

CODE OF CRIMINAL PROCEDURE I

TOPIC: BAIL

“The issue of bail is one of 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”. – Justice V.R. Krishna Iyer

TABLE OF CONTENT

PARTICULARS	PG.
List of cases	4-5
Introduction	6-7
History	8-9
Objective of Bail	10
Types of Bail <ul style="list-style-type: none">• Bail in Bailable offences• Bail in Non Bailable offences• Anticipatory Bail• Bail on Default• Interim Bail• Bail after Conviction	13-25
Cancellation of bail	26
Conclusion	27
Reference	28

LIST OF CASES

CASE NAME	CITATION
Adri Dharamdas v State of West Bengal	AIR 2005 SC 1057.
Amar Nath Singh v The State of Jharkhand	Case No.4644 of 2016
Atul Tripathi V. State of UP	CrI. Appeal No.NO.1516/2014
Babu Singh v. State of U.P	(1978) 1 SCC 579
Balchand Jain v. State of M.P	AIR 1977 SC 2447
Deepak Bajaj v State of Maharashtra	(2008) 16 SCC 14
<u>Deepak Khosla v state of NCT of Delhi & Ors</u>	CRL.M.C.--663/2017.
Dhiren Prafulbhai Shah v State of Gujarat	2016 CriLJ 2217
<u>Dolat Ram v. State of Haryana</u>	(1955) 1 SCC 349.
Dr <i>Subhash Kashinath</i> Mahajan v The State Of Maharashtra And Anr	CRIMINAL APPEAL NO.416 OF 2018.
Govind Prasad v. State of West Bengal.	1975 CriLJ 1249.
Gudikanti Narasimhulu v. Public Prosecutor	(1978) 1 SCC 240.
Gurbaksh Singh Sibbia v. State of Punjab.	AIR 1980 SC 1632
Gurcharan Singh v. State (Delhi Admn.)	(1978) 1 SCC 118.
<u>Kalyan Chandra Sarkar v. Rajesh Ranjan,</u>	(2005) 2 SCC 42
Kamlendra Pratap Singh v State of U.P.	(2009) 4 SCC 437.
Kanhaiya Kumar v State of NCT of Delhi	W.P.(CRL) 558/2016.
Lal Kamlendra v State	(2009) 4 SCC 437.
<u>Lalita Kumari v State of U.P</u>	(2014) 2 SCC 1.
Md Shahabuddin v State of Bihar	Cr.Misc. No.35785 of 2016
Moti Ram v. State of M.P	(1978) 4 SCC 47
Nirmal Jeet Kaur v State of Madhya Pradesh and Ors.	(2004) 7 SCC 558
<u>Prahlad Singh Bhati v. NCT</u>	(2001) 4 SCC 280
<u>Puran vs. Ramvilas</u>	AIR 2001 SC 2013.
<u>R.J Sharma Vs. R.P. Patankar</u>	1993 Cri.L.J. 1993 [Bombay].

<u>Rakesh Kumar Paul vs. State of Assam</u>	SLP (CRL.) NO. 2009 OF 2017
<u>Ram Govind Upadhya Vs. Sudarshan Singh</u>	2002 Cr.L.J 1849 (S.C.)
Rasiklal v. Kishore s/o Khanchand Wadhvani	AIR 2009 SC 1341
Sanjay Chandra v CBI	(2012) 1 SCC 40
Sanjay Dutt v. State, Through CBI	(1994) 5 SCC 410.
Shakuntala Devi v State of UP	1986 CriLJ 365.
Siddharam Satlingappa Mhetre v. State of Maharashtra	(2011) 1 SCC 694
Siddharam v State	(2011) 1 SCC 694.
State of Kerala v. Raneef	(2011) 1 SCC 784
State of M.P. & Anr. v. Ramkishan Balothia	(1995) 3 SCC 221.
State of Rajasthan v. Balchand	(1977) 4 SCC 308
<u>State of U.P. v. Amarmani Tripathi</u>	(2005) 8 SCC 21.
<u>State of U.P. v. Laxmi Brahman</u>	AIR 1983 SC 439
Suddu kumar vs. State of Bihar	Criminal Appeal (DB) 583 of 2015
Sukhwant Singh v State	(2009) 7 SCC 559.
<u>Suresh Jain v. State of Maharashtra</u>	(2013) 3 SCC 77.
Vaman Narain Ghiya v. State of Rajasthan	(2009) 2 SCC 281.

INTRODUCTION

‘Bail’ is derived from the old French verb ‘baillier’ meaning to ‘give or deliver’.¹ The term bail has not been defined in the Criminal Procedure Code (herein after referred to as CrPc)², nevertheless, the word ‘Bail’ has been used in the Cr.P.C. several times and remains one of the vital concepts of criminal justice system in consonance with the fundamental principles enshrined in Parts III and IV of the Constitution along with the protection of human rights as prescribed under International treaties/ covenants.

Wharton’s Lexicon³ and Stroud’s Judicial Dictionary⁴ defines bail as “the setting free of the defendant by releasing him from the custody of law and entrusting him to the custody of his sureties who are liable to produce him to appear for his trial at a specific date and time.”

According to Halsbury’s Laws of England:⁵ “..the effect of granting bail is not to set the defendant (accused) free, but to release him from the custody of law and to entrust him to the custody of his sureties who are bound to produce him to appear at his trial at a specified time and place. The sureties may seize their principal at any time and may discharge themselves by handing him over to the custody of the law and he will then be imprisoned.

The literal meaning of the word “bail” is surety.⁶ Bail, therefore, refers to release from custody, either on personal bond or with sureties. Bail relies on release subject to monetary assurance either one’s own assurance (also called personal bond / recognizance) or through third party sureties. The Supreme Court has also reiterated this definition in the *Moti Ram Case*⁷.

According to Black’s Law Dictionary,⁸ what is contemplated by bail is to “procure the release of a person from legal custody, by undertaking that he/she shall appear at the time and place designated and submit him/herself to the jurisdiction and judgment of the court.”. Bail has been defined in the Law Lexicon as security for the appearance of the accused person on

¹ The Report No.268 of the Law Commission of India, on bail reforms, titled “Amendments to Criminal Procedure Code, 1973

² See *Vaman Narain Ghiya v. State of Rajasthan*, (2009) 2 SCC 281.

³ Law lexicon by Ramanth Iyer, (3rd ed).

⁴ 4th Edn., 1971.

⁵ Halsbury’s Laws of England, , Vol II para 166 (4th Edn., 1998)

⁶ *Sunil Fulchand Shah v. Union of India*, AIR 2000 SC 1023

⁷ (1978) 4 SCC 47.

⁸ Black's Law Dictionary 177 (4th ed.)

giving which he is released pending trial or investigation. Govind Prasad v. State of West Bengal.⁹

The bail, in lay man's term, means a guarantee or assurance given by a person arrested to appear before a competent court at a specified time at a specified place. The provisions of law which govern the bail are provided under Chapter XXXIII of CrPC, which is the premier statute laying down criminal procedure in India.

The concept of the bail involves two conflicting concerns- an individual's right to liberty and his right to be presumed innocent until proven guilty against the society's interest in maintaining law, order and security. The custody of a person pending the completion of trial may cause great hardships to that person which may include loss of liberty, livelihood during that period. The object of keeping an accused person in detention prior to or during the trial is not punishment but (1) to prevent repetition of offence with who is charged (2) to seek the presence of the accused during the trial and (3) to prevent destruction of evidence.

Thus position with respect to bail can be finally described as what was held in Vaman Narain Ghiya v. State of Rajasthan.¹⁰ "Bail" continues to be understood as a right for assertion of freedom against the State imposing restraints. Since the UN Declaration of Human Rights of 1948, to which India is a signatory, the concept of bail has found a place within the scope of human rights. The dictionary meaning of the expression "bail" denotes a security for appearance of a prisoner for his release. Etymologically, the word is derived from an old French verb "bailer" which means to "give" or "to deliver", although another view is that its derivation is from the Latin term "baiulare", meaning "to bear a burden". Bail is a conditional liberty.

Bail may thus be regarded as a mechanism whereby the State devolves upon the community the function of securing the presence of the prisoners, and at the same time involves participation of the community in administration of justice.

⁹ 1975 CriLJ 1249.

¹⁰ (2009) 2 SCC 281.

HISTORY

The concept of bail can be traced back to 399 B.C, when Plato tried to create a bond for release of Socrates. The modern system of bail evolved from England.

In medieval England, the sheriffs originally possessed the sovereign authority to release or hold suspected criminals.¹¹ Some sheriffs would exploit the bail for their own gain. The Statute of Westminster (1275) limited the discretion of sheriffs with respect to the bail. Although sheriffs still had the authority to fix the amount of bail required, the statute stipulates which crimes are bailable and which are not.

In the early 17th century, King Charles I ordered noblemen to issue him loans. Those who refused were imprisoned. Five of the prisoners filed a habeas corpus petition arguing that they should not be held indefinitely without trial or bail. In the Petition of Right (1628) Parliament argued that the King had flouted Magna Carta by imprisoning people without just cause.

The Habeas Corpus Act 1679 states, "A Magistrate shall discharge prisoners from their Imprisonment taking their Recognizance, with one or more Surety or Sureties, in any Sum according to the Magistrate's discretion, unless it shall appear that the Party is committed for such Matter or offences for which by law the Prisoner is not bailable." The English Bill of Rights (1689) states that, "excessive bail hath been required of persons committed in criminal cases, to elude the benefit of the laws made for the liberty of the subjects. Excessive bail ought not to be required." This was a precursor of the Eighth Amendment to the US Constitution.

The Bail Act 1976 was enacted with the aims of creating more conditions by which defendants could be denied bail and also redefining the parameters of fulfilling bail.¹² The legislation outlined that courts were obliged to offer bail to defendants unless a specific exception was met. The first of two known exceptions was that the defendant would not willingly surrender and tamper with case evidence the second was that insufficient case evidence had been collected to allow a defendant to be granted bail. The act also nullified the recognizance system, removing the requirement of paying a specific amount of money and instead arresting defendants for failing to surrender. Many historians have observed a

¹¹ Keiper, Claudia A. (1983). *Criminal Justice Reform: A Blueprint*. ISBN 9780895268419.

¹² Dell, Susanne. "The Bail Act 1976". *The British Journal of Criminology* 17.2 (1977): 185-188. Academic Search Complete. Web. 31 October 2017.

dilemma in which the 1976 Bail Act granted greater power to the courts in handling custody but also pushed them to not put defendants in custody unnecessarily. Legal commentator Susanne Bell notes that the act failed to incur universal legal promotion, instead only allowing defendants to be provided legal aid after they have been reprimanded. Bell believes that this, among other minor flaws, flawed the legislation, but it was nonetheless a springboard for other practical applications.

As a partial amendment to the 1976 Bail Act, the Criminal Justice Act 2003, stipulates that bail must be denied to defendants who test positive for Class A drugs outlined in the Misuse of Drugs Act 1971.¹³

¹³Dell, Susanne. "The Bail Act 1976". The British Journal of Criminology 17.2 (1977): 185-188. Academic Search Complete. Web. 31 Oct. 2017

OBJECTIVE OF BAIL

The objective of bail or purpose of bail has been put forth by various scholars, most of them being on similar lines that firstly It helps assure reappearance of the accused and secondly. It prevents the un-convicted individuals from suffering unnecessary imprisonment.

However the leading authority which could be referred to for explaining the objective of bail in detail is *Sanjay Chandra v CBI*.¹⁴ It defined the objective of bail as follows-

In bail applications, generally, it has been laid down from the earliest times that the object of bail is to secure the appearance of the accused person at his trial by reasonable amount of bail. The object of bail is neither punitive nor preventative. Deprivation of liberty must be considered a punishment, unless it can be required to ensure that an accused person will stand his trial when called upon. The courts owe more than verbal respect to the principle that punishment begins after conviction, and that every man is deemed to be innocent until duly tried and duly found guilty. From the earliest times, it was appreciated that detention in custody pending completion of trial could be a cause of great hardship. From time to time, necessity demands that some un-convicted persons should be held in custody pending trial to secure their attendance at the trial but in such cases, 'necessity' is the operative test. In this country, it would be quite contrary to the concept of personal liberty enshrined in the Constitution that any person should be punished in respect of any matter, upon which, he has not been convicted or that in any circumstances, he should be deprived of his liberty upon only the belief that he will tamper with the witnesses if left at liberty, save in the most extraordinary circumstances. Apart from the question of prevention being the object of a refusal of bail, one must not lose sight of the fact that any imprisonment before conviction has a substantial punitive content and it would be improper for any Court to refuse bail as a mark of disapproval of former conduct whether the accused has been convicted for it or not or to refuse bail to an un-convicted person for the purpose of giving him a taste of imprisonment as a lesson.

¹⁴ (2012) 1 SCC 40

LEGAL PROVISIONS

The concept of bail emerges from the conflict between the police power to restrict the liberty of a man who is alleged to have committed a crime, and presumption of innocence in favour of the person accused of an offence. Bail is regarded as a mechanism whereby the State imposes upon the community the function of securing the presence of the prisoners, and at the same time involves participation of the community in administration of justice. The provisions relating to the grant of bail are enshrined in Chapter XXXIII, under sections 436-450 of Cr.P.C. Offences have been classified into bailable and non bailable and “cognizable” and “non-cognizable”. Officer-in-charge of police station, Magistrate, Sessions Court and High Court are empowered under Cr.P.C. to deal with bail, imposing conditions on bail, cancellation of bail or anticipatory bail.

Provisions As To Bail And Bonds

Sec. 436 : In What Cases Bail To Be Taken

Sec436a :Maximum Period For Which An Undertrial Prisoner Can Be Detained

Sec.437 :When Bail May Taken In Case Of Non-bailable Offence

Sec.437a:bail Ta Require Accused To Appear Before The Next Appellate Court

Sec.438 :Directions For Grant Of Bail To Person Apprehending Bail

Sec.439 :Special Powers Or High Court And Court Of Session Regarding Bai

Sec.440 :Amount Of Bond And Reduction Thereof

Sec.441 :Bond Of Accused And Sureties

Sec.441A :declaration By Sureties

Sec.442 :Discharge From Custody

SEC443 :power to order sufficient bail when that first taken is insufficient.

SEC444 :discharge of sureties

SEC445 :Deposit instead of recognizance

SEC446 :Procedure when bond has been forfeited

SEC446A :Cancellation of bail and bail bond

SEC447 :Procedure in case of insolvency or death of surety or when a bond is forfeited

SEC448 :Bond required from minor

SEC449 :Appeal from orders under section 446

SEC450 :Power to direct levy of amount due on certain recognizance

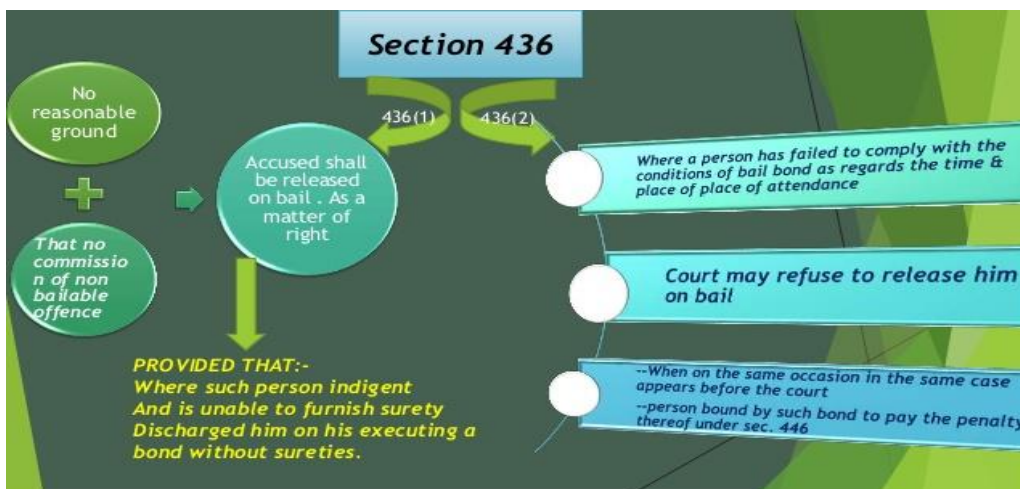
TYPES OF BAIL

The Code of Criminal Procedure, 1973 contains elaborate provisions relating to bails. Code provide different kinds of bail :-

- Bail in Bailable offence (Section 436)
- Bail in Non bailable offene (section 437)
- Anticipatory bail (section 438)
- Ad interim bail
- Bail after conviction (section 389)
- Bail on default (section 167(2))

1. BAIL IN BAILABLE OFFENCE

Section 436 provides for the release on bail of a person accused of a bailable offense. Section 436 of Cr.PC is mandatory in nature and the court or the police has no discretion in the matter. Any accused person arrested for a bailable offence willing to provide bail must be released.¹⁵ The only discretion available with the police is to release the accused either on a personal bond or with sureties. In cases where the accused is unable to provide bail, the police officer must produce the accused person before the Magistrate within 24 hours of arrest as specified under s. 57 of Cr.P.C. Subsequently, when the person accused of an offense is produced before a Magistrate and is willing to furnish bail, then the Magistrate must release the accused person and the only discretion available is to release either on personal bond or a bond with sureties. The Magistrate cannot authorize detention of a person who is willing to furnish bail with or without sureties even for the purposes of aiding the investigation.



¹⁵ *Santh Prakash v. Bhagwandas Sahni*, 1969 MLW (Cri) 88.

In Rasiklal v. Kishore s/o Khanchand Wadhvani¹⁶ the Supreme Court held that the right to bail for bailable offences is an absolute and in-defeasible right and no discretion can be exercised as the words of s. 436 Cr.P.C are imperative and the person accused of an offence is bound to be released as soon as the bail is furnished.¹⁷ It further observed that there is no need for the complainant or the public prosecutor to be heard in cases where a person is charged with a bailable offence. Moreover, the court has no discretion to impose any conditions except to demand security. Thus any condition to surrender passport,¹⁸ directing the person accused of an offence to appear before police¹⁹ or the police commissioner²⁰, or even directing such accused person not to take part in public demonstration or make any public speech²¹ cannot be imposed.

The Hon'ble Supreme Court in Vaman Narain Ghiya v. State Of Rajasthan,²² observed The Court has no jurisdiction when granting bail under section 436 cr.p.c, even to impose any condition except demanding of security.

Amar Nath Singh v The State of Jharkhand²³ where a person has failed to comply with the conditions of the bail-bond as regards the time and place of attendance, the Court may by virtue of section 436 (2) refuse to release him on bail, when on a subsequent occasion in the same case he appears before the Court.

In Deepak Khosla v state of NCT of Delhi & Ors²⁴ Delhi High Court held that grant of bail to a person accused of bailable offence is governed by the provisions of section 436 of the code of criminal procedure, 1973. Bail in such cases is compulsory and a person accused of a bailable offence if prepared to furnish bail has the right to be released on bail and the Court has no discretion to deny bail.

By Criminal Procedure (Amendment) Act, 2005 sub-section (1) Section 436 was amended to make a mandatory provision that if the arrested person is accused of a bailable offense is an indigent and cannot furnish surety, the courts shall release him on his execution of a bond without sureties.

¹⁶ AIR 2009 SC 1341.

¹⁷ Id.

¹⁸ *Azeez v. State of Kerala*, 1984 (2) Crimes 413 (Ker).

¹⁹ *Mir Hasim Ali v. Emperor*, AIR 1918 Bom 254.

²⁰ *Public Prosecutor v. Raghuramaiah* (1957) 2 Andh. W. R. 383

²¹ *T.N. Jayadeesh Devidas v. State Of Kerala*: 1980 Cr.LJ 906

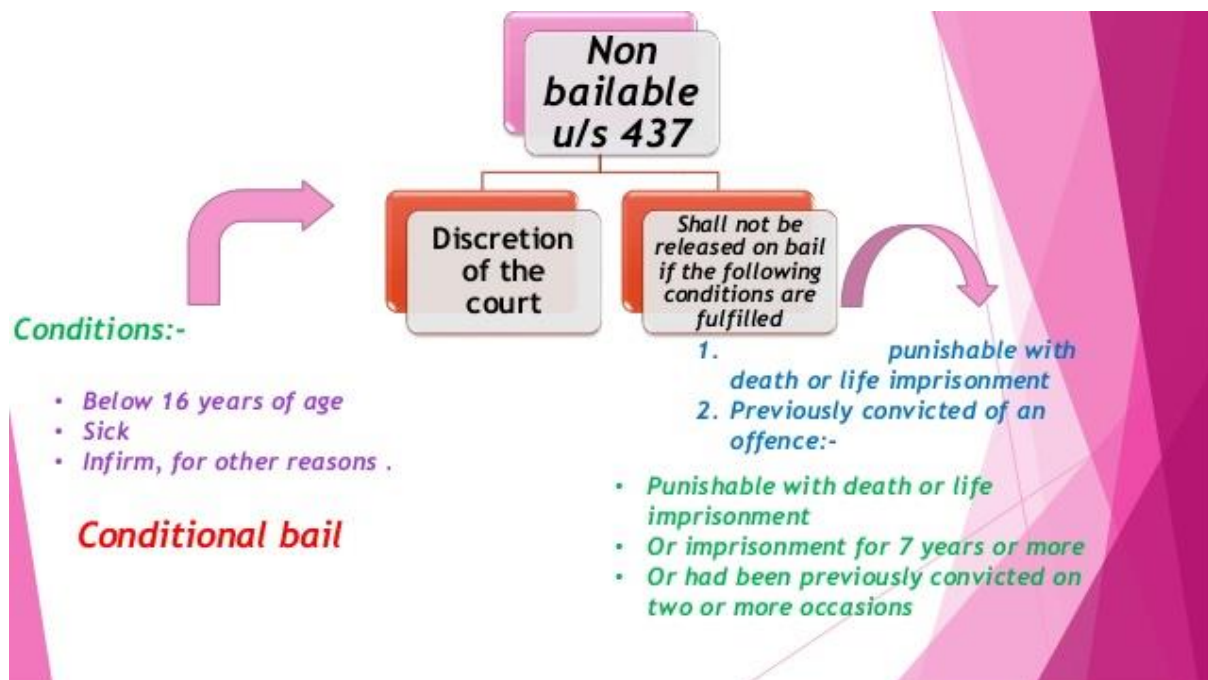
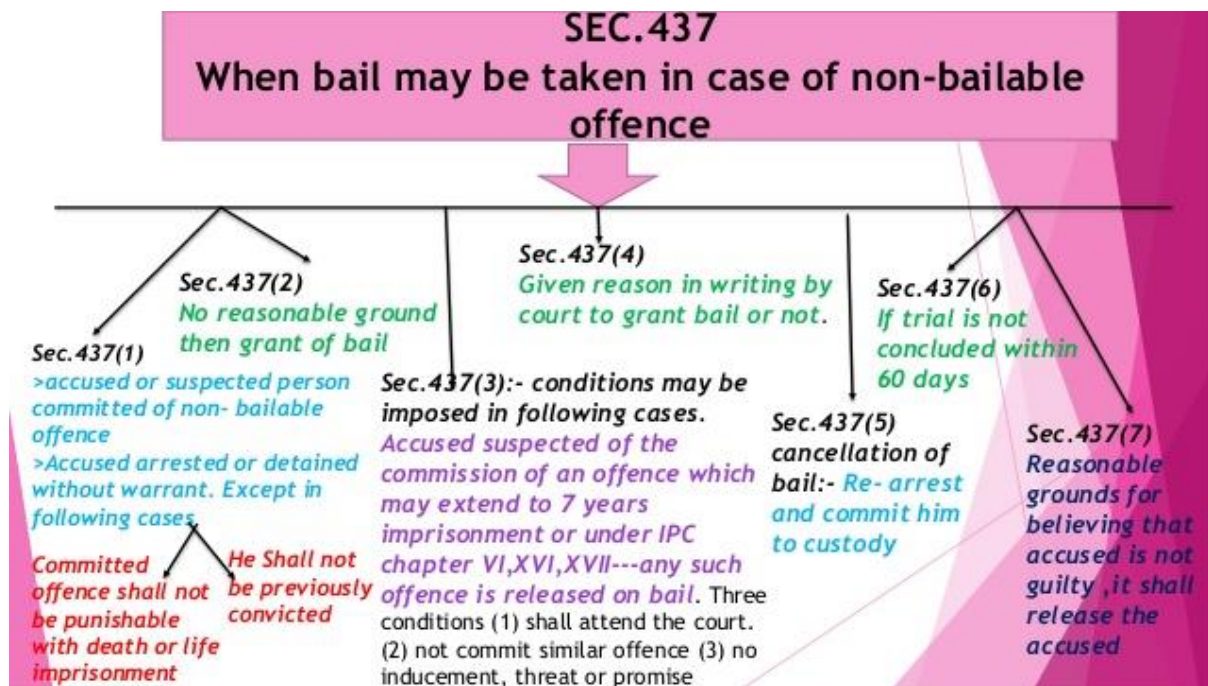
²² 2009 (2) SCC 281.

²³ REGULAR BAIL- Case No.4644 of 2016

²⁴ CRL.M.C.--663/2017.

2. BAIL IN CASE OF NON-BAILABLE OFFENCE

Provision, as to bail in case of non-bailable offence, is laid down in Section 437 of the code. This section gives discretionary power to the Court (other than High court or Court of Session) to release an accused on bail in a non-bailable case. It list down circumstances when bail will not be granted²⁵ or when shall bail be granted with specific condition²⁶ etc.



²⁵ Section 437(i) (ii) CrPC.

²⁶ Section 437(iii) CrPC.

In Shakuntala Devi v State of UP²⁷ court explained that word “may” has been used in Section 437 which should not be read as mandatory rather it confer discretionary power on Court.

In the case of State of Rajasthan v. Balchand,²⁸ this Court opined: *The basic rule may perhaps be tersely put as bail, not jail, except where there are circumstances suggestive of fleeing from justice or thwarting the course of justice or creating other troubles in the shape of repeating offences or intimidating witnesses and the like, by the Petitioner who seeks enlargement on bail from the Court. We do not intend to be exhaustive but only illustrative.*

In the case of Gudikanti Narasimhulu v. Public Prosecutor,²⁹ V.R. Krishna Iyer, J., sitting as Chamber Judge, enunciated the principles of bail thus: *What, then, is "judicial discretion" in this bail context In the elegant words of Benjamin Cardozo: The Judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to "the primordial necessity of order in the social life". Wide enough in all conscience is the field of discretion that remains*

In Gurcharan Singh v. State (Delhi Admn.),³⁰ the Court took the view that in other non-bailable cases the Court will exercise its judicial discretion in favour of granting bail subject to sub-section (3) of Section 437 Code of Criminal Procedure if it deems necessary to act under it. Unless exceptional circumstances are brought to the notice of the Court which may defeat proper investigation and a fair trial, the Court will not decline to grant bail to a person who is not accused of an offence punishable with death or imprisonment for life. It is also clear that when an accused is brought before the Court of a Magistrate with the allegation against him of an offence punishable with death or imprisonment for life, he has ordinarily no option in the matter but to refuse bail subject, however, to the first proviso to Section 437(1) Code of Criminal Procedure and in a case where the Magistrate entertains a reasonable belief on the materials that the accused has not been guilty of such an offence. This, will however,

²⁷ 1986 CriLJ 365.

²⁸ (1977) 4 SCC 308.

²⁹ (1978) 1 SCC 240.

³⁰ (1978) 1 SCC 118.

be an extraordinary occasion since there will be some materials at the stage of initial arrest, for the accusation or for strong suspicion of commission by the person of such an offence.

In *Babu Singh v. State of U.P.*,³¹ Supreme Court opined: *Personal liberty, deprived when bail is refused, is too precious a value of our constitutional system recognised under Article 21 that the curial power to negate it is a great trust exercisable, not casually but judicially, with lively concern for the cost to the individual and the community. To glamorise impressionistic orders as discretionary may, on occasions, make a litigative gamble decisive of a fundamental right. After all, personal liberty of an accused or convict is fundamental, suffering lawful eclipse only in terms of "procedure established by law". The last four words of Article 21 are the life of that human right.*

In the case of *Prahlad Singh Bhati v. NCT*,³² court held that It has also to be kept in mind that for the purposes of granting the bail the legislature has used the words "reasonable grounds for believing" instead of "the evidence" which means the court dealing with the grant of bail can only satisfy it (sic itself) as to whether there is a genuine case against the accused and that the prosecution will be able to produce prima facie evidence in support of the charge. It is not expected, at this stage, to have the evidence establishing the guilt of the accused beyond reasonable doubt.

Supreme Court, in *Kalyan Chandra Sarkar v. Rajesh Ranjan*,³³ observed that *"under the criminal laws of this country, a person accused of offences which are nonbailable, is liable to be detained in custody during the pendency of trial unless he is enlarged on bail in accordance with law. Such detention cannot be questioned as being violative of Article 21 of the Constitution, since the same is authorized by law. But even persons accused of non-bailable offences are entitled to bail if the Court concerned comes to the conclusion that the prosecution has failed to establish a prima facie case against him and/or if the Court is satisfied by reasons to be recorded that in spite of the existence of prima facie case, there is need to release such accused on bail, where fact situations require it to do so."*

³¹ (1978) 1 SCC 579.

³² (2001) 4 SCC 280.

³³ (2005) 2 SCC 42

In the case of *Siddharam Satlingappa Mhetre v. State of Maharashtra*,³⁴ this Court observed that Personal liberty is a very precious fundamental right and it should be curtailed only when it becomes imperative according to the peculiar facts and circumstances of the case.

This Court, in the case of *State of Kerala v. Raneef*,³⁵ has stated that in deciding bail applications an important factor which should certainly be taken into consideration by the court is the delay in concluding the trial.

In *Sanjay Chandra v CBI*³⁶ court stated that at the time of considering bail the sentiments of community are not to be taken into account for rejecting a bail plea. Court held that it should not function as per whims of society judges should not work in arbitrary manner.

*Md Shahabuddin v State of Bihar*³⁷ The petitioner requested to renew his prayer of bail, which was earlier rejected vide order dated 03.02.2016 passed in Cr. Misc. No. 30060 of 2015, on the ground that up-till-now the case has not been committed to the court of Sessions and trial has not even commenced. Court held that there is no direct allegation against the petitioner, he is not the assailant and only on the allegation of conspiracy he is suffering in custody since 27.11.2014, in all other cases the petitioner has been allowed bail, even in the case wherein he has been convicted he has also been allowed bail and, as such, he deserves sympathetic consideration because no one can be detained in custody for indefinite period without putting him on trial.

3. ANTICIPATORY BAIL

Anticipatory bail means bail in anticipation of an arrest. Any person who apprehends arrest under a non-bailable offence in India can apply for Anticipatory Bail under the provisions of section 438 of The Code of Criminal Procedure, 1973. The words anticipatory bail is neither found in section 438 nor in its marginal note.

Scope And Ambit Of Anticipatory Bail

³⁴ (2011) 1 SCC 694.

³⁵ (2011) 1 SCC 784.

³⁶ (2012) 1 SCC 40.

³⁷ Patna High Court Cr.Misc. No.35785 of 2016.

The court in the case of *Siddharam Satlingappa Mhetre v. State of Maharashtra*,³⁸ here discussed the scope and ambit of anticipatory bail and said that principles regarding it has been laid down in the Sibbia's case should be followed by the court.³⁹

- a. Section 438 (1) is to be interpreted in light of Article 21 of the Constitution of India.
- b. Filing of FIR is not a condition precedent to exercise of power under Section 438.
- c. Order under Section 438 would not affect the right of police to conduct investigation.
- d. Conditions mentioned in Section 437 cannot be read into Section 438.
- e. Although the power to release on anticipatory bail can be described as of an "extraordinary" character this would "not justify the conclusion that the power must be exercised in exceptional cases only." Powers are discretionary to be exercised in light of the

The expression "anticipatory bail" is also not defined in Cr.P.C. However, the Supreme Court in *Balchand Jain v. State of M.P.*⁴⁰ has characterized anticipatory bail to mean 'a bail in anticipation of arrest'. The expression is a misnomer as it represents a futility that bail may be granted by the court in apprehension of an arrest. When a competent court grants "anticipatory bail", it issues an order that in case of an arrest, the person shall be released on bail.

It has been held in the *Gurbaksh Singh Sibbia v. State of Punjab*⁴¹ that s. 438 of Cr.P.C. was enacted to protect those people who are implicated by their rivals in false cases for the purpose of disgracing them or for other purposes by detaining them in jail.⁴²

In *State of M.P. & Anr. v. Ramkishan Balothia*⁴³ Section 18 was held not to be violative of Articles 14 and 21 of the Constitution. It was observed that exclusion of Section 438 Cr.P.C. in connection with offences under the Act had to be viewed in the context of prevailing social conditions and the apprehension that perpetrators of such atrocities are likely to threaten and intimidate the victims and prevent or obstruct them in the prosecution of these offenders, if they are granted anticipatory bail.

³⁸ AIR 2011 SC 312.

³⁹ AIR 2011 SC 312 para 119.

⁴⁰ AIR 1977 SC 2447.

⁴¹ AIR 1980 SC 1632.

⁴² Law Commission of India, "Forty-first Report on the Code of Criminal Procedure, 1898" Vol. I (1969) at para 39.9.

⁴³ (1995) 3 SCC 221.

Nirmal Jeet Kaur v State of Madhya Pradesh and Ors.⁴⁴ Protection in terms of Section 438 is limited that is it can be sought only till the time person is not in custody.

In Adri Dharamdas v State of West Bengal⁴⁵ court held the power exercisable under section 438 is extraordinary and is exercisable only in exceptional cases. Where it appears that a person may be falsely implicated in such cases this power may be exercised.

In State of U.P. v. Amarmani Tripathi,⁴⁶ this Court held as under: It is well settled that the matters to be considered in an application for bail are (i) whether there is any prima facie or reasonable ground to believe that the accused had committed the offence; (ii) nature and gravity of the charge; (iii) severity of the punishment in the event of conviction; (iv) danger of the accused absconding or fleeing, if released on bail; (v) character, behaviour, means, position and standing of the accused; (vi) likelihood of the offence being repeated; (vii) reasonable apprehension of the witnesses being tampered with; and (viii) danger, of course, of justice being thwarted by grant of bail.

The Supreme Court in Siddharam Satlingappa Mhetre v. State of Maharashtra,⁴⁷ observed: *the law of bail dovetails two conflicting interests namely, the obligation to shield the society from the hazards of those committing and repeating crimes and on the other hand absolute adherence to the fundamental principle of criminal jurisprudence - presumption of innocence and the sanctity of individual liberty.*

The Supreme Court emphasized that anticipatory bail is a device to secure the individual's liberty, and neither a passport for the commission of crimes nor a shield against any and all kinds of accusations likely or unlikely. History and object of introducing the provision of anticipatory bail can be traced back to judgment of the Supreme Court in Balchand Jain v. State of M.P.⁴⁸ and Gurbaksh Singh Sibbia case.⁴⁹

Lalita Kumari v State of U.P.⁵⁰ it was observed : “While registration of FIR is mandatory, arrest of the accused immediately on registration of FIR is not at all mandatory. In fact, registration of FIR and arrest of an accused person are two entirely different concepts under

⁴⁴ (2004) 7 SCC 558.

⁴⁵ AIR 2005 SC 1057.

⁴⁶ (2005) 8 SCC 21.

⁴⁷ AIR 2011 SC 312

⁴⁸ AIR 1977 SC 2447. See also, State v. Anil Sharma AIR 1997 SC 3806.

⁴⁹ Supra, 40.

⁵⁰ (2014) 2 SCC 1.

the law, and there are several safeguards available against arrest. Moreover, it is also pertinent to mention that an accused person also has a right to apply for “anticipatory bail” under the provisions of Section 438 of the Code if the conditions mentioned therein are satisfied. Thus, in appropriate cases, he can avoid the arrest under that provision by obtaining an order from the court.”

*Dhiren Prafulbhai Shah v State of Gujarat*⁵¹ the Gujrat High Court in this case dealt with section 438 of CrPC in the context of Section 18 of atrocities act where court held that “If a person is accused having committed murder, dacoity, rape, etc., he can pray for anticipatory bail under Section-438 of the Cr.P.C. on the ground that he is innocent and has been falsely involved, but if a person alleged to have committed an offence under the Atrocities Act, cannot pray for an anticipatory bail because of the bar of Section-18 of the Act, and he would get arrested. This is the reason for the authorities to guard against any misuse of the Provisions of the Atrocities Act.”

*Dr Subhash Kashinath Mahajan v The State Of Maharashtra And Anr*⁵² Exercise of jurisdiction under Section 438 CrPC is an extremely important judicial function of a Judge and must be entrusted to judicial officers with some experience and good track record. Both the individual and society have vital interest in orders passed by the courts in anticipatory bail applications.

4. BAIL ON DEFAULT

Section 167(2) of the Criminal Procedure Code, 1973 empowers judicial magistrates to authorize custody of an accused person in cases wherein investigation cannot be completed in twenty-four hours. It provides for the maximum period of custody that can be authorized. It further contains a mandate that if the investigation is not completed within the stipulated maximum period, the accused is to be released on bail whatever may be the nature of accusation against him.

The object of this provision manifests the legislative anxiety that once a person’s liberty has been interfered with, the arrest made without a warrant or a court order, the investigation must be conducted with utmost urgency.⁵³ Persons who are detained for committing an offence and undergoing investigation are statutorily eligible for bail under Section 167(2) of

⁵¹ 2016 CriLJ 2217

⁵² CRIMINAL APPEAL NO.416 OF 2018.

⁵³ *Aslam Babalal Desai v. State of Maharashtra*, AIR 1993 SC 1.

Code after ninety days where the investigation relates to an offence punishable with death, imprisonment for life or imprisonment for not less than ten years; and sixty days where the investigation is relating to any other offence, if the investigating authorities fail to complete their investigation and file a charge-sheet within this period.

In *Moti Ram v. State of M.P.*,⁵⁴ this Court, while discussing pre-trial detention, held: The consequences of pre-trial detention are grave. Defendants presumed innocent are subjected to the psychological and physical deprivations of jail life, usually under more onerous conditions than are imposed on convicted Defendants. The jailed Defendant loses his job if he has one and is prevented from contributing to the preparation of his defence. Equally important, the burden of his detention frequently falls heavily on the innocent members of his family, therefore it becomes important that a person may be granted bail on default under section 167(2).

State of U.P. v. Laxmi Brahman,⁵⁵ Section 167(2) deals with powers of the magistrate to detain the accused in custody and release him on bail on expiry of the statutory period. It is quite clear that power is conferred on the magistrate to release the accused on bail under the proviso.

In *Sanjay Dutt v. State, Through CBI*,⁵⁶ Supreme Court held that this *indefeasible right* of the person accused of an offence to be released on bail under s. 167(2) of Cr.PC would not apply if the accused person does not file an application to “avail” the right before filing of charge-sheet. The Court held that if the charge-sheet is filed after the period specified in s. 167 (2) of Cr.PC but before the application for bail is considered, then the right to bail under s. 167(2) of Cr.P.C would not be available and the application for bail will then be considered only on merits.⁵⁷ Although the right to avail bail for failure to complete investigation is ‘indefeasible’, it is not automatic. The person accused of an offence should avail the right at an appropriate stage and enforce it prior to the filing of the *challan*.⁵⁸ Further, such accused person continues to remain in custody until he furnishes bail.

⁵⁴ (1978) 4 SCC 47.

⁵⁵ AIR 1983 SC 439

⁵⁶ (1994) 5 SCC 410.

⁵⁷ *Id.*; See also, *Pragya Singh Thakur v. State of Maharashtra*, (2011) 10 SCC 445.

⁵⁸ *Id.*

In the case of Suresh Jain v. State of Maharashtra,⁵⁹ the Supreme Court clarified that a person accused of an offence acquires an “*indefeasible right*” to be granted bail on meeting the bail conditions if investigation is not completed within the periods mentioned in s. 167(2) of Cr.PC, and the Magistrate is mandatorily required to release the accused person. Any detention beyond the prescribed period would be illegal.

Recently, Hon’ble Apex Court in Rakesh Kumar Paul vs. State of Assam,⁶⁰ held that an accused is entitled to statutory bail (default bail) under Section 167(2)(a)(2) of Code of Criminal procedure if the police failed to file the charge-sheet within 60 days of his arrest for the offence punishable with ‘imprisonment up to 10 years.

5. INTERIM BAIL

There is no express legal provision of ad-interim or interim bail. Section 439 CrPC is on the High Court’s and the Sessions Court’s power to release the accused on bail in custody. Evident as it is that Sections 436, 437 and 439 are repository of powers of the court to release the accused in custody on bail. That’s post-arrest. As seen above, the newly substituted Section 438 expressly provides for interim bail pending disposal of the plea for anticipatory bail. It’s a important provision as the accused faces the threat of arrest before his application for the bail is decided. Also, it’s consistent with the concept of fundamental right to life and liberty under Article 21 of the Constitution of India. Interim bail may be granted when the court is satisfied that the object of the. However, this kind of bail may be granted at any stage of a case by way of court’s inherent power.

In Siddharam v State⁶¹ court held that there is no express provision for interim bail in Sections 437 or 439 CrPC. Of course Section 437(2) hints at such a power, but not in explicit terms. Even to exercise the power there under, the Magistrate may order notice to the prosecution in which case the accused under arrest can’t avoid detention in jail. Thus, the interim bail regime becomes relevant even in post-arrest matters, leaving alone the interim bail provision in Section 438 CrPC. Life bereft of liberty is without honour and dignity.

In Lal Kamlendra v State,⁶² court observed: “...*following the decision of this Court in Kamlendra Pratap Singh v State of U.P.*⁶³ we reiterate that a court hearing a regular bail application has got inherent power to grant interim bail pending final disposal of the bail

⁵⁹ (2013) 3 SCC 77.

⁶⁰ SPECIAL LEAVE TO APPEAL (CRL.) NO. 2009 OF 2017 dt.16.08.2017

⁶¹ (2011) 1 SCC 694.

⁶² (2009) 4 SCC 437.

⁶³ (2009) 4 SCC 437.

application. In our opinion, this is the proper view in view of Article 21 of the Constitution of India which protects the life and liberty of every person..... .. 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, here interim bail comes into picture.”

In Sukhwant Singh v State,⁶⁴ the Supreme Court filled the gap in Sections 437 and 439 holding that in the power to grant bail is inherent the power to order interim bail, Which means the court hearing a plea for regular bail has inherent power to order interim bail, pending final disposal of the bail application

Deepak Bajaj v State of Maharashtra⁶⁵ court held 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.

Kanhaiya Kumar v State of NCT of Delhi⁶⁶ in this case Kanhaiya Kumar, President of Jawaharlal Nehru University Students Union, was granted interim bail for a period of six months on furnishing personal bond in the sum of ₹10,000/- and an undertaking.

6. BAIL AFTER CONVICTION

Section 389 (1) and (2) of Cr.P.C. deals with a situation where convicted person can get a Bail from appellate court after filing the criminal appeal. Section 389 (3) deals with a situation where the trial court itself can grant a bail to convicted accused enabling him to prefer an appeal.

The Patna High Court in Suddu kumar vs. State of Bihar⁶⁷ has observed that if a prayer for suspension of sentence and release of an appellant on bail, convicted of a capital crime and sentenced to undergo imprisonment for life, it is to be considered favourably and he is ordinarily allowed bail if he has completed seven years of incarceration in connection with such case before conviction and after conviction, taken together when his appeal is not likely to be heard on merits in near future, on the ground of possible delay in the disposal of the appeal.

⁶⁴ (2009) 7 SCC 559.

⁶⁵ (2008) 16 SCC 14.

⁶⁶ W.P.(CRL) 558/2016.

⁶⁷ Criminal Appeal (DB) 583 of 2015 dt. 09-03-2017.

A Two Judge Bench of the Supreme Court, in *Atul Tripathi V. State of UP*⁶⁸ discussed the scope and ambit of Section 389 of Cr.P.C and issued the following Guidelines regarding the suspension of Sentence during the pendency of Criminal Appeal.

- a. The appellate court, if inclined to consider the release of a convict sentenced to punishment for death or imprisonment for life or for a period of ten years or more, shall first give an opportunity to the public prosecutor to show cause in writing against such release.
- b. On such opportunity being given, the State is required to file its objections, if any, in writing.
- c. In case the public prosecutor does not file the objections in writing, the appellate court shall, in its order, specify that no objection had been filed despite the opportunity granted by the court.
- d. The court shall judiciously consider all the relevant factors whether specified in the objections or not, like gravity of offence, nature of the crime, age, criminal antecedents of the convict, impact on public confidence in court, etc. before passing an order for release

POWER OF SESSIONS COURT AND HIGH COURT REGARDING THE BAIL

Section 439 gives Special powers to High Court or Court of Session regarding bail. It may direct that any person accused of an offence and in custody be released on bail. It may impose any condition which it considers necessary for the purposes mentioned in that sub-section. It may impose or set aside any condition imposed by a Magistrate when releasing or set aside or modified. When the offence is triable exclusively by the Court of Session, give notice of the application to the Public Prosecutor unless it is, for reasons to be recorded in writing, of opinion that it is not practicable to give such notice. It may also direct that any person who has been released on bail under this Chapter be arrested and commit him to custody.

⁶⁸ CrI. Appeal No.NO.1516/2014 Dated.22-07-2014.

CANCELLATION OF BAIL

The basic criteria for cancellation of bail are interference or even an attempt to interfere with due course of Justice or any abuse of indulgence/ privilege granted to the accused.

Ram Govind Upadhya Vs. Sudarshan Singh,⁶⁹ The power of the Court under the section to cancel bail can be invoked either by the state itself or by any aggrieved party or even suo motu as held in the case of Puran vs. Ramvilas.⁷⁰

As per Section 437 (5) of Cr.P.C. any Court which has released a person on bail may, if it considered it necessary so to do, cancel the bail and direct that such person be arrested and committed to custody. In R.J Sharma Vs. R.P. Patankar,⁷¹ it is held that Magistrate ought to pursue the application for cancellation of bail and afford an opportunity to accused to be heard.

Dolat Ram v. State of Haryana⁷² The Hon'ble Supreme Court has held that once bail has been granted, it can only be cancelled based on cogent and overwhelming circumstances. Proceedings for the cancellation of bail are not in the nature of an appeal from the grant of bail, and therefore, a court must look for circumstances that warrant cancellation of bail, such as interference or attempt to interfere with the due course of justice, or abuse of concession of bail granted to the accused in any manner. Bail granted to an accused with reference to bailable offence can be cancelled only if the accused (1) misuses his liberty by indulging in similar criminal activity, (2) interferes with the course of investigation, (3) attempts to tamper with evidence of witnesses, (4) threatens witnesses or indulges in similar activities which would hamper smooth investigation, (5) attempts to flee to another country, (6) attempts to make himself scarce by going underground or becoming unavailable to the investigating agency, (7) attempts to place himself beyond the reach of his surety, etc. These grounds are illustrative and not exhaustive. However, a bail granted to a person accused of bailable offence cannot be cancelled on the ground that the complainant was not heard.

⁶⁹ 2002 Cr.L.J 1849 (S.C.)

⁷⁰ AIR 2001 SC 2013.

⁷¹ 1993 Cri.L.J. 1993 [Bombay].

⁷² (1955) 1 SCC 349.

CONCLUSION

The Criminal Procedure Code, gives only an outline of the provisions of bail, but most of the work is done by the courts themselves. The judicial principles laid-down by the courts may be changed by the courts also. As far as the meaning and definition of bail is concerned it has not been statutory defined. Consequently, it continues to be understood as a right for assurance of freedom against State imposed restrains of security of appearance of a person for his release. Bail is generally a matter of judiciary discretion. While considering whether to grant or not to grant bail, conflicting claims of undoubtedly liberty of the accused and the larger interest of the society have to be taken note of. As far as the evolution and history of bail is concerned it has gradually evolved in India. This is a very important instrument. The importance of instrument of bail can be imagined from the fact that from the initial stage of accusation at police level to Apex Court and right from direction for anticipatory bail to special powers of High Court and Court of Session to grant bail and writ of Habeas corpus and certiorari have been provided to restore the liberty of the individual

For the purpose of granting bail offences have been classified into Bailable and non-bailable offences under Section 2 of the Criminal Procedure Code. The basic distinction in these offences is that in bailable offences Bail can be claimed as a matter of right, whereas in non-bailable offences it is at the discretion of the Courts whether to grant bail or not. While granting bail in case of non-bailable offences various factors are to be taken into account by the Courts Today the horizon of Human Rights is expanding. At the same time, the crime rate is also increasing. Observing this, Supreme Court has been held that there is urgent need to make a balance between personal liberty and investigational powers of Police. There can be no gain saying that freedom of an individual must yield to the security of the state. However, not right can be absolute and reasonable restrictions can be placed on them.

REFERENCES

BOOK'S REFERRED

- R.V. KELKAR'S CRIMINAL PROCEDURE, 6TH EDITION, 2016.
- RATANLAL AND DHIRAJLAL'S THE CODE OF CRIMINAL PROCEDURE, LEXIS NEXIS, 22ND EDITION.
- SARKAR, THE CODE OF CRIMINAL PROCEDURE.

ONLINE REFRENCES

- ALL INDIA REPORTER
- SCC ONLINE
- MANUPATRA

REPORT

- The Report No.268 of the Law Commission of India, on bail reforms, titled "Amendments to Criminal Procedure Code, 1973"