THE LEGAL FRAME WORK OR PRACTICAL IMPLICATION OF BAIL IN INDIA: A COMPREHENSIVE STUDY

A DISSERTATION TO BE SUBMITTED IN PARTIAL FULFILMENT OF THE REQUIREMENT FOR THE AWARD OF DEGREE OF MASTER OF LAWS

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SESSION 2022-23

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Acknowledging the wide panorama of people who helped and motivated me to complete this project, I am grateful in presenting to you the rare shades of marketing and technology by documenting the project **"THE LEGAL FRAME WORK OR PRACTICAL IMPLICATION OF BAIL IN INDIA: A COMPREHENSIVE STUDY"**

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ABBREVIATIONS

AIR	: All India Reporters
All Cr C	: Allahabad Criminal Cases
Cr L J	: Criminal Law Journal
Cr P C	: Criminal Procedure Code
H. C.	: High Court
Ibid	: Ibidem (In the same place)
Mad.	: Madras
Vol.	: Volume
V/s	: Verses
All L J	: Allahabad Law Journal
Art.	: Article
CWN	: Calcutta weekly Notes
DLT	: Delhi Law Journal
DB	: Division Bench
E.g.	: Example
FIR	: First Information Report
Id	: In the same place but at different page
I.e.	: That is to say
Infra	: Below
IPC	: Indian Penal Code
SC	: Supreme Court
SCC	: Supreme Court Cases
SCJ	: Supreme Court Journal
Supra	: As above
WR	: Weekly Reports
P & H	: Punjab and Haryana High Court

LIST OF CASES

(i) Ranjan Yadav @ Pappu Yadav v. State of Bihar

(ii) Gurcharan Singh v. State[28]

(iii) [179]ShriGurbaksh Singh Sibbia v State of Punjab (1980) 2 SCC 565)

(iv) Durga Prasad v State of Bihar

(v) Control Bureau v. Kishan Lal[138]

(vi) 991 Cr. L.J. 654 SC; Prem Narain Sharas v. State of U.P.,1992(2() ACC 423.0

(vii) Om Pdrakash v. State of M.P., 1993(2) Crimes 170;

(viii) Sewa Ram v. State (1992) 20 ACC 586;

(ix) Dasrath Lal v. State,1992 JIC 739 All.

(x) Om Pdrakash v. State of M.P., 1993(2) Crimes 170;

(xi) Sewa Ram v. State (1992) 20 ACC 586;

(xii) Dasrath Lal v. State,1992 JIC 739 All.

(xiii) Mahinder Kumar v. State of Panji, Goa, AIR 1995 SC 1157,

(xiv) T.P. Razak v. State of Kerala, 1995 Supp. (4) SCC. 256;

(xv) State of Punjab v. Jasbir Singh 1996(1) SCC. 288,

(xvi) State of Punjab v. Balbir Singh, (1994) 3 SCC. 299;

(xvii) Saiyad Mohd. Saiyad Umar Saiyad v. State of Gujrat; 1995(3) SCC 610;

(xviii) Ali Mustafa Abdul Rahman Moosa v. State of Keral, AIR 1995 SC 244.

(xix) Lawence D'Souza v. State of Maharashtra, 1990 Cr. L.J. 299;

(xx) Mari Appas Case 1990 Cr. L.J. 1990: Hakam Singh v. Union Territory of

Chandigarh,

(xxi) 1988 Cr.L.J. 528: Sewa Ram v. State, 1992 (29) ACC 586:

(xxii) Bhan Pratap Singh v. State of U.P. 1992 JIC 738 All;

(xxiii) Smt. Babi v. State of U.P. 1992(2) EFR 486;

(xxiv) Anand Goswamy v. State of U.P. 1992(2) EFR 486;

(xxv) Lal Mlohd. Siddiqui v. State of U.P., 1996 ACC All. 80.

(xxvi) Sew Ram's case (Supra).

(xxvii) Abdul Habibkhan v. Emperor, AIR 1928 All. 211

(xxviii) Emperor v. H.L. Hutchinson, AIR 1931 All 356.

(xxix) .Babu Mulla v.State of M.P., 19778 Cr. L.J. 1846.

(xxx) .Jivaji Jadeja v. State of Maharashtra AIR 1987 SC 1491: 1987 Cr.L.J. 1850.

(xxxi) .Lateef v. State of U.P. 1990 All. L.J. 659.

(xxxii) Babu Ram v. State of U.P., 1988 A. Cr. R. 464.

(xxxiii) .Dilip Kumar v. State U.P.. 1989 All. L.J. 1204.

(xxxiv) Malwati v. State of U.P.,Crim. Misc. Writ Petition No.-/1993d/on 7.4.1993, All H.C.

(xxxv) 10 Dr. Vinod Narain v. State of U.P. , Crim. Misc. Writ Petition No. 3643/1992 decided on 1.2.95 (FB) 1995 ACC 375 All.(FB).

(xxxvi) Lateef v. State of U.P., 1990 All. L.J. 1396 All (DB).

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CHAPTER 1

INTRODUCTION

Justice and Personal Liberty: Meaning and Significance

Justice, in its broadest sense, is the concept that individuals are to be treated in a manner that is equitable and fair.To achieve justice, individuals should receive that which they deserve, with the interpretation of what "deserve" means, in turn, drawing on numerous viewpoints and perspectives, including fields like ethics, rationality, law, religion, equity and fairness. The state may be said to pursue justice by operating courts and enforcing their rulings.[1]

It was held that the right to personal liberty constitutes not only the right to be free from restrictions placed on one's movements but also to be free from encroachments on one's private life. Thus, personal liberty was considered to include all the residual freedoms of a person not included in Article 19(1).

The law relating to enlargement of liberty of individual, which is also referred to as bail in criminal jurisprudence has its own dimension like any other aspect of any criminal law, as undergone tremendous transformation like any other branch of criminal law and now considered as the most important criminal jurisprudence. In the ancient time we were in primitive stage of development of humanity it was not recognize as such which is the present strata of the law relating to the bail but period of time, it‘s has developed with the development of civilization, and it has become articulated, in criminal procedure is across the world.

The concept of Bail is a very vital organization in criminal justice system. It prepare in twin objective and provide an opportunity to accused to continue with his life activities enabling an accused to continue with his life activities enabling an accused to continue with his life activities and at the same time providing a mechanics to seed to ensure the presence of accused at the time of trial.[1]

Bail is too common a term in the legal sphere to need any explanation as to its

[1] Moore, Margaret (November 2021). "Justice Principles, Empirical Beliefs, and Cognitive Biases: Reply to Buchanan's 'When Knowing What Is Just and Being Committed to Achieving it Is Not Enough'". *Journal of Applied Philosophy*. **38** (5): 736–741. doi:10.1111/japp.12547. ISSN 0264-3758. S2CID 245448304

meaning and purpose. Even the non-litigant public or a man of ordinary prudence does have the common knowledge about availability of a bail facility to an offender in between the stages of his arrest and the trial in law Court.

In *Ranjan Yadav @ Pappu Yadav v. State of Bihar,*[3] the Apex Court held that the bail is not invariably a way out to get relief from such detention or custody as a matter of course. In actual dispensation, the decision to grant or refuse the bail hinges on the merits of each case and particularly on due consideration of whether the case inter-alia involves aspects of:

1. Non-cognizable offence punishable with death or life imprisonment or imprisonment for a term not less than ten year,
2. heinousness of the charge,
3. question of jurisdiction
4. antecedents of abuse of the bail

1.2. Bail Justice and Personal Liberty.

At the pre-trial stage, every accused person is presumed to be innocent until the matter is finally disposed of by a competent Court. Simply because a person has been charged with an alleged offence, he does not lose his right to protection of life and personal liberty. He has, till the final disposal of the case against him, the same right as enjoyed by any other citizen under the Constitution of Indian and other provision of the law of the land. That is why various High Courts and the Hon'ble Supreme Court in India have held in their judgment that "grant of bail is a rule and refusal is an exception". The requirement of the law to enlarge a person on bail is expressive concerning that the personal liberty of an accused shown in accordance with the procedure established by law. The principle aim of the bail is removal of restrictive and punitive consequences of pre-trial detention of an accused.

The main object to grant bail is to change restrictive and punitive consequences of pre-trial detention of an accused. This object is achieved by delivering him to the custody of his surety who may be a third person. Such custody may also be given to accused himself by way of his furnishing a bond that on demand made upon him to

attend; he will be ready to attend, before the Court. It is an obligation on the part of law enforcement agencies that if a criminal process is initiated by the alleged action of a wrong-doer, it is to be completed. Accordingly, the grant of bail for release may be allowed with appropriate conditions which may resultantly cover three types of situations namely,

(a) Where the custody is deemed to be safe with the accused himself,

(b) Where it is entrusted to the surety,

(c) Where it may be entrusted to the state for safe custody. The mechanism of bail is thus meant for manouevring a best arrangement for custodial control of the accused in

the system. The bail is matter of lawful right for safe keeping of the accused to answer an accusation. In order to implement the right, the mechanism of bail has been designed to handover the custody of the accused either to self or a surety or to the state, but in each case the accused is to be assured of the beneficial enjoyment of regular liberty.

1.3. **Purpose, meaning and Object of bail**

PURPOSE OF BAIL

The principal purpose of bail is to ensure that an accused person will return for trial if he is released after arrest. It is not the purpose of the criminal law to confine a person accused of crime before his conviction. Bail, in criminal cases is, therefore, intended to combine the administration of justice with the liberty and convenience of the person accused. Administration of justice on the spot or immediately after the commission of a crime in accordance with the fundamental principles of natural justice embedded in a fair and just legal system is not feasible. This appears to be one of the reasons for the evolution of

the bail jurisdiction in any legal system. The release on bail is crucial to the accused as the consequences of pre-trial detention are given. If release on bail is denied to the accused, it would mean that though he is presumed to be innocent till the guilt is proved beyond reasonable doubt, he would be subjected to the psychological and physical deprivations of

jail life. The jailed accused loses his job and is prevented from contributing effectively to the preparation of defence. Equally important, the burden of his detention frequently falls heavily on the innocent members of his family.[17] After the registration of crime, it takes time to complete the investigation and thereafter, it takes even longer to conclude the trial. It is a matter of common experience that the judicial machinery, more particularly in India, is ill-equipped to provide a speedy trial to the accused in conformity with well-established principles of criminal jurisprudence. The question, whether an accused should be kept in the prison or set free pending investigation and trial, therefore, falls for consideration before the Court in every criminal case where the accused is under arrest. An accused person cannot be detained in judicial custody for a long time by refusing him bail if the legal system is not in a position to provide a speedy trial. The inability of the judicial system to provide an expeditious trial to the accused should always be kept in mind while dealing with the issue of bail. Keeping a person behind bars without providing him a quick trial is quite incongruous to the concept of personal liberty, which is a basic human right. The under-trial prisoner, therefore, cannot be allowed to suffer in jail for an indefinitely long time.

Bail meaning:

Webster's new 7th dictionary defines bail as follows:

"Bail is a security given for the due appearance for the prisoner in order to obtain his release from imprisonment; a temporary release of a prisoner upon security of one who provides bail"[2]

"To set at liberty a person arrested or imprisoned on security being taken for his appearance on date at a certain place, which security is called bail because the person arrested or is delivered on the hands of these who bind themselves or become bail for his due appearance when required in order that he may be safely protected from prison to which of they have, of they fear his escapr, rtc;l the legal power to deliver him".[3]

"To set at liberty a person arrested or imprisoned, or security being taken for his appearance on a day and at a place certain..... because the party

[2] Websters *7th new Judicial Dictionary.*
[3] Wharton's *Law Lexicon.*

arrested or imprisoned is delivered into the hands of those who bind themselves or become bail for his due appearance when required in order

that he may be safely protected from the prison .....”[44]

Our Supreme Court defines bail as ‘a technique which is evolved for effecting the synthesis of two basic concepts of human value, viz., the right of an accused to enjoy his personal freedom and the public’s interest on which a person’s release is conditioned on the surety to produce the accused person in the Court to stand the trial’.

Object of Bail

The primary object of bail is to ensure that an accused person will appear at thetime of trial if he is released after arrest.

"*The principal aim of bail is removal of restrictive and punitive consequences of pretrial detention of an accused. This is achieved by delivering him to the custody also of his surety who may be third party. Such custody may also be given to one's ownself by way of his furnishing a bond that on demand made upon him to attend he will readily attend the court.*"[5]

Administration of justice on the spot or immediately after the commission of a crime in accordance with the fundamental principles of natural justice embedded in a fair and just legal system is not feasible. This seems to be one of the reasons for the genesis of the bail jurisdiction in any legal system. So the purpose of bail is not to confine an accused person before his conviction. Bail, in criminal cases, is therefore, intended, to combine the administration of justice with the liberty and convenience of the person accused.[6]

1.1 REVIEW OF LITERATURE

Janak Raj Jai in his book “Bail Law and Procedures” discussed elaborately that it is a well settled law, that grant of bail is a rule and refusal of the bail is an exception. Unfortunately, the letter and spirit of the law is not adhered to by most of the Courts in our country. Personal liberty of an individual citizen and right to life under Article 21 of the Constitution is the most precious fundamental right which cannot be jeopardized by any agency or institution whatsoever. A government founded on anything except liberty and justice cannot

[4] Venkatrammaiya’s *Law Lexicon*, 2nd edition, vol I at pp 260-61

[5] M.R. Mallick, *Bail Law and Practice* 2 (Eastern law house, Kolkata 5th ed. 2014)[21]

[6] Asim Pandya, *Law of Bail Practice and Procedure* 7 (lexis nexis, haryana 2013) [22] Ibid.

stand. All the wrecks on either side of the stream of time, all the wrecks of great cities and all the nations that have passed away–all are a warning that no nation founded upon injustice can stand. Personal liberty of a citizen, therefore, is certainly deprived when the bail is refused. It is too precious a value of a constitutional system recognized under Article 21 of the Constitution. After all, personal liberty of an accused is fundamental, suffering lawful eclipse only in terms of procedure established by law. Keeping in view the fundamental right of each and every individual citizen irrespective of caste,

colour or creed, a very humble effort has been made by the author in this book to deal with the provisions and procedure for the grant of bail as per the letter and spirit of the law of the land.[7]

P.V. Ramakrishna, described the right to liberty is one of the fundamental rights guaranteed by the modern constitution of all the civilized countries. The right is as well recognised in India as in other foreign countries and the constitution of India contains detailed provisions relating to the fundamental rights. Further the constitution reflects the tendency of modern civilization to shift the emphasis from the individual to the community and at the same time it has struck a balance between individual liberty and social control. It is in the background of the constitution that the law relating to „bail" is being shaped and as such a brief survey of the fundamental rights has been made in the first chapter of his book. This book deals with the law of bail, bonds, arrest and custody at length. Bail is a mechanism by which by which the adverse consequences of delay before trial can be minimised. Attention of the author unfold minutely the minutely the nature of the law of bails, the principles on which it is founded, and the practical rules connected with its administration to facilitate the readers understand the basic nuances of the law. Most recent judicial decisions of Supreme Court and High Courts have been added in good measure.[8]

[7] http://elib.bvuict.in/moodle/pluginfile.php/184/mod_resource/content/0/Bail%20and%20Judicial%20Discretion%20-%20A%20Study%20of%20Judicial%20Decissions%20-%20Navneet%20 Prabhakar.pdf

[8] Janak Raj Jai, Bail Law and Procedures, Universal Law Publishing, 6th edition, 2015.

Asim Pandey, in his book Law of Bail Practice and Procedure, described the law of bail plays a very important role in the administration of justice. Law of bail Practice and Procedure has been conceptualized as a handy reference work to cater to the needs of lawyers and judges in day to day court practice. The law of bail is of supreme importance since it is directly and intimately connected with the liberty of a person which is safeguarded in article of the constitution. It

is always difficult to decide bail applications without being influenced by external and internal forces which drive a judge to form a particular opinion.[9]

V.R. Krishna Ayer, Grant of Bail: Practice and Procedure**,** Justice V.R. Krishna Ayer in his judgment in case *Gudikanti Narsimulu v. Public Prosecutor*[10] says "significance and sweep of Article 21 make the deprivation of liberty, ephemeral or enduring, a matter of grave concern and permissible only when the law authorizing it, is reasonable, even handed and geared to the goals of community good and State necessity spelt out in Article 19. Reasonableness postulates intelligent care and predicates that deprivation of freedom by refusal of bail is not for punitive purpose but for the bifocal interests of justice to the individual involved and society affected." Justice Krishna Iyer also mention that the code is cryptic on the topic of bail and the Court prefer to be the order custodial or not. And yet the issue is one of the liberty, justice, public safety and burden of the public treasury all of which insist that a developed jurisprudence of bail is integral to a socially sensitized judicial process. Rowena Jones, Bail law and practice: Recent Developments, in this paper, author describe that bail in New South Wales is allowed in every case except where the accused is involved in charges of murder rape or drug offences. In Australia we may see bail hostels. The accused persons who have been granted restrictive Bail or where the trial process is in progress in such cases the accused persons are kept in bail hostel.

Max Taylor, Response by NSW council for civil liberties to review of NSW Bail Act, 1978. Max Taylor says NSW Bail Act 1978 is not humanistic. Presumption in favour of bail has been removed from the Act which must be restored then alone the council for civil liberties

[9] P.V. Ramakrishna, Law of Bails, Universal Law Publishing, Ninth Edition, 2016.

[10] *Gudikanti Narsimulu v. Public Prosecutor*

will give its opinion on the Act. All over the world presumption of innocence of the arrestee is eroding and judges are also swayed by the public opinion and articles published by the courts. This article contains provisions regarding the presumption favouring the bail in all crimes even in those cases where there is no provision of right to bail in some offences. The author has contended in his report that no provision has been set up in the bail Act 1978, regarding restriction or limitation over the bail in a special condition, the author has also pointed out that in this act there is no minimum or maximum limit has been mentioned respect to application of bail that the accused may apply in the Court.[11]

[11] Queensland Parliamentary Library, Research Publications and Resources Section, Brisbane, March 2000 ISSN 1325-1341 ISBN 0 7242 7866 4, https://www.parliament.qld.gov.au/documents/explore/ResearchPublications/researchBulletins/rb0100kc.pdf

1.2 SIGNIFICANCE OF STUDY

In this research I would like to work out to evaluate the existing provisions of bail. The basis on which bail is granted while exercising the judicial discretion. Whenever an application for bail is made to a court, the first question that it has to decide is whether the offence for which the accused is being prosecuted is baillable or otherwise. If the offence is bailable, bail will be granted under Section 496 of the Code of Criminal Procedure (of 1898) equivalent to Section 436 of Criminal Procedure Code, 1973 without more ado; but if the offence is not bailable, further considerations will arise and the Court will decide the question of grant of bail in the light of those further considerations such as, nature and seriousness of the offence, the character of the evidence, circumstances which are peculiar to the accused, a reasonable possibility of the presence of the accused not being secured at the trial, reasonable apprehension of witnesses being tampered with, the larger interests of the public or the State, and similar other considerations which arise when a court is asked for bail in a non-bailable offence.[12]

It is clear that an unnecessarily prolonged detention in prison of under trials is against the law and justice which is the main object of Indian constitution by declaring in the preamble of the constitution, equal justice to every person, the law of bails should have too much discretion in grant of bail and guidelines must be codified. The study is to contribute to literature on bail. Bail is a right and in the interest of liberty bail must be granted. There are stringent laws passed by parliament every alternate year which have been denuded of the safeguards for innocent persons who might be arrested on suspicion.

1.3 OBJECTIVE OF THE STUDY

The aim of my study is about to highlight the drawback of the bail system in India as the matter of bail is largely a matter of discretion. So such discretion

has to be exercise not arbitrarily but judiciously on the basis of norms which by now have become fairly established but not followed properly.

- The study will highlight the demerit of refusal of bail in minor and petty

[12] New Council for Civil Liberties Submission to the New South Wales Law Reform Commission (NSWLRC) In Relation to the Review of the Law of Bail, http://www.lawreform.justice.nsw.gov.au/Documents/Completed-projects/2010-onwards/Bail/Submissions/BA03.pdf

offences due to exorbitant money as security.

- The study will help to analysis the concept of anticipatory bail, as not to allowed the alleged criminal to disappear evidences.
- To suggest to classify certain offences in which bail must not be granted as in cases of acid-attack, gang-rape, offences against children etc.
- Our bail system suffers from property oriented approach which seems to proceed on the erroneous assumption that risk of monetary loss is the only deterrent against fleeing from justice.

1.4 HYPOTHESIS

- Whether the existing criteria granting and refusing bail is sufficient.
- Whether the societal interest override in certain heinous crimes such as gang-rapes, acid-attacks against individual liberty as denying bail.
- Whether monetary bond are sufficient or required some stringent security regarding bail.
- Whether the existing criteria for exercising the judicial discretion fulfilling the present needs.

1.5 RESEARCH METHODOLOGY TO BE OPTED

The present research work requires theoretical study of the topic. The theoretical work will deal with judicial decisions relate to grant or refusal of bail. The study will include the comprehensive study through the libraries, journals, Case laws and books. The entire study is concerned to the analysis of bail provision in India. This study comprised doctrinal form of research. Doctrinal research is done with help of primary sources including Acts, legislation, bylaws, ordinances and secondary sources are the various judgements prounced by the Hon‟ble Supreme Court of India and the other High Courts in India.

CHAPTER 2
CONCEPT OF BAIL IN INDIA

2.1. BAIL UNDER THE CRIMINAL PROCEDURE, 1973

The Criminal Procedure Code, 1973 confers the power to the police to release an accused on bail. Any person arrested by police officer has to be released on bail if he is arrested without warrant or order from the Magistrate under the circumstance mentioned in this act and that if the offence with which he is charged is a bailable offence.[13] Also in case a person when arrested by the police officer in relation to non cognizable offence ground that he refused to give his correct name or address may be release on executing a board with or without surety to appear before a Court if he required. The officer incharge of police station may in his discretion release any person accused of or suspected of the commission of non bailable offence arrested.[14]

The Criminal Procedure Code, 1973 authorizes any Magistrate either Judicial or Executive to arrest or order the arrest of any person who has committed any offence in his presence. Since he can order ones arrest, he also has the power to release him on bail. It has been held that Magistrate arresting a person is not a Court, so detaining such person beyond 24 hours would be illegal normally.[15]

The Criminal Procedure Code, 1973 confers the power upon the Sessions Judge to take up bail application of an accused against whom the investigation is pending and the bail of such accused has been refused by the Sessions Judge at the investigation stage.[16] In *Gurcharan Singh v. State*[17], The Apex Court has clearly drawn the distinction between the powers of Magistrate under section 437 and power of the Court of Session or High Court under section 439 of Criminal Procedure Code If a person

[13] Section 43, The Criminal Procedure Code 1973

[14] New Council for Civil Liberties Submission to the New South Wales Law Reform Commission (NSWLRC) In Relation to the Review of the Law of Bail, http://www.lawreform.justice.nsw.gov.au/Documents/Completed-projects/2010-onwards/Bail/Submissions/BA03.pdf

[15] Halsburys *Laws of England*, London Butterworth's, Vol I, 4th Edition. para 166

[16] Section 41, The Criminal Procedure Code 1973

[17] *Gurcharan Singh v. State*

has been arrested by a police officer and with a reasonable ground to believe that he has committed an offence which is punishable with life imprisonment or death, then in that case Magistrate will have no discretion to grant bail at that point of situation.

4(c)- LAW COMMISSION OF INDIA 48th REPORT.

1. Anticipatory bail

Para 31 of the 48th law commission discussed in short on the bill recommended by the 41st PRACTICAL IMPLICATION OF BAIL IN INDIA. It discussed on the provision of grant of anticipatory bail. The present commission agreed with the addition of the provisions in the bill, but added that the power should be exercised in very exceptional cases.

Further the commission was of the view that in order to ensure that the provision is not put to abuse at the instance of unscrupulous petitioners the final order should be made only after the notice of to the public prosecutor. The initial order should only be an interim one. Further the relevant section should make it clear that the direction can be issued for reasons to be recorded, and that if the Court is satisfied that such a direction is necessary in the interest of justice.

The commission further added "it will also be convenient to provide that notice of the interim order as well as of the final orders will be given to the superintendent of police"[18]

4 (d) THE LAW COMMISSION of INDIA 154th REPORT:

A person accused of a bail able offence is entitled to be released on bail as a matter of right if he is arrested or detained without

warrant. But if the offence is non-bail able, depending upon the facts and circumstances of the case, the court may grant bail on its discretion. The scope of discretion varies in inverse proportion to the gravity of the crime. The courts have formulated the following guidelines for grant of bail in non-bail able offences.:

a. the enormity of the charge;
b. the nature of the accusation;

[18] 48th Law Commission report

c. the severity of the punishment which the conviction will entail.
d. the nature of the evidence in support of the accusation;
e. the danger of the accused person absconding if he is released on bail;
f. the danger of witnesses being tampered with;
g. the protracted nature of the trial;

With the above provisions there arose a very important question which the law commission took seriously as poverty is a big problem in our country and expressed the question in the following words:

"Does the bail system discriminate against the poor?"

·4(e)-LAW COMMISSION OF INDIA 203rd report.

This Report deals with Section 438 of the Code of Criminal Procedure, 1973 as amended by the Code of Criminal Procedure (Amendment) Act, 2005. This Section provides for a direction from the Court of competent jurisdiction, viz. the High Court or the Court of Session, for grant of bail to person apprehending arrest in the event of his arrest. This is popularly known as 'Anticipatory Bail', that is to say, bail in anticipation of arrest. The amended Section has not yet been brought into force

"The Code of Criminal Procedure (Amendment) Act, 2005 has a provision vide clause 38 to amend Section 438 Cr.P.C. to the effect that

(i) The power to grant anticipatory bail should be exercised by the court of session or high court after taking into consideration certain circumstances;

(ii) If the court does not reject the application for the grant of anticipatory bail, and makes an interim order of bail, 8 it should, forthwith give notice to the public prosecutor and superintendent of police and the question of bail would be reexamined in the light of the respective contentions of the parties; and

(iii)The presence of the person seeking anticipatory bail in the court should be made mandatory at the time of hearing of the application for the grant of anticipatory bail subject to certain exceptions.

2. Pre-Amended Law

Section 438 provides for Court's direction for grant of bail to person apprehending arrest. Such a bail is popularly referred as anticipatory bail as it is granted in anticipation of arrest. This is a new provision in the present Code. The earlier Code of Criminal Procedure, 1898, did not contain any specific provision regarding anticipatory bail. In the absence of specific provision under the Old Code, there was a difference of opinion among the High Courts of different States on the question as to whether Courts had the inherent power to pass an order of bail in anticipation of arrest, the preponderance of view being that it did not have such power.[19] The new provision in Section 438 was inserted in the Code after the recommendation of the Law Commission's 41st Report.

In this Report, the Law Commission made the following observations on 'anticipatory bail' viz.

"Anticipatory Bail:- The suggestion for directing the release of a person on bail prior to his arrest (commonly known as "anticipatory bail") was carefully considered by us. Though there is a conflict of judicial opinion about the power of a Court to grant 12 anticipatory bail, the majority view is that there is no such power under the existing provisions of the Code. The necessity for granting anticipatory bail arises because in the opinion of the commission sometimes influential persons try to implicate their rivals in false causes for the purpose of disgracing them or for other purposes by getting them detained in jail for some days. In recent times, with the accentuation of political rivalry, this tendency is showing signs of increase. Apart from false cases, there are reasonable grounds for holding that a person accused of an offence is not likely to abscond, or otherwise misuse his liberty while on bail, then there seems no justification to require him first to submit to custody be in prison for some days and then apply for bail the law commission recommended acceptance of the suggestion. Further that this special power should be conferred on the High Court and the Court of Session, and that the order should take effect at the time of arrest or thereafter, but it was not found practicable to exhaustively enumerate those conditions; also, the laying down

[19] *ShriGurbaksh Singh Sibbia v State of Punjab* (1980) 2 SCC 565)

of such conditions would amount to pre-judging (partially at any rate) the whole case. Hence it was left to the discretion of the court and the commission did not fetter such discretion in the statutory provision itself with expectation that superior Courts would, exercise their discretion properly, and not make any observations in the order granting anticipatory bail which will have a tendency to prejudice the fair trial of the accused."

Based on the 41st Report of the Law Commission, Government introduced the Criminal Procedure Code Bill, 1970. In the Statement of Objects and Reasons of the Bill of the Code of Criminal Procedure in respect of Clause 447 which was incorporated in the Code as Section 438, it was stated as follows:

"As recommended by the Commission, a new provision was made enabling the superior Courts to grant anticipatory bail, i.e., a direction to release a person on bail issued even before the person is arrested. With a view to avoid the possibility of the person hampering the

investigation, special provision is being made that the Court granting anticipatory bail may impose such conditions as it thinks fit. These conditions may be that a person shall make himself available to the Investigating Officer as and when required and shall not do anything to hamper investigation."

From the Statement of Objects and Reasons for introduction of Section 438 of the Code, it is apparent that the framers of the Code on the basis of recommendation of the Law Commission purported to evolve a device by which a citizen is not forced to face disgrace at the instance of influential persons who try to implicate their rivals in false cases; but the Law Commission, at the same time, had also issued a note of caution that such power should not be exercised in a routine manner. (*Durga Prasad* v *State of Bihar)*[20]

The Bill was referred to the Joint Committee of both the Houses. In the meantime, Government decided to seek the opinion of the Law Commission on few points, the reasons for which were stated as follows:-

[20] ®, 1987 Cri. L.J.1200

"Ás there are divergent opinions on certain points which are being considered by the Joint Committee in respect of the said Bill, the Government would like to have the considered opinion of the present Law Commission on certain specific points hereinafter mentioned. As the consideration of the Bill, clause by clause, has already been taken by the Joint Committee of Parliament, it would not be necessary to refer the whole Bill for the opinion of the Law Commission afresh. But the Government would very much like to have the considered opinion of the Commission on a few specific points which has arisen for consideration." These points, inter alia, included Provision for grant of anticipatory bail".

The Commission submitted 48th Reports on these points. As regards anticipatory bail, the Report stated as follows:-

"The Bill introduces a provision for the grant of anticipatory bail. This was in accordance with the recommendation made by the previous Commission. It was expected that this would be a useful addition though it is in very exceptional cases that such a power should be exercised. In order to ensure that the provision is not put to abuse at the instance of unscrupulous petitioners, the final order be made only after notice to Public Prosecutor. The initial order only be an interim one. Further, the relevant Sections make it clear that the direction can be issued only for reasons to be recorded and if the Court is satisfied that such a direction is necessary in the interest of justice. That notice of the interim order as well as of the final orders will be given to the Superintendent of Police forthwith,"[21]

It appears that the aforesaid recommendations did not find favour with the Government as can be gathered from the text of Section 438 as ultimately enacted in the Code of Criminal Procedure, 1973. 2.9 The Joint Committee of the Parliament made the following observations in respect of Clause 436, which was the original clause 447 of the Code of Criminal Procedure Bill, 1970:- "The Committee is of the opinion that certain specific conditions for the grant of anticipatory bail should be laid down in the clause itself for being complied with before the anticipatory bail is granted. This clause has been amended accordingly".

Clause 436 was then enacted as Section 438 of the Code of Criminal Procedure, 1973, which reads as follows:- "438. Direction for grant of bail to person apprehending arrest.

[21] [48 th Report of Law Commission of India, July 1970

(1) When any person has reason to believe that he may be arrested on an accusation of having committed a nonbailable offence, he may apply to the High Court or the Court of Session for a direction under this Section; and that Court may, if it thinks fit, direct that in the event of such arrest, he shall be released on bail.

(2) When the High Court or the Court of Session makes a direction under sub-section (1), it may include such conditions in such directions in the light of the facts of the particular case, as it may think fit, including –

i. a condition that the person shall make himself available for interrogation by a police officer as and when required;

ii. a condition that the person shall not, directly or indirectly, make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to any police officer; 17

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

iv. such other condition as may be imposed under subsection (3) of Section 437, as if the bail were granted under that Section. (3) If such person is thereafter arrested without warrant by an officer-in-charge of a police station on such accusation, and is prepared either at the time of arrest or at any time while in the custody of such officer to give bail, he shall be released on bail; and if a Magistrate taking cognizance of such offence decides that a warrant should issue in the first instance against that person, he shall issue a bailable warrant in conformity with the direction of the Court under subsection (1).

3. RECOMMENDATIONS

The commission made the following recommendations:

(i) The proviso to sub-section (1) of Section 438 shall be omitted.
(ii) Sub-section (1B) be omitted.
(iii) A new sub-section on the lines of Section 397(3) should be inserted.

(iv) An Explanation be inserted clarifying that a final order on an application seeking direction under the section shall not be construed as an interlocutory order for the purposes of the Code.

(v) The text of Section 438 so revised will be as follows: "438. Direction for grant of bail to person apprehending arrest (1) Where any person has reason to believe that he may be arrested on accusation of having committed a non bailable offence, he may apply to the High Court or the Court of Session for a direction under this section that in the event of such arrest he shall be released on bail; and that Court may, after taking into consideration, inter alia, the following factors, namely[22]

(i) the nature and gravity of the accusation;

(ii) the antecedents of the applicant including the fact as to whether he 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; and

(iv) If the accusation is made with the object of humiliating the applicant by having him arrested, either reject the application forthwith or issue an interim order for the grant of anticipatory bail.

Where the Court grants an interim order under sub-section

(1), it shall forthwith cause a notice being not less than seven days notice, together with a copy of such order to be served on the Public Prosecutor and the Superintendent of Police, with a view to give the Public Prosecutor a reasonable opportunity of being heard when the application shall be finally heard by the Court.

Explanation: The final order made on an application for direction under sub–section (1) shall not be construed as an interlocutory order for the purposes of this Code. When

the High Court or the Court of Session makes a direction under sub-section (1), it may include such 95 conditions in such directions in the light of the facts of the particular case, as it may think fit, including:

[22] 203rd law commission report

(a). a condition that the person shall make himself available for interrogation by a police officer as and when required;

(b). a condition that the person shall not, directly or indirectly, make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to any police officer;

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

(iv) such other condition as may be imposed under subsection (3) of Section 437, as if the bail were granted under that section. 4. If such person is thereafter arrested without warrant by an officer in charge of a police station on such accusation, and is prepared either at the time of arrest or at any time while in the custody of such officer to give bail, he shall be released on bail, and if a Magistrate taking cognizance of such offence decides that a warrant should issue in the first instance against that person, he shall issue a bailable warrant in conformity with the direction of the Court under sub-section (1). 96 5. If an application under this section has been made by any person either to the High Court or the Court of Session, no further application by the same person shall be entertained by the other of them.

CHAPTER 3
LEGAL FRAMEWORK IN INDIA

3.1. Bail under the Criminal Procedure Code of 1882 (Old Code).

The **Code of Criminal Procedure** (CrPC) was first drafted in **1882** and continues to be in use with amendments from time to time. In medieval India, subsequent to the law set by the Muslims, the Mohammedan Criminal Law came into prevalence. The British rulers passed the Regulating Act of 1773 under which a Supreme Court was established in Calcutta and later on at Madras and in Bombay. The Supreme Court was to apply British procedural law while deciding the cases of the Crown's subjects.

After the Rebellion of 1857, the crown took over the administration in India. The Indian Penal Code, 1861 was passed by the British parliament. The CrPC was created for the first time ever in 1882 and then amended in 1898, then according to the 41st Law Commission report in 1973.

3.2. Bail under the new code of 1973.

Provisions of bail have been given in chapter 33 of the Criminal Procedure Code, 1973. Sections 436 and 437 of the code have conferred the powers of bail on officer in charge of police station and court of Magistrate, Here the word "Court" means the court having jurisdiction over the area.

Thus while releasing a person on bail, the court has first to determine his jurisdiction over the matter.

The powers of bail under section 436 and 437 of the Code have been conferred on that court only which has a jurisdiction to take cognizance and try the person accused of an offence.[23] Allahabad High Court has also the same view[24] and held that bail order passed by court not having jurisdiction to take cognizance and try the accused of such offence is bad in law. In a

[23] Sidheshwar Singh v. State of Bihar, 1976 Cr. L. J. 1151.

[24] Randhir Singh v. Desh Raj Singh Chauhan, 1983 All . L. J. 1051 All.

Full Bench Case[25] Patna High Court held that under section 437, Magistrate having jurisdiction to take Cognizance and try such offence will have power to grant bail.

Thus, for the purpose of ascertaining the jurisdiction of taking cognizance or try such offence, court has to see:

Whether the accused has been detained in custody?

[25] . Syed Zafrul Hasan v. State, AIR 1986 Pat. 186.

2. Whether the said offence, leveled against the accused is bailable or non-bailable? with the position in society occupied by the person released on bail[26].

Demanding local surety or cash surety is improper and illegal[27]. But to avoid any criticism accused may he offer cash security in place of bail bonds, cash surety is as much effective as bail bonds.[28]

3.2.1 UNCONDITIONAL BAIL:

While granting bail in the bailable offence, the officer or court has no power to impose any condition except the demanding of security with surety. The conditions that till the conclusion of trial accused shall not enter into the land in question[29] or accused shall not deliver any speech or make any demonstration during bail[30], are illegal.

Similarly accused cannot be bound down to appear in court during pre-trial stage.[31]

(i) Police Custody Remands:

If the accused is ready to furnish bail-bonds then the accused under Section 167(2) of the code cannot be given on police custody remand in bailable offences.[32]

(ii) Refusal of bail in bailable offences:

Sub- section (2) of section 436 of the Code empowers the Court to refuse bail in bailable offence if the person accused of a bailable offence fails to comply with the conditions of bail bonds as regards time and place at attendance.[33] But the High Court or Court of Session

[26] Baxi Sardari Lal v. Tehar Central Jail, 1968 Cr. L.J. 675; Moti Ram v. State of M.P., 1978 Cr.L.J. 1703;AIR

[27] 1978 SC 1594; 1978 S.C.C.(Cri)485.

[28] Moti Ram (Supra).

[29] Surendra Lal Das v. Latika Das, 1977 Cr. L. J. 485.

[30] Kota Appal Knoda, 44 Cr. L.J. 1943 (page 202).

[31] Rox v. Cenda Singh, 51 Cr. L. J. 1950 Page 1377 (All.).

[32] Free Legal Aid Committee v. State of Bihar, 1982 Cr. L. J. 1943 (SC).

[33] Kanu Bhai Chhagan Lal v. State of Gujrat, 1973 Cr. L. J. 533.

under section 439(2) of the code is empowered to order the arrest of a person already on bail in an offence including bailable offence and commit him to custody canceling his bail bonds. But the court of Magistrate has no such power.

The Magistrate or the Court of Session had no power to cancel bail in bailable offence, yet the High Court had inherent power to cancel bail in bailable offence granted to a person accused of on offence and in proper case such power could be exercised in the interest of justice.[34] Now this power of High Court is given in section 482 of the Code.[35] Once the application for cancellation of bail after hearing the parties has been rejected then subsequent application should not been moved to harass the accused without new material against him.[36]

(iii) Notice:

There is no provision for any notice to be given to public prosecutor before granting bail to a person accused in bailable offence.

(iv) Executive instructions inconsistent with Section 436 are ultavires:

The executive instructions of District Supdt. of Police not to release on bail the persons charged with bailable offence to all the subordinate Sub-Inspectors is contrary to the mandatory provision of Section 436 and as such ultra vires and illegal.

(v) Security Proceedings:[37]

Any person other than a person accused of non-bailable offence is to be released on bail as a matter of right. But the second proviso of sub-section (1) of section 436 excludes the provisions of section 116(3) Cr. P.C. or Section 446-A of Cr.P.C. from the purview of Section 436. If a person has been directed to furnish interim bond under S. 116(3) under security proceedings, he can be taken into custody on his failure to furnish the interim bond called under Section 116(3) Cr.P.C. Such person cannot apply for bail under Section 436 Cr.P.C. He can be released on his furnishing the interim bond as ordered by the Magistrate.

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[34] . Sukur Narain Bhakhia v. Rajnikant, 1982 Cr. L.J. 2148

[35] Talab Hazi v. Madhukar, AIR 1958 SC 376.

[36] Panna Lal v. R.P. Sinha, 1967 Cr.L.J. 980 All.

[37] State of Maharashtra v. Anil Baloda, 1983 Cr.L.J. 1308

The object of Section 446A Cr. P.C. is to deal with habitual criminals and anti- social elements and those creating enmity between different groups of communities. As soon as the bond is furnished under the Code for the appearance of person in a case is forfeited for breach of condition then the bond executed by such person as well as the bond, if any, executed by one or more of his sureties shall stand cancelled automatically and if the police officer or the court, as the case may be, for appearance before whom the bond was executed is satisfied that there was no sufficient reason for the failure of the person bound by the bond to comply with its condition, then such person shall not be released on his bond and he can be released subject to any other provision of the Code upon execution of a fresh personal bond and or sureties as the police officer or the court may deem fit. There is no doubt that the provision of Section 446A is not affected in any way by the provisions of Section 436 Cr. P.C.

3.2.2 Bail in Non-Bailable offences:

Section 437 of the Criminal Procedure Code lays down the provisions regarding the circumstances under which the officer in charge of police station or court other than High Court or a court of session can release any person accused of, or suspected of, the commission any non-bailable offence when arrested or detained without warrant by an officer in charge of police station, or appears or is brought before such court.

Distinction between Sec. 436 and Sec.437:

The Law Commission in its 41st Report has observed that the broad principle adopted in the Code regarding bail are:

(i) Bail is a matter of right if the offence is bailable;

(ii) Bail is a matter of discretion if the offence is non-bailable;

(iii) Bail shall not be granted by the Magistrate if the offence is punishable with death or imprisonment for life, but if the accused is a woman, or a minor under the age of sixteen years or a sick or infirm person, the court has discretion to grant bail; and

(iv) The court of Session and the High Court have as wider discretion in granting bail, even in respect of offences punishable with death or imprisonment for life;

All these above recommendations have been adopted in the Code of Criminal Procedure. Bail in bailable offences is right of the accused while in non-bailable offenceit is a discretion of the court or officer in charge of police station.

There are two exceptions to this rule that under section 436(2) the court may refuse bail if the accused released on bail in bailable offence fails to comply with the conditions of bail with

regard to time and place of his attendance. Secondly the High Court and the Court of Session can cancel such bail in bailable offence under Section 439(2) when the accused is tempering with the evidence or is likely to abscond.

But the bail in non-bailable offences which is a discretion of court or officer in charge of police station may be cancelled under Section 437(5) by the same court. But the power of police officer is restricted one in this respect. The court or police officer in charge of police station cannot grant bail in non-bailable offence if the offence is punishable with death, life imprisonment or imprisonment of 7 years or more or the accused has been previously convicted on two or more occasions of non-bailable and cognizable offence except where the accused is under the age of sixteen years, or is woman, or is sick or infirm person or court is satisfied that it would be just and proper to release the accused on bail.

Thirdly police officer is under a duty to grant bail to a person in bailable offence but in non-bailable offences the police officer or court while granting bail has to record his reasons for granting bail.

Lastly, unlike bail in bailable offences, the court may order for imposing conditions other than fixing of the bail for the attendance of the accused for which a specific provision is made in sub-section (3) of Section 436.

At the time of considering bail application the court, generally has to decide the question whether the accused should be released on bail or be remanded into judicial custody. Thus bail in non-bailable offence is discretionary one.[38]

The system of courts with regard to bail in non-bailable offences is as follows:-

1. The court of magistrate, which can grant bail under Section 437 ofthe Code.
2. The Court of Session or High Court, which can grant bail under Section439 of the code.

Section 437

The provisions of Sec. 437 of the Code are applicable to the Court of Magistrate only and the Court of Session and High Court are clearly debarred to grant bail under this provision. While considering bail application, the non-bailable offences are divided into two parts:-

Firstly, those non-bailable offences which are punishable with death or imprisonment for life; and secondly all the rest non-bailable offences.

[38] State of Gujrat v. Lal Singh Kishan Singh,AIR 1981 SC 368.

In the first category of offences, the officer in charge of police station or the Magistrate is restrained from granting bail while in the second category of offences; the Magistrate has a judicial discretion to grant bail which ordinarily goes in granting bail unless there is no exception to it. Magistrate while granting bail may impose any condition u/s 437(3), necessary to ensure his appearance in the court.

Now the question arises, whether the Magistrate has power to grant bail in non- bailable offence which is exclusively triable by the Court of Session

Allahabad High Court[39] has observed that there is no limitation on the power of the Magistrate to grant bail in session triable offences in the provisions of the bail given in the code. Only limitation in such offences is punishment prescribed in the law. This view had been reiterated by the High Court in another case[40] and the High Court held that powers of Magistrate in granting bail are not governed by the court which has jurisdiction to try the case, rather are governed by the punishment prescribed for the offence. A Magistrate has no jurisdiction to grant bail only in such case where the prescribed punishment is imprisonment for life or death penalty. It was further held that the offences lying under sections 363 and 366 are punishable with ten years imprisonment, therefore Magistrate has power to grant bail[41] and Magistrate should dispose of the bail application, if possible on the same day.

Whenever police arrest and produce any person in any non-bailable offence before a Magistrate to seek remand then it must put up sufficient evidence or material before the court to establish the complicity of the accused in the commission of crime. Court has not to see the merit and reliability of the evidence or material produced before the Court. If the court after seeing the material comes to the conclusion that the accused is guilty of an offence punishable with death or life imprisonment then the Magistrate, ordinarily, has no option but refuse bail to him and commit him to judicial custody. There are two exceptions to this rule.

(a) Magistrate may grant bail to an accused person in case the accused is woman, minor person up to sixteen years of age or sick and infirm person.

(b) Where the Magistrate has reasons to believe that accused has not committed an offence

[39] Vijay Kumar v. State of U.P., 1989 All. W. C. 569 All (DB).

[40] Pati Lal v. Asstt. Collectyor, AIR 1978 SC 1636

[41] Aftab Ahmed v. State of U. P., 1990 Cr. L. J. 1636.

punishable with death or imprisonment for ife then Magistrate may also grant bail.
But these two exceptions are found very rarely because it is always seen that some evidence remains available to establish the complicity of the accused in the crime.

Now the question arises, whether in case of first exception bail is mandatory or Magistrate has to exercise judicial discretion. Allahabad High Court does not hold it(the first proviso f Section 437(i) of the code) mandatory provision to release an accused or bail[42]
Now another question arises, who can be released on bail on the ground of sickness or infirmity? Every infirmity or sickness does not entitle an accused to be released on bail. The nature and seriousness of sickness or infirmity, the suitability or otherwise of the remand to jail custody and the availability of the necessary medical treatment and reasonable amenities have to be taken into consideration along with other circumstances before granting bail on the ground of illness. Where the applicant was suffering from diabetes and blood pressure and proper treatment was available, the applicant held was not entitled to bail on that ground.[43]

3.3 Whether custody of accused is necessary for bail:

The provisions of Code of Criminal Procedure wherein the powers of ail to accused are given, lead us to the conclusion that no person can be enlarged on bail unless he is in the detention or in custody. The concept of bail and the provisions of bail in the code contemplate pretrial detention and subsequent release from the custody. This detention may be either voluntary or involuntary. When an accused surrenders before a court, then detention is voluntary but when police arrests an accused, detention will be said to be involuntary. Surrender of an accused is essential for considering the bail application in a court. Person who is not in custody cannot be released on bail.[44] For the purpose of sections 436, 437 and 439, the appearance of accused for the purpose of bail must be the personal appearance and without such personal appearance bail application cannot be entertained[45].

[42] Aftab Ahmed v. State of U.P., 1990 Cr., L. J. 1636

[43] . Pramod Kumar v. Sadhana Rani, 1989 Cri. L. J. 1772(DB) All; All. W. C. 403 (Shakuntala Devi . State, 1986 Cr. L. J.365: 1986 All. W. C. 51 over ruled).

[44] Amir Chand v. Crown, AIR 1950 EP 53; State of U.P. v. Kailash, AIR 1955 All 98; State v. Batlu Panja. AIR 1954 Madhya Bharat 113.

[45] Sangappa v. State of Karnataka., 1978 Cr. L. J. 1367.

Where a person accused of or suspected of the commission of a non-bailable offence appears before a Magistrate having jurisdiction and surrenders or submits himself to the jurisdiction and orders of the court, he would be in custody and although no processis issued against the person, the Magistrate would be required to accept the surrender and deal with the bail application of such person. In such a case, the person is under duress and has placed himself under the power of restraint exercisable by the court by his physical presence before the court and expressing his intention to submit himself to the orders of the Court[46] (1980 Cri. L.J. 426 (SC) Relied on). The Hon'ble Supreme Court observed custody is physical control or at least physical presence of accused in court coupled with submission to the jurisdiction and orders of the court.

3.3. Bail under Special Acts —

In the Code of Criminal Procedure, the provision of bail shall not be applicable where any different procedure with regard to bail is given by any other laws like Narcotic Drugs and Psychotropic Substances Act and TADA Act etc. This conclusion flows from the provision of Sections 4 and 5 of code of Criminal Procedure, 1973.

i. The Custom Act 1962.

In tune with international practice, the entry and exit of goods and passengers into and out of the country is regulated by law. The Customs Act, 1962 is the basic statute which governs and regulates the entry and exit of different categories of vessels, crafts, goods, passengers etc, into or outside the country. In addition to the Customs Act, the Customs Department also works to ensure compliance with various other national and international laws and regulations. It is the responsibility of the Customs to handle international traffic speedily and effectively while ensuring that all movement of goods and passengers across the national borders are in conformity with the laws of the land. Essentially all goods brought into the country or taken outside the country must pass through authorized entry/exit points, be reported to Customs, and the importers/exporters must fulfill the prescribed legal and procedural requirements laid down under Customs Act, 1962 and allied laws including payment of the duties leviable, if any. Accordingly, the Customs Act lays down in detail provisions to deal with acts and omissions that violate the law, and provide for penalties that

[46]Kripa Shankar v. State of U.P. 1984 All. Cri.C. 160.

can be imposed by departmental authorities and punishments that can be imposed by courts of law. The law also empowers Customs officers to carry out searches, arrests and prosecution of persons involved in such offences. The Customs Act also lays down the procedural requirements to be followed while imposing the various penal provisions for violations so as to ensure that due process of law is followed before action is taken against offending goods, persons or conveyance involved in the violations

Bailable or non-cognizable offences: The offences punishable with imprisonment for a term of less than 3 years or only fine are covered in the category of bailable or non-cognizable offences. These offences are as follows: (a) Section 132 (b) Section 133 (c) Section 134 (d) Section 135: In all offences under the Customs Act other than those mentioned under 'non-bailable or cognizable offences' above, the punishment for imprisonment may extend to a term of three years, or with fine, or with both. However, under Section 135(1)(i), in the absence of special and adequate reasons to the contrary to be recorded in the judgment or the court, such imprisonment shall not be for less than 1 year. (e) Section 135A Guidelines for arrest and bail: Vide Circular No. 38/2013-Customs, dated 17.9.2013, the CBEC issued detailed guidelines for arrest. The salient features of the same are as under:- All offences are bailable other than the categories of offences punishable under section 135 of the Act ibid, which are classified as non-bailable. These are offences relating to: (a) evasion or attempted evasion of duty exceeding fifty lakh rupees; or Civil and Criminal Penalties under the Customs Act, Prosecution and Compounding of Offences Page 19 of 26 (b) prohibited goods notified under section 11 of the Customs Act, 1962 (as amended) which are also notified under sub-clause (C) of clause (i) of sub-section (l) of section 135 of the Customs Act, 1962 (as amended); or (c) import or export of any goods which have not been declared in accordance with the provisions of this Act and the market price of which exceeds one crore rupees; or (d) fraudulently availing of or attempt to avail of drawback or any exemption from duty provided under this Act, if the amount of drawback or exemption from duty exceeds fifty lakh rupees. This is in effect from 10.5.2013 vide amendment in the Finance Act, 2013 Bail -Matter of Right As afore-stated, offences under the Customs Act fall in two categories i.e. (i) bailable; or (ii) non-bailable. The guidelines related to arrest clearly point that the power to arrest is to be exercised with restraint as it impinges on the liberty of a person in cases where a Commissioner of Customs or Additional Director General has reason to believe on basis of information or suspicion that such person has committed an offence under

the Act punishable under the sections 132 or 133 or 135 or 135A or 136 of the Customs Act. Persons involved should not be arrested unless the exigencies of certain situations demand their immediate arrest. These situations may include circumstances: (i) to ensure proper investigation of the offence; (ii) to prevent such person from absconding; (iii) cases involving organised smuggling of goods or evasion of customs duty by way of concealment; (iv) masterminds or key operators effecting proxy/ benami imports/exports in the name of dummy or non-existent persons/IECs, etc. The decision to arrest should be taken in cases which fulfil the requirement of the provisions of Section 104 (1) of Customs Act, 1962 and after considering the nature of offence, the role of the person involved and evidence available. Civil and Criminal Penalties under the Customs Act, Prosecution and Compounding of Offences Page 20 of 26 While the Act does not specify any value limits for exercising the powers of arrest, the circular clarifies that arrest in respect of an offence, categorized as bailable offence, should be effected only in exceptional situations which may include: (a) Outright smuggling of high value goods such as precious metal, restricted items or prohibited items or goods notified under section 123 of the Customs Act, 1962 or foreign currency where the value of offending goods exceeds Rs. 20 lakh. (b) In a case related to importation of trade goods (i.e. appraising cases) involving wilful mis-declaration in description of goods /concealment of goods/goods covered under section 123 of Customs Act, 1962 with a view to import restricted or prohibited items and where the CIF value of the offending goods exceeds Rs. 50 lakh.

II. Dowry Prohibition Act 1961

Dowry Prohibition Act is an Indian law which was enacted on 1st of May in the year 1961. This act was levied to prevent giving or receiving any form of dowry. The Dowry Prohibition Act was passed in the year 1961 which justifies the term 'dowry' which includes the property, goods, or money that is given by either of the parties who is engaged in the marriage.

This can be given by the parents of either of the party or by anyone else who is in connection with the marriage. The Dowry Prohibition Act is applicable to all persons irrespective of caste or religion in India. Let us learn about the same and get an awareness check on the Dowry Prohibition Act 1961, which is issued by the government of India and is mandated rigorously.

Indian Penal Code, there are special legislations passed by the Parliament of India to deal with particular offences. Most of those legislations, like the Food Adulteration Act, 1954

(repealed), the Dowry (Prohibition) Act, 1961, the Narcotics Drugs and Psychotropic Substancses Act, 1985 etc. borrow the procedural mechanism provided in the Code of Criminal Procedure (hereinafter referred to as 'Code') including the bail provisions therein. However, with the increase in complexity of crimes in the last four decades there has been a lot of pressure on the State to enact laws which can deal with these complexities. The substantive provisions of the Indian Penal Code as well as the procedures provided under the Code were evidently found wanting in many respects. Thus came into existence certain special legislations which created new offences and provided for different procedures to be followed to try those offences. These procedures were more stringent and they even tugged at the time tested principles of procedural fairness and human rights. As far as the bail provisions are concerned, it has been said in the earlier chapters that the Code has always viewed bail as a right of the accused, to be denied only in exceptional circumstances. There was one viewpoint that this outlook was becoming a hindrance to investigation and prosecution of crimes.

3.4 Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS Act, 1985)and the provision of bail.

The relevant provisions of bail in Narcotic Drugs and Psychotropic Substances Act, 1985 are given in Sections 37 and 51 of the Act as well as the provisions of bail given Sections 437 and 439 of the Code of Criminal Procedure are applicable but are additional to them, and qualify the provisions of Code, because the provisions of bail in the Act are not exhaustive though stringent one.[47] The Supreme Court in Narcotics Control Bureau v. Kishan Lal[48]observed that the powers of High Court to grant bail under Section 439 Cr.P.C. are subject to the limitations mentioned in section 37 of the Act. Section 37 of the Act provides further limitations in grant of bail and the exceptions provided in the first proviso to Section 437 of the code are still applicable in such provisions given to Section 437 are not limitations rather exceptions to the general principles of bail, therefore, applicable in the grant of bail

[47] Union of India v Thamisharasi, (1995) 4 SCC (Cri) 665.

[48] Om Pdrakash v. State of M.P., 1993(2) Crimes 170; Sewa Ram v. State (1992) 20 ACC 586; Dasrath Lal v. State, 1992 JIC 739 All.

under the Act.[49] Accused who was infirm and minor found with the possession of 170 gms. of heroin was granted bail.The provisions of bail under 37 of the Act do not oust the provisions of Section 167 of the Code. These provisions will be applicable only when the application for bail is going to be considered on merit but if the charge sheet or complaint has not been submitted within the time limit i.e. 90 days as prescribed in Section 167(2) of the Code of Criminal Procedure, then accused has to be released on bail.[50] Thus it confirms the view that the provisions of bail in the Act are in addition to the provisions of Code with respect to bail, arrest, remand and search etc.

Section 51 of the Act confirms this view which is given as follows:- The provisions of the Code of Criminal Procedure 1973 (2 of1974) shall apply, in so far as they are not inconsistent with the provisions of this Act, to all warrants issued and arrests, searches and seizures made under this Act." Bail shall be granted if the mandatory provisions of Sections 42 and 50 of the Act are not followed.[51] As the provisions of these sections with respect to arrest, search and seizure without warrant and conditions of search of an accused were held mandatory.[52] A Police Officer on receiving information with regard to an accused having contraband, he must give to accused an option to be searched in the presence of Gazetted Officer or Magistrate.

Right given to the Accused under Section 50 of the Act is a valuable right and if the accused is not informed of his right that his search could be made before a Gazetted Officer or a Magistrate and if he so desires, be taken to the nearest Magistrate. Violation of such right entitles the accused for bail.[53] The question of the violation of the mandatory provisions of

[49] 1991 Cr. L.J. 654 SC; Prem Narain Sharas v. State of U.P.,1992(2() ACC 423.

[50] Vidya v. State of Punjab, 1996(1) Crimes 280 P&H; Dr. Bipin Shantilal Panchal v. State of Gujrat, 1996 ACC 126SC: 1996 S.C.C. (Cri.)200: 1996 Cr.L.J. 1652: (1996)2 S.C.C.718 (720).

[51] Om Pdrakash v. State of M.P., 1993(2) Crimes 170; Sewa Ram v. State (1992) 20 ACC 586; Dasrath Lal v. State, 1992 JIC 739 All.

[52] Mahinder Kumar v. State of Panji, Goa, AIR 1995 SC 1157, T.P. Razak v. State of Kerala, 1995 Supp. (4) SCC. 256; State of Punjab v. Jasbir Singh 1996(1) SCC. 288, State of Punjab v. Balbir Singh, (1994) 3 SCC. 299; Saiyad Mohd. Saiyad Umar Saiyad v. State of Gujrat; 1995(3) SCC 610; Ali Mustafa Abdul Rahman Moosa v. State of Keral, AIR 1995 SC 244.

[53] Lawence D'Souza v. State of Maharashtra, 1990 Cr. L.J. 299; Mari Appas Case 1990 Cr. L.J. 1990: Hakam Singh v. Union Territory of Chandigarh, 1988 Cr.L.J. 528: Sewa Ram v. State, 1992 (29) ACC 586: Bhan Pratap Singh v. State of U.P. 1992 JIC 738 All; Smt. Babi v. State of U.P. 1992(2) EFR 486; Anand Goswamy v. State of U.P. 1992(2) EFR 486; Lal Mlohd. Siddiqui v. State of U.P., 1996 ACC All.

the Act could and ought to be considered at the stage of bail and pleas thereof may not be brushed aside by mere observation that those will be considered only during evidence or in the trial.[54]

3.5 The Terrorist and disruptive Activities (Prevention) Act (TADA),Act 1987

The bail provisions of TADA Act are contained in Section 20(8). It shows that the provisions of Sub-Section (8) can be pressed into service when the person whom is sought to be released on bail is accused of an offence punishable under the Act or any rule made there under. In the matter of granting bail to the accused charged with the offence punishable under the Act a heavy burden has been cast by the legislature to be shouldered proportionately on the Public Prosecutor and the court. If he does not oppose the application for bail, he in that way shares a heavier burden with a grave sense of responsibility and thereby absolves the court from recording satisfaction that while a bail the offender was not likely to commit an offence.

80.

[54] Sew Ram's case (Supra).

3.6 Bail under SC/ST (Prevention of Atrocities) Act, 1989

Magistrate has got jurisdiction to grant bail for the offence u/s. 3(1)(x) of the aforesaid Act irrespective of the fact that the offence is triable by the Court of Sessions, if the accused had allegedly committed offences u/s 323, 504, 506 IPC and 3(1)(x) of the SC/ST (Prevention of Atrocities) Act, 1989, as punishable with sentence upto five years and fine only.

CHAPTER 4

PRACTICAL IMPLICATION OF BAIL IN INDIA

Normally the bail must be granted. Howsoever serious an offence may be, if it is bailable, the seriousness of the offence will not justify refusal of bail.[55] The principle underlying release on bail is that an accused person is presumed in law to be innocent till his guilt is proved. As a presumably innocent person, he is entitled to freedom and opportunity to look after his case, provided his attendance in court at the appropriate time is assumed by proper security.[56] It is an inability of existing judicial system to try an accused expeditiously. Therefore, the accused cannot be detained in judicial custody for a long time by refusal to grant bail.[57] Order granting or refusal bail need not necessarily be speaking or reasoned.[58]

2.1 Disposal of Bail Application:

The accused has a right to claim expeditious disposal of his bail application by the court on the day of his surrender and the court should dispose of the bail application of the accused the same day [59]which is part of right to personal liberty. The right of speedy trial implicit in Article 21 and Sec. 309 of Cr.P.C. has to take precedence over other consideration, such as gravity of the offence, at the time of considering bail application. Non framing of charge even after a lapse of one year of the committal of case was considered fit case for bail.[60]

Hon'ble Allahabad High Court in writ petitions[61] held that bail applications should be disposed of same day or as expeditiously as possible. While considering the bail, if the court has some practical difficulty in its disposal, the court should release the accused on his furnishing personal bond till such time the court is able to hear and dispose of the bail application finally,[62] and where the bail application has been moved at the time of grant of remand then the remand and bail application should be dealt with together without

[55] Abdul Habibkhan v. Emperor, AIR 1928 All. 211
[56] Emperor v. H.L. Hutchinson, AIR 1931 All 356.
[57] Babu Mulla v.State of M.P., 19778 Cr. L.J. 1846.
[58] Jivaji Jadeja v. State of Maharashtra AIR 1987 SC 1491: 1987 Cr.L.J. 1850.
[59] Lateef v. State of U.P. 1990 All. L.J. 659.
[60] Babu Ram v. State of U.P., 1988 A. Cr. R. 464.
[61] Dilip Kumar v. State U.P.. 1989 All. L.J. 1204.
[62] Malwati v. State of U.P.,Crim. Misc. Writ Petition No.-/1993d/on 7.4.1993, All H.C.

postponement of the hearing of either of them.[63] But Hon'ble Justice Virendra Saran in a case[64] held that the Magistrate is justified in not hearing the bail application where accused was not in judicial custody. Confinement to jail for indefinite period refusing bail for want of relevant material supply of which is mandatory for the investigating agency, amounts to punishment and is contrary to the philosophy of criminal jurisprudence.[65] In another case Allahabad High Court (FB) held that right to speedy trial includes the right to get bail application decided expeditiously and if possible the same day and where the Magistrate comes to the conclusion that the charges leveled against the accused do not make out any non bailable offence, only in that event the accused certainly can be released on bail but that too after ascertaining and hearing the prosecution subject to availability of record because State represents the society and every crime is an offence against the society.[66]

2.1.1 Bailable offence & Non-Bailable Offence:

Bailable offences are offences which are mentioned as such are schedule. I to the Code of Criminal Procedure. In such cases the accused has right to be released on bail. The Law Commission's Report on the basis of which the present Code of Criminal Procedure 1973 was enacted observed that the broad principle adopted in the report was that bail was a matter of right if the offence was bailable. And was a matter of discretion if the offence was non-bailable. As the word "Non-Bailable" denotes, there is no question of claiming a right to bail by the accused. Accused is non-bailable offence shall not be released on bail as a rule like in bailable offence, but he may be so released if there are reasons to believe that the case against the accused is not likely to succeed or there are special circumstances for grant of bail.[67]

In a bailable offence court has no discretion to refuse bail as in the case of non bailable offence. Bail granted in a bailable offence, later be cancelled except on development of situations which leads to conversion of the offence into a non-bailable one or when the accused misuses the liberty and fails to appear before the court when required causing hindrance in the progress of the trial.

But bail in non-bailable offence may be cancelled,[68] bail in non-bailable offence is a concession granted to the accused, and powers of court are still restricted where the offence is

[63] 10 Dr. Vinod Narain v. State of U.P. , Crim. Misc. Writ Petition No. 3643/1992 decided on 1.2.95 (FB) 1995 ACC 375 All.(FB).
[64] Lateef v. State of U.P., 1990 All. L.J. 1396 All (DB).
[65] K.K. Girdhar v. M.S. Kathuria, 1989 Cr. L.J. 1094 Del.
[66] Ranjeet Kumar alias Laddo Singh v. U.P. State Crim. Misc. case No. 522/1994
[67] Dr. Vinod Narain v. State of U. P.. 1995 ACC 375 All. (FB)
[68] Dr. Vinod Narain (Supra)

punishable with life imprisonment or death sentence, but the police officer is at all, not empowered to grant bail in such offences, while the court may grant bail if accused is infirm or sick person or woman or person under the age of sixteen years. Thus bail in non-bailable offence is not a rule like in bailable offence. Thirdly unlike bailable cases, in the case of non bailable offence a Court may impose any condition other thanthe fixing of the bail for the attendance of the accused. Such conditions are legal.[69]

2.1.2 Cognizable Offence and Non Cognizable Offence:

The basic difference between the two is that in the former case the police officer has the power to arrest the accused under section 41 of the Code of Criminal Procedure without a warrant and without any order of the Magistrate while in the latter, except when accused refuses to give his name and address, [70] the police officer has no power to arrest the person who has committed or is accused of committing a non-cognizable offence unless the Magistrate has ordered so. The list of cognizable offences and non-cognizable offences has been given in the First Schedule of the Code of Criminal Procedure.

2.2 Preventive Action of the Police:

The code empowers a police officer to interpose for the purpose of preventing the commission of a cognizable offence to the best of his ability[71] and every police officer is under a duty to communicate the information of a design regarding commission of any such offence which he has received to his superiors who are under a duty to prevent or to take cognizance of such crime.[72] However such officer appears to have understood that situation so grave that it may go out of control then he may arrest such person going to commit any cognizable offence. Further police has been empowered under the Code to arrest without orders from a Magistrate where he gets knowledge of design of the commission of cognizable offence and prevention of the same otherwise appears to be difficult. Such arrest shall not exceed a period of twenty four hours from the time of his arrest except otherwise permissible under the provisions of the Code of any other law for the time being in force.[73] Thus it is clear that under Section 151 police officer can detain such person only for twenty four hours and if his further detention is necessary he shall have to obtain orders from the competent jurisdiction.

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[71] Mata Palat v. Emperor AIR 1923 All. 479; 26 Cr. L.J.4.

[72] Sec 437(5) Cr.P.C.

[73] In re Sardamma, AIR 1965 A.P. 444.

2.3 Detention in Custody:

Besides the aforesaid provisions of arrest given in section 43 and 44 of the Code there are certain other provisions in the Code in which the accused person can be detained in custody. Such detention in custody may involve release of such person on bail by court which is given in the various provisions of the Code.

In the case of trial of a unsound mind whenever it is found that such person or accused is of unsound mind and incapable of making his defense, the Magistrate or Court as the case may be irrespective of the provisions of the bail in the Code or law for the time being in force, may release him on being given sufficient security firstly that he shall be properly taken care of and shall be prevented from doing injury to himself or to any other person and secondly to secure his appearance in court whenever required. But bail should not be taken if security is not sufficient, and in that case Magistrate or court, as the case may be shall order for the safe custody of the accused on an appropriate place and manner. Same shall be reported to State Government.[74] Subsequent to it if such person ceases to be of unsound mind, the Magistrate or Court may order for production of the accused to face trial.[75] On production of accused again if the Magistrate or court finds him capable of making defense, the trial shall be proceeded with[76] but if the accused is found still incapable of making defense their accused shall again be dealt with according to the provision of S.330 Cr.P.C.

When any court on an application made to it in this behalf or others is of an opinion that it is necessary in the interest of justice to make an enquiry into any offence given in clause (b) of section 195(1) Cr. P.C. appears to have been committed in or in relation to a proceeding in that court as the case may be, in respect of a document produced or given in evidence in a proceeding in that court, such court may under section 340 Cr. P.C. make a preliminary enquiry and record a finding to the effect and send a written complaint thereof to the Magistrate having jurisdiction to take cognizance of the offence. During such course the Court shall require the accused to give sufficient security for his appearance before the Magistrate but if the offence is non-bailable one, the court may send the accused in custody to the Magistrate and bind over any person to appear and give evidence before such court.[77]

[74] Section 330 Cr.P.C.
[75] Section 331(1) Cr.P.C.
[76] Section 331(1) Cr.P.C.

In other words, the Magistrate may detain him into

custody or grant bail. Above said power has also been given to the appellate court under Section 341 Cr. P.C. if the trial court has refused to exercise such jurisdiction.

2.4 Competent officer for grant of bail:

Under the Code, the officer in charge of police station and court both have thepower to grant bail.

2.4.1. Bail by Police:

Police Officer in charge of police station has powers to grant bail infollowing circumstances:

(i) When the true name and residence of the person arrested, who is accused of non-cognizable offence and committed the same in the presence of such police officer, has refused disclose his identity or has given believably false identity, is ascertained (S.42(2)).

(ii) Where the true name and residence of the person arrested by the private person subsequently handed over in the nearest police station is ascertained. If the said person is accused of non-cognizable offence and has refused to disclose his identity or has given believably false identity (S. 43(3)).

(iii) When the evidence is insufficient to make prima facie case against the accused regarding the commission of an offence. (S.169).

(iv) In all bailable offences.

(v) In non-bailable offences if the offence is not punishable, the Police Officer should give reasons in granting bail in the non-bailable offences. The power of a police officer to grant bail cannot be curtailed by way of issuing executive instruction.[78] The grant of bail by police officer is a discretionary one under section 437 Cr. P.C. But the officer in charge of a Police Station while granting bail in non-bailable offence, especially when the offence is punishable with death, or with imprisonment for life or for seven years or more, shall have to give reasons for so doing.[79]

[78] Section 340(1) Cr.P.C.

[79] State v. Lal Singh, AIR 1981 SC 368.

Power of Police to grant bail in an offence subsequently becoming non-bailable one:

As soon as offence becomes non-bailable one, the provisions of section 436 Cr. P.C. cease to be applicable. The Police Officer or investigating officer can in such circumstances arrest the accused if he desires to investigate the case in the light of additional evidence to make out the case of non-bailable offence.[80]

The power of a Police Officer/in charge of a Police station to grant bail and the bail granted by him comes to an end with the conclusion of the investigation except in cases where the sufficient evidence is only that of a bailable offence, in which eventually he can take surety for appearance of the accused before the Magistrate on a day fixed or from day to day until otherwise directed. No party can be claimed with an order passed by Magistrate in view of enabling provision, contained of section 209, under which the committal Magistrate has been empowered to grant bail until conclusion of trial, which power was otherwise restricted to grant of bail by him during pendency of committal proceedings under clause (1) of section 209 of the Code.[81]

2.4.2 Bail by Magistrate

(i) Bail by Executive Magistrate u/s. 44(1) Cr. P.C.:

Section 44(1) empowers any Magistrate whether Executive or Judicial to arrest a person who commits "any offence" in the presence of such Magistrate, even in respect of that offence which cannot be taken cognizance without a complaint made under the authority of the State Government. But such Magistrate is not a Court. Such detention for more than twenty four hours is illegal one unless the remand order to custody under section 167(1) is obtained by producing him before competent Magistrate. If this procedure is going to be not followed or remand order is not going to be obtained, then the Executive Magistrate can release such offender on bail under the provisions of bail given in code under section 436 and 437 for bailable and non-bailable offences respectively. But in such case, the Magistrate has to take undertaking of appearance before the court having jurisdiction on any appointed day.

[80] Section 437(4).

[81] Babu Bamboj v. State of Rajasthan, 1986 R.L.W. 699

(ii) Bail by Executive Magistrate under Section 81:

This section empowers an Executive Magistrate to release a person on bail produced before him, if the offence is bailable one and the persons ready to furnish suretybonds provided such person arrested under a warrant of arrest executed outside the district in which it was issued. Such Magistrate, in case of granting bail, shall have to forward the bail bonds to the court which issued the warrant.

(iii) Bail in Security Proceedings:

(i) When an Executive Magistrate makes an enquiry into breach of peace and disturbance of public tranquility caused by a person under Section 107, or receives information regarding dissemination of seditious matter by a person under Section 108, or regarding a person concealing his identity with a view to commit cognizable offences or receive an information regarding residing of habitual offender within his local jurisdictionor if such person does not appear inspite of issuance of summon or warrant under section 113 of Code of Criminal Procedure Code, then the Executive Magistrate may order to detain such person in custody till he furnishes surety bonds with or without executing personal bond under section 116(3) of the Code.

(ii) And if upon an enquiry, it is proved that it is necessary for keeping the peace or maintaining good behavior that the person regarding whom the enquiry is made should execute a bond, with or without sureties, the magistrate may make order accordingly.[82]

(iv) Bail by Executive Magistrate u/s 167 Cr. P.C. :

Where a Judicial Magistrate is not available to grant remand in a case, the Section 167(2A) empowers the officer in charge of a police station or the police officer making the investigation to forward the accused along with relevant material and case diary to the nearest Executive Magistrate on whom the powers of Judicial or Metropolitan Magistrate have been conferred. Such Executive Magistrate can grant remand for a judicial custodyof not more than seven days in aggregate. This exercise of power is valid only when Judicial Magistrate is not available. While granting remand by Executive Magistrate he may release the accused on bail in accordance with the provisions of section 436 and 437 Cr. P. C.

2.4.3 Bail by Judicial Magistrate:-

As a matter of fact, bail before a Judicial Magistrate can be moved at any stage of investigation, enquiry or trial by the respective state agencies, at the time of the commitment

[82] Hazi Mohd, Wasim v. State of U.P., 1992 Cr.L.J 1299 All.

or after conviction so far as the proper bail order is obtained from the appellate court.

(i) Bail during investigation:-

When the investigation under Section 436 and 437 cannot be completed within a period of fifteen days, the magistrate may authorize the detention of the accused in custody for a total period of ninety days, if the investigation relates to an offence punishable with death or imprisonment for life or imprisonment for a term not less than ten years and sixty days. If the investigation is not completed within the aforesaid period, the accused shall be released on bail if he is prepared and does furnish bail.

To grant bail the custody of the accused is essential for considering the application for grant of bail. The provisions of bail come into operation only when a person accused of non-bailable offence is brought before the court and not earlier to that.[83] The expression "appear" occurring in this section including voluntary appearance "as when a person accused of an offence seeks bail by" appearing in Court, he is in fact surrenders to the custody of the court and the expression "appear" in that sense means "presents and surrenders" himself before the court. In such circumstances there would be notional detention of the accused person.[84] Person not under restraint but voluntarily appearing and surrendering before court is not entitled to bail. Person(s) placed under restraint by arrest or otherwise cannot be granted bail.[85] The word "Court" under section 436 and 437 means the Court which has jurisdiction to try the accused for the offence alleged to have been committed by him.[86]

(ii) Bail in the case of person of unsound mind triel before Court:

When a person is on unsound mind is found incapable of making his defence then in that case the Magistrate or Court of Session may release him on bail after taking adequate security on the condition that he shall be taken care of and shall be prevented from doing injury to himself or to any other person and for requiring his appearance before any Magistrate or Court, order may also be passed for the same.[87] Under this provision the power to release a person or bail in bailable offence is vested in the Court.

(iii) Bail After Conviction:

If a convicted person satisfied the court by which he is convicted that he intends to present an appeal, then that court shall release the convict on interim bail in following circumstances:

[83] 1978 UCR (Bom.) 499 (504)
[84] 1979 Cr.L.J. 345 (350)
[85] Bharmar V.t. of Orissa, 1981 Cr.L.J. 1957 (1059)
[86] 1975 Cr..J. 1249 (1254) (DB) Cal.
[87] Section 330(1). Code of Criminal Procedure.

(i) Where such person, being on bail during trial, issentenced to imprisonment for a term not exceeding three years, or

(ii) Where such person, being on bail, has been convictedfor a bailable offence.

Here the word "interim bail" means the period till he presents an appeal and gets the orderof bail from appellate court- Section 389(3), Cr. P.C.

(iv) <u>Bail to a person including witness and surety present in Court:</u>

Where any person for whose appearance or arrest the officer presiding in any court is empowered to issue a summon or warrant, is present in such court, such officer may require such person to execute a bond, with or without sureties, for his appearance in such court, or any other court to which the case may be transferred for trial. (Section 88 Cr. P.C.)

It enables a court to release a person or witness including accused and sureties onexecuting a security bond with or without sureties provided such person is present in court not necessarily in pursuance of any summon or other process but such court must beempowered to issue a process for compelling his appearance or arresting such person. This power can be exercised only when the person is free and present in court and not in custody or under detention after arrest.[88] It cannot be interpreted that a Magistrate may go to the house of a person and direct him to execute bond for his appearance.[89] This poweris not exercisable by the police though Police Officer may obtain bond for appearance before Court under Section 44(2).[90]

[88] Madhu Limaye v. Ved Murti, AIR 1971 SC 2486

[89] Madhu Limaye v. Ved Murti, AIR 1971 SC 2486

[90] Om Prakash v. State (1971) 77 Cr.L.J. 865 All.

Court has no inherent power to remand such person to custody in case[91] he defaults to execute bonds despite apprehension of non-appearance of such person[92]. Supreme Court has held that court has no inherent power to remand suchperson unless this power is conferred by law. Thus there is a legal flow in the section 88 of the code which requires amendment in the Code and following provision be added in section 88 Cr. P.C., "if such person does not execute bond with or without sureties, the court may remand him to custody till the execution of bonds or the purpose of appearance of such person extinguishes."

Allahabad High Court in a case[93] held that in complaint cases where person is appearing before Magistrate or Court in pursuance of summon or warrant issued, proper procedure to be followed is as given in section 88 which was not approved by the Full Bench[94] later in time.

(v) Bail to persons appearing in Court:

When a Magistrate of the 1st Class sees reason to believe that any person within his local jurisdiction has committed outside such jurisdiction (whether within or outside India) an offence which cannot, under the provisions of Sections 177 to 185 (both inclusive), or any other law for the time being in force, be inquired into or tried within such jurisdiction but in under some law for the time being in force triable in India, such Magistrate may enquire into the offence as if it had been committed within such local jurisdiction and compel such person in the manner hereinbefore provided to appear before him, and send such person to the Magistrate having jurisdiction to enquire into or try such offence, or, if such offence is not punishable with death or imprisonment for life and such person is ready and willing to give bail to the satisfaction of the Magistrate acting under this section, take a bond with or without sureties for his appearance before the Magistrate having such jurisdiction. (Sec.187(1) Cr. P.C.).

When there are more Magistrates than one having such jurisdiction and the Magistrate acting under this section cannot satisfy himself as to the Magistrate to or before whom such person should be sent or bound to appear, the case shall be reported forthe Orders of the High Court. (Sec. 187(2) Cr. P.C.).

2.4.4 Bail by Sessions Judge:

Session Judge has been conferred with the power to release a person on bail in the following

[91] Vasudeo Ojha v. State of U.P., AIR 1958 All. 578

[92] Kazim, (1901) ANN 35; Ram Chandra v. State, 1977 Cr.L.J. 1783; Natbar Parinda v. State, AIR 1971 SC 1465

[93] Vishwnath Jiloka v. 1 Addl. Munsif L.C.C. Bahraich, 1989 Cr. L. J. 2082

[94] Dr. Vinod Narain v. State, 1995 ACC 375 All (FB).

case:

1. If any person has reason to believe that he may be arrested on an accusation of having committed a non-bailable offence, he may apply to the court of Sessions for bail in anticipation of his arrest to be made and the Court may, if it thinks fit, direct that in the event of such arrest he shall be released on bail. (Sec. 438(1) Cr.P.C.).

Note: This provision is not applicable in the State of Uttar Pradesh).

2. Court of Session may direct:-

(a) To release a person on bail who has been in custody and accused ofan offence.

(b) If any condition imposed by Magistrate while releasing any person on bail be set aside or modified provided the court of Session shall, beforegranting bail to a person who is accused of an offence which is triable onlyby the Court of Session of which, though not so triable, is punishable withimprisonment for life.

3. An appeal is normally preferred against an order of conviction recorded by the Magistrate in the Court of Session. During the pendency of appeal against such conviction, if such person convicted under any offence is in custody, he may be released on bail. Suspending the execution of sentence (Sec. 389 (1) Cr. P.C.)

4. Similarly, the Court of Session, while exercising the powers of revision, may release an accused of an offence on bail if he is in the custody suspending the execution of sentence (Sec. 397(1) Cr. P. C.).

2.4.5 Bail by the High Court:

Following powers to release a person on bail have been conferred on High Court under the Code of Criminal Procedure:-

1. When any person has reason to believe that he may be arrested on an accusation of having committed a non-bailable offence, he may apply to the High Court for bail, in anticipation of arrest to be made that court may, if it thinks fit, direct that in the event of such arrest he shall be released on bail, (Sec. 438(1) Cr.P.C.). Omitted in U.P. State.

2. The High Court may direct:-

(a) to release a person on bail who has been in custody and accused onan offence.

(b) that any condition imposed by Magistrate while releasing an person on bail be set aside or modified provided the High Court shall, before granting bail to a person who is accused of an offence which is triableexclusively by the Court of Session, of 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 givesuch notice, (Sec. 439(1) Cr.P.C.).

3. Where an appeal has been preferred in the High Court by a convicted person, such person if he is in custody, may be released on bail by the High Court. (Sec. 439 (1) Cr. P. C.).

4. Similarly, the High Court, while exercising the powers of revision, may release such person accused of an offence on bail if he is in custody suspending the execution of sentence. (Sec 397(1) Cr. P.C.).

5. Where an appeal has been preferred against the order of acquittal recorded by subordinate court then High Court may issue a warrant directing that the accused be arrested and brought before it or any Subordinate Court and the court before which he is brought may release him on bail. (Sec. 390 Cr.P.C.).

2.4.6 Bail by Supreme Court:

1. If a bail has been referred by the High Court then appeal against such order of High Court refusing bail to a person while in custody may be preferred in Supreme Court. Supreme Court may release such person on bail. (Arts.134 & 136 of Constitution of India).

2. Under Articles 134 and 136 of Constitution of India, appeal may be preferred in Supreme Court against any judgment, final order or sentence in a criminal proceeding or case. During the pendency of such appeal if the accused is in custody, he may be released on bail by the Supreme Court.

2.5 Bail and delayed or improper trial:

The Supreme Court has held that no person can be deprived of his personal liberty without a reasonable, just and fair procedure, otherwise deprivation would be violation of his fundamental right enshrined in Article 21 of Constitution of India and he would be entitled for bail. There can be no doubt that speedy and expeditious trial is an integral

and essential part of the fundamental right to life and personal liberty as enshrined in Article 21 of the Constitution. This view was again echoed by the Supreme Court in cases[95] and Supreme Court referred Article 3 of the European convention of Human Rights which says that every one arrested or detained shall be entitled to trial within a reasonable time or to release pending trial. Delayed trial and consequently incarceration of accused in jail during

[95] Meneka Gandhi v. Union of India AIR 1978 SC 597.

the pendency of such delayed or improper trial would amount to imposition of punishment without trial according to law. The Supreme further emphasized that even a delay of one year in the commencement of trial is bad enough.

Full Bench of Patna High Court[96] laid emphasis on Sixth Amendment to the U.S. Constitution and Art.3 of the European Convention on Human Rights observing that in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial and everyone arrested and detained shall be entitled to trial within a reasonable time or to release on bail during the pendency of trial. It was further held that inordinately prolonged and callous delay of ten years or more occasioned entirely by the prosecutions default in the context of reversal of a clean acquittal on a capital charge would be per se prejudicial to the accused. If an accused is not committed to the Court of Session for a period of nine months inspite of the fact that the case was taken up for hearing on several dates by the Magistrate, Allahabad High Court[97] held that there was inordinate delay in the trial of the accused and therefore accused is entitled to bail.

Similarly Madhya Pradesh High Court in a case[98] held that adjournment of a case for two months on the request of Public Prosecutor that he had illegible copies of challan papers is unjustified when the original papers were on record and in such case accused would be entitled to bail. But the delay caused in trial due to adjournments sought by the accused on one pretext or the other would not entitle him to bail[99] when accused did not allow the court to proceed and there was sufficient material on record that there was danger of the accused to tamper with or intimidate the witnesses, and aborting the caseand also the danger to the life of the main witnesses or to the life of the accused being endangered.

Mere fact that after commitment of session trial case was not taken up for one year would not entitle the accused to bail[100.] In a case[101] Allahabad High Court has held thataccused will be entitled for bail if his case was not committed for more than three and half years while accused was in jail and FIR was lodged after 15 days and medical examination of the

[96] Hussain-ara Khatoon v. State of Bihar AIR 1979 SC 1360, A.R.Antulay v. R.S. Nayak (1992) 1S.C.C.225.

[97] State v. Maksudan Singh, AIR 1986 Pat. 38 (FB).

[98] Sita Ram v. State of U.P. 1987 Cr. L. J. 645 All.

[99] Bhagirath Singh Judya v. State of Gujrat. AIR 1984 SC 372.

[100] State v. Maksudan Singh, AIR 1986 Pat. 38 (FB).

[101] Sita Ram v. State of U.P. 1987 Cr. L. J. 645 All.

prosecutrix was conducted after forty days of the incident respectively. Incarceration of accused in jail for nine months and failure of court to commit the case to the Court of Session for no fault of accused would entitle him for bail.[102] But Hon'ble R.B.Lal J. of Allahabad High Court in a case,[103] explained the observation of Supreme Court in Kadra Pahadia's case[104] "the reasonable period of trial cannot and should not exceed one year for a sessions trial" should not be taken as laying down an absolute and invariable rule for conclusion of sessions trial without having regard to the nature of offence and other circumstances of such particular case. This law laid down by Supreme Court in Kadra Pahadia's case provides a guideline about the period of time during which sessions trial should ordinarily conclude. However this does not mean that special circumstances of a case which prolonged the period of trial are to beignored while considering the question of inordinate delay. The question of inordinate delay in conclusion of trial of a case should be decided in the light of its own facts and circumstances. Thus inordinate delay only cannot become the sole criterion for granting bail[105] if otherwise facts and circumstances of a case are not favourable to the accused. It may become one of the grounds for granting bail. An accused who has been in jail for more than six years and trial did not conclude inspite of direction of High Court and have been deprived of his personal liberty, was held entitled to be released on bail[106]. Trial did not commence even after 4 ½ years have passed and trial is not expected to commence in near future and accused cannot be blamed for delay. Accused was held entitled to bail.[107]

2.6 Absence of Prima Facie case or insufficiency of evidence:

For refusal of bail for any offence, proof of prima facie case and sufficiency of evidence in necessary. Where there is no prima facie case or sufficient evidence or material shown in the charge-sheet, then bail should be granted on the assumption that when conviction cannot be based on such evidence and material, how bail can be refused. The material shown in the charge sheet with regard to offence to abetment to commit suicide was hardly prima facie establish the case therefore bail was granted.[108] Similarly in case[109] bail was granted wherein the FIR lodged after a period of one month where cause of death was

[102] Bhagirath Singh Judya v. State of Gujrat. AIR 1984 SC 372.
[103] State v. Maksudan Singh, AIR 1986 Pat. 38 (FB).
[104] Sita Ram v. State of U.P. 1987 Cr. L. J. 645 All.
[105] Bhagirath Singh Judya v. State of Gujrat. AIR 1984 SC 372
[106] Hasan Abbas v. State of U.P.. 1992 (3) crimes 59.
[107] Kalika Prasad Shukla v. State of U.P., 1993(30) ACC 413
[108] Bhagat Singh v. State of U.P.. 1993(30) ACC 444.
[109] Basant Kumar v. State of M.P.

unascertainable as per the post mortem report.

In a case[110] where an inference of guilt has to be drawn from circumstantial evidence and even one link is missing in the chain, no inference of guilt can be drawn from any amount of suspicious or incriminating circumstances the case will be fit for bail. Similarly, partnership firm holding liquor license and one of the partner retired long before the occurrences of offences under Excise Act and Excise Department, was informed regarding his retirement though formal order regarding absolving the partner as licenses was not passed by Excise Authorities. It was held that no prima facie was established against the accused therefore entitled for bail.[111] Where an accused was charged with the offence of rape while medical report did not support the commission of rape and infliction of injuries on the person of prosecutrix[112] and in another case[113] where accused was charged under section 354 I.P.C. being subsequently converted into section 376

I.P.C. on the complaint of prosecutrix, Medical report did not support the charge of rape and the prosecutrix was adult lady. Both the cases were held fit for bail.

The confessional statement of accused cannot be considered as an usable evidence against the co-accused for the refusal of bail.[114] Similarly where the evidence of prosecution is meager and is not supported by sufficient evidence, bail may be granted to the accused.[115]

Where the investigating officer did not make any effort to know the cause of death and no statement was recorded of any witness giving the identifying particulars of the assailants involved in the crime, the investigation made appears to be slipshod and perfunctory, bail should be granted in such cases.[116]

The property recovered and shown in the investigation was silver Gajra, and ornament which was not mentioned in the FIR as a stolen property in a case under section 395/397 I.P.C. and Section 11 of the M.P. Dacoity Adhiniyam 1981 bail was granted.[117] Where an accused is appearing to be a simple mute spectator of a crime like rape should be granted bail.[118]

2.7 Interim Bail:

[110] Puran Singh v. State of M.P.(1992) 3 Crimes 371; (1993) 1 Cur. Cri.R. 291 (M.P.).

[111] Sukhdev Singh v. Union of India, (1987)2 Crimes 894 (P&H).

[112] Ishar Dass v. State of Haryana, 1981 Cri. L. J. 562. 59 Bhyawal v. State of M.P., (1992)3 Crimes 184 M.P.60 Nanho v. State of M.P., (1993) 1 Crimes 1048 M.P.

[113] Santu v. State of M.P.. (1992)3 Crimes 250 (251) M.P., G. Shyamala v. State of M.P.,(1993)1 Crimes 730.

[114] All. (1987) 1 All. Cri. L.R. 504 (P&H).

[115] Ganapathi v. State. (1992)3 Crimes 488 Mad.

[116] Babu Singh v. State of M.P., (1985)2 Crimes 259.

[117] 75 R.M. Shrirao v. State of Maharashtra, 1992 Cr. L. J. 2641.

[118] Smt. Amravati v. State of U.P. 2005 Cr LJ 755 (FB-All) & Som Mitttal v. Government of Karnataka AIR 2008 SC 1126

A Seven Judges Full Bench of Allahabad High Court has held that the Sessions Judge while considering a bail application under Section 439 Cr.P.C. can grant interim bail till the final disposal of the bail application subsequently. This will enable innocent persons to avoid going to jail pending consideration of their bail application. The Supreme Court has laid emphasis on the strict compliance of direction given in Amravati[119] case and held that it must be implemented in letter and spirit by Sessions Courts in U.P.

2.7.1 Interim bail - Inherent power of Court

When a person applies for regular bail then the court concerned ordinarily lists that application after a few days so that it can look into the case diary which has to be obtained from the police authorities and in the meantime the applicant has to go to jail. Even if the applicant is released on bail thereafter, his reputation may be tarnished irreparably in society. The reputation of a person is his valuable asset, and is a facet of his right under Article 21 of the Constitution. Hence, we are of the opinion that in the power to grant bail there is inherent power in the court concerned to grant interim bail to a person pending final disposal of the bail application. Of course, it is in the discretion of the court concerned to grant interim bail or not but the power is certainly there.[120]

2.7.2 Grounds for refusing interim or regular bail

Based on a long line of judicial precedents of the apex and this Court[121], some of the exceptional circumstances where the Courts below would be justified in refusing interim or regular bails could be:-

a. Where the Magistrate concerned is not empowered to grant regular bail as there are reasonable grounds for believing his complicity in offences punishable with death or imprisonment for life or under the other circumstances enumerated in section 437 Cr. P.C.

b. There is prima facie material to suggest the involvement of the accused in a grave offence like murder, dowry death, dacoity, robbery, rape, kidnapping for ransom, rape etc., unless it appears to the Sessions Court at the stage of initial appearance itself that the accused appears to have been falsely implicated for some bona fide reasons.

[119] Deepak of Maharashtra, (2008) 16 SCC 14 & Sukhwant Singh & others v . State of Punjab, (2009) 7 SCC

[120] Sheoraj Singh alias Bajaj v. State Chuttan v. State of U.P. ^ others, 2009(65) ACC 781 (All- D.B.) Also circulated videH.C. Letter No. 15336/2010/Ad,om G-11 dated 20.9.2010.

[121] Shiv Shyam Pandey v. State of U.P., 2009 (5) ALJ 70 &C.L. No. 28/2010/Admin GII dated 18.9.2010.

2.7.3 No delay in release of accused where interim bail granted:

It is imperative for the Sessions Judges and Addl. Sessions Judges to be circumspect enough in directing release of the accused in appropriate cases, in which specific direction had been issued by the High Court for releasing the accused on interim bail pending hearing of regular bail by accepting the bonds provisionally and no person who has been on interim bail should be relegated to jail custody simply for purpose of verification of sureties failing which they would make themselves liable to be handled up…… The Sessions Judges/ Addl. Sessions Judges must invariably mention in their orders in such cases that the accused persons must be released without the least delay and they should not be detained just for verification of sureties.[122]

2.8 Accused not likely to abscond or commit offence or tamper withevidence

There is no hard and fast rule as to when bail should be granted. Thus absence of some factors has been recognized by the Supreme Court and High Court Allahabad[123] in granting bail. As Supreme Court[124] further observed, "we may repeat the two paramount considerations. If it is prima facie established that the presence of the accused would not be readily available or that he is likely to abuse the discretion granted in his favour by tampering with evidence, bail may be refused. Allahabad High Court also in a case[125] emphasized these two factors while considering the bail application.

While considering the bail application the Court has to bear in mind the nature and seriousness of the offence as well as the character of evidence, the circumstance which are peculiar to the accused, the reasonable possibility of the accused person not being secured at the trial, reasonable apprehension of the witnesses being tampered at the stage of investigation or during trial and the larger interest of the public. Two criteria viz. whether the accused, in the event of his release will flee from justice and whether he will tamper with evidence have to be answered against the accused. Just because a co-accused was enlarged on bail is not ground for the release of accused on bail.[126] Court must exercise its discretion on merit and fact of the case irrespective of consent given by the prosecutor for release on

[122] Rakesh Kkumar v. State of U. P., 1992(3) Crimes 945.
[123] 1978 Cr. L. J. 129: AIR 1978 SC 179; M.P. Ramesh v. State of Karnataka, 1991 (1) Crimes 247(258).
[124] Ram Kishor v. State, 1991 A.Cr.R.378.
[125] Channappa G. Anadadi v. State of Karnataka 1993(1) Crimes.
[126] Ibid

bail.[127]

2.9 Absence of Overt Act

Absence of overt act cannot be said to be sound principle of entitlement of bail. Nature of offence and other factors should be considered while granting the bail[128] besides the absence of overt act. In the absence of overt act giving mere company to accused is not sufficient to refuse bail.[129] Similarly non attribution of overt act in the judicial confession[130], absence of overt act regarding the use of only weapon which the accused was carrying[131] is sufficient to grant bail.

2.10 Failure or delay in Identification Test

From series of pronouncements of High Courts and Supreme Court, the identity of accused may be said to be important factor to determine the guilt of the accused and it is settled law where the identity of accused is not established[132] or the identity of giving of single below is not clear, the accused will be entitled to bail.

Where the prosecution failed to hold identification parade on application of the accused, the accused should normally be released on bail but it would not be proper to grant bail in every case where prayer for identification made by the accused has been rejected by the investigating agency. If there appears to be some doubt in the conduct of the prosecution for holding identification requested by the accused with the assertion that the alleged eye witnesses did not know him previously, then accused shall be entitled to bail.[133]

2.11 Illegal detention and Bail – Non-compliance of Section 50, Cr.P.C. and Article 22(1) of Constitution-effect.

Every offender has to be informed of grounds of arrest and of right to bail under Section 50 of the Code of Criminal Procedure and under Article 22(1) of the Constitution. Thus this is a fundamental right. If in a case it has not been complied with, accused will be entitled to bail.[134] However Allahabad High Court in a latest case[135] held that ground of arrest has not been proved to have been communicated by itself would not be a sole consideration for

[127] Bhagaban Bhai v. State,1993 All. L.J. 286.
[128] 1983 All. Cri. R. 619.
[129] 1984 Chand Cri. C. 395 (P&H).
[130] (1998) 1 Rec. Cri. R. 144(2) (145) P&H.
[131] 607 (1985)1 A;;.Cri.L.R. 66(1) P&H.
[132] 1989 U. P. Cri. R., 393 All. 1986 U. P., Cri. R. 217 All
[133] Neeraj v. State of U. P. , 1991 All. L. J. 426 (429)
[134] (1993) 2 Cri. Cri .R.981 (All.).
[135] Vikram v. State, 1996 Cr. L. J. 1536 All. (FB).

releasing an accused on bail, though it may be taken into account with other relevant factors. Article 22(1) and Section 50 require only the communication of grounds of arrest "as soon as may be" and not immediately at the time of arrest.[136]

Similarly when the accused has been illegally detained in jail for a long period without seeking remand from a Magistrate, he will be entitled to bail.[137]

But if the detention of accused at the time of consideration of bail application is legal then illegality of his earlier detention will not entitle the accused for grant of bail.[138] Recording of statement of an accused by coercion while he was in illegal detention may become one of the grounds for granting bail.[139] The Code does not contain any provision entitling an accused merely on the ground and without more, that his detention in prison was illegal. In order to obtain his release on bail, the accused must show that his case was either covered proviso to sub-section 2 of Section 167 Cr. P.C. or that he was entitled to bail under the provisions of Chapter XXXIII of the Code.[140]

Even under Section 309(2) of the Code for remanding an accused to judicial custody the requirement of principle of natural justice particularly that of audit alter am partum should be complied with. Production of the accused is an indispensable requirement of natural justice and fair procedure as the order of remand seeks to deprive him of his personal liberty. On these very analogy repetitive orders for remand without production of accused before court prior to the taking of cognizance will entitle the accused for bail?[141]

2.12 Bail by default of Investigation Officer: Bail under Default Clasue i.e. S. 167(2) Cr.P.C.:

The proviso to Section 167(2) is novel provision to speed up the investigation so that a person does not have to languish unnecessarily in the prison facing the trial. Section 167(2) proviso provides that if it is not possible to complete the investigation within a period of 60 days (or 90 days in the case of offences punishable with death or imprisonment for not less than 10 years) then even in serious cases of ghastly types of Crimes, the accused shall be entitled to

[136] Vimal Kumar Sharma v. State of U. P., 1995 (1) AWC 425 A. (DB).

85 *1993 U. P.* Cri. R., 112.

[137] Deva Ram v. The State of Rajasthan, 1984 Cri. L.J. NOC 129 Raj. 1983 Cr. L.J. 1231 Raj.

[138] Ashok Hussain Allah Detha v. Asstt. Collector of Customes.

[139] A. Narayana Reddy v. State of A.P.. 1992 Cri. L.J. 630 A.P. (D.B.).

[140] Natbar v. State of Orissa, AIR 1975 SC 1465.

[141] Hussainara v. State of Bihar, AIR 1979 SC 1377.

be released on bail, on the expiry of period from the date of arrest.[142] The completion of investigation means submission of charge sheet.

Failure to submit charge sheet within stipulated period of 60 days or as the case may be 90 days, will entitle the accused to bail and Magistrate in such circumstance cannot grant further remand even on the basis of a preliminary charge sheet stating that investigation is yet complete[143] and in such circumstance if the accused is prepared and does furnish bail, the Magistrate is bound to release him on bail and Magistrate will inform the accused right to bail.[144] It gives an absolute and indefeasible right to bail priorto filing of challan report and the right is extinguished on the filling of challan.[145] Bail once granted cannot be cancelled on subsequent submission of charge sheet.[146]

Computation of detention:

The computation of 60 days or 90 days (as the case may be) started from the first day of remand by the Magistrate.[147]

2.13 Languishing of Accused in Jail for a longer period:

Nature of commission of crime is to be taken into consideration while disposing of a bail application in non-bailable offence. Long detention of an accused in heinous crime cannot be said to be a sole ground for granting bail in the absence of overt act especially when the trial is in progress.[148] It may become one of the grounds in those cases where offences are not heinous.

The Supreme Court in a case[149] held accused who was about twenty years old at the time of commission of crime had undergone more than nineteen years of imprisonment and has had to remain in jail for even eight months more and his case was deferred by the Sentence Revising Board on the ground of non-availability ground of his long detention in jail.

Thus where the accused has been languishing in jail for a long period which is more or less equal to the maximum sentence of an offence the accused should be released on bail.

2.14 Failure to connect accused with the crime:

[142] Ibid

[143] Devindrapal Singh v. Govt. of NCT, Delhi, S.C.C. (Cri) 5; Dr. B.S. Panchal v. Stat of Gujrat, 1996 ACC (36) 126 SC.

[144] Shaukin v. State of U.P., 1996 ACC 43 All.; Mohd. Iqbal Madar Sheikh v. State of Maharashtra, 1996(33) ACC 136 (SC)

[145] Satyanarayana v. State of A.P., AIR 1986 SC 2130.

[146] Bhagwan Bhoi v. State, 1993 Cri. L.J. 286; Ram Bhawan v. State of U.P., 1996 ACC 414. All.

[147] Shri Niwas v. Delhi Administration (1982)3 S.C.C. 209: AIR 1982 SC 1391.

[148] Sawan Lal v. State of M.P., (1992) Crimes 382 (2) 383.

[149] Brij Mohan v. State of Rajasthan, (1989)3 Crimes 213 Raj.

Where there is no direct evidence to connect the accused with the crime or circumstantial evidence is not so strong as to connect the accused with the commission of crime, bail should be granted.

Where the applicant was facing a charge of killing his own wife and concealed herdead body, however evidence showed that on that particular night accused had a talk with his wife in the backyard of his in law's house and the next morning the wife was found hanging on a tree in the rear of the house but there was nothing to connect the accused with the crime, bail was granted.[150]

Similarly, where the accused was tried for causing damage to the railway engine by putting his tractor on the railway track, accused was charge sheeted only because he was the owner of tractor while he was not named in the F.I.R., accused was held entitled to bail on the ground of lack of direct or circumstantial evidence against the accused.[151]

2.15 Recall of Bail Orders

Every litigant must come before the court with clean hands. If an accused obtains bail by playing deception on the court, the court itself may recall such bail order.[152]

2.16 Cancellation of Bail

Whenever an accused is granted bail he should normally be not required to appear before the court until charge sheet is filed and he is ordered to appear in court.[153] The provisions of cancellation of bail are given in section 437(5) and 439(2) of the Code in identical words which empower all the courts to cancel the bail if circumstances warrant so.[154] Bail cannot be cancelled[155] because it cannot justify the inference that the accused has won then over. The witnesses have turned hostile must be having a casual connection[156] with the subjective involvement of accused in getting witnesses hostile. In the absence of the same bail once granted cannot be cancelled. Thus this power must be exercised with due care and circumspection in appropriate cases[157] in judicious manner. It is a punitive action, hence

[150] Cirijesh v. State, 1990 A.Cr. 462 All.
[151] Free Legal Aid Committee, Jamshedpur v. State of Hihar, AIR 1982 SC 1463
[152] Aslam Bab Lal Desai v. State of Maharashtra, AIR 1993 SC 1.
[153] Delhi Admn. v. Sanjay Gandhi, AIR 1978, 961.
[154] Ibid
[155] Delhi Admn. v. Sanjay Gandhi, AIR 1978, 961.
[156] Aslam Bab Lal Desai v. State of Maharashtra, AIR 1993 SC 1
[157] Ibid

should not take lightly.[158]

Bail in non-bailable offence is a concession allowed to an accused person, given to an accused with this hypothesis that accused will not abuse this privilege or trust granted or created by court in any manner and if it is found that he has betrayed or misused the trust he disentitles himself to the liberty granted to him.[159] Because an accused who is putting the trial in jeopardy by his misconduct then it is the solemn duty of the court to get all the risks and obstacles removed to make the trial smooth.[160]

But where the bail has been granted by the higher Court in a Committal case then the court of Magistrate should not entertain the application for cancellation of bail to maintain the judicial discipline unless the bail order is not of temporary nature.[161] This power may be exercised suo-motu or on moving application.[162]

The court has power to cancel the bail even before the arrested person is actually released and the court or Magistrate who has released on bail has power to cancel the same.

Once the accused has been enlarged on bail under Section 167(2) in spite of the fact that earlier to it bail application was rejected, his liberty cannot be curtailed and bail cannot be cancelled on the ground of subsequent filling of charge-sheet.[163] But conditional bail granted under Section 167(2) may be cancelled, subsequently even by another Magistrate who comes to be in seining of the case.

Bail may be cancelled where accused persons were seeking adjournments. Adjournments causing inordinate delay in trial and there were serious allegations regarding tampering with evidence.

Bail already granted should not ordinarily be cancelled merely on the ground of mere likelihood of tampering with evidence in absence of specific allegation, long period of liberty per se, vague allegation of tampering with the evidence, or making contact with some of the important witnesses, setting up a plea of alibi by the accused, merely on the ground of heinousness of crime, and in the absence of cogent evidence with regard to the threat given to the witnesses.

[158] Talab v. Mondkar, AIR 1958 SC 376: (1958) SCR 1226

[159] Seoti & other v. Rex, AIR 1948 All. 366.

[160] Rajnikant Jivanlal Patel v. Intelligence Officer, Narcotic Control Bureau, AIR 1990 SC 71.

[161] Aslam Baba Lal Desai v. State of Maharashtra, AIR 1993 SC 1.

[162] 131 Dhena Suren v. The State, 1977 Cr. L. J. 781 Pat.

[163] Shahazad Hasan Khan v. Ishtiaq Hasan

Thus where it is not shown any miscarriage of justice or abuse of process of law in granting bail to accused or there is no direct evidence of involvement of accused in crime, the bail should not be cancelled.

CHAPTER 5

JUDICIAL APPROACH REGARDING BAIL IN INDIA

The accused has committed two types of offenses: 1) Bailable offenses and 2) non-bailable offenses. Infractions that are eligible for bail are subject of Section 436 of Criminal Procedure Code of 1973. The offenses categorized as non-bailable are the subject of Section 437. If the offense falls under section 436, bail is a right; however, if the offense falls under non-bailable offenses, the court has power over whether to give or deny bail. Therefore, it is straightforward for the police or judicial officer to grant bail to the indicted in a bailable offense. When granting or denying bail to an indicted for a non-bailable offense, the judicial officer must use his discretion judiciously and not arbitrarily in accordance with the law. This classification is on the premise that the bailable offence normallytreated as less serious, whereas non-bailable, the offence considered as graver and more serious.

A. In Bailable Offences

When a person appears or produced for a bailable offence before Magistrate or police, then there is statutory duty imposed on the police officer and the court to acquit a person on bail, if he is ready to seek bail. The Magistrate or the police officer can also absolve such person on furnishing his bond as given in section 436. There appears to be no power or even discretion to restrain the indicted from his enshrined liberty. There appears no compulsion on the court to cancel the bail when the offence is bailable.

A person can be freed on bail prior to the police investigation under section 436. Only the bonds properly filed in by the surety guaranteeing the accused timely production to the court are required fora bailable offence. There is no requirement for a written bail request. Indicted can either himself or through a lawyer apply even orally for bail.

The expression "appears or is brought before court" in section 436 means that when a person who is indicted of an offence appears in court with a request for being freed on bail, he has to be immediately put in custody and surrendered to the concerned authority. Application for release on bail can be considered only when this has been done.

If a police officer refuses to free the indicted on bail in a bailable offence, he commits a felony under section 342 I.P.C. A Magistrate act without jurisdiction and improperly refuses bail, he is not protected. The court cannot while granting bail impose any situation except taxing of security with sureties. It is not open to Magistrate to authorize detention of person arrested of bailable offence and is prepared to give bail under section 167(2) of the code in the police custody for the objective of investigation.

Section 436 applies to all security proceedings. A Magistrate has no jurisdiction to ask a person with reference to whom order under section 111 of the code has been passed to furnish bail bond for appearance in the court except when court intends to bind opposite party under section 116(3) of the code.

Bail application for bailable offences should be disposed of on the same day. The bail bond asked to be furnished must be reasonable. Right of the indicted to bail cannot be denied incidentally by charging too much the amount of bond or bail bond to be supplied by person asking for release.

Though there is no special procedure for plea against refusal to grant bail under section 436(1), the High Court and the Court of Sessions can be moved for bail under section 439.

B. In Non-Bailable Offences

When a person is arrested of non-bailable offence he has no right to be released on bail. But it does not mean that indicted in non-bailable offence cannot be released in any way. Here judge in exercise of his discretionary power may release a person on bail. While exercising discretionary power, a duty automatically casts on the judge to keep a balance between the two conflicting demands i.e., shielding the society from misadventure and presumption of innocence till he is found guilty. Therefore, when deciding whether to grant the accused bail or not, the judge must use his discretion wisely and not arbitrarily in accordance with the law. Each case's facts and circumstances, as well as the guidelines established by the Supreme Court of India, must be taken into consideration by judges before they can make a decision. Section 437 contemplates three stages, namely, first, at the time of accusation, second is during investigation, inquiry or trial, third, after the conclusion of the trial and before judgment. Under sub-section (1) of section 437, at the mere stage of accusation, bail may not be refused, but if the accusation indicates that the person is involved in an offence punishable

with death or life imprisonment, bail may not be granted, then bail may be given only to persons under the age of 16 years, or a woman or sick or infirm person. If the case is under investigation, inquiry or trial and there are no logical grounds to believe that the indicted is guilty of any non- bailable offence, he has right to be released on bail. The Session Court may acquit a person on bail and by a consecutive order cause any person to confine to bail, to be arrested and put to custody.

Jurisdiction to grant Bail

It is only the court having power to try the case which can release the accused on bail. Thus, a second-class Magistrate cannot enlarge an accused on bail that he cannot try according to first schedule of Criminal Procedure Code. He can only forward the indicted to a Magistrate having such jurisdiction. A police officer should ordinarily produce the indicted before theMagistrate vested with power to try the case.

If the court means any court, then it would mean that an indicted can go to any Magistrate, in any district, even if the case has not been registered in that district and apply for bail whether or not he could take the cognizance of the case. This was not the intention of law. In that case, it would mean that overlapping of orders of different High Courts. Even if an arrest is made in another district andthe indicted is produced before the executive Magistrate of that district for transfer to other district where he is to be tried, then Magistrate should not release on bail. It should only be forwarded to the responsible district judge according to section 81 of Criminal Procedure Code. In a case, when an irresponsible Magistrate obtains a bail bond from an indicted person for his appearance in another court, outside the jurisdiction and subsequently, it was found that the Magistrate was not competent to do so, then all the proceedings done by the Magistrate shall be nullity. In case of an order passed without jurisdiction, a Magistrate must immediately detain the indict and commit him to custody.

Also, when a non-bailable warrant is given by the court and it is to be applied in another district, the court, as required by section 78(2), shall forward alongwith warrant, substance of information and other relevant evidence in accordance with section 81 Criminal Procedure Code, about the person to be arrested, to enable the court acting under section 81 to decide whether or not to grant bail to the said person. The Chief Judicial Magistrate or Sessions Judge of that district where arrest is made on such a warrant can release the accused on bail.

(i) Sessions Trial

There are no legal barriers to a magistrate's consideration of a bail application of an indicated person, arrested for a crime exclusively triable by the Court of Session, even then the magistrate should direct the accused to approach the Sessions court for bail. If a magistrate exercises this power under section 437 with respect to an offence exclusively triable by the Court of Session, then he has reasonable ground to form the opinion that the defendant is not guilty of an offence punishable with death or lifeimprisonment. If there are sufficient grounds to show that defendant has committed a criminal offence punishable with death or life imprisonment, he will be deemed ineligible to grant bail. Since the powers of magistrates to deal with bail applications are governed by the penalties prescribed for the crimes for which bail is sought. Where the penalties prescribed for the crimes are generally the death or life imprisonment, then bail application is to be heard only by a Court of Sessions and Magistrates do not have jurisdiction to grant bail unless the matter falls under a section 437.

When an accused is granted bail by a Magistrate in such a situation, the bail is only granted for the duration of the inquiry before the Magistrate. When the case is transferred to the Court of Session, the indicted is re-arrested and brought before the Court of Session, where he must apply for fresh bailonce more. In that circumstance, the indicted person experiences a lot of inconvenience as a result, butthere is no corresponding benefit for the administration of the criminal justice system also. However, there is a provision in section 441, sub-section 3 of the code of Criminal procedure, makes the situation easy wherein an indicted person can be granted bail that requires him to appear in front of the Court of Session. This means that if he is committed, he won't have to be re-arrested and brought before the Court of Session again. The section 209, clause (b), also makes it abundantly clear that even in cases, where the offence is triable by the Court of Session, the Magistrate has power to set free the accused on bail during and after the trial.

While deciding the bail matter, Magistrate should act judicially. A bail order issued by a Magistrate determines the right of state and accused and is issued by the Magistrate after application of mind and, therefore in the performance of his judicial duty and constitutes a judicial act.

After the High Court grants the release of a suspect, the Sessions Court may not revoke bail already granted by the High Court unless new circumstances arise in the course of the

proceedings. If the accused is granted bail by the Sessions Court, then state has two options either to seek cancellation of bail from the same court or to approach to the Hon'ble High Court**.**

Under Section 439 of the Code, no person can apply for bail, unless he is in custody. When he surrenders before the court and follows its orders, he is said to be in judicial custody. One of the

healthy standards, in giving bail is that the court should be satisfied that accused, being released on bail, would not tamper with the evidence.

(ii) Power of High Court and Supreme Court to Grant Bail

Bail is usually a matter over which the High Court should have final authority. Section 439(2) permitsthe detention of a person released on bail by any court, including Sessions Courts as it deems fit. High Court has jurisdiction to grant bail in Habeas Corpus petition filed against orders of detention passed under rule (3). The exercise of said jurisdiction is inevitably circumscribed by the considerations which are special to such proceeding and which have relevance to the object which is intended to be served by orders of detention passed under the said rule.

The Apex Court can only intervene in a limited class of cases involving major legal matters requiring final determination for the entire country, where there is a violation of principles of natural justice. Supreme Court justices should not shut their eyes to injustice but they should also avoid keeping their eyes wide open to involve in petty matters, otherwise, the Supreme Court will be unable to play the noble and luxurious role that the Constitutional framers believe it should play. The Supreme Court hasmade rules to exercise its discretion over orders granting or denying bail or advance bail when special leave requests are made for these reasons.

(iii) Indicted Refused Bail by Sessions Court. Whether can Approach High Court for Bail without Challenging Order of Refusal by Sessions Court:

When Sessions Court rejects a request for bail on merits under section 439(1), an order refusing the grant of bail would be a judicial order and such order govern the field until set aside and substitutedby an order made by the High Court. If the indicted wants to approach High Court by filing fresh application, then he has to challenge the order of refusal of Sessions

Court. The proper course for the applicant is to challenge that order and simultaneously pray for bail to High Court. If the High Court finds that the order passed by Sessions Court is unjust, the High Court can set it aside and grant bail inexercise of its power under section 439.

High Court granted –bail, Magistrate not Releasing Indicted on Technical Grounds:

If the High Court has directed the applicant to set free on bail on his submission of bonds to the satisfaction of the Magistrate, the Magistrate cannot refuse the indicted to release on bail on the ground that the order has some technical mistake, such an order has some technical mistake like order does not indicate crime number in which the applicant was arrested etc., because when the identity of the prisoner ordered to be released was not in dispute or doubtful, the technical ground by magistrate is wholly unjustified. There are records to show that indicted is released many times in the absence of crime number. The reason is that the hyper-technical view in matters like bail, which directly relates to liberty of the citizen, must always be avoided.

Whether the Judge Can Act as Prosecutor?

No, the Magistrate cannot, under any circumstances, act as prosecutor. The judge has such broad powers that he must actively participate in the trial to uncover the truth and safeguard the weak and innocent. Magistrate must ask questions that do not frighten, coerce, confuse or intimidate the witnesses.

The inherent risk if a judge adopts much strict attitude towards witnesses have been narrated by Lord Justice Birkett: "The people accustomed to the procedure of the court are likely to be overawed or frightened or confused or distressed, when under the ordeal or prolonged questioning from the presiding judge."

(iv) Bail by Police

In accordance with the procedure of the code, in bailable offences, the police are empowered to accept bail, if the indicted is ready to furnish the bail. Then the police have no power to detain him or produced him before the Judicial Magistrate, and in such a situation, the police officer detaining him also become liable to penal action under the procedure of the Indian Penal Code for illegal detention, besides civil liability. If a person in bailable offence does not want to go to the police, as is generally the case, he can appear before the Judicial Magistrate

of the police station concerned, in the open court, make application and get himself bailed out without any problem and harassment.

The bail taken will be for the indicted to appear in the court of "Illaqa" Magistrate. Ordinarily two bonds, surety bond and bail bond most commonly known as "Muchalka" are taken. The police haveno power to take bail from the indicted for his appearance before the police officer. The object of Sections 436, 437, 444 Criminal Procedure Code is for appearance of the indicted before court and not before police.

Section 170 Criminal Procedure Code authorises the officer-in-charge of the P.S. to take security in bailable cases for his presence before such Judge on a day fixed and for his attendance on daily basis before such Judge until otherwise dictated.

The police officer can also release on bail:

a. U/s 42(3), on arrested in a non-cognizable offence committed in his view, when theperson tells his true name etc.

b. U/s 43(3), when produced before him by a private person and the offence made out isnon-cognizable or bailable.

c. U/s 170 Criminal Procedure Code, when sending challan in bailable case.

d. U/s 436 (1) proviso, he can release on bond only in bailable case.

In non-bailable case, the officer in charge of a police station can release the indicted on bail for offence except those which are punishable with death or imprisonment for life under section 437(1) Criminal Procedure Code. If during the investigation of a case, there are no reasonable grounds for believing that the indicted has committed any non-bailable offence, the officer in charge can release the indicted on bail under section 437(2) Criminal Procedure Code This power is also given to the I.O. or officer in charge of police station, under section 169 Criminal Procedure Code These officers can release on bail the indicted who has been arrested but against whom there is no major evidence or legitimate grounds for suspicion to support the forwarding of indicted to a Magistrate. This power can only be exercised before taking remand under section 167 Criminal Procedure Code

It must also be noted that even in those cases, in which bail is taken by police, the indicted is required to submit fresh bail when he is required to appear before judicial/metropolitan

Magistrate. So, it is useful to get bail from the judicial /metropolitan Magistrate.

The bail however under section 437(1) Criminal Procedure Code should be very cautiously and sparingly done by the officer in charge. It is not a mandatory provision and as such, these powers are, only permissive and not obligatory. These should therefore, be exercised with caution. Police officers must be confident that bail is unlikely to unduly impede law enforcement or lead to the escape of a prima facie offender. It is also further provided in these rules. "In every case of release on bail or recognizance whether under section 169 or 497 (437) Criminal Procedure Code, full reasons shall be recorded in a case diary and the police officer concerned shall preserve the bond in form 26 until it is discharged either by the appearance of the indicted person or by the order of a competent court."

The police officer has no right to reject the bail given by itself as there is no procedure under section 437(5) Criminal Procedure Code to this effect. The bond taken by the police officer is valid only up to the date and time given in it. If the indicted does not appear in court on that date, it is liable to be forfeited under section 446 Criminal Procedure Code. If he appears on the said date, then the bond become invalid and the court will take a new bail bond.

A police officer shall not have the power to re-arrest a defendant released on bail under section 437 of the Code of Criminal Procedure if arrest is deemed necessary and the police shall apply to the competent court for release of bail and comply with section 437 (5) of Code of Criminal Procedure.

C. Power of Appellate Court in Respect of Granting Bail

While any appeal against conviction is pending, the appellate court may terminate the execution of the punishment, and if the convicted is in confinement, the appellate court may release him on bail or on his own bond. The court shall, however, record its reasons for taking any such action under section 389(1). The order for bail under section 389(1) is for limited period only and is applicable only to 'convicted' persons and not to those who are bound over. The appellate court has no power to enforce personal presence of the appellant by issue of warrants or otherwise, especially in a case where sentence imposed on him is of fine only.

As the discretion in these matters is to be exercised judicially, the appellate court must i.e. consider (i)Whether there is prima facie evidence to raise serious doubts about the conviction. and (ii) whether administration of the remedy could be unduly delayed. It has been found that, with few exceptions, one year is generally a reasonable period for hearing a substantive

appeal of a pending capital actionin the High Court.

Where an order granting bail by the High Court to the indicted sentenced for the offence under section 302, 201, 331 read with 34 IPC, during pendency of appeal, was set aside by the SC and remanded to decide afresh, bail granted after considering the following points: -

(a) Appellants have raised some arguable points,

(b) The petitioner presented good prima facie evidence,

(c) Applicant surrendered shortly after Supreme Court revoked bail.

(d) The appeal is not likely to be heard for a long time.

According to the above rules, the appellate court may have the power to grant bail to a convicted person only after an appeal has actually been filed. Therefore, the court of first instance that convicted the defendant may, in certain circumstances, grant the time to defendant to file an appeal and to receive a bail order from higher court. Defendant must be released on bail to give him sufficient time for filing of Appeal. The circumstances under which a convicted person wishing to file an appeal against his conviction, should be released on bail by the court of first instance are:

1) if the person is released on bail to imprisonment for not more than three years, or

2) when the convicted offence is released on bail and is on bail; [S. 389(3)].

An appeal against an acquittal can only be filed to the High Court under Section 378. If such anappeal is made, the High Court may issue an arrest warrant for the acquitted defendant and imprison him pending appeal or release him on bail (S 390). The discretion conferred on the court in granting bail to the defendant shall normally be exercised by the court in connection with any crime involving

the death penalty, and the defendant's appeal against acquittal shall be subject to pending appeal. It shall be deemed appropriate provided there are serious and exceptional reasons for their detention.

If bail is granted by the Court of Appeal or Court in first instance, will find that there appears to be no provision in the Code to reverse bail. This omission is a serious hole in code.

However, for the sake ofjustice, the High Court may, in exercise of its inherent powers under Section 482, grant bail in such cases if it deems fit. When the defendant was convicted of murder and the court of first instance granted bail because the defendant was on bail at trial. Bail orders may be overturned because trial courts do not recognize exceptional circumstances to grant bail. Regarding order of bail in murder cases, court considers relevant factors such as the nature of the charges against the defendant, the manner in which the crime was allegedly committed, the seriousness of the crime, and the desirability of the defendant released on bail after conviction.

As powers to release on bail have been given to appellate courts, so also, the courts exercisingrevision jurisdiction, namely the High Court and the Court of Session, have similar powers to release on bail during the pendency of revision proceedings as mentioned in Section 397(2). It has, however, been held that the Supreme Court is not an appellate Court as contemplated under section 389(1) and the provisions of section 389 will not apply in the case of appeals to the Supreme Court.

D. Recent Supreme Court Judgements Relating to Bail

In Muhammed Rafi v. Satheesh Kumar Con. Case, the Court opined "we deem it necessary to remind you that the State's police officers have the authority to arrest people at various stages of the criminal justice system, but this authority cannot be used as a tool of punishment or harassment without taking into account the protections outlined in Section 41 of the Criminal Procedure Code. We warn the relevant authorities that any effort to disobey a court order is disrespectful to the very dignity of the court and the administration of justice. The Supreme Court's directives in particular must be followed exactly as written, with no exceptions or justifications. The directions so issued are binding and must be obeyed by the parties and all concerned stricto sensu.

"The Apex Court in Mohammed Zubair v. State of NCT of Delhi & Ors Writ Petition (Criminal) No 279 of 2022 held a public interest in upholding both the rights of the indicted and the criminal justice system. By imposing requirements that are excessive in comparison to the requirements necessary to guarantee the presence of the indicted, the proper conduct of the investigation, and ultimately to guarantee a fair trial, the human right todignity and the protection of constitutional safeguards should not become illusory. The court may set

requirements, but those conditions must be proportionate to the goal of those conditions. Each situation calls for a careful assessment of the type of danger that the grant of

permission, as requested in this instance, poses. The mere fact that the charges brought against the petitioner relate to tweets he posted on a social media site does not warrant the issuance of a broad anticipatory injunction prohibiting him from tweeting. Given the objective of establishing bail terms, a broad injunction forbidding the petitioner from expressing his opinion, which he is lawfully permitted to do as an involved citizen, would be excessive. Such a requirement would effectively be a gag order against the petitioner. Gag orders limit people's ability to speak freely. The petitioner asserts to be a journalist and co-founder of a fact-checking website that uses Twitter as a communication tool to reveal false information in this age of morphing images, clickbait, and personalized videos.

Recently in Arnab Manoranjan Goswami v. State of Maharashtra Criminal Appeal No. 742 of 2020 (Arising out of SLP (Cr) No.5598 of 2020) The Apex Court held the following points:

"1. To ensure the goals of justice, a court must issue the necessary orders to carry out the provisions of the Criminal Procedure Code, stop the misuse of any court's procedure, or in other ways. The High Courts must exercise caution when exercising the jurisdiction granted to them under Section 482 in accordance with this court's rulings. The decisions of this Court are based on the fundamental concept that the indicted should not utilize artifices and methods to prevent the proper implementation of criminal law, which is why we emphasize that the High Court must exercise this jurisdiction with moderation.

2. Even one day of liberty restriction is one day too many. We must constantly be aware of the broader systemic effects of our choices. Justice Krishna Iyer famously stated in the case State of Rajasthan, Jaipur v. Balchand (1977) 4 SCC 308 that "bail, not jail" is the fundamental tenet of our criminal justice system. This Court may intervene at any moment if the High Courts and Courts in the district court of India fail to put this concept into practice. These comments of Justice Krishna Iyer have been routinely applied in this Court's rulings for many years and are not isolated silos in our jurisprudence.

3. Pendency before the High Courts with regard to Bail Applications is 91,56842 and Pendency before the District Courts with regard to Bail Applications are1,96,861.

4. We sincerely hope that our courts will demonstrate a keen understanding of the need to increase the scope of liberty and adopt our method as a guiding principle when making bail

decisions in the future."

Recently The Apex Court in Satender Kumar Antil v. Central Bureau of Investigation (SC)2022 AIR (Supreme Court) 3386 held that "it equally responsible for preventing the criminal code from being used as a tool for the targeted harassment of citizens is the district judiciary, the High Courts, and the Supreme Court. The necessity to assure the appropriate application of criminal law on the one hand, and the need, on the other hand, to ensure that the law does not serve as a pretext for targeted harassment, should be recognized by courts at both ends of the spectrum. Liberty is as flimsy as flimsy can be across human eras. Liberty endures thanks to the watchfulness of its people, the din of the media, and the stale hallways of the courts where the rule of (and not by) law is alive. Yet, much too often, liberty is a casualty when one of these components is found wanting."

And The Apex Court recently too in Siddharth v. State of Uttar Pradesh Criminal Appeal No.838 of 2021 (Arising out of SLP(Crl.) No.5442 of 2021) held, "We should be aware that a key component of our constitutional mandate is personal liberty. When a custodial investigation is required because of a serious crime, there is a chance that the witnesses might be influenced, or the indicted would flee, there is cause to make an arrest. It does not follow that an arrest must be made just because it is legal to do so. There must be a distinction between the existence of the authority to arrest and the reason for using it. A simple arrest can do enormous damage to a person's reputation and self-esteem. We find it difficult to see why the investigating officer should be required to make an arrest if there is no reason to suspect that the indicted will elude capture or refuse to follow a summons, and the indicted has actually cooperated with the inquiry throughout."

CHAPTER 6
CONCLUSION AND SUGGESTIONS

1. Conclusion:

The purpose of Article 21 is to prevent encroachment upon personal liberty by the executive except in accordance with law, and in conformity with the provisions thereof. It is, therefore, imperative that before a person is deprived of his life or personal liberty, the procedure established by law must be followed and must not be departed so as to the disadvantage of the person. In each case where a person complains of the deprivation of his life or personal liberty, the Court, in exercise of its Constitutional power of judicial Review, decides whether there is a law authorizing such deprivation and whether in the given case, the procedure prescribed by such law is reasonable, fair, just, and not arbitrary,. On liberal interpretation of the words 'life' and 'liberty' in Article 21, the said Article has now come to be invoked as a residuary right, Thus, personal liberty cannot be taken away save in accordance with the procedure established by law. Personal liberty is a Constitutional guarantee. However, Article 21 which guarantees the above right also contemplates deprivation of personal liberty by procedure established by law.

Under the criminal laws of our Country, a person accused of offences which are non-bailable is to be detained in custody during the pendency of trial unless he is enlarged on bail. Such detention cannot be questioned as being violate of Article 21 as the same is authorized by law. [164]ut even persons accused of non-bailable offences are entitled to bail if the court concerned comes to a conclusion that the prosecution has failed to establish prima facie a case against him and if the court is satisfied for reasons to be recorded that in spite of the existence of prima facie case there is a need to release such persons on bail where fact and situations require it to be done. In that process a person whose application for enlargement on bail is once rejected is not precluded from filing a subsequent application for grant of bail if there is a change in the fact situation. While liberty of an individual is precious and there should always be an all-round effort on the part of Law Courts to protect such person's right to personal liberty is important but

[164] *ShaliniRawat*v. *State*, 1998 Cri LJ 1815 at pp. 1817-18 (Del)

in case of a conflict between accused person's right of personal liberty and interest of public justice and welfare objectives of society, the former should be subordinated to the latter.[165]

The main purpose of the bail is to assure that an accused person will return for trial if he is released after arrest it is held by the Supreme Court that general policy is to grant bail rather than to refuse. Thus, there is a need to strike balance between individual freedom and public interest.

Certain conditions are always explicit or implicit in an y application for bail. but those conditions should be arbitrary. The conditions should be such especially in bailable offences that the accused is able to conform with them, especially while bringing surety and amount of the bond. The amount of bond should not be excessive, but reasonable such that one is able to deposit it. This means that the amount should be fixed according to the financial capacity of the accused. There are many languishing in jail for want of bail even in case of petty offences.

In *re Kota Appalakonda* it has been pointed out that a person accused of a bailable offence shall be granted bail with no conditions except those sanctioned by law. The condition prescribed under the law is the preparedness of an accused to give bail.

"A person is entitled for his release on his readiness to offer bail on bond which he can only miss if he is unwilling or unable to offer bail or lacks the capacity to execute bail bonds. Fixation of the amount of bail for the accused and surety bonds are lawful conditions that can be imposed while exercising the powers to grant bail. The bail amounts ought not to be excessive and the demand for verification of surety not unreasonable"

In *Afsar Khan Vs. State*, the Karnataka High Court has held a cash security of Rs.6750/- as harshand oppressive amounting to denial of bail and deprivation of personal liberty.

Precedents continue to show that it is well within the court's jurisdiction to impose some restrictions on the freedom secured by an accused who has been granted bail, irrespective of the fact whether these restrictions really relate to the purpose of the bail or not. Unreasonable restrictions on freedom, however, cannot be justifiably imposed in any case. A court cannot impose conditions which may restrict the freedom granted to the accused on bail under section

[165] 1992 Cr.LJ 1976

436 of the Code. The bail in bailable cases can be fettered only by requirements of the willingness and capacity of the accused to furnish bail bond and such other conditions as are provided under section 436 (1) and (2). The prescribed requirements may not be enough to give credibility to the working of a bail system and perhaps leave some lacunae but this may not be allowed to put the bail system to an abuse either though the judicial practice of imposing conditions not covered by the statues or those ought to be saved by virtue of Naresh Mirajkar's case.

A very common practice is to detain the arrested person in the lock-up for an unduly long period for standing his trial and no formal case is registered. The arrested person is also not produced before the court on the expiry of twenty-four hours after his arrest. A large number of these arrested persons are semi-literates or illiterates with limited means of income and influence and are thus unable to avail of the opportunity to communicate with a lawyer, friend or relative to arrange for legal aid or for standing sureties. In such cases, the arrest is not entered into the formal records although some paper work is shown to be done. The poor and the illiterates have no means for access to law or lawyers so that they can proceed with legal procedure, though many judgments and guidelines have been made by the apex court. The problem lies with the executive and also the socio economic conditions of the country. The legal procedure is very tiresome and complicated that ordinarily cannot be understood by an ordinary person.

The existence of professional sureties in the system of bail, within the knowledge of the magistracy, the lawyers and the police is a wonder – work in the system. Bonds are accepted from them as sureties for even those who are unknown to them personally. These bailsmen have come to stay as an integral part of the system in subordinate courts and identifiable lawyers trade with them in the release of the arrested persons from custody. No system of verifying the character or status of the person standing as surety or his property exists in the records of the courts. The verification of sureties may be the responsibility of the lawyers or of the officials but the records, in the course of field survey, were found without showing any such verification, suggesting thereby that either the verification of sureties does not take place at all or the records are removed with the connivance of the officials.

It has come to notice that the verification is done by requiring the surety to produce his ration card. The details of his status, income and address are generally vouchsafed by the lawyer. No endorsement is made on the ration card. Bogus ration cards are even sometimes shown with the connivance of officials of the civil supplies department. The capacity, antecedents and character of the sureties are seldom questioned during the proceedings. There have also not been prosecutions for perjury or furnishing false bail bonds. Contrary to the above, the professional surety is generally considered an important person who helps in lessening the burden of the court by enabling it to take its order effective. He also unburdens the task of jail authorities, who otherwise have to take the arrested person in custody. Indeed, the professional surety is able to provide succor to the person securing release from custody on mere payment of a "fee". This instrumentality has become a convenience agency for the implementation of law of bails. The professional sureties appear simultaneously in many cases on the basis of one and the same property which is sometimes even nonexistent. The forfeiture of bail bonds is a rare phenomenon. If the proceedings are initiated they are commonly set aside. This is all done at the knowledge of the authorities but this is the way it works

The collusion of court officials, lawyers and professional sureties is evident and the willing indifference of the police, prosecution and the courts towards the existing mode of securing the bail is distinctly discernible. This is the ground available against justice Krishna Iyer'sobservation:

"a developed jurisprudence of bail is integral to a socially sensitized judicial process."

There is a complete absence of any standard to determine the amount of bail. The amount required to be furnished in a case is mostly determined arbitrarily. No consideration is ever given to the personality of the accused or to his financial ability. No standards are followed to ascertain the integrity and capacity of the sureties as well. The quantum of bail amount can be deemed excessive from the general standards since most of the accused persons are from poor economic background. The usual mode of granting release is to ask for a personal bond from the accused stipulating a guaranteed sum of money for his presence along with surety with a similar stipulation. Alternative bail process, particularly the recognizance without sureties virtually do not exist.

Finally it can be concluded that all these corruption is done to earn money and the Fat people are the one who are the main beneficiaries of the above mentioned process, and the poor suffer, either due to reluctance on the part of the officials or their deliberate intention.

2. Suggestions:

i. Formulation of bail provisions in the Code may alone be not sufficient to make the system of bail functions with a purpose. A serious effort of securing public support and participation in the administration of criminal justice, coupled with necessary legislative, executive and judicial powers to act effectively are most warrant. Such an effort alone can help in fulfilling the pre-conditions required for smooth operation of the bail system. Urgent attention in this regard is needed towards the:

(a) Proper functioning of police power,

(b) Developing the devices to control the police power

(c) Speedy trial of the accused, and

(d) Availability of legal aid and legal service from the preliminary stage for the terminal end of criminal process.

ii. Performance of the existing bail law would require enactment of a comprehensive code to replace the existing law on the subject. The proposed code must reflect the basic philosophy, utility and guidance for grant and refusal of bail. In view of the emergence of certain issues under the Human Rights jurisprudence, specific mention of arrangements has become necessary about dealing the cases of minors, lunatics, and those detained for preventive purposes under special laws.

iii. Procedural lucidity and comprehensiveness are required in the existing statutory bail scheme. The reformation of bail law is must; therefore, replace this vagueness and uncertainty by clarity and coherence. Matters relating to jurisdiction, the successive stages necessary for

availing of the freedom on bail, the extent and power of various courts in their hierarchical order to grant, refuse or cancel bail, the discretion to grant bail and prescribing the prohibition in cases where bail ought not to be granted, must be well comprehended under the scheme.

iv. Also there should be an active effort to eradicate poverty and spread education because poverty is the root of most of the crimes. If this problem is solved there will be less disputes hence less no of under-trials Languishing in jail.

v. Also the the number of courts should be increased and the vacant seats of the judges be filled up immediately. The number of courts are not adequate enough to dispose all the cases. Its inadequacy results in pending of cases. And vacant post of the judges adds to the problem.

The above suggestions are merely outlines for improvement law on bails. A separate legislation is urgently needed firstly to remove the prevailing confusion and then to law down a sound mechanism for smooth working of the bail system. It is indeed a major task to overhaul the existing law of bail. Rationalism of the law of bails requires thinking on the basic premises in favour of the grant of bail with risks appurtenant to it, as well as the determining of factors relevant to assessment of risks.

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