.*

25. *When was the recommendation from the Authority, forwarded to the Lt. Governor's office?*

26. When was it perused by the Lt. Governor's office for the purposes of grant of sanction?

27. Did the Authority or the Office of the Lt. Governor, examine any witness in connection with the allegations made against the accused, to independently asses and verify the allegations made therein?

28. Are you aware that after the discharge of the accused on 28.03.2012, a fresh charge sheet was filed by the prosecuting agency, on 30.03.2012?

29. I put it to you that in the said fresh charge sheet, the sanction order Ex. PW 20/A, was relied upon again, although its validity came to an end, at the time of passing the discharge order by the Trial Court, on 28.03.2012.

30. I put it to you that the Authority appointed by you, did not make any independent review of evidence gathered in the course of investigation, and in this manner, it acted as a mouth piece of the prosecution, and succeeded in defeating the objects and reasons of the amendments to Section 45(2) of the UAP Act.

31. I put it to you that the Authority so appointed was appointed on 22.03.2012, more than 2 years after the original charge sheet was filed in the case.

32. I put it to you that given the factual sequence of events, the sanction order dated 23.03.2012, is a sham and does not conform with the legal requirements of Section 45(2) of the UAP Act.

A separate sample of questions asked during the cross-examination of a sanctioning authority in another case is given in the CD.

DEFENCE WITNESSES

Rules of Caution :

1) Defence witnesses must further the case of the accused and must corroborate the defence taken by the accused during the cross examination of the Prosecution Witnesses.

2) There should be consistency between the defence taken during Prosecution Evidence and Defence Evidence.

3) As far as possible one should try to get Defence Witnesses to prove the record so that theircredibility is not in doubt.

4) Meet and prepare with Defence Witnesses andexplain to them the broad parameters of their evidence.

ALWAYS KEEP ABREAST WITH THE LAW, EVEN BEFORE THE TRIAL BEGINS AND RELY ON JUDGEMENTS OF SUPERIOR COURTS THAT MAY BENEFIT YOU IN TRIAL

For example, in a case against a public servant,Mr T, for criminal misconduct under the Prevention of Corruption Act, the allegation was that the public servant Mr. T took a bribe ofRs. 2500/- from a contractor, (the Complainant in the case), but the defence of the accused was that this money was taken by him to pay a petty contractor for the work not completed by the said contractor (complainant). This was in the knowledge of all his colleagues and he had even informed all his superiors about the same. A reported case, close in facts,is that of "M Abbas v/s State of Kerala "(2001) 10 SCC 103. The Supreme Court,after examining the facts, came to the conclusion that the accused had proved his defence by preponderance of probabilities. And that it was now for the prosecution to prove that the money received by the accused was a bribe.

Having examined this judgement before the trial of the case, involving the Public Servant Mr. T, his lawyer sought to benefit from it during the trial of case involving Mr. T.

The cross examination of the shadow witness **which produced results is given below:**

PW-1 Sh. PS S/o MS, Assistant Manager, ZZZ, New Delhi (Shadow witness)

Cross examination

I am working in ZZZ office. I was called by the CBI on _____ without any written requisition. It is correct that the office of Mr. T is on the 1st floor. It is correct that one peon was sitting outside his office. It is correct that when we went into the office Mr. T, he was not there and he came a few minutes later with another person who was also an official there. It is correct that I was introduced to Mr. T as a Sanitary contractor by Mr. N and Mr. N asked Mr. T to give me some work. The official accompanying Mr. T also sat down on a chair/. Thereafter Mr. N took out Rs. 2500/- (of Rs. 100/- denomination each) and told Mr. T " WoThekedar Mila Nahi Hai, Ye UskePaise Hai, Aap Use De Dena". (I could not find the contractor. It is his money, please give this money to him.) Thereafter the official in the room left the room. It is correct that the CBI had handed over a Micro Tape recorder to Mr. N while leaving the office of CBI to keep in his pocket with the instruction to record the conversation which might take place in the room at the time of raid. To the best of my knowledge the Tape recorder was played after the CBI entered to room. It is correct that at the time Mr. T was apprehended the other officer of the department who was earlier in the room, came back on hearing the noise and protested to the CBI that money was taken for purposes of paying petty contractor and not as a bribe. I do not know if Mr. T had demanded or accepted any bribe from Mr. M. It is incorrect to suggest that on the asking of CBI I became a witness in the case.

CROSS EXAMINATION TO DISLODGE STATUTORY PRESUMPTIONS AND THE INGREDIENTS OF AN OFFENCE

Let us take the example of a case under Section 304B IPC.

Facts - Pooja died in her parental home after being separated from her husband for over a year. There was no demand for dowry while she remained with her parents at her parental home. Her suicide note, recovered from the spot, revealed that she was upset with her husband as he was in a relationship with another woman .Fed up with her life and the fact that she was separated from her husband for a year, she committed suicide.She made no allegation that she was being harassed for bringing insufficient dowry,in her suicide note. After her death,her parents, for the first time,alleged that her husband and his father 'A' had come to their house ,two days before Pooja's death demanding dowry. This allegation was not made by Pooja, in her suicide note. The endeavour of the prosecution was to bring the ingredients of Section 304 B IPC, into the case. The cross examination must seek to refute the allegation that " soon before her death" demand for dowry was made.

Questions for cross-examination of B, the father of Pooja

1. *Is it correct that Pooja was residing with you for over a year before her death?*
2. *Would it be correct to say that during this period she had no contact with her husband?*
3. *I put it to you that her husband and his father 'A' had never made any demand for dowry, nor had they visited your house two days prior to death of Pooja.*

4. *Please see the suicide note of Pooja. Is it correct that she did not make any allegation of harassment on account of* alleged d*emand for dowry by her husband and his father 'A'.*

5. *I put it to you that you have for the first time made thisallegation after the death of Pooja,in order to falsely implicate her in laws.*

6. *I put it to you that Pooja did not commit suicide because of any alleged demand of dowry by her husband or his father 'A'.*

7. *Is it correct that Pooja and her husband were married for 8 years prior to her death?*

8. *Is it correct that during these eight years neither you nor Pooja made any complaint to the police or anyone else about any harassment caused by her in laws on account of any grievance that she had brought insufficient dowry ?*

9. *Is it correct that other than Pooja, there were two other daughters in law in the house and they are living happily with their respective husband's ?*

10. *By showing the suicide note to her father-the writing on the note is of your daughter*

IMPORTANCE OF SUGGESTIONS:

Suggestions, if not affirmed by the witness, do not constitute evidence nor does a suggestion that the witness is telling lies shake his credit or credibility. Suggestions, at best, only show that the party against whom the witness is deposing is not admitting the deposition to be correct.

Any allegation made against an accused in the examination-in-chief of the witness may be refuted in a suggestive form, to prevent exposure to a finding that the accused had not refuted the allegations against him. However, the best way to shake the veracity of the witness is to extract from him facts showing his chief examination to be false.

If a witness has given multiple statements to the investigating agency, care must be taken to see whether there are improvements/omissions/contradictions between the statements *inter se* and questions highlighting the same should be put to the witness.Furthermore if there are significant variation in the statement of witness recorded u/s 161 Cr.P.C. and his examination in chief, the witness can be confronted with his previous statement in order to discredit him.

CONFRONTATIONS :

If a witness while testifying in court goes beyond what he has stated in hisstatement under Section 161 Cr.PCor if he conceals or withholds relevant portions of his statement under Section 161 Cr.PC, he must be confronted with his previous statements in terms of Section 145 of the Indian Evidence Act.

E.g. 161 statement – I was asked by A(accused) to find out whether the applications of all the companies had been filed at our counter that day."

Statement before court- "I was asked by A(accused) to find out whether the application of company X had been filed at our counter that day"

The witness must be confronted with that portion of his previous statement where he mentioned the phrase all companies, and then it must be put to him that he has deliberately made an improvement in court by confining his allegation to company X.

The witness's credibility can be tested by asking him questions relating to the place of occurrence and other relevant materials that you may have collected during the preparation of the case.

Cross-examination consists of attacking the prosecution case as well as proving the defence.Both go hand in hand. Sometimes the defence may want to make inroads into the prosecution case by setting out the parameters of your defence with a particular witness. The defence may prove its defence or portion thereof subsequently, at an appropriate time.

One should remember that the questions must be simple and straightforward,the defence lawyer should know when to stop questioning the witness and should not over cross-examine a witness. One of the cardinal rules of cross-examination is never to ask questions, the answers of which,the counsel himself does not know.

THE DEMEANOUR OF THE WITNESS:

The demeanour of the witness is always importantin a criminal trial. Equally the demeanour of the cross -examiner is important. The cross-examiner should be firm but not emotional. And even when a witness has given an answer that is not entirely to the cross-examiner's satisfaction, the cross-examiner must not appear to be affected by the said answer.

When the witness takes the stand during examination in chief, the cross examiner should observe his demeanour very, very carefully to know the lengths to which the cross examiner can go in cross-examination. No amount of preparation in the office can act as a substitute for the visual impact of observing a witness in the box.

Forensic and other expert witnesses have to be cross-examined differently. If portions of the post-mortem report or a forensic examiner's report need to be contested, it is best to bring in an expert who gives an independent view of the report under challenge. The cross examiner should prepare the questions after taking into account his own expert's viewpoints. Forensic documents and DNA documents are typically voluminous and sometimes difficult to grasp. Do not hesitate to take the help of independent experts before cross-examining these crucial witnesses.

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Short Note on Final Arguments (Criminal)

— Rebecca M. John*

While preparing for final arguments, lawyers must ensure that their file matches with the court's file in its entirety. Statements of prosecution witnesses must be complete in your file and placed in order, followed by the 313 statement of the accused, followed by defence evidence if any. The formal charge framed in the case must be flagged and kept separately. Likewise, the file containing exhibited documents must be indexed and carefully marked. A trial lawyer should never wait for the conclusion of trial to put his file in order. On each date of trial, statements of witnesses that are recorded must be collected and filed. If a witness has exhibited any document, the same must be simultaneously identified and marked in your file.

GENERAL INSTRUCTIONS

A. Once the trial files are properly indexed and marked, the lawyer preparing for finalarguments, must carefully read the file keeping in mind, the nature and extent of the charges framed, looking for contradictions, omissions and variations in the prosecution case.

B. It must be remembered that every witness produced by the prosecution was required to prove a particular aspect of the prosecution case.

C. While reviewing statements recorded in court, it has to be seen whether the witness has indeed proved any fact in issue or has given any material evidence furthering the prosecution case or whether he has fallen short. If a witness has been confronted with his previous statements, those portions must be separately highlighted while preparing for final arguments.

D. Documents supposedly 'proved' in evidence must be re-examined to see whether they have passed the litmus test of 'proof'.

E. With electronic record forming a substantial part of modern day evidence, all Section 65B Indian Evidence Act certificates and testimonies must be examined to see whether they satisfy the requirements of the law and the ratio of the decision of the Supreme Court in Anwar PV v. PK Basheer reported in 2014 (10) SCALE 660.

F. Reading of evidence should not start necessarily from PW 1 and go onwards to PW 2 and PW 3 till the end. Evidence has to be read to bring out the chronological of facts alleged. Hence, if there are several witnesses to the same event, say recovery of weapon, their testimonies should be read one after the other. Here the arguing defence counsel can show contradictions. All missing links and contradictions in the prosecution case have to be noted during preparation and can be pointed out while reading the evidence. In a case of circumstantial evidence, a note must be prepared on the various circumstances proved, not proved and disproved in the case. Thereafter, it must be seen whether the case proved by the prosecution is sufficient to form a chain of circumstances that are intrinsically linked and proved so that the hypothesis of guilt and guilt alone is reached against the accused.

G. At every stage, and for every submission that is to be made in the final arguments, try and rely on a judgment that is closest in facts and law to the submissions sought to be made. It is always important to go back to the specific charges framed against the accused in order to come to the conclusion that none of the charges set out against the accused have been

*Senior Advocate

conclusively proved by the prosecution. Defence lawyers, must and should resort to the first principles of criminal jurisprudence. For example proof must be beyond reasonable doubt or suspicion is not substitute for proof and may be true is not the same at must be true. Appropriate references from judgments should be made and the best points should be highlighted in the beginning of the summation.

H. The 313 Statement should be carefully examined to see whether important circumstances or facts that the prosecution seeks to rely upon have been put to the accused during his examination under Section 313 of the Code of Criminal Procedure.

I. Certain points can be taken at any stage of the trial. Points like the validity of a sanction order, the plea of juvenility, etc. which go to the root of the prosecution can be taken up for the first time even at the stage of final arguments. Ultimately, a good advocate must marshal his facts in a focused and logical manner so that he presents them with force and precision.

Final arguments constitute an important stage of any trial. While approaching the stage of final arguments, a lawyer must structure the same and as far as possible, put it in writing so that no important point or judgment escapes his attention at the time when he appears to make his closing remarks. It may be worthwhile, in some cases, to give written submissions, containing bullet points of the final arguments addressed by counsel and to further co-relate these points with judgments that may be annexed with the written submissions. In this way, counsel will be satisfied that all his submissions and judgments have been placed on record and there is no possibility of the same being overlooked.

A sample note of final arguments is given in the CD.

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Session-VI

11.15 AM to 1.00 PM

Total Time: 1 hr 45 min

Session-VI
11.15 AM to 1.00 PM
Total Time: 1 hr 45 min

Module For Training Of Panel Lawyers

Law of Temporary Injunction Under Order 39 Civil Procedure Code

Objective

- To provide the young lawyers grounding in concept and law relating to interlocutory reliefs with particular reference to injunction.
- To give them clear perspective of related topics e.g. prima facie case, balance of convenience and irreparable loss.

Expected learning outcome

- Participants will be able to draft pleadings when the client is in need of an interim relief.
- Participants will be able to draft an application under order 39 Rule 1 C.P.C.
- Participants will be able to argue for and against a prayer or temporary injunction.
- Participants will be able to identify the grounds of appeal against an order of the trial court under order39 Rule 1 C.P.C.

Training Method

1. Lecture
2. Group Discussion and Presentation
3. Quiz (experiential)

Programme:

Introduction - 30 minutes

Trainer will introduce the scheme of the Civil Procedure Code in the matter of interlocutory reliefs of different nature with emphasis on the purpose of injunctions. He/she can introduce the concept of equitable reliefs as available in the Specific Relief Act, 1963 and the various principles governing equitable reliefs.

Group discussions, presentation and whole group discussions - 1 hour

Participants will be divided in groups of 4-6 and they will be asked to find the answers to the questions in one or both the cases. Each group will present its views to the whole group for a whole group discussion. The resource person will provide the points missed by the participants and will present a wholesome view of the topics.

Quiz - 25 Minutes

This is not a competitive or evaluative quiz but only questions raised to evoke previous experience and to generate a discussion. This is an individual exercise. The participants will be given 10 minutes time to answer the questions. This will be followed by the trainer compiling/asking for the answers and raising a discussion giving the law on the subject.

Concluding Remarks - 05 Minutes

The remarks can be made at the end by the trainer or by one of the participants.

ACTIVITY FOR SESSION VI

- Justice Manju Goel (Retd.)*

READING FOR GROUP DISCUSSIONS-I

Mr. Shanmugam, aged about 35 yrs seeks to protect his possession over a room with a kitchen and a toilet in a part of a building used as a Dharamshala or Choultry as known in the southern part of the Country. The Secretary, Taluka Legal Services Committee has assigned the case to you.

On interviewing Mr. Shanmugam you find the following facts which he can allege:

a) The building used as Dharamshala was owned by one Mr. Naicker and later vested in a Charitable Society by virtue of testament executed by Mr. Naicker.

b) The Society engaged the father of Shanmugam as a watchman on a monthly salary and provided the accommodation in question (suit property), now with Mr. Shanmugam.

c) The father of Mr. Shanmugam died while Shanmugam was a young unemployed man. That was about 13 yrs. back. The Society offered the job of watchmen to Shanmugam and Shanmugam accepted the job.

d) Shanmugam continued to live in the suit property and has now been living in the same with his family since his birth, for 35 years.

e) Shanmugam has documents to show his possession over the suit property, like school records, old and new ration cards and correspondence between the Society and his father carrying the same address.

f) By virtue of his long possession over the suit property, he has gained title by adverse possession.

g) Shanmugam is not in the employment of the Society any more.

h) The Society has served him with a notice asking him to vacate the suit property.

i) Mr. Shanmugam and his family will face severe hardship if he is evicted from the suit property. He needs immediate court order against the effort of the society to evict him.

Activity

In small group discussion find answers to the following questions:

1. Is Mr. Shanmugam entitled to injunction by virtue of his long possession?
2. Is Mr. Shanmugam entitled to an injunction on the strength of adverse possession?
3. What document would you look for as evidence of adverse possession?
4. If you decide to go to the Court, what would be the frame of your suit?
5. What factors do you have to make out for seeking a temporary injunction under order 39 Rule 1 of the Civil Procedure Code?

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*Member, NALSA

READING FOR GROUP DISCUSSIONS-II

Mrs. Radhamani an illiterate widow owned a three storied house in Delhi. She died in 2010 leaving behind two sons and a daughter. The elder son Rakesh has entered into a agreement to sell with a builder. The younger son Kamesh seeks legal aid to prevent alienation of the property. On interviewing Kamesh, you get the following facts:

1. Rakesh is claiming to have a registered will of the deceased bequeathing the entire property to him. The will in his favour is registered.
2. Radhamani executed a will soon before her death bequeathing one floor to each of her three children. This will is not registered but surely the last testament.
3. Kamesh believes the will in favour of Rakesh has been obtained from the deceased mother by fraud for she, who loved all her children, could not have made a will in favour of only one child.
4. Rakesh has alleged the will of Kamesh to be forged making things difficult for Kamesh.

Activity

In small group discussion find answers to the following questions:

1. What relief can Kamesh get from the Court?
2. What should be the frame of the suit?
3. How would you value the suit?
4. Is he entitled to temporary injunction in the suit that you propose to file?

Quiz

(Answer if True [✓] False [X])

1. An order of mandatory injunction cannot be passed under order 39 Rule 1 C.P.C.

[ ] True [ ] False

2. An industrial worker can seek an injunction from the Civil Court to retrain the employer from retrenching him.

[ ] True [ ] False

3. The technical questions like limitation are not relevant at the stage of considering an application under order 39 Rule 1 C.P.C.

[ ] True [ ] False

4. No appeal can be filed against an order under order 39 Rule 1 C.P.C.

[ ] True [ ] False

5. The provisions of contempt of Court Act can be invoked for violation of an order under order 39 Rule1 C.P.C.

[ ] True [ ] False

6. Only the allegations in the plaint has to be seen for considering whether a prime facie case has been made only.

[ ] True [ ] False

7. An injunction barred by Section 41 of the Specific Relief Act can be granted as an interim measure if the suit is maintainable.

[ ] True [ ] False

SHORT NOTE ON LAW OF TEMPORARY INJUNCTION

- Justice Manju Goel (Retd.) *

INTRODUCTION

An injunction is a judicial remedy by which a person is ordered to refrain from doing or to do a particular act or thing. It is a remedy of equitable nature not available in common law. Injunction can be granted as a decree on adjudication of a suit. It can also be granted during the pendency of suit when it is called a temporary injunction. The power to grant an injunction during the pendency of a suit without finally adjudicating the rights of the parties thereto flows from the provisions of Sec.94 of the Civil Procedure Code. From the opening words of Sec.94 of the Civil Procedure Code it is amply clear that such powers are given to prevent the ends of justice from being defeated. Hence, if there is any apprehension that the defendant may by his action change a state of things in respect of the subject matter of dispute in such a way that a decree eventually passed would become meaningless or ineffective or difficult to execute the Court can exercise the power of granting an injunction to prevent such an intended on apprehended action. For example In a case of specific performance of agreement to sell an immoveable property or a suit for redemption/foreclosure of mortgage, the court may restrain alienation of the property during the pendency of the suit by exercising the power to grant temporary injunction.

The detailed instructions regarding temporary injunction are available in Order 39 of the Civil Procedure Court. A temporary injunction is of two types. The one which is granted even when an application for temporary injunction has not been decided and it operates till the disposal of such operationis called ad interim injunction. It may be confirmed or vacated or modified when the application for temporary injunction is decided.

PRINCIPLES

There are three well known basic principles for seeking/granting an order U/O 39 rules 1 C.P.C., They are:

1. Prima facie case;
2. Balance of Convenience;
3. Irreparable damage;

The foremost of these principles is prima facie case. The concept of a prima facie case needs to be clearly understood. Generally speaking prima facie case means a good case. That is to say that the case on first sight appears good on merit and a good case to go in for trial. A prima facie case implies the probability of the plaintiff obtaining relief on the material placed before the court. As explained by the high court of Kolkatta in AIR 1997 Cal 67 in examining the prima facie case the court is called upon to see whether the party who has approached to court has a plausable case and whether there is a possibility of such a case succeeding at a trial.

Therefore, the case of the plaintiff should be free of any technical flaws and also have merit in it. The technical aspects like jurisdiction, maintainability, limitation, court fees etc. come up for examination before any order for exemption is granted. Therefore, the lawyer who drafts a suit expecting a temporary injunction at the interlocutary state must take care of all these aspects. It is necessary now to take a look at these aspects individually.

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*Member, NALSA

JURISDICTION OF CIVIL COURT

A very wide jurisdiction has been conferred on the civil courts by Section 9 of the Civil Procedure Code. But in certain matters the jurisdiction of the civil courts is barred.

Section 9 CPC says.

> **"Sec.9 – Courts to try all civil suits unless barred.**
>
> The courts shall subject to the provisions herein contained have the jurisdiction to try all suits of civil nature excepting suits of which their cognizance is either expressly or impliedly barred."

An action which can be brought under the Industrial Disputes Act in the Labour Courts or Industrial Tribunals cannot be brought before the civil courts as the jurisdiction of the civil courts are impliedly barred by the enactment of the Industrial Disputes Act.

Some other enactments that specifically or by implication bar the jurisdiction of the Civil Court are land reform laws, the Land Acquisition Act, certain rent control legislations like the Delhi Rent Control Act, certain Municipal Acts like the Punjab Municipal Act, the Municipal Corporation of Delhi Act etc. Hence the lawyer filing a civil suit will do well to examine the competence of the court where he is going to file his case. In case the jurisdiction of the civil court is barred, the lawyer has to find out what is the appropriate forum where the intended action can be filed and what are the procedural aspects of such forum.

Section 15 to 21 give us the provisions governing the territorial jurisdiction of the courts. The objection to jurisdiction can be raised at the earliest possible opportunity and no objection to the jurisdiction of the court can be raised at the appellate on revisional stage.

PROVISIONS OF ORDER 7 OF THE CIVIL

At this stage it is necessary to draw the attention of the young lawyers to the provisions of Order VII of the Civil Procedure Code. Order VII rule 1 C.P.C. provides, inter alia that the plaintiff must state the facts constituting the cause of action and when it arose, the facts showing that the court has the jurisdiction and the value of the subject matter of the suit for the purpose of court fee and jurisdiction. The failure to mention these facts may lead to rejection of the plaint. u/o 7 rule 11 C.P.C. or return of the plaint u/o 7 rule10 C.P.C.

LIMITATION

The question of limitation is something that has to be examined at the very initial stage. If the plaint is liable to be rejected for the want of the mandatory pleadings, no temporary injunction can be sought. If the suit is clearly barred by time, the same can be dismissed. If the suit is prima facie barred by limitation, the plaintiff cannot claim to have a prima facie case in his favour.

Limitation has to be computed from the date of cause of action. In case the Plaintiff pleads the extension of limitation for any reason the same has to be specifically pleaded. The documents in support should also be in place. In case the plaintiff claims the cause of action to have arisen from the date of knowledge of an event the lawyer should take care to mention how the plaintiff optained that knowledge.

COURT FEE

Appropriate court fee should be paid before seeking an injunction. However in a case of an indigent person, the counsel may pray for certain reliefs even before paying the court-fee. The counsel is well advised to cite the specific law and rulings on the point, when such a prayer is made.

PLEADINGS

Pleadings should be sufficient to make out a prima facie strong and probable case. Although

the court cannot, at the inter-locutory stage, give a finding on merits and may proceed on the basis of documents, the court will be vigilant in weighing the respective cases of the parties. Therefore, the case should not be an inprobable one and the events leading to the cause of action should appear to be natural.

The rules of pleadings have to be followed. For exampleIf fraud is pleaded details of how the fraud was committed should also be specifically pleaded as provided in order 6 of the Code of Civil Procedure. Similarly if the case is based on contract the contract should be a valid and subsisting contract. If the contract is a written contract it should be ascertained that the document is written on an appropriate stamp paper. Similarly the questions of registration, authentication and execution etc. have to be examined.

If the suit is for a specific performance of a contract it is necessary to plead that the plaintiff has always been ready and willing to perform the contract. The plaintiff should also plead instances to show the readiness of the plaintiff. It has to be remembered that grant of equitable relief is governed by the specific relief act. Therefore, the provision of the Specific Relief Act has to be kept in view while praying for temporary injunction. Sec.41 of the Specific Relief Act bars grant of injunction in certain situations. Those provisions will also apply for temporary injunctions.

BALANCE OF CONVENIENCE

Balance of convenience is an important consideration at this stage. Since the relief of interim injunction is an equitable relief, the court shall also consider whether the comparative mischief or inconvenience which is likely to ensue from withholding the injunction will be greater than that which is likely to arise from granting it, which means that the balance of convenience is in favour of the plaintiff seeking injunction (DorabCawasji Warden V/s Coomesorab Warden (1990) 2 Sec 117).

IRREPARABLE DAMAGE

Irreparable damage does not mean that the damage can never by repaired. It only means that the damage caused cannot be adequately compensated by money. Sometimes, in law, compensation may be available, but in a given case it may be difficult or well-nigh impossible to recover such damage. Such cases may be considered as cases of irreparable damage.

AD INTERIM INJUNCTION &PROVISIONS OF ORDER 39 RULE 3 CPC

Grant of an ex-parte order of an interim injunction is not a rule but an exception. Order 39 rule3 directs that the court shall issue a notice to the Defendent before granting an injunction. It is only by way of exception that it is provided that where it appears that the object of granting injunction would be defeated by the delay that an ex-parte injunction can be issued. It is further provided that if the court proceeds to grant an injunction without giving notice of the application to the opposite party the court shall record its reason for its opinion that the object of granting injunction would be defeated by delay.

In all such situations where an ex-parte injunction is issued the court has to require the plaintiff to deliver to the Respondent or to send to him by Registered Post a copy of the application for injunction to gether with a copy of the application filed in support of the application, a copy of plaint and copies of documents on which the plaintiff relies and to file an affidavit on the day following the grant of injunction that the copies mentioned by have been so delivered.

While issuing an interim ex-parte injunction the court is expected to examine the following aspects:

- Whether irreparable or serious mischief will ensue to the plaintiff if the injunction prayed for is not immediately issued.

- Whether the refusal of ex-parte injunction would involve greater injustice than the grant of it would involve;
- The court will also consider the time at which the plaintiff first had notice of the act complained of, so that the making of an improper order against a party in his absence is prevented;
- The Court will consider whether the plaintiff had acquiesced for sometime and in such circumstances, it will not grant ex-parte injunction;
- The Court would expect a party applying for ex-parte injunction to show utmost good faith in making the application;
- Even if granted, the ex-parte injunction would be for a limited period of time; and
- General principles like prima-facie case,balance of convenience and irreparable loss would also be considered by the Court.

The drafting lawyer should remember that the principles of grant of equitable relief will have to be followed by the plaintiff and accordingly all the conditions mentioned above should be completely complied with.

INTERIM INJUNCTION IN A MANDATORY FORM

Grant of a mandatory injunction is permissible under order 39 of CPC. However , courts are generally very slow in granting this kind of relief. Instances where such reliefes are granted are actually very rare. If the court is called upon to grant a relief on any interlocutary application, which when granted would mean granting substantially the relief claimed in suit the court, will be slow and circumspect in the matter of granting such prayer. Temporary mandatory injunction can be granted only in rare cases where there are compelling circumstances and where the injury complained of is immediate and pressing and is likely to cause extreme hardship. No interim mandatory injunction can be granted if such an injunction means decreeing the suit (AIR 2005 SC 1444).

When a mandatory injunction is issued the court has to expeditiously decide the application during the pendency of which such an order is made.

At times an injunction may appear to the refrain dependents but in effect mandates the defendant to do some task the court should be careful in granting such injunctions and examine all the pros and cons of the consequences of passing such an order.

APPEAL

An appeal lies from an order refusing as well as from one granting temporary injunction. An order under Rule 1, Rule 2, Rule 2A, Rule 4, or Rule 10 of Order 39 is appealable under the provisions of Order 43 Rule 1(r) of the CPC.

Order 39 Rule 3 requires the court to issue notice of the application for injunction to the opposite party before granting any injunction. It is only in the case where it appears that object of granting the injunction would be defeated by the delay that an injunction can be issued before a notice is served on the respondent. When an ex parte order of injunction is issued pending notice to the defendant and final hearing of the application under Order 39, the order becomes an appealable order under Order 43 Rule 1 (r) of CPC. When only a notice is issued without granting an order of injunction, the same does not become appealable.

Where the ex parte injunction order is issued, the remedy of seeking discharge or setting aside or varying that order of injunction is available with the defendant under Order 39 Rule 4 CPC. This remedy is available in addition to the remedy of an appeal. The defendant may opt for any of the two reliefs.

A second appeal is barred as per the provision of Section 104 (2) of the CPC. The party aggrieved by the order of the appellate court can approach the High Court by way of a civil revision petion.

DISOBEDIENCE OR BREACH OF AN ORDER OF INJUNCTION & ENFORCEMENT

The remedy of violation of an injunction order is provided in Order 39 Rule 2A. The court issuing the injunction may order the person guilty of disobedience or breach to be detailed in civil prison for three months or may order attachment of his property. This is the appropriate remedy. No action under the Contempt of Courts Act is called for, nor is such action appropriate. The punishment under order 39 rule 2A is primarily to indicate the dignity of court and to elicit respect and submission for administration of justice. Police protection is also available to the party in whose favour an order of injunction is passed whether at an interim exparte stage or later an order of temporary injunction when the application for injunction is disposed off.

ADVERSE POSSESSION

Mere possession, however long, does not necessarily mean that it is adverse to the true owner. Adverse possession really means hostile possession, which is expressly or impliedly in denial of the title of the true owner. In order to constitute adverse possession, the possession proved must be adequate in continuity, in publicity and in extent so as to show that it is adverse to the true owner. The classical requirements of acquisition of title by adverse possession are that such possession in denial of the true owner's title must be peaceful, open and continuous. The possession must be open and hostile enough to be capable of being known by the parties interested in the property though it is not necessary that the adverse possessior actually informs the real owner of his adverse hostile action(T.Anjanappa V/s Somalingappa (2006) 7 SCC 570).

The Hon'ble Supreme Court dealt with the concept of possessory rights and the pleadings required to establish a right to continue in possession.In A Shanmugam V/s Aryia Khatriya Rajakula Vamsathu Madalaya Nandhavana Paripalanai Sangam (2012) 6 SCC 430 (paras 67 to 71-pages 442-443)

"67. In an action for recovery of possession of immovable property, or for protecting possession thereof, upon the legal title to the property being established, the possession or occupation of the property by a person other than the holder of the legal title will be presumed to have been under and in subordination to the legal title, and it will be for the person resisting a claim for recovery of possession or claiming a right to continue in possession, to establish that he has such a right. To put it differently, wherever pleadings and documents establish title to a particular property and possession is in question, it will be for the person in possession to give sufficiently detailed pleadings, particulars and documents to support his claim in order to continue in possession.

68. In order to do justice, it is necessary to direct the parties to give all details of pleadings with particulars. Once the title is prima facie established, it is for the person who is resisting the title-holder's claim to possession to plead with sufficient particularity on the basis of his claim to remain in possession and place before the court all such documents as in the ordinary course of human affairs are expected to be there. Only if the pleadings are sufficient, would an issue be struck and the matter sent to trial, where the onus will be on him to prove the averred facts and documents.

69. The person averring a right to continue in possession shall, as far as possible, give a detailed particularized specific pleading along with documents to support his claim

and details of subsequent conduct which establish his possession.

70. It would be imperative that one who claims possession must give all such details as enumerated hereunder. They are only illustrative and not exhaustive:

(a) who is or are the owner or owners of the property;

(b) title of the property;

(c) who is in possession of the title documents;

(d) identity of the claimant or claimants to possession;

(e) the date of entry into possession;

(f) how he came into possession—whether he purchased the property or inherited or got the same in gift or by any other method;

(g) in case he purchased the property, what is the consideration; if he has taken it on rent, how much is the rent, licence fee or lease amount;

(h) if taken on rent, licence fee or lease—then insist on rent deed, licence deed or lease deed;

(i) who are the persons in possession/occupation or otherwise living with him, in what capacity; as family members, friends or serants, etc:

(j) subsequent conduct i.e. any event which might have extinguished his entitlement to possession or caused shift therein; and

(k) basis of his claim that not to deliver possession but continue in possession.

71. Apart from these pleadings, the court must insist on documentary proof in support of the pleadings. All those documents would be relevant which come into existence after the transfer of title or possession or the encumbrance as is claimed. While dealing with the civil suits, at the threshold, the court must carefully and critically examine the pleadings and documents."

In this context one has to read also the forerunner to this advice which is available in the case **Maria Margarida Sequeira Fernandes vs. Erasma Jack de Sequeira(2012)5 SCC.370** the relevant portion is which is as under:

"Experience has shown that all kinds of pleadings are introduced and even false and fabricated documents are filed in civil cases because there is an inherent profit in continuation of possession. In a large number of cases,honest llitigants suffer and dishonest litigants get undue benefit by grant or refusal of an injunction because the Courts do not critically examine pleadings anddocuments on record. Incase while granting or refusing injunction, the Court properly considers pleadings and documents and takes the pragmatic view and grants appropriate mesne profit, then the inherent interest to continue frivolous litigation by unscrupulous litigants would be reduced to a large extent."

WILL

Will is document of inheritance. It operates after the death of the executant or the testator. It is the last will that operates. Any previous will, though registered cannot be given effect to. It is however, necessary that the will set up by the plaintiff satisfies the condition of a valid will viz. intelligent execution, attestation by the two witnesses and the testator signing in presence of the two witnesses.

Section 59 of the Indian Succession Act-provides that every person of sound mind not being a minor may dispose of his property by will. A woman is not disqualified from making a will. If a woman possesses property which she can alienate, she can dispose of the property by her will.

Section 61 of the Indian Succession Act speaks of fraud, coercion or importunity in making a will. The principle laid down is that a will or any part of a will, the making of which has been caused by fraud or coercion, or by such importunity as takes away the free agency of the testator is void.

Sec 62 of the Indian Succession Act clearly lays down that a will is liable to be revoked or altered by the maker of it at any time when he is competent to dispose of his property by will.

The mode of making a will is provided in section 63 of the Act as under:-

(a) The testator shall sign or shall affix his mark to the will.

(b) The signature or the mark of the testator shall be so placed that it shall appear that it was intended thereby to give effect to the writing as a will.

(c) The will shall be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark to the will or has received from the testator a personal acknowledgement of his signature or mark but it shall not be necessary that more than one witness be present at the same time.

As for proof of a will reference can be made to section 68 of the Evidence Act. At least one attesting witness has to be produced in the witness box to prove the execution and attestation of the will unless, however, none of the attesting witnesses are alive or they are not subject to the process of the court. If the will is registered, the sub-registrar can be an attesting witnesses if the executant acknowledged before him the signature on the will (AIR 2005 SC 4362-Pentakota Satyanarayana V/s. Pentakota Seetharatham)

RIGHT OF A CO-SHARER

When a co-sharer in a property wants to assert his right in respect of the property, the best efficacious relief is partition. However, if one of the co-sharer wants to sell his undivided share, the other co-sharer has a right of pre-emption. Care should be taken to check the provisions of the Court Fee Act, 1870 as well as of the Suit Valuation Act, 1887 while going in for a suit for partition.

VALUATION FOR COURT FEE AND JURISDICTION

The partition suit fall in two categories viz. (i) in which the plaintiff has been ousted from possession and; (ii) in which he is in the joint possession.

So far as the first category is concerned, the plaintiff has to claim possession of the property and he has to value the suit for the purpose of Court Fee under Section 7(v) of the Court Fee Act on the market value of the share in the property. When the plaintiff is in the joint possession, the court fee will be paid as per Section 7(iv) (b) of the Court Fee Act. So far as valuation of the suit is concerned, the filing lawyer should refer *inter-alia* to Section 9 of the Suit Valuation Act, 1887. The High Courts have been empowered by Section 9 to issue directions about valuation of suit in certain cases.

The High Court of Punjab framed rules under this Section providing that value of the suit for the purposes of Suit Valuation Act, 1887 and Punjab Courts Act 1918, shall be the value of the whole of the property as determined by Section 3, 8 & 9 of the Suit Valuation Act, 1887.

The same rules were extended to Delhi w.e.f. 01.08.1959. The filing lawyer will, therefore, examine the position in his own State in determining the value of the suit so that the suit is filed before the Court having pecuniary jurisdiction over the subject matter of the suit.

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Session – VII

1.30 PM to 3.00 PM

Total time : 1 hr 30 min

Session – VIII

3.15 PM to 4.10 PM

Total time : 55 min

Session – VII
1.30 PM to 3.00 PM
Total time: 1 hr 30 min

Session – VIII
3.15 PM to 4.10 PM
Total time:55 min

MODULE FOR TRAINING OF PANEL LAWYERS ON LAWYERING SKILL – CIVIL

- **Drafting**
- **Witness Examination**
- **Argument**

Objectives:

- To provide the young lawyers grounding in basic lawyering skills in the area of civil law.
- To give them exposures to the areas of drafting, witness examination and arguments.

Expected Learning Outcome

- The participants will be able to draft pleadings in accordance with substantive and procedural law.
- The participants will be able to understand the methods of cross-examination.
- The participants will be able to argue their cases efficiently, competently and effectively and will be able to assist the court better.

Session – VII

Training Method

1. Experience Sharing
2. Lecture

Programme:

Introduction - 10 Minutes

Resource person will speak for 05 minutes introducing the subject, telling the participants the importance of knowing the provisions of the Code of Civil Procedure in respect of Rules of interpretation of pleadings and the necessity of knowing the entire facts from the client.

Questions for experience sharing - 20 Minutes

The resource person will ask the participants to share their experience over the first 3 questions given in the questionnaire taking care to encourage more than 1 participant to speak but keeping the economy of the time in view.

Lecture by the Resource Person - 20 Minutes

In this lecture the resource person will cover the law on the issues raised in the experience

sharing . In addition, the resource person will cover the issues of law regarding rejection of plaint, set off and counter claim to the extent time permits.

Experience sharing - 20 Minutes

The resource person will ask the participants to share their experience on the questions 4, 5 and 6 given in the questionnaire.

Lecture - 20 Minutes

The resource person will cover the law on the issues raised in the experience sharing by the participants. In addition, the resource person will briefly give the law given in Order X rule 4 CPC, responsibility of the lawyer in case of death of any party and attachment before judgment to the extent time permits.

Session - VIII

Training Method

1. Lecture
2. Group Discussion
3. Presentation

Programme:

Introduction - 10 Minutes

Resource Person will introduce basic skills particularly in the area of drafting, witness examination and arguments which the lawyers must have to succeed in the civil side.

Group Discussion - 20 Minutes

The participants will be divided in groups of 4 and they will be asked to find the answers to the questions for discussion.

Presentation - 30 Minutes

After group discussion each group will present its views one or the other question to the whole group for a whole group discussion. The resource person will provide the point missed by the participants and will present awholesome view on the topics.

Remarks by resource person - 05 Minutes

ACTIVITY FOR SESSION VII

- Justice Manju Goel (Retd.) *

Questionnaire of Experience Sharing

1. Did you ever come across unlikely evidence/hidden facts on interviewing your client?
2. Were you ever a party to a suit in which the suit property was situated in more than one local jurisdiction? Did you examine the law on local jurisdiction?
3. Were you ever required to file/oppose an application for amendment of pleadings?What occasioned the application? Did you examine the law on amendment of pleadings?
4. Was any of your clients ever called upon to make a statement under Order X rule 2 CPC? What is the effect of such a statement?
5. Were you ever required to produce electronic evidence? How is electronic evidence produced and proved?
6. Did you ever succeed in extracting facts in favour of your client by cross examining the witness of the other side? Tell us how did you design the cross examination?

*Member, NALSA

ACTIVITY FOR SESSION VIII

- Justice Manju Goel (Retd.) *

Reading for group discussion

The Plaintiff has filed a suit for specific performance of agreement to sell a piece of land in a semi-urban locality. The original agreement is filed along with the plaint. The title deed of the Defendant has also been similarly filed along with other documents like municipal record etc. The defendant did not reply to the legal notice stating that the plaintiff has been ready always to perform the agreement and calling upon him to receive the consideration money and execute the sale deed. Hence the Suit.

The defendant in the written statement pleads that the plaintiff has manufactured the agreement to sell using a blank signature given on a stamp paper to the plaintiff's husband, who owns a jewellery shop, by way of security on behalf of a friend who purchased jewellery for his sister's marriage and owed part of the price of the jewellery. The defendant pleads that the title deed was also handed over on the insistence of the plaintiff's husband.

The two main issue cast by the court are:

(i) Did the defendant agree to sell the suit land to the plaintiff?

(ii) Is the plaintiff entitled to relief prayed for?

During trial the plaintiff proves the agreement to sell by proving where and by whom the document was typed and executed as well as the signature of the defendant on the agreement. She also deposes that she paid the earnest money from the funds provided by her husband.

The defendant deposes about the story of the friend buying the jewellery on credit from the husband's shop but denies his signature on the agreement to sell. He further deposes that the price mentioned in the document is too low compared to the market price. He further states that he is a semi-literate man and is being exploited by the jeweller.

Questions for group discussion

(i) The defendant having made the above deposition in his examination-in-chief what questions would you put in cross-examination if you are the plaintiff's counsel?

(ii) If the above deposition was made by the plaintiff in chief-examination what question would you put to the plaintiff in cross-examination if you were the defence counsel?

(iii) What are the ingredients of a cause of action in a suit for specific performance? What details would you like to plead as a plaintiff's counsel?

(iv) What will be the main point that you will emphasise in argument as a plaintiff's counsel?

(v) What would you emphasise in argument if you are the defence counsel?

(vi) What should be your demeanour and attitude during the arguments - while answering the question from the court, on being interrupted by the other counsel and on finding yourself unable to reply to a query from the court?

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*Member, NALSA

SHORT NOTE ON CLIENT COUNSELLING, DRAFTING, WITNESS EXAMINATION AND ARGUMENTS (CIVIL)

Anupam Srivastava*

1. CLIENT COUNSELLING

- ***Treat the Client with dignity***

The Client referred by legal aid are certainly those whom the life has not treated well, hence legal aid lawyers have greater responsibility in treating them with honour and respect. The office of the legal aid lawyer must give them a feeling of security that here is someone who will be able to bring justice to them.

- ***Interview the Client to achieve the following***:

Interviewing the Client is the most important part of the Client Counselling. It shall be the responsibility of the lawyer to EXTRACT information from the Client by probing details from him. The lawyer must not rely only on the information provided by the Client. The lawyer must do the following after obtaining the factual details:

- Merging the facts with applicable law to determine the strategy;
- Inform the Client about likely reliefs which may be granted by the Court;
- Advising the Client to avoid litigation if no case is made out;
- Advising the Client about the strong and weak points in his matter
- Advise him about the likely time to be taken in the matter
- Informing the Client that cost of lawyer, Court fees, process fee shall be paid by State

2. ROLE OF LEGAL SERVICES AUTHORITIES

- The Role of Legal Services Authorities constituted under the Legal Services Authorities Act, 1987 [hereinafter referred to as "the Act"] is to provide legal services to such poor, marginalized, downtrodden and weaker sections of the Society.
- Section 12 of the Legal Services Authorities Act, 1987 lays down the eligibility criteria for the legal assistance.
- Duty of the panel lawyers towards the client:

√ To have empathy.

√ To have enhanced Listening skills.

√ To have Patience.

√ To be tolerant and compassionate.

√ To frame the right questions.

√ To maintain Confidentiality.

*Advocate

- √ To have an attitude of respect and professional relationship.
- √ To serve as a guide.
- √ To be more sensitive to the downtrodden and meek, particularly SC/ST, women and children.
- √ To maintain integrity & set high standard.

- Informed about the mode of mediation to sort out the matter like mediation and conciliation or the Lok Adalat to avoid the cost and expenses if any and the most of the precious time.

3. JURISDICTION OF CIVIL COURT

Jurisdiction means the extent of power of a court to entertain suits and applications. It signifies the power, authority and competency of the court to adjudicate disputes presented before it. It refers to the right of administering justice by means of law. There are three kinds of jurisdiction of courts, viz, pecuniary, territorial and jurisdiction as to the subject matter. It is also classified into original and appellate jurisdiction.

4. JURISDICTION AS REGARDS LOCAL LIMITS, PECUNIARY LIMITS, AND SUBJECT MATTER

We speak of the jurisdiction of a court.

(i) As regards its territorial jurisdiction;

(ii) As regards its pecuniary limits; and

(iii) As regards the subject matter of suits.

5. TERRITORIAL JURISDICTION

Every court has its own specific local territorial limits, which refers to the geographical boundaries, beyond which it cannot exercise its jurisdiction. Territorial jurisdiction is governed by Section 16-20 of the CPC. The first rule is that it is the subject matter of suit which will determine the territorial jurisdiction of a Court-subject matter could either be immovable property or a movable property which is under distraint or attachment. Hence following suits would be filed where the subject property is situated:

1. Landlord-Tenant eviction matters;
2. Suit for partition;
3. Suits for foreclosure, sale or redemption;
4. Suits for declaration/cancellation etc. in respect of immovable property;
5. Suits for compensation for wrong to immovable property; and
6. Suit for recovery of movable property actually under distraint or attachment.

At times, in respect of above mentioned suits, the subject properties may be situated within jurisdiction of different Courts, in which circumstance, the Plaintiff will have the option to institute the suit in either of the Courts where any portion of the property is situated. Illustratively in a suit for partition comprising of properties situated at Delhi, Gurgaon and Lucknow, the Plaintiff shall be free to institute the suit in any of the above mentioned three cities.

In class of suits other than those mentioned above, the jurisdiction shall be governed by Section 20 CPC. The suits shall be filed in either of the following places:

1. Where the Defendant or each of the Defendant, actually or voluntarily resides;

2. Where the Defendant or each of the Defendant, carries on business;
3. Where the Defendant or each of the Defendant, personally works for gain;
4. Where the cause of action wholly or in part arises.

In cases falling in conditions 1 to 3 above, if the Defendants are living in different jurisdictions, at the time of institution of the suit, it shall be necessary for the Plaintiff to seek permission of the Court, in respect of the Defendants not residing in the jurisdiction where the suit is instituted.

if the Plaintiff bank institutes its suit for recovery, for a loan extended from Mumbai, against four Defendants, three of which are residing in Kolkata and one in Mumbai. Section 20(a) CPC allows the Plaintiff to bring in the suit either at Kolkata or in Mumbai. Should the Plaintiff decide to bring in the suit at Mumbai, it will be necessary for them to seek the permission of the Court under Section 20(b) CPC for instituting the suit in Mumbai against the Defendants based in Kolkata.

This illustration is only applicable if the Plaintiff is invoking the jurisdiction in terms of clause (a) of Section 20. Where the Plaintiff institutes the suit invoking clause (c) of Section 20, permission under clause (b) of Section 20 need not be obtained. If we modify the above mentioned illustration by changing the place of extension of loan from Mumbai to New Delhi, the Plaintiff could have instituted the suit in New Delhi on account of the fact that cause of action arose in Delhi.

Cause of action is a bundle of facts which give right to the Plaintiff to institute the suit. In the absence of those multiple events, the Plaintiff would not gather the right to bring in a civil action.

A supplies goods to B from Mumbai, to be delivered in Amritsar. The order was placed on A from Jalandhar. B fails to pay A for the goods supplied. The suit for recovery of money can be instituted at either of the places as the cause of action arose at all the places.

Where the Defendant is a Corporation (Joint Stock Company), it is deemed to carry on its business at its sole or principal office in India. Hence, any suit against the corporation shall have to be instituted at a place where the Defendant has either its sole office or the principal office.

In case the Defendant has more than one offices in India, and one of the subordinate offices is situated at a place where cause of action arose, the suit has to be instituted at a place where the subordinate office is situated.

Defendant has two offices in India, the registered office is situated at Kochi and its subordinate office is situated in Agra. Defendant placed order upon Plaintiff from Agra but did not pay the Plaintiff towards the cost of the product. The Plaintiff has to institute the suit at Agra. Courts at Kochi shall have no jurisdiction.

6. PECUNIARY JURISDICTION

Each state has divided the jurisdiction of a court on the basis of fiscal valuation, which is also known as pecuniary jurisdiction. A court cannot entertain a suit which does not fall within its pecuniary jurisdiction. Illustratively, the Judiciary in Delhi is divided in three categories, Civil Judge, Additional District Judge and High Court. According to the Delhi High Court Rules, a Civil Judge can entertain suits up to the valuation of Rs. 3,00,000/-, Additional District Judge shall have jurisdiction of the matters having valuation more than Rs. 3,00,000/- and up to Rs. 20,00,000/- and the High Court can entertain suits beyond the value of Rs. 20,00,000/-.

It is the Plaintiff's valuation in his plaint which prima facie determines the jurisdiction and the allegation made in the plaint which decide the forum.

7. SUITS OF A CIVIL NATURE

Another important rule is that no court has jurisdiction to try any suit unless it is of a civil nature (s.9). There is no definition provided in the Code or any guidelines mentioned to determine the civil nature. A suit can be said to be of civil nature if it involves determination of civil rights. Civil rights mean the rights and remedies vested in a citizen, within the domain of private law as distinct from rights related to criminal or political matters and public law.

There are certain types of suits of a civil nature from which the courts are precluded, either expressly or impliedly, from trying and adjudicating. The provision under S.9 of the code enables a person to file a suit of civil nature excepting those, the cognizance whereof is expressly or by necessary implication barred.

The expression 'expressly barred' used in the Code means barred by any enactment or statutory instrument. For example, Section 5 of the Arbitration and Conciliation Act, 1996 specifically bars the jurisdiction of the Civil Court.

A suit is said to be impliedly barred when it is not barred on account of general principles of law or public policy. It is always open to a party for his convenience to fix the jurisdiction of any competent court to have his disputes adjudicated by that court alone, that is to say, if one or more courts have jurisdiction to try the suit, the parties may choose any one of the two competent courts to decide their disputes. In such circumstances, only such nominated court shall have the jurisdiction to try the suit. These principles shall not be applicable where the Court upon which jurisdiction has been conferred by the parties, did not otherwise have the jurisdiction.

Where company A enters into a contract with company B at Delhi, company B has its registered office at Patna for execution of work at Chennai, where company B has its subordinate office. The contract between A and B limits jurisdiction of any dispute to the courts exclusively/ only in Bangalore. Notwithstanding the jurisdiction clause in the contract, the suit cannot be instituted in Bangalore. In the illustration above, if the Jurisdiction clause instead of Bangalore, had limited its jurisdiction to Chennai, the suit could only be filed in Chennai.

If the jurisdiction clause in an agreement does not mention expressions like "exclusive" and "only", both the courts at Delhi and Chennai would have had jurisdiction.

8. PLEADINGS

- *Principles of Pleading*

Pleadings include Plaint[1] and Written Statement[2]. Principles of drafting Plaint are different from drafting Written Statement, which is discussed herein below.

Replication is strictly not a part of pleading; however it is advisable to file the replication where the Defendant has brought out new facts in the Written Statement.

No party should be permitted to travel beyond its pleading. The object and purpose of the pleading is to enable the adversary party to know the case it has to meet.

9. DRAFTING OF PLAINT

*A plaint must only contain the facts and not the law.*The lawyer must categorise the information gathered from the Client in three broad categories viz.-

[1] Order 7 CPC
[2] Order 8 CPC

1. “Must Share”

2. “Must not share”, and

3. “Fence sitting positions”.

A plaint must only contain the “Must share” facts in great details as these facts would narrate the factual story line leading to institution of the plaint. Illustratively in a commercial suit for recovery of money the plaint must categorically state the date of placing the order, date of supply, value of goods etc.

“Fence sitting positions” are those facts sharing of which is dependent upon what position would the Defendant take in the Written Statement. The Plaintiff should briefly touch upon these points, without elaborating much. The Plaintiff must place himself in such a position that based on the stand of the Defendant it can switch positions without contradicting itself. Illustratively, if a legal notice was issued but the Plaintiff does not have the proof of delivery, it must only mention that notice was served upon the Defendant. If the Defendant does not challenge the service of notice, the Plaintiff is saved of the botheration of proving the service of notice.

“Must not share” facts are those facts which the Plaintiff must not admit in the plaint. Illustratively, in a Motor Accident claim, the Plaintiff must not say that he was drunk while driving or did not possess driving licence at the time of accident. Narrating these facts would lead to dismissal of the claim before the Court. Let the Defendant prove these allegations, if he fails to allege and prove those allegations, the Plaintiff would succeed in default.

While drafting the Plaint the lawyer should keep an eye on evidence. No amount of evidence can lead to prove something which is not mentioned in the plaint. Evidence beyond pleadings is not permissible. The lawyer at the time of drafting of plaint should identify the witness/document, which/who would prove the allegations in the plaint at the stage of evidence.

Original documents should be filed along with plaint. If the original documents, for some reasons cannot be filed at the time of filing, they have to be necessarily filed within fifteen days of framing of issues. Evidence cannot be lead in the absence of original documents. The court may, on an application of the party, allow original documents to be produced at the stage of evidence (and not filed) and compare the original carried by the witness with the documents on record.

Each plaint has to have three statutory paragraphs pertaining to Court fees, Jurisdiction and Cause of action. These paras are usually written at the end of plaint just before the prayer.

Court fees para is to determine how much Court fees has to be paid on the plaint which is determined by reading the Court fees Act and Suit valuation Act together. Court fees can be paid at the appellate stage as well, as it is well known that appeal is a continuation of the suit[3].

The jurisdiction para is to determine the territorial and pecuniary jurisdiction of the Court where the suit has been instituted.

The cause of action para is to determine if the suit is filed within the prescribed period of limitation.

The prayer clause is the most important part of the plaint. The Court usually cannot grant any relief beyond what has been sought in the Plaint. The lawyer must draft the prayers carefully after

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[3]SardarTejinder Singh vs SardarGurpreet Singh; AIR 2015 SC 242; ekhraj Bansal Vs State of Rajasthan 2014(3) Scale 80

determining which is the best relief which can be sought by the Plaintiff and if the same is permissible in law.

Last but not the least a good plaint can be drafted if the lawyer is aware about the latest precedents on the subject.

10. DRAFTING OF WRITTEN STATEMENT

Written Statement has to be filed within a period of 30 days from the date of service of summons. The period may be extended with the permission of the court. The courts are liberal in granting permission if the written statement is filed within 90 days from the date of service of summons and strict, if the delay is beyond 90 days. It is however better to file the Written Statement within a period of 30 days.

Preliminary objections in the Written Statement have to be carefully drafted. It should include all legal issues, which would form the basis for framing of issues. Legal issues could be in the nature of objection to maintainability of suit, Court fees, barred by limitation etc.

Written Statement must reply to every allegation in the plaint. Order 8 Rule 5 CPC provides that what is not specifically denied is deemed to be admitted. The written statement must give the version of the Defendant to the allegations in the plaint. Illustratively where the Plaintiff has filed suit for recovery of money for goods supplied, the Defendant may have a defence that goods were defective. If the Defendant succeeds in proving the defective goods, the suit of the plaintiff will be dismissed.

The Defendant in the Written Statement must reply only to the allegations in the plaint. Irrelevant and extraneous factors must be avoided. Keep focus to the fact what is relevant to the facts of the case and the relief prayed for. If the claim of the Plaintiff is genuine the lawyer must encourage the Defendant to settle the matter. Unnecessary litigation should be avoided for the legal aid cases.

Like in Plaint the Defendant cannot lead evidence beyond pleading.

Original documents haveto be filed along with the Written Statement. Documents may be filed later with the permission of the Court.

Where the Defendant has a counter claim and set off the same must be pleaded in the Written Statement.

11. SET-OFF

The doctrine of set-off is provided by the Order-8, Rule-6, of Civil Procedure Code. Set –off may be defined as the extinction of reciprocal debts of two persons against each other. Set off happens when both the plaintiff and defendant are debtors as well as creditors against each other. It is a reciprocal recovery of debts of two persons.

The following three conditions are necessary to entitle a defendant to claim set off :

1) The suit must be for recovery of money.

2) The amount claimed for set off must be ascertained sum of money . If the amount is not ascertained then the set off does not lie . The sum of money , claimed for set off must be legally recoverable . Where the plaintiff is not legally bound to pay the money by virtue of the law of limitation or res judicata , set off does not lie . And the amount of money to be set off must not exceed the pecuniary jurisdiction of court .

3) Both the plaintiff and defendant must fill in the defendant's claim to set off the same character as they fill in the plaintiff's suit .

4) The money must be recoverable by the defendant or by all the defendants where there are more than one , from the plaintiff or the plaintiffs where there are more than one .

Set off may be legal set off or equitable set off .

A files a suit for recovery of money amounting to Rs. 25,000 against B. B says that A took a loan from him, amounting to Rs. 20,000 which is legally recoverable from A by a separate suit . And claims set off of Rs. 20,000 from the claim of A amounting to Rs.25,000. If the claim of set off is proved and if the claim is not barred by the law of limitation or resjudicata,, B need not to pay the whole amount of claim of A . Making minus of Rs.20,000 as set off , from the claim of A amounting to Rs. 25,000 , B needs to pay only the rest amount of Rs.5,000 to A . This is called set off.

12. COUNTER-CLAIM

Order 8, Rules 6A to 6G , of the Civil Procedure Code deal with the principle of Counter claims by the defendants .

When a suit is filed by the plaintiff it may happen that the defendant also has any right or claim in respect of a cause of action as against the plaintiff for which he is legally entitled to bring a separate suit . In that event he need not to bring a separate suit against the plaintiff for his cause of action . He may file a plaint for his claim with the written statement in the same suit filed by the plaintiff against him ,without bringing a separate suit . This plaint filed by the defendant with the written statement is called counter claim .

Where any defendant seeks to rely upon any ground as supporting a right of counter claim , he shall, in his written statement , state specifically that he does so by way of a counterclaim. The counter claim can not in any case exceed the pecuniary limit of the Court's jurisdiction. The plaintiff shall be at liberty to file a written statement in answer to the counter claim.Such counter claim shall have the same effect as a cross suit.The counter claim shall be treated as a plaint and shall be governed by the rules applicable to the plaints.

If the plaintiff contends that the defendant's claim ought not to be disposed of by way of a counter claim but by an independent suit, the court may , if so satisfied , pass an order to that effect .

Where in any suit counter claim is established and any balance is found due to the plaintiff or the defendant, as the case may be , the court may give judgment to the party entitled to the balance.

The rules relating to the written statement by a defendant shall apply to a written statement filed by the plaintiff in answer to the counter claim.

It is mention here that the court can pronounce a final judgment in that suit , both on the original claim andon the counter claim . If the plaintiff's original suit is dismissed for default, the counter claim shall alone proceed to the final judgment as an independent suit.

Even if the suit is dismissed, counter-claim shall remain alive for adjudication. For making a counter-claim entertainable by the court, the Defendant is required to pay the requisite court fee on the valuation of the counter-claim[4].

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[4]Rajni Rani Vs KharatiLal, 2014(12)SCALE29, 2014

13. AMENDMENT OF PLEADINGS

Rule 17 of Order 6 permits either of the parties to amend their pleadings, which may be necessary for the purpose of determining the real question in controversy between the parties. Ordinarily, the Courts are liberal in granting this permission. It is however necessary that the application for amendment should be filed before the trial has commenced. The date on which the issues are framed is the date of first hearing. Provisions of the Code of civil Procedure envisage taking of various steps at different stages of the proceeding. Filing of an affidavit in lieu of examination in chief of the witness, would amount to 'commencement of proceeding'[5].

An application for amendment can also be filed after commencement of trial if the applicant is able to satisfy the court that despite their due diligence, the said fact could not be brought to the notice of the Court at the time of filing the initial pleadings. Usually, subsequent events, facts which came to knowledge later are those facts which can be added to the pleadings after the commencement of trial.

Some basic principles emerge which ought to be taken into consideration while allowing or rejecting the application for amendment[6].

(1) Whether the amendment sought is imperative for proper and effective adjudication of the case?

(2) Whether the application for amendment is *bona fide or mala fide?*

(3) The amendment should not cause such prejudice to the other side which cannot be compensated adequately in terms of money;

(4) Refusing amendment would in fact lead to injustice or lead to multiple litigation;

(5) Whether the proposed amendment constitutionally or fundamentally changes the nature and character of the case? (6) As a general rule, the court should decline amendments if a fresh suit on the amended claims would be barred by limitation on the date of application.

It is equally well settled principle that a prayer for amendment of the plaint and a prayer for amendment of the written statement stand on different footings. The general principle that amendment of pleadings cannot be allowed so as to alter materially or substitute cause of action or the nature of claim applies to amendments to plaint. It has no counterpart in the principles relating to amendment of the written statement. Therefore, addition of a new ground of defence or substituting or altering a defence or taking inconsistent pleas in the written statement would not be objectionable while adding, altering or substituting a new cause of action in the plaint may be objectionable[7].

However, there is no prohibition upon a party from seeking an amendment in the plaint to include the unsought relief, provided that it is saved by limitation[8].

An application allowing/disallowing the amendment application can be challenged by way of a CM Main before the High Court. An appeal/revision does not lie against the order allowing/ disallowing an amendment application.

14. RETURN OF PLAINT

Where a plaint is instituted before a Court which is not competent to entertain the same either on account on lack of territorial or pecuniary jurisdiction, the Court shall direct the plaint to be returned to be filed in a court of competent jurisdiction. When a plaint is returned under order 7 rule 10, CPC,

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[5]Vidhyabai Vs Padmalatha AIR 2009 SC 1433
[6]Revajeetu Builders and Developers Vs Narayanaswamyand Sons (2009)10SCC84
[7]UshaBalasaheb Swami vs KiranAppaso Swami; AIR 2007 SC 1663
[8]Venkataraja Vs Vidyane;2013(5)SCALE511

the plaintiff is handed over the original plaint from the court record which is replaced by its certified copy. At the time of return of plaint, the court fixes a date of hearing before the competent Court with the directions that the party should appear on the same date.

The benefit of a return of plaint is that the plaintiff does not have to serve the defendant afresh. An order allowing/disallowing an application under order 7 rule 10 can be challenged under order 43 rule 1 sub clause a, CPC.

15. REJECTION OF A PLAINT

The Court may reject a plaint certain circumstances which have been stated in rule 11 order 7, CPC. The relevant facts which need to be looked into for deciding an application thereunder are the averments in the plaint and the documents filed along with plaint; the pleas taken by the defendant in the written statement would be wholly irrelevant at this stage. The plaint has to be read as a whole. There cannot be any compartmentalization, dissection, segregation and inversions of the language of various paragraphs in the plaint. At the same time it should be borne in mind that no pedantic approach should be adopted to defeat justice on hair splitting technicalities. The trial Court must remember that if on a meaningful and not formal reading of the plaint it is manifestly vexatious and meritless in the sense of not disclosing a clear right to sue, it should exercise the power under Order VII Rule 11 of the Code taking care to see that the ground mentioned therein is fulfilled. If clever drafting has created the illusion of a cause of action, it has to be nipped in the bud

The trial court can exercise the power under Order VII Rule 11 C.P.C. at any state of the suit - before registering the plaint or after issuing summons to the defendant at any time before the conclusion of the trial.

16. DISMISSAL OF SUIT FOR DEFAULT/NON-PROSECUTION AND ITS RESTORATION

The suit of the Plaintiff may be dismissed in default if the Plaintiff either himself or through the lawyer does not appear on the date fixed, irrespective of the fact, if the Defendant was present on the said date of hearing. If there are multiple Plaintiffs, the suit would be dismissed only qua the Plaintiff who remains absent.

The suit of the Plaintiff may be dismissed for non-prosecution if the Plaintiff does not take steps to serve the defendant. The cause of dismissal could be either non-payment of Court fee, process fee, postal expenses etc.

The dismissal order on account of default can be set aside by the Court on an application under Rule 9 order 9 filed on behalf of the Plaintiff, wherein the Plaintiff shows sufficient cause for non-appearance on the date of hearing. The application is to be moved within a period of 30 days from the date of dismissal of the suit. The date of knowledge of dismissal is not relevant. Sufficient cause is an elastic expression and will include anything which the Court feels is sufficient cause. The usual causes offered in the court are wrong noting of the date of hearing, illness of lawyer etc. if the application for restoration is filed beyond the period of 30 days from the date of dismissal, it must be accompanied with an application under Section 5 of the limitation Act for condonation of delay.

If the application for restoration of the suit is dismissed by the Court, an appeal shall lie against the same under Order 43 Rule 1(C) of CPC.

17. PASSING OF EX-PARTE ORDER/DECREE AND SETTING ASIDE THE SAME.

- **Ex-parte order**

Where the Defendant fails to appear before the Court either himself or through the lawyer on the designated date of hearing after the service of summons, the Court shall pass an ex-parte order against the absent Defendant and proceed with the matter without the absent Defendant.

The Defendant is permitted to participate in the hearings after the passing of an ex-parte order without getting the ex-parte order set aside under Rule 7 order 9, CPC, however the Defendant will have to continue the proceedings from the stage where it was fixed after the passing of order. Illustratively if the Defendant fails to appear on the date fixed for cross examination of the Plaintiff's witness and the Court fixes the matter for final arguments. The Defendant can join the proceedings to argue the matter but his right to cross examine the witness of the Plaintiff and right to lead Defendant evidence is closed.

It is thus better that the Defendant should always move application under Rule 7 Order 9, CPC, for setting aside ex-parte order. There is no limit fixed for setting aside ex-parte order. The ex-parte order can be satisfied upon the Defendant showing sufficient cause for its absence on the prescribed date. The expression sufficient cause has been liberally interpreted by the Courts.

The effect of setting aside ex parte order is that it "sets the clock backward". It effectively means that the Defendant shall be permitted to join the proceedings from the stage when he was proceeded ex-parte. In the above mentioned illustration if the ex-parte order was set aside the Defendant shall get the right to cross examine the witness of the Plaintiff and lead its own evidence.

- **Ex-parte decree:**

If the Defendant does not appear after an ex-parte order has been passed against the Defendant the Court shall complete the proceedings in the absence of the Defendant. The Decree so passed shall be called an ex-parte decree.

The Defendant has following three options on the passing of an ex-parte decree and it can elect to choose one:

I. Move application for setting aside ex-parte decree under Rule 13 order 9, CPC;

II. Move a review application under Rule 1 order 47, CPC to the Court which passed the decree; and

III. File an appeal under Order 41 against the ex-parte decree.

It is better to file an application for setting aside ex-parte decree. The application has to be filed within a period of thirty days from the date of decree when the Defendant was served with the summons and within a period of thirty days from the date of knowledge of passing of ex-parte decree. The period of limitation is prescribed under Article 123 Schedule 1 of the Limitation Act, 1963.

An ex-parte decree can be set aside by the Court which passed the decree if the Defendant satisfies the Court that it was not served with the summons and/or was prevented by sufficient cause from appearing when the suit was called for hearing.

If the Court dismisses the application for setting aside ex-parte decree, the Defendant shall have the right to file an appeal under Order 43 Rule 1 (c) of CPC.

18. RECORDING OF STATEMENT UNDER ORDER 10, CPC BY THE COURT

Order 10 CPC gives immense power to the Court to record the statement of parties to ascertain the allegations of the parties in the pleadings. The party to litigation has to be present before the Court for recording the statement, without the assistance of the lawyer. It is a very strong tool, though rarely used by the Court.

19. DECREE ON ADMISSIONS

Rule 6 of order 12 empowers the Court to pass a decree in the matter wherein the parties admit the allegations made in the pleadings.In other words, where the Court may decide the suit if the other party has admitted the claim of the opposite party. Illustratively, in a recovery suit, where the defendant admits that he has to pay the money as per the transactions mentioned in the plaint, a decree would be passed in favour of the plaintiff and against the defendant. The benefit of a decree under this rule is that a decree is passed without the trial and only on the basis of admissions in the pleadings or otherwise. A suit can be both decreed and dismissed under this suit. Decree on an admission does not mean that it is a decree in favour of the plaintiff. Illustratively, if in a recovery suit, the narration of the plaint discloses that the suit transaction if beyond the period of limitation, the suit of the plaintiff may be dismissed under Rule 6 order 12 or rejected under Rule 11 order 7, CPC.

20. ADMISSION/DENIAL OF DOCUMENTS

Original documents filed by the parties are put to each other for stating if the documents are admitted or denied. The documents which are admitted by the parties are given the exhibit numbers and need not be proved. Admission of document is a proof in itself.

Documents which are denied have to be proved by the parties who want them to be proved.

Admission/denial cannot be carried out on the photocopy of the documents. It should ordinarily be done by the parties themselves.

Admission/denial comes within the ambit of Order 13, CPC.

21. FRAMING OF ISSUES

Based on the pleadings of the parties the Court frames issues under Rule 1 of Order 14. The issues are framed on the controversy between the parties which needs to be proved.

The issues may be added or deleted by moving an application under Rule 5 order 14, CPC.

Some of the issues may be considered preliminary issues, which are necessarily questions of law, which does not require leading of evidence.

On all other issues the parties lead evidence.

The Court at the time of framing of issues places Onus of proof, by stating OPP, OPD and OP Parties. OPP means onus of proof on Plaintiff, which means that the Plaintiff has to prove this issue. OPD means onus of proof on Defendant which means that the Defendant has to prove such issues. Where onus if put on the parties both the parties will have to frame the issues.

Onus of proof is different from burden of proof. Onus remains constant however burden of proof keeps shifting.

22. RECORDING OF EVIDENCE

- **General**

Parties have to file the list of witness within 15 days of framing of issues under Rule 1 Order 16, CPC. The parties can produce only those witnesses whose names have been disclosed in the list of witnesses. The Plaintiff/Defendant can appear as witness without the list.

Some witnesses need to be summoned while others may be produced by the parties on their own. Where the witness has to be summoned, an application has to be made to the Court seeking Court to issue summons for their production, the application must also disclose the document which the parties want the witnesses to produce. If a witness fails to appear before the Court without a lawful excuse, a bailable warrant of arrest may be issued against the said witness of his properties may be directed to be attached.

Evidence of non-summoned witness has to be led by affidavit, which will be considered as the examination in chief of the witness. Summoned witness may appear and record their statements orally.

Lawyer should be careful in choosing the witness. It is advisable not to produce more than one witness to prove the same allegation. Multiple witnesses lead to contradictions which are not in the interest of the litigant.

Documents can be proved by the parties who have either executed the same or in whose presence the documents were executed. Lawyer should be careful in determining which document can be proved by which witness.

There is a difference between admissible and non-admissible evidence. Illustratively photocopy of a document is inadmissible.

Objection as to mode of proof is different from admissibility of documents.

Exhibition of document does not mean that documents have been proved.

The witness during cross-examination can be confronted with the documents which have not been filed on record by the cross-examining party. This power of confrontation is not available to the party leading evidence.

- **Additional Evidence**

An application under Order XLI Rule 27 Code of Civil Procedure **is to be considered at the time of hearing of appeal on merits so** as to find whether the documents and/or the evidence sought to be adduced have any relevance/bearing on the issues involved. The admissibility of additional evidence does not depend upon the relevancy to the issue on hand, or on the fact, whether the applicant had an opportunity for adducing such evidence at an earlier stage or not, but it depends upon whether or not the Appellate Court requires the evidence sought to be adduced to enable it to pronounce judgment or for any other substantial cause. The true test therefore is, whether the Appellate Court is able to pronounce judgment on the materials before it without taking into consideration the additional evidence sought to be adduced. Such occasion would arise only if on examining the evidence as it stands the court comes to the conclusion that some inherent lacuna or defect becomes apparent to the Court[9].

23. ELECTRONIC EVIDENCE

Section 65A provides that the contents of electronic records may be proved in accordance with the provisions of Section 65B. Section 65B provides that notwithstanding anything contained in

[9] Union of India Vs Ibrahim Uddin; (2012)8SCC148

the Evidence Act, any information contained in an electronic record [i.e., the contents of a document or communication printed on paper that has been stored, recorded and copied in optical or magnetic media produced by a computer ('computer output')], is deemed to be a document and is admissible in evidence without further proof of the original's production, provided that the conditions set out in Section 65B(2) to (5) are satisfied.[10]

24. DRAFTING OF EVIDENCE BY WAY OF AFFIDAVIT

Drafting of affidavit under Order 18, CPC is not reproduction of pleadings. It must be drafted carefully while marking Exhibits if any. A witness should only say about something which is in its personal knowledge. Hearsay evidence is weak evidence.

- **Cross examination**

Cross examination of witness is a work of art and requires precision of facts and absolute knowledge of law.

A lawyer should prepare the cross examination of the witness in his office and not ask spontaneous questions in Court. It is likely a thought out question in cross examination would better result. Cross examination is a double edged sword; a wrong question could damage the case of the lawyer who is cross examining.

While cross examining a witness, the lawyer, must be careful not to ask questions of which he does not know the answer. Do not make fishing enquiries in cross examination. The lawyer must know what does he expects as answer from a witness.

As far as possible design questions in a manner in which the answer comes in Yes.Avoid in cross examination questions which start from What, When, Where and Who.

Effort should be made to complete the entire cross examination in one day. Witness after every hearing is smarter hence the best results in cross comes only when the witness appears for the first time.

25. DEATH OF ANY OF THE PARTIES

Upon the death of either of the parties, an application for substitution has to be made under relevant provisions of Order 22 by the Plaintiff within a period of 90 days, failure to file the same within the prescribed period shall lead to abatement of suit against the said party. Upon abatement, the plaintiff has to move an application for setting aside abatement. Courts are liberal in allowing the application for setting aside of abatement.

26. WITHDRAWAL OF SUIT/COMPROMISE OF SUIT

The plaintiff may withdraw or abandon the suit under order rule 1 order 23, CPC. Withdrawal of a suit does not authorise the plaintiff to bring a fresh suit of the same cause of action without the leave of the court. The court may grant the leave to institute a fresh suit under the same cause of action sub rule 3 of rule 1 order 23, CPC where the court is satisfied that the suit must fail by reason of some formal defect or there are sufficient grounds for allowing the plaintiff to institute a fresh suit.

Where a suit is compromised between the parties, a joint application may be moved under Rule 3 order 23, CPC, wherein the terms of compromise may be recorded. The application has to be accompanied by the affidavit of the parties. The parties to the compromise have to be present before

[10]Anwar P.V. Vs P.K.Basheer MANU/SC/0834/2014

the court for recording their statement, after the court is satisfied about the compromise and its terms, the court may pass an order passing a compromise decree in terms of the terms of the compromise.

27. APPOINTMENT OF LOCAL COMMISSIONER

The Court may appoint a Local Commissioner (hereinafter referred to as "LC") under rule 9 of order 26 for local investigation. The application for appointment of an LC can be made by either of the parties, specifying the purpose for which the LC may be appointed. When the court is satisfied that circumstances are made out for appointment of an LC, it shall pass an order to that effect.

The LC acts as the ears and eyes of the Court, but has no determining powers to adjudicate on any point. The LC has to record his observation in a report along with the material fathered in the local investigation, submit it to the Court and give its finding. The party aggrieved by the said report may file an objection to the report of the LC. In the absence of any objections, the court may accept the report of the LC as correct. However, the Court within its discretion may reject the aforesaid report.

Since the amendment of CPC in 2002, the LC can also be appointed to record the evidence of the parties.

28. ATTACHMENT BEFORE DECREE[11]

5. Where. defendant may be called upon to furnish security for production of property:

(1) Where, at any stage of a suit, the Court is satisfied, by affidavit or otherwise, that the defendant, with intent to obstruct or delay the execution of any decree that may be passed against him,-

(a) is about to dispose of the whole or any part of his property, or

(b) is about to remove the whole or any part of his property from the local limits of the jurisdiction of the Court, the Court may direct the defendant, within a time to be fixed by it, either to furnish security, in such sum as may be specified in the order, to produce and place at the disposal of the Court, when required, the said property or the value of the same, or such portion thereof as may be sufficient to satisfy, the decree, or to appear and show cause why he should not furnish security.

(2) The plaintiff shall, unless the Court otherwise directs specify the property required to be attached and the estimated value thereof.

(3) The Court may also in the order direct the conditional attachment of the whole or any portion of the property so specified.

[(4) If an order of attachment is made without complying with the provisions of sub-rule (1) of this rule such attachment shall be void.]

6. Attachment where cause not shown or security not furnished

(1) Where the defendant fails to show cause why he should not furnish security, or fails to furnish the security required, within the time fixed by the Court, the Court may order that the property specified, or such portion thereof as appears sufficient to satisfy any decree which may be passed in the suit, be attached.

(2) Where the defendant shows such cause or furnishes the required security, and the property specified or any portion of it has been attached, the Court shall order the attachment to be withdrawn, or make such other order as it thinks fit.

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[11]ORDER XXXVIII : ARREST AND ATTACHMENT BEFORE JUDGEMENT

7. Mode of making attachment: Save as otherwise expressly provided, the attachment shall be made in the manner provided for the attachment of property in execution of a decree.

8. Adjudication of claim to property attached before judgement

9. Removal of attachment when security furnished or suit dismissed

10. Attachment before judgement not to affect rights of strangers, nor bar decree -holder from applying for sale

11. Property attached before judgement not to be re-attached in execution of decree

11A. Provisions applicable to attachment

(1) The provisions of this Code applicable to an attachment made in execution of a decree shall so far as may be, apply to an attachment made before judgement which continues after the judgement by virtue of the provisions of rule 11.

(2) An attachment made before judgement in a suit which is dismissed for default shall not become revived merely by reason of the fact that the order for the dismissal, of the suit for default has been set aside and the suit has been restored.

12. Agriculture produce not attachable before judgment**.**

29. GRANT OF INJUNCTION

Injunction means a judicial order restraining a person from beginning or continuing an action threatening or invading the legal right of another, or compelling a person to carry out a certain act, e.g. to make restitution to an injured party.

A Court order by which an individual is required to perform, or is restrained from performing, a particular act. A writ framed according to the circumstances of the individual case.

An injunction commands an act that the court regards as essential to justice, or it prohibits an act that is deemed to be contrary to good conscience. It is an extraordinary remedy, reserved for special circumstances in which the temporary preservation of the status quo is necessary. An injunction is ordinarily and properly elicited from other proceedings.

For example, a landlord might bring an action against a tenant for waste, in which the right to protect the landlord's interest in the ownership of the premises is at issue. The landlord might apply to the court for an injunction against the tenant's continuing harmful use of the property. The injunction is an ancillary remedy in the action against the tenant.

Injunctive relief is not a matter of right, but its denial is within the discretion of the court. Whether or not an injunction will be granted varies with the facts of each case.

The courts exercise their power to issue injunctions judiciously, and only when necessity exists. An injunction is usually issued only in cases where irreparable injury to the rights of an individual would result otherwise. It must be readily apparent to the court that some act has been performed, or is threatened, that will produce irreparable injury to the party seeking the injunction. An injury is considered irreparable when it cannot be adequately compensated by an award of damages. The pecuniary damage that would be incurred from the threatened action need not be great, however. If a loss can be calculated in terms of money, there is no irreparable injury. The consequent refusal by a court to granting injunction is, therefore, improper. Loss of profits alone is insufficient to establish irreparable injury. The potential destruction of property is sufficient.

Injunctive relief is not a remedy that is liberally granted and therefore, a court will always consider any hardship that the parties will sustain by the granting or refusal of an injunction. The court that issues an injunction may, in exercise of its discretion, modify or dissolve it at a later date if the circumstances so warrant.[12]

30. APPOINTMENT OF RECEIVER:PROVISIONS RELATING TO APPOINTMENT OF RECEIVER UNDER CIVIL PROCEDURE CODE

A 'Receiver' is a person who receives money of another and renders account. Order XL (i.e. 40) lays down the rules governing the appointment of a receiver, his duties, etc. The purpose of appointment of receiver is to preserve the suit property and safeguard interests of both the parties to the suit [13]

A "receiver" is an impartial person between the parties to a cause, appointed by the court (see Sec. 94) to receive and preserve the property (immovable or movable) or fund in litigation *pendentelite*, when it does not seem reasonable to the court that either party should hold it. It is a protective relief. It is one of the harshest remedies as it deprives the opposite party the possession of property before a final judgment is pronounced. Thus, it should not be lightly resorted.[14]

A receiver should not be appointed unless the plaintiff prima facie proves that he has very excellent chance of succeeding in the suit. Where it appears to the court to be just and convenient, it may appoint a receiver (before or after the decree) of any property [Rule 1 (a)], and remove any person from the possession/custody of the property. A receiver is an officer/ representative of the court and he functions under its directions. In exceptional circumstances or for special reasons, a party to a suit/proceeding (plaintiff or defendant) can also be appointed as receiver.[15]

The appointment of a receiver is a discretionary power of the court. The power to appoint under Order 40 is, however, subject to the controlling provisions of Sec. 94, and is to be exercised for preventing the ends of justice being defeated. The court can appoint a receiver not only on the application of a party to the suit, but any person who is interested in the preservation of property. The court can also do so on its own motion.

The court may confer upon the receiver any of the following powers: to institute and defend suits; to realize, manage, protect, etc. the property; to collect, apply and dispose of the rents/profits; to execute documents; etc. [Rule 1 (d)]. A receiver cannot sue or be sued for acts done in his official capacity by a third party without the leave of the court. Property in the hands of receiver cannot be attached without the court's leave. Since he is *custodia legis*, any obstruction/interference by anyone with his possession without the court's leave is interference with the court's proceedings and is liable for contempt of court.

A receiver is the right arm of the court in exercising the jurisdiction invoked in cases for administering the property; the court can only administer through a receiver. For this reason, all suits to collect or obtain possession of the property must be prosecuted by the receiver, and the proceeds received and controlled by him alone.[16]

A receiver is entitled to the remuneration fixed by the court for the services rendered by him (Rule 2). A receiver is entitled to be indemnified for the debts incurred or contracts entered into by him in the course of the management of the estate. A receiver has to furnish security as the court thinks fit,

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[12]http://legal-dictionary.thefreedictionary.com/injunction
[13]P. Lakshmi Reddy v L. Lakshmi Reddy AIR 1957 SC 314).
[14]*Krishna Kumar v Grindlays Bank AIR 1991 SC 899)*
[15]*Kasturi Bai v Anguri Chaudhary AIR 2001 SC 1361*
[16]*JagatTariniDasi v Naba Gopal Chaki ILR (1907) 34 Cal 305*

duly to account for what he shall receive in respect of the property. He has to pay the amount due from him as per the court's directions (Rule 3). If the receiver fails to submit accounts, or fails to pay the amount due, or occasion loss to the property by his willful default/negligence, the court may direct his property to be attached and sold and make good any amount found to be due from him (Rule 4).

The court has an inherent power to remove the receiver appointed by it, when he does not comply with the orders of the court or abuses his power or authority. A Collector may be appointed as a receiver in cases where the property in question is land paying revenue to the Government (Rule 5).

31. ARGUMENTS

A lawyer must inspect the Court record before addressing final arguments. The file of the lawyer must match with the Court page number wise, each of exhibit numbers must be marked on the file of the lawyer, and file must be complete in all respects.

Lawyer must prepare notes of the cases containing factual details. Arguments must be addressed issue wise. The lawyer must draw attention of the Court to the issues, supporting pleadings, statement of witness in examination of witness and cross examination of the opposite side.

Mark the relevant lines on your file. Be brief and to the point. Reading of the entire plaint, evidence without a point makes the process dull for the Judge leading to loss of interest by the Judge.

Support your arguments with the precedents.

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FINAL ARGUMENTS – CIVIL CASE

— Justice Manju Goel (Retd.)*

Final arguments are addressed on completion of trial. The date of final argument is the ultimate date for a lawyer to persuade the judge to decide the case in favour of his client. By way of preparation for final arguments, the lawyer should study the entire case file and find all the material available there in favour or against the client. His brief should be arranged in the same manner in which judges' file is arranged so that he and the judge can simultaneously refer to the same page. The lawyer then should mark the pages with 'stick on' writing on them some identifying word like 'sale deed' 'date', 'admission of the respondent' etc.

He should then make a list of the material in his favour and a list showing the material against him. He should then think as to how to meet the points that go against him and are likely to be highlighted by the opposite counsel. At the same time, he cannot be complacent with finding the points in his own favour. The other side is likely to find law or fact to challenge those points. So now the lawyer has to think of what the other side is likely to present in its defence and accordingly prepare himself to meet those point.

The lawyer should have the text of the relevant legislations tagged to the file. He should carefully read the case law on the important issues. The portions worthy of reading out during the arguments should be marked. While arguing before the court the lawyer should first introduce the case and tell the facts emphasizing his client's case. The strongest issues in favour of the client be given prominence by taking them up first. The issues in which the client's case is weak should be addressed later.

Similarly, the weakness of the other side's case should be highlighted, however, if the client is the plaintiff, his own case has to be stated and argued vehemently before the weakness of the defendant's case referred to. If the client is the defendant, the weakness of the plaintiff's case becomes more important to state.

The attitude of the arguing lawyer should be persuasive but modest and humble. He should hear all queries from the court with attention and answer them with respect. If the lawyer is dismissive of the questions from the court, he is losing an opportunity of clarifying the judge's doubts about his case and then losing an opportunity of winning the judge over to client's side.

The lawyer has to hear the argument of the other side lawyer very carefully. Even if his own case is very strong, he should not assume that he is going to win in all eventualities. When the other side lawyer is arguing, he should carefully watch which of the arguments are going well with the judge. These points need to be tackled on his turn to reply.

The lawyer should remain courteous throughout and take care not to annoy either the judge or the other side advocate by use of any unparliamentarily language or any loose remark. He should not interrupt the other side counsel even if he feels strongly against something said by him. These points must be carefully and persuasively argued when it is his turn.

If the other side interrupts, the arguing lawyer should not lose his calm for there he is likely to lose the link of his arguments or make some avoidable mistakes.

*Former Judge, Delhi High Court

If the lawyer knows that he is likely to lose his case, he must find out what can be salvaged for his client. If a money decree is likely to be passed against his client, he may seek leniency for his client in the matter of interest and cost or in the matter of time within which payment can be made. He may also look for instalments. In an eviction case he may seek a long time to vacate. For seeking such reliefs, againa case for leniency has to be made out. Remember always he who seeks equity must do equity. A courteous and submissive attitude will go a long way in getting such equitable reliefs.

The Lawyer should be open to suggestions of settlement and other kinds of alternatives till the very end. He should be ready to amend his mistakes, if possible, even at a late stage if that helps the cause of his client.

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