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# An Insight into the Provisions Relating to Bail Practice and Procedure under the Code of Criminal Procedure

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## ABSTRACT

*Whenever, a crime or offence is committed in any civilized society, it is usually reported to police authorities, as police authority is first representative of law. Thereafter, the police officials note down the information in daily diary and reaches to the scene of crime, for carrying out necessary preliminary investigation regarding the offence, offender / suspect, victim, complainant, witnesses etc. After doing this preliminary investigation, if police official finds offender or some person suspected to have committed the offence, the police official takes the offender and or suspect in custody, for further investigation. This is the first stage when the necessity of bail arises for taking out the person from police / judicial custody. The investigation of the case and filing of charge sheet in the competent court of law takes time. Therefore, the question arises before the court in every criminal case, whether an accused should be bailed out or sent to judicial custody, till the filing of the charge sheet.*

*The object of this paper is to give an overview of the provisions of Cr. P.C. relating to bail, including stages of a criminal case, where bail can be granted, regulatory bodies which can grant bail. This paper also aims at assessing issues/ shortcomings in the provisions pertaining to bail, like:*

- a) Exercise of Judicial discretion in non-bailable offence i.e. is this discretion an absolute or there is some mechanism to regulate it?*
- b) Magistrate's power U/s 167(2) of Cr. P.C. to release accused on bail or remand him to judicial custody?*
- c) Admissibility of successive bail applications.*
- d) Whether the anticipatory bail is available for a limited period of time from the date of grant or does it continue till the conclusion of trial of the case?*

**Keywords:** *Bail, default bail, anticipatory bail, successive bail, bailable and non-bailable offences.*

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## I. BAIL: MEANING AND ITS OBJECT

Bail is fundamental in any criminal justice system. The practice of granting bail grew out of the need to ensure right to liberty, a fundamental right i.e. no law can deprive a person from his life including liberty unless it prescribes a due, reasonable, fair and just procedure. Hence, right to liberty cannot be taken away from a person unless it is in accordance to law as decided in *Maneka Gandhi v. Union of India*<sup>2</sup>. Deprivation of someone liberty must be considered as a punishment and the criminal justice system believes that punishment should begin only after conviction and, that every man is believed to be innocent until the guilt has been proved beyond reasonable doubt. Infact, law gives equal treatment to a foreigner in matter of granting bail.

It has been traced out that 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. The bail has a long history in Indian Criminal legal system. It is granted to secure the liberty of the person charged with some offence till his guilt is proved beyond reasonable doubt.

Webster's Dictionary of Laws defines "bail as a temporary release of a prisoner in exchange for security given for the prisoner's appearance at a later stage when required by the court"<sup>3</sup> The philosophy for grant of bail has been discussed in various pronouncement including *Vaman Narain Ghiya v. State of Rajasthan*<sup>4</sup> in which the court has observed "law of bail like any other branch of law has its own philosophy and occupies an important place in the administration of justice."

Therefore, it can be said that though the chief objective of bail in a criminal case is, to relieve the accused from imprisonment, however, at the same time, the accused also remains in the constructive custody of the court, so that, whenever court requires the presence of the accused, he should be available. This is the reason, the court releases the accused either on his personal bond and or bond by surety. So, bail is a conditional release. Thus, custody of an accused is given to a respectable person of the society who promises or accepts responsibility for producing detainee before the court or authority as and when required. The person, who gives the promise to bring back the prisoner before the court, is known as Surety. He is required to execute a bond before getting custody of the detainee. Hence, it can be said that the object of the bail is to secure the appearance of the accused at the time of trial.

Justice William defined the term bail as-

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<sup>2</sup>AIR 1978 SC 597

<sup>3</sup> K.D. Gaur, *Textbook on The Code of Criminal Procedure* 472(Universal Law Publishing ed .first 2016)

<sup>4</sup>AIR 2009 SC 1362

“A delivery or bailment of a person to his sureties on their giving, together with himself, sufficient security for his appearance, he being supposed to continue in their friendly custody instead of going to jail.”<sup>5</sup>

## II. REGULATORY BODIES CONFER BAIL

The Code of Criminal Procedure (hereinafter referred as Cr. P. C or Code) confers power to grant bail to both police officer as well as to courts. The police officer here mentioned is officer-in-charge of the police station and the courts imply, Court of Magistrate, Session court and The High Court (herein after referred as HC). However, the Supreme Court (hereinafter referred as SC) i.e. apex court of India is not a regular court for bail matters. The apex court interferes only where it finds that some grave injustice/ miscarriage of justice would be caused if it would not take up the matter. The SC has power to examine the legality of bail order passed by HC under Article 136 of The Constitution of India. The police-officer in charge can grant bail in bailable offences only. The Court has the power to grant bail even in non-bailable offences. The Court of Session and High Court can grant bail under Section 439(1) of Cr. P.C. and in case of bail application in appeal and revision, under Section 389 and 401 of Cr. P.C., respectively.

Court of Magistrate can grant bail under section 436 and 437 that is, in case of bailable offences bail can be given under section 436 and, in non bailable offences, it can be given under section 437. The code has put a mandate on magistrate court for grant of bail under section 167(2).<sup>6</sup> He has the power to grant bail when an accused is in judicial custody under clause (b) of section 209.

## III. CLASSIFICATION OF OFFENCES

The Code of Criminal Procedure, under chapter Thirty Three has incorporated the provisions related to bail from Section 436 to 450. In context of bail, the term ‘offence’ has been categorised in two forms i.e. bailable offences and non-bailable offences, as defined in section 2(a).

### 3.1 Bailable offences

“Bailable offences” are those offences which are 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 offences means any other offence. Bailable offences are usually less heinous in nature and, that’s why punishment provided for such offences under Schedule 1 of the code are less severe in nature.

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<sup>5</sup> Asim Pandya, *Law of Bail Practice and Procedure* 4 (Lexis Nexis, ed. 2015).

<sup>6</sup> Section 167(2) states about default bail.

In bailable offences, the accused can claim release on bail as a matter of right. In bailable matter it is a mandatory upon the court as well as detaining authority, to release the accused on bail if he is ready to furnish the bail at any time during his arrest and custody, as the case may be.

Section 436 of the Cr.P.C deals with bail in bailable offences. It says “when any person other than an accused of a non-bailable offence is arrested..... such person shall be released on bail”. It depicts that right to get release on bail cannot be denied and right to bail in bailable offences is an absolute and indefeasible right. Hence, the court has no discretion in granting bail. The Supreme Court held in *state of Maharashtra v. Captain Buddhikota Subha Rao*<sup>7</sup> that it is true that Supreme Court does not interfere with an order granting bail but in case judicial discipline is sacrificed or refused to be exercised, then SC can exercise jurisdiction under Article 136 of Constitution of India.

Section 436 of the Cr.P.C should be read with sections 50<sup>8</sup>, 56<sup>9</sup> and 57<sup>10</sup> which also depict the compliance of Article 22 of the Constitution of India. It confers fundamental right on a person arrested to be informed of the ground of arrest and that he should be produced before the nearest judicial magistrate with a period of twenty-four hours.

As per the proviso of Section 436 if the arrested person has not applied for bail even after a week of an arrest, then he would be considered as an indigent (poor) person and, so entitled to be released on executing a bond for his appearance in the court, whenever required.

In bailable offences, the court can usually impose conditions for releasing an accused on bail regarding time and place of attendance and, in case the accused has not complied with these conditions, then the court can refuse to grant bail in future in the same case when such accused produced or brought before the magistrate. In *Shantilal Javerchand Jain v. State of Gujarat*<sup>11</sup> the court held that reasonable and relevant conditions can be imposed while releasing an

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<sup>7</sup> AIR 1989 SC 2292.

<sup>8</sup> Section 50 of the code provide “ Person arrested to be informed of ground of arrest and of right to bail  
(1)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.

(2) 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”.

<sup>9</sup>Section 56 says Person arrested to be taken before Magistrate of officer in charge of police station i.e. “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”.

<sup>10</sup> Section 57 says- 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”.

<sup>11</sup> 2012 (1) GLR 902.

accused alleged to be guilty of a bailable offence as there is no specific mandate under the provision that the court cannot impose relevant conditions.

Bail in bailable matter can be cancelled under Section 482 of Code only when accused forfeits his right to be released on bail under sub-section (2) of Section 436 of the Code. The power to cancel bail can be exercised only in the interest of justice.

### 3.2 Non- bailable offences

According to Section 2(b) of the Code, non-bailable offences are those offences which are not bailable. In non bailable offences, it is the discretion of the court to grant bail or not. It does not mean that bail cannot be granted in non bailable offences. Therefore, it can be said that in non bailable offences, accused has to convince the court for granting bail. These offences are usually of serious nature i.e. the punishment provided for such kind of offences is quite higher in comparison to bailable offences. This is the reason that in non-bailable cases, the accused will get released on the discretion of the court but it does not mean court exercise this discretion arbitrarily.

Section 437 of the code specifically deals with the non-bailable offences. However, Section 439 of the code grants special power to High Court and Court of Session for granting and cancelling bail. Section 437 says “when any person accused of, or suspected of, the commission of any non-bailable offence is arrested.... he may be released on bail” these words depict the discretion of court for discharging accused on bail. In *State of Orissa v. Mahimananda Mishra*<sup>12</sup> the court held that the apex court ordinarily does not interfere in the order of High Court regarding granting or rejecting bail to the accused, though it is open for the court to set-aside the order of High Court, where it is apparent that the High Court has not exercised its discretion judiciously and in accordance with the fundamental rules governing grant of bail.

In *Neeru Yadav v. State of U.P*<sup>13</sup> and *Prasanta Kumar Sarkar v. Ashish Chatterjee*<sup>14</sup>, the court observed that it is well settled principle for bail that at the time of considering bail application, the court must take into account certain factors such as existence of a prima facie case against the accused, the gravity of the allegations, position and status of the accused, the likelihood of the accused fleeing from justice, past conduct etc but do not go into the merits of case.

Sub-clause (i) of Section 437(1) of the Code states that such person should not be released if such person is charged for an offence for which punishment prescribed is either death or

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<sup>12</sup> (2018)10 SCC 516.

<sup>13</sup>(2014) 16 SCC 508.

<sup>14</sup> (2010) 14 SCC 496.

imprisonment for life. Whereas, sub-clause (ii) of Section 437 of the Code, provides that bail should not be granted to a person if a person is arrested in regard to an offence which is cognizable offence and he had been a previously convicted of an offence for which punishment is death, life imprisonment or imprisonment for seven years or more, or he had been previously convicted twice or more than twice in the some instances ( which are also a cognizable offences punishable with imprisonment for three years or more but not less than seven years) . Thus, the provisions of the Code provide that no bail should be granted in the above mentioned cases.

However, proviso (1) of Section 437 of the Code states that the court can give direction for release of persons referred in clause(i) and clause(ii) if they are women, child or sick or infirm. The logic behind this discretion might be to give protection to weaker persons. In *Bakshish Ram v. State of Punjab*<sup>15</sup> court permitted bail to an eighty year old lady suffering from various age related ailments and she was also in jail for more than one year.

Proviso 2 of section 437(1) also enables court for exercising its discretion in clause (ii) if the court finds release on bail just and proper, by recording its reasons in writing. This provision indicates that in case of non-bailable offence the court has very wide powers to exercise its discretion.

Proviso 3 of section 437(1) states that pendency of test identification parade is not a valid ground for denial of bail in a case where accused is otherwise entitled to be released on bail and ready to give undertaking.

Proviso 4 of section 437(1) puts a mandate upon the court not to grant bail under section 437 unless and until an opportunity of hearing is given to Public Prosecutor.

Sub-section (2) of section 437 of the Code provides that if at any stage of investigation, inquiry or trial as the case may be, the court or officer in charge of police station finds that the accused has not committed a non-bailable offence, he should be released on bail. It simply means that an officer in charge can also release an accused of a non- bailable offence if he has sufficient reason to believe that person accused has not committed a non-bailable offence.

Sub-section (3) of section 437 of Code states about conditions which court can impose for any of the offence covered under chapter VI of Indian Penal Code (here and after refer as IPC i.e. offences against state, chapter XVI of IPC i.e. offences against human body and chapter XVII of IPC i.e. offences against property. This provision also states that the court can impose conditions for granting bail in case of abetment, attempt and conspiracy of these

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<sup>15</sup> (2009) 6 SCC 561

abovementioned offences covered in these chapters. The conditions are as under-

- a) The released accused should attend court proceeding according to the terms of the executed bond;
- b) The released person should not commit an offence similar to the offence for which he is accused, or suspected, and
- c) The released person shall not directly or indirectly make an inducement, threat or promise to any person acquainted with the facts of case, so as to dissuade him from disclosing such fact to the court or to any police officer or tamper with the evidence, and, any other condition as the court considers necessary in the interest of justice.

In *Kunal Kumar Tiwari Alias Kunal Kumar v. State of Bihar and Another*<sup>16</sup> the court said that section 437(3) allows court to impose conditions “in the interest of justice” referred in clause (c) of section 437(3). The court further said “interest of justice” has broader meaning but, with regard to the conditions that can be imposed, it should not be arbitrary, fanciful and whatever is required for the good administration of justice.

Sub-section (4) of section 437 of the Code puts a mandate upon the court and the officer in charge to record reasons in writing if they have released an accused on bail under sub-section (1) and sub-section (2) of section 437. Therefore, it can be concluded that in non-bailable offences, the court as well as officer in charge both have the powers to release an accused in a non bailable offences.

Sub-section (5) of section 437 of the Code states about the cancellation of bail by the same court who granted bail under sub-section (1) and sub-section (2), if it find necessary so to do and, simultaneously can pass order to re-arrest and send him in custody.

Sub-section (6) of section 437 of the Code puts a time limit on the court to complete the trial of an accused within a period of sixty days, starting from the first date fixed for taking evidence of non-bailable, who is not released on bail and, is in custody during the whole of the period passed, unless the magistrate otherwise directs.

Sub-section (7) of section 437 of the code states if, at after the conclusion of trial and before the judgment is delivered, the court finds that the person who is an accused is not guilty of an offence, it shall release the accused on execution of a bond with surety for his appearance till the judgment is delivered.

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<sup>16</sup> (2018) 16 SCC 74

#### IV. SPECIAL POWERS OF HIGH COURT AND COURT OF SESSION REGARDING BAIL

The marginal note of Section 439 of the code has used the term ‘special power’ which denotes special or grater in a sense, these courts i.e. High Court (hereinafter referred as HC) and Court of Session (hereinafter Court of Session referred as COS) have the wider power to grant and cancel bail. They have supervisory power for modifying the conditions and, to impose any other condition on a bail which is granted by a magistrate under section 437. The marginal note of section 439 also depicts that bail provision confers concurrent jurisdiction. But, it does not mean that the accused can file the application before both the courts simultaneously. So, ordinarily, an application ought to be made first to the session court and, in case if it is rejected by the COS then to the HC. Sub-section (1) of section 439 of the Code provides for granting of bail in non bailable offences.<sup>17</sup> It also states, while granting bail under section 439 courts can impose any condition/ conditions specified in section 437(3). However, the HC or COS shall, before granting bail to a person who is accused of an offence which is triable exclusively by the COS or which, though not so triable, is punishable with imprisonment for life, shall give notice to the public prosecutor unless it is, for reason to be recorded in writing, of opinion that it is not practicable to give such notice.

Section 439(1) (b) provides that any condition imposed by a magistrate when releasing any accused on bail can be set aside or modified by the HC or the COS.

Section 439 (2) provides for cancellation of bail granted under section 437(1) and in section 439(1).

In *Kanwar Singh Meena v. State of Rajasthan and Anothers*<sup>18</sup> the court observed that no doubt section 439 of the code confers wider power to Court of Session and HC regarding bail for granting and cancelling but, these courts also observe the same principles i.e. the gravity of the crime, the character, evidence, position and status of the accused, chances of the accused to flee from justice, likelihood of tampering evidence and influencing witnesses etc. The court

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<sup>17</sup> Section 439 says Special powers of High Court or Court of Session regarding bail

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

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

(b) that any condition imposed by a Magistrate when releasing an person on bail be set aside or modified: Provided that the High Court or the Court of Session shall, before granting bail to a person who is accused of an offence which is triable exclusively by the Court of Session or which, though not so triable, is punishable with imprisonment for life, give notice of the application for bail to the Public Prosecutor unless it is, for reasons to be recorded in writing, of opinion that it is not practicable to give such notice.

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

<sup>18</sup> (2012) 12 SCC 180

also stated that each criminal case presents its own peculiar factual situation and these peculiar facts also impinge on court in decision regarding bail.

#### **4.1 Cancellation of Bail**

As mentioned in above stated heading (bailable offences) bail granted under section 436 of Code can be cancelled on the breach of condition pertaining to presence of accused on specified date and time. This cancellation can be done by the same court under section 436(2). However, the court of magistrate has the power to cancel bail under section 437(5) in case where the court finds it necessary to do so.

Whereas, HC and COS can cancel bail granted under section 437 and in section 439(1) in section 439(2).

### **V. KINDS OF BAIL**

- a) Regular bail
- b) Default bail
- c) Anticipatory bail

#### **5.1 Regular bail**

The term 'regular bail' usual means bail application made by a person who is already arrested or in custody. It can be made in cognizable<sup>19</sup> and non bailable offences. This kind of bail application is usually filed under Section 437 (given by a court of magistrate) and under section 439 (given by a Court of Session or High court).

#### **5.2 Default Bail**

Default bail is given under proviso (a) of section 167(2) of the code. It states that if the investigating officer is not able to file the charge sheet within the ninety days, where prescribed punishment for an offence is either death, life imprisonment or ten years; or sixty days for any other offence, then the accused will get a right to be released on bail under chapter 33 of the code. Therefore, an accused must file an application on the expiry of the period and before the filing of the charge-sheet to avail the benefit provided under the provision. Hence, it is clear that this kind of bail is applicable after arrest. The period would start on the date when the accused is produced before the nearest judicial magistrate. The purpose of this bail is to give protection to right of liberty to those persons who are in judicial custody for a long time.

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<sup>19</sup> Section 2(c) of the Cr.P.C defines cognizable cases or cognizable offences as an offence 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.

In *Sanjay Dutt v. State through C.B.I Bombay (II)* court observed the word expression “availed of” must be understood to mean when the accused files an application and is prepared to offer bail on being directed, then it has to be considered as he has availed his indefeasible right provided under section 167(2). The court reaffirmed Sanjay Dutt case in *Uday Mohanlal Acharya v. State of Maharashtra*,<sup>20</sup> the court interpreted the phrase “availed of” where after expiry of period of sixty days, accused filed an application for being released on bail, however the magistrate rejected application on erroneous interpretation about non application of section and in meanwhile charge-sheet is filed, in this situation, the indefeasible right of the accused does not get extinguished.

In *Sadhwi Pragyna Singh Thakur v. State of Maharashtra*<sup>21</sup> the SC deviated from Sanjay Dutt and Uday Mohanlal case and observed that even if an application for bail is filed on the ground that the 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 enlarged on bail is lost.

In *Union of India through CBI v. Nirala Yadav*<sup>22</sup> the SC observed that an application for default bail must be decided on the same day on which it is filed. The postponement of hearing of an application would be contrary to the legislative scheme of Cr.P.C.

In *Rakesh Kumar Paul v. State of Assam*<sup>23</sup> the court observed that there is no discretion while granting default bail where accused satisfies prerequisites for grant thereof. The court also said that there is no ambiguity in wording of section 167(2) Cr.P.C inasmuch as if offence is punishable with death, imprisonment of life or with minimum sentence of ten years. Thus, where punishment is less than ten years and maximum sentence is not death and life imprisonment, there the accused would be entitled to default bail after 60 days, if charge-sheet is not filed.

### 5.3 Anticipatory bail

Section 438 of the Code deals with anticipatory bail. It is different from abovementioned kind of bails (regular bail and default bail), in a way that it is granted only before arrest. Section 438 states “*when any person has reason to believe that he may be arrested on accusation of having committed a non-bailable offence, he may apply to High court or the Court of Session for a direction under this Section that in the event of such arrest he shall be released on bail....*” It

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<sup>20</sup> AIR 2001 SC A1910.

<sup>21</sup> (2011) 10 SCC 445.

<sup>22</sup> AIR 2014 SC 3036.

<sup>23</sup> (2017) 15 SCC 67.

means both the courts i.e. the High Court and the Court of Session have concurrent powers with regard to anticipatory bail but judicial discipline requires that applicant should first move in Court of Session, as in case, bail is rejected by the Court of Session, then still applicant has an option to move application in High Court.

The object of anticipatory bail is to relieve a person from unnecessary apprehension of arrest and stigma attached with arrest. In *Gurbaksh Singh Sibbia v. State of Punjab*<sup>24</sup> the court held that an order of anticipatory bail grants protection against police custody followed by an arrest. Unlike a post arrest order of bail, it is pre-arrest legal process in which court directs that if the applicant is required to be arrested in a particular offence then he should be released on bail by the arresting authority. But, it does not mean anticipatory bail is a blanket order, it is applicable in case of a particular offence or case.

*Bhadresh Bipinbhai Sheth v. State of Gujarat*<sup>25</sup> the SC has held that while considering an anticipatory bail application under section 438, the court is not concerned with feasibility of framing charges or merits thereof, as that would be a matter of trial.

One fiery issue related with Anticipatory bail is whether it is available for a limited period of time or continues till the conclusion of trial of the case. There are two lines of judgments on this point i.e., one which states that anticipatory bail should not be limited for a particular period of time and reliance in this regard can be placed on the judgment of constitutional bench of the Supreme Court in *Gurbaksh Singh Sibbia*. In *Siddharam Satingappa Mhetre v. State of Maharashtra*<sup>26</sup>, a bench of two judges of the Supreme Court, took the view that the Constitution bench has held that anticipatory bail granted by the court should ordinarily continue till the conclusion of the trial of the case. The decision in *Siddharam Satingappa Mhetre* (supra) was followed in *Bhadresh Bipinbhai Sheth* case. The other line of judgment is that order of anticipatory bail should be for a limited period of time. *Slalauddin Abdulsamad Shaikh v. State of Maharashtra*<sup>27</sup> is one of the judgments which states that anticipatory bail should be for a limited period of time and ordinarily on the expiry of that limited period or extended period, the court granting anticipatory bail should leave it to the discretion of the regular court which is trying the case. The purpose stated to do so was not to bypass the authority of trial court. This view was followed in *K.L. Verma v. State*<sup>28</sup>, *Sunita Devi v. State of Bihar*<sup>29</sup>, and in *Adhri*

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<sup>24</sup> AIR 1980 SC 1632.

<sup>25</sup> (2016) 1 SCC 152.

<sup>26</sup> (2011) 1 SCC 694.

<sup>27</sup> (1996) 1 SCC 667.

<sup>28</sup> (1998) 9 SCC 348.

<sup>29</sup> (2005) 1 SCC 608.

*Dharan Das v. State of West Bengal*<sup>30</sup>. In *HDFC Bank Ltd v. J.J.Mannan*<sup>31</sup> the court has referred to Gurubaksh Singh Sibbia case and has taken the view that protection under section 438 is limited till the investigation is completed and charge-sheet is filed.

In *Sushila Aggarwal v. State (NCT of Delhi)*<sup>32</sup> the Supreme court held that in the light of the conflicting view of different benches, the court is of the view that the legal position need to be authoritatively settled in clear and unambiguous terms. Therefore, the Supreme Court referred the following questions for consideration by a larger Bench:

- a) Whether the protection granted to a person under section 438 of the Code should be limited to a fixed period so as to enable the person to surrender before the trial court and seek regular bail?
- b) Whether the life of an anticipatory bail should end at the time and stage when the accused is summoned by the court?

## VI. SUCCESSIVE BAIL APPLICATION

With the passage of time, a recent practice has emerged i.e. successive bail application. Under the code, where an application for bail is heard or denied by a court, the subsequent bail based on the same ground and on the same facts would not be entertained. Section 362 of the code states that save as otherwise provided by this code or by any other law for the time being in force, no court can review its judgment or final order which it has passed for final disposing of a case except to correct a clerical or arithmetical error. This bar lies against judgment and final order not against interlocutory order passed during the proceeding and, bail is an interlocutory order. Hence, section 362 does not have any application on bail.

However, it has been clearly specified that the doctrine of res-judicata is not applicable on bail but still courts are bound by the doctrine of judicial discipline. In *Kalyan Chandra Sarkar v. Rajesh Ranjan*<sup>33</sup> the apex court of country held that if a change of substantial nature in the facts and circumstances can be established in the second or subsequent bail application then there is no prohibition in entertaining second application. The court also said that there is no prohibition on filing of fresh bail application on the filing of charge-sheet provided that on the earlier occasions, the bail application is decided on the basis of other material, might be on the basis of First information report. So, the bail application submitted after filing of charge-sheet should

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<sup>30</sup>(2005)4 SCC 303.

<sup>31</sup> (2010) 1 SCC 694.

<sup>32</sup> (2018) 7 SCC 731.

<sup>33</sup>AIR 2005 SC 921.

be considered as a change of substantial nature.

In *LT. Col. Prasad Shrikant Purohit v. State of Maharashtra*<sup>34</sup> the court said that an accused person has a right to make successive applications for grant of bail, the court entertaining such subsequent bail application has a duty to consider the reason and ground on which the earlier bail application was rejected. And, in case where bail is granted, the court should record reasons which persuaded the court to take a view different from the one taken in earlier application.

## VII. DIFFERENT STAGES IN A CRIMINAL CASE WHERE BAIL CAN BE GRANTED

Bail can be filed in criminal proceeding at different stages –

- a) Bail grantable to a person who is arrested in connection of an offence; or
- b) Bail grantable to a person who has been an under trial prisoner for committing a non bailable offence; or ;
- c) Bail application filed by a person who is convicted by trial court and, filed an appeal against conviction in appellate court.

Clause (a) deals with the situation where a person has been arrested in connection of an offence which might be a bailable or non bailable offence. This kind of bail can be given by a court before which the accused has been produced for the first time after arrest, for the compliance of section 57.<sup>35</sup> In-fact, this is the situation where investigating authority has been doing investigation and it is not yet completed and, the investigating officer has some little evidence to prove material against the accused. This is the reason usually court rejects the bail at this stage. The court which grants the bail at this stage does not have the power to try the case.

Whereas, clause (b) specifically deals with the trial stage of a criminal case, it means the bail application is lying before the trial court which has the power to try case as per schedule – I. At this stage of criminal proceeding, the matter of bail is listed in the trial court. So, the court which has taken-up the bail application at this stage has more clarity about the involvement of the accused in committing crime in a manner, as the investigating authority has filed the police report under section 173 of the code<sup>36</sup>. So, when the trial court has refused the bail application

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<sup>34</sup> (2018) 11 SCC 458

<sup>35</sup> Section 57 of the Cr.P.C says that no police officer shall detain in custody a person arrested without warrant for a longer period than under all 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.

<sup>36</sup>Section 173 says- Report of police officer on completion of investigation.

(1) Every investigation under this Chapter shall be completed without unnecessary delay.

(2)(i) As soon as it is completed, the officer in charge of the police station shall forward to a Magistrate empowered to take cognizance of the offence on a police report, a report in the form prescribed by the State Government, stating-

it may be more justified for refusing bail but, when the court refused bail at this stage, the court has the duty to complete the trial expeditiously as specified in section 437(6) or if the trial has not begun, then to start it very soon. The rationale behind section 437(6) is to safeguard fundamental rights of the accused to get speedy trial.

In *Common Cause v. Union of India*<sup>37</sup>, the court held that if the court finds it is not proper to release the under trial prisoner at this stage of criminal proceeding, then the court should pass at least necessary orders for concluding trial as expeditiously as possible.

Clause (c) states when the question of bail arises after conviction and the decision of trial court i.e. conviction order has been challenged in appeal or revision as the case may be. The question of bail depends upon the quantum of sentence. The quantum of sentence can be divided into three categories: short-term sentence (a person sentenced to imprisonment up to 3 years), middle term sentence (more than 3 years and less than 7 years) and long term sentence (more than 7 years).

In case of short term sentence, the appellate court allows admission of appeal, it may release

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- a) The names of the parties;
  - b) The nature of the information;
  - c) The names of the persons who appear to be acquainted with the circumstances of the case;
  - d) Whether any offence appears to have been committed and, if so, by whom;
  - e) Whether the accused has been arrested;
  - f) Whether he has been released on his bond and, if so, whether with or without sureties;
  - g) Whether he has been forwarded in custody under section 170.

ii) The officer shall also communicate, in such manner as may be prescribed by the State Government, the action taken by him, to the person, if any, by whom the information relating to the commission of the offence was first given.

(3) Where a superior officer of police has been appointed under section 158, the report shall, in any case in which the State Government by general or special order so directs, be submitted through that officer, and he may, pending the orders of the Magistrate, direct the officer in charge of the police station to make further investigation,

(4) Whenever it appears from a report forwarded under this section that the accused has been released on his bond, the Magistrate shall make such order- for the discharge of such bond or otherwise as he thinks fit.

(5) When such report is in respect of a case to which section 170 applies, the police officer shall forward to the Magistrate along with the report-

(a) all documents or relevant extracts thereof on which the prosecution proposes to rely other than those already sent to the Magistrate during investigation;

(b) the statements- recorded under section 161 of all the persons whom the prosecution proposes to examine as its witnesses.

(6) If the police officer is of opinion that any part of any such statement is not relevant to the subject- matter of the proceedings or that its disclosure to the accused is not essential in the interests of justice and is inexpedient in the public interest, he shall indicate that part of the statement and append a note requesting the Magistrate to exclude that part from the copies to be granted to the accused and stating his reasons for making such request.

(7) Where the police officer investigating the case finds it convenient so to do, he may furnish to the accused copies of all or any of the documents referred to in sub- section (5).

(8) Nothing in this section shall be deemed to preclude further investigation in respect of an offence after a report under sub- section (2) has been forwarded to the Magistrate and, where upon such investigation, the officer in charge of the police station obtains further evidence, oral or documentary, he shall forward to the Magistrate a further report or reports regarding such evidence in the form prescribed; and the provisions of sub- sections (2) to (6) shall, as far as may be, apply in relation to such report or reports as they apply in relation to a report forwarded under sub- section (2).

<sup>37</sup> AIR 1996 SC 1619.

the convict on bail and order that the decision of trial court i.e. execution of conviction sentence be suspended<sup>38</sup> and, if the court thinks it proper to refuse bail then may record reasons in writing. And, in case of refusal, the court should reconsider for grant of bail in case where accused has lapsed half sentence as an under trial prisoner.<sup>39</sup>

### **VIII. CONCLUSION AND SUGGESTIONS**

The foremost object of the provisions relating to bail is protection of Right to Liberty. Deprivation of someone's Right to Liberty and Freedom affects not only the interest of an individual, rather it impacts also the welfare, well-being of the society at large. That is the reason, the code puts a mandate on courts/authorities to grant bail in bailable offences. Whereas, in case of non-bailable offences, the court has the discretion for granting bail but it does not mean that bail is not given in non bailable matters. Infact, there are various instances where the apex court made it clear that bail is a rule and jail is an exception. For the application of this rule, it must be kept in mind by the appropriate authorities that curtailment of someone's Right to Liberty and Freedom, must be supported by sufficient evidences proving guilt beyond reasonable doubt. So, the provisions relating to bail cannot be exercised casually and mechanically. The power should be exercised very consciously, considering basic tenants of criminal jurisprudence that every man is presumed to be innocent unless and until guilt is proved beyond doubts.

One another grey area in the application of law relating to bail is, in most of the cases, bail is granted at a very later stage, though the law expect it should be granted at appropriate stage in light of the facts of each case. If the court finds at initial stage of the case that there is no prima facie case against the accused in a non-bailable offence, it should grant bail in the interest of justice. It is pertinent to mention here that Court should also keep in mind that justice delayed is justice denied and keeping an under trial in jail for a period longer than required, is violation of his Constitutional as well as Human Rights.

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<sup>38</sup> Section 389 of the Cr.P.C provides for suspension of sentence pending the appeal; release of appellant on bail

<sup>39</sup>Section 436 A says Maximum period for which an under trial prisoner can be detained- Where a person has, during the period of investigation, inquiry or trial under this Code of an offence under any law (not being an offence for which the punishment of death has been specified as one of the punishments under that law) undergone detention for a period extending up to one-half of the maximum period of imprisonment specified for that offence under that law, he shall be released by the Court on his personal bond with or without sureties:

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

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

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