A

DISSERTATION

ON

BAIL AND JUDICIAL DISCRETION. A STUDY OF JUDICIAL DECISSIONS

IN PARTIAL FULFILMENT OF THE REQUIREMENT FOR THE DEGREE OF

MASTERS OF LAW

SUBMITED BY: -

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LL.M (TRIMESTER) 1YEAR COURSE

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CERTIFICATE

This is to certify that the entire work embodied in the practical title BAIL AND JUDICIAL DISCRETION. A STUDY OF JUDICIAL DECISSIONS has been carried out by Mr. NAVNEET PRABHAKAR under my supervision and guidance in the department of Law, New Law College, Bharati Vidhyapeeth Deemed University, Pune for the L.L.M (Trimester) 1 year course.

Place:-Pune **PROF .Dr. M. SARRDAH**
Date: - ***(Research Guide)***

DECLARATION

I hereby declare that the entire work embodied in the particle paper title **BAIL AND JUDICIAL DISCRETION. A STUDY OF JUDICIAL DECISSIONS** is written by me and submitted to New Law College, Bharati Vidhyapeeth, Pune. The present work is of original nature and the conclusion is based on the data collected by me. To the best of my knowledge this work has not been submitted previously, for the awards of any degree or diploma, to this or any other university.

Signature

Place: Pune Mr. NAVNEET. PRABHAKAR

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I sincerely thank the faculty members and college librarian for their co-operation and assistance.

Signature

Place:-Pune
Date: -

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Significance:

- Bail as defined is the security given for the due appearence of a prisoner in order to obtain his temporary release.

- The very purpose behind bail being that a person is not guilty untill proven so beyond reasonable doubt.

- In a democratic society every one is guarenteed such freedoms that are must as a human being so even if a person is charged of any offence, he is ensured his all other freedoms by granting bail and not needlessly detained. only certain security is demanded from him only to ensure his timely appearence before the court whenever required.

- The bail laws along with other are equally applicable to all the persons within the territory of india as stated in article 14 of our constitution.

Research problem:

What is the importance of discretionary power to the judiciary in matters of bail?

Hypothesis:

The guidelines issued by the Supreme Court in matters of bails have not yet ensured real freedom to the accused, there is need to revisit the guidelines to ensure better freedom .

Research methodology:

The purpose of this research is to study different statutes, books, cases, articles, reports etc. and uncover different studies and develpment in this field. hence the research methodology adopted here will be purely doctrinal.

Sources of data collection

i. Books on bail laws.
ii. Judgements of High Courts and Supreme Court.
iii. Statutes on bail.
iv. Related articles.
v. E-sources.

I. INTRODUCTION.

Almost after three decades after Supreme Courtdeclared right to speedy trial as a fundamental right, being implicit in the broad sweep and contentof Article 21 of the Constitution, the situation with regard to pending cases has in actually worsened instead of improvement. The Indian courts have not been making the requisite efforts to improve thesituation. But, in spite of the best efforts on the part of the judiciary, there is noimprovement in the number of pending cases or in the number of years for whicha case has to remain pending; on the other hand, there has been a continuing trendof further deterioration over the years. The main culprit is thegrossly insufficient number of judges at all levels to match the ever-growingnumber of cases which keep coming before the courts for their disposal year afteryear while the existing ones never appear to be getting reduced, despite the fact that the annual disposal rate of cases by courts has improved over theyears as comparable to the annual number of fresh cases coming to courts.

Theblame lies mainly on the executive, the Governments at the Central and Statelevels, for not setting up sufficient number of courts citing the reason of lack offundsandillustration would show the reality.

The Government can spare a giant amount of about Rs. 2,45,000on oil subsidiesevery year, both explicitand implicit subsidies to the consumers, even if we forget substantial amountsspent on other subsidies, such as fertilizer subsidy, food subsidy, etc., on otheravoidable expenditures; but the

Government is not able to find a meager amountof Rs. 1426 crore per year which is what isrequired to approximately double the strength of judiciary in India! Even thisamount of Rs. 1426 crore per annum, calculated reportedly using the number ofadditional judges required as per the estimate of the Chief Justice of India, isnecessary only if the salaries of judges are increased substantially. To say that the Government lacks financial resources for such apaltry amount for such an important task is nothing but insult to the country, one ofthe largest economies in the world. And, yet, the Government dithers on settingup new courts. Such being the situation, what is wrong of one draws theirresistible conclusion that the Government is simply not interested to have anefficient judiciary.The unfortunate part that the SupremeCourt of India, which is otherwise quite eloquent in the field of what is commonlycalled "judicial activism" to ameliorate the miserable conditions of a billion-plusIndia, and rightly so, has not done much to compel the Government toimprove the judiciary infrastructure by issuing an appropriate Mandamus and following it up for strict compliance thereof. Despite the fact that manyopportunities came before the Supreme Court when it could and should have done so starting with the *Husainara Khatoon*[1]case thirty years ago whereinthe Supreme Court came quite close to issuing such directions to improve thejudicial infrastructure, but unfortunately, it failed to live up to the expectationswhich it had raised by elevating the right to speedy trial to the pedestal of fundamental right.

What is the worth of a fundamental right if it cannot be implemented fornot one or two but for tens of millions of people? And, not for a few days, but

[1] (1980)1 SCC 108 at p. 114; AIR 1979 SC 1377 : 1979 Cri LJ 1052

foryears together? How does it make a difference whether it is a fundamental right ora normal statutory right or no right at all, if it is for academic purposes only andnot for practical use by the people ? we are discussing here the right to speedytrial.And, while the failure of the criminal justice system in India to effectivelyimplement the said fundamental right to speedy trial affects not only thosepersons who continue to languish in jail for years despite presumed to be innocentby the system itself until completion of the trial, but also those who werecomparatively fortunate at least in getting bail even though they also have to facethe anxiety of waiting for completion of trial for years together, it is actually theones who are not able to get bail for long durations who suffer the most.

Lest it be misunderstood that speedy trials help only the accused persons,whether on bail or otherwise, it must be clarified that the society, in fact, is thebiggest beneficiary of speedy trials. To give an illustration, one particular accusedperson after his first offence of murder, came out on bail and committed 3-4 otherserious offences, again got arrested and got bail, and committed anotherserious offences, and in this way, he committed around 18 seriousoffences before finally he was convicted in his first murder case after aprolonged trial after which he was finally sent to jail putting an end to theseries of serious offences being committed by him! The moral of the story is, ifonly the trial in his first murder case could have been expeditiously completedand he been sent to jail at earlier, the society would definitely havebeen saved from his other 17 serious offences.Another big advantage to the society of speedy trials is the muchimproved conviction rate. With trials getting delayed for several years or decades,some witnesses die in the meanwhile, some becomemissing or shifted out to unknown places, some witnesses forget the intricate details of the case, some of them

might lose interest andmotivation in the case, some be won over by accused overthe period of time, and like. Normally the result of all these developments due to delayed trial is nothing but an acquittaleven in a case where conviction should otherwise have been the only possibleoutcome due to strong evidence.A speedy trial also helps the courts. A delayed trial is like a vicious circle.Delay in trial gives rise to numerous miscellaneous applications revision petitions,appeals, SLPs, etc., for the purposes of Bails, cancellation of Bail, modification ofconditions of bail, discharge applications return of property, etc. e.g., if atrial is delayed by say 10 years and the accused is not bailed out, one may see aseries of several bail applications, revision applications, and a few odd SLPs, onlyfor seeking bail. A speedy trial can obviate the need for many of suchmiscellaneous matters, thereby drastically reducing the number of matters filed inthe courts and saving precious time of the courts for more constructive purposes,which could indirectly result into further speedier trials.

Thus while a delayed trialis a vicious circle, a speedy trial is like a virtuous circle.Another big advantage of speedy trials, for the judiciary, is theimprovement in its image. Whether we like it or not, the fact remains that whatever negative image the judiciary in India has,is the delayed process of law. If a majority of the consumers of the justice systemin India are dissatisfied with the delivery of justice, despite good work of thejudiciary, then the biggest reason for it is the delayed proceedings.A speedy trial can definitely improve this situation.Right to speedy trial is a fundamental right and if the trial is delayed itwould amount to the denial of justice and entitle an accused to be admitted to bail.But, a significant question, the cause of delay whether attributable to the prosecution or to the accused, has to be

borne in mind at the time of exercise ofjudicial discretion for grant of bail. The delay in trial is an importantfactor to be taken note of at the time of consideration of application for bail andno Court can take a myopic view in this regard but simultaneously it cannot bemagnified to ostracize the role played by the accused in causing the delay. Theage old principle that he who seeks discretion must conduct himself cannot begiven a decent burial to confer the concession of bail to an accused who has madea deliberate attempt to cause delay with ultimate intent to gain advantage of such delay.

In a case where direction were issued by the court for disposal of case within aprescribed period but subsequently a counter criminal case was clubbed togetherwhen almost all witnesses had been examined. Itwas held that the prosecution was not responsible for the delay caused due to theclubbing together of the said case and the accused was not entitled to be granted bail on the ground of delay in trial.An expeditious criminal trial is a fundamental right of the accused, especially when he is in jail. No accused can be kept in jail for uncertain period, as a under-trial prisoner. In Criminalcases in which the accused is in jail, it is the duty of the presiding Offer tocomplete the trial as expeditiously as possible and to record the statements of theprosecution witnesses without any delay, and all efforts are tobe made through the police agency to secure the witnesses on the date fixed forrecording their statements.

For a speedy trial regardless of the innocence or guilt of the accused, protractedtrial is most traumatic to an innocent person. The object of the new Code ofCriminal Procedure is the expeditious investigation inquiry and trial of criminalcases. Indefinite detention of the accused, even in graver

offences, is against theLegislative intent and the object of the Code of Criminal Procedure. Proceduralconstraints in the Code are designed to protect the rights of the accused. Section309, Cr. P.C. gives a mandate to the trial Court that the proceedings in everyinquiry or trial or trial shall be held as expeditiously as possible and in particularwhen the examination of the witnesses has once begun, the same shall becontinued from day to day until all the witnesses in attendance have beenexamined, unless the Court finds the adjournment of the same beyond thefollowing day to be necessary for reasons to be recorded. Section 437(6) Cr. P. C.gives a mandate to the Magistrate to releasethe accused on bail if the trial of a person accused of any non-bailable offence isnot concluded within a period of sixty days from the first date fixed for takingevidence in the case Section 167(2) Cr. P.C, which deals with the investigation, also gives a mandate to the Magistrate to release the accused on bail if theinvestigation is not completed within required period of sixty days or ninety days, as the case may be.

I(a)– BAIL.

1. Bail meaning:

Websters new 7th dictionary defines bail as follows:

"Bail is a security given for the due appearence 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 appearence 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 appearence 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 appearence on a day and at a place certain..... because the party arrested or imprisoned is delivered into the hands of those who bind themselves or become bail for his due appearence when required in order that he may ne safely protected from the prison....."[4]

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 peerson in the Court to stand the trial'.[5]

2. Arrest:

The word ordinarily means apprehension or deprivation of one's personal liberty. The question that whether one is under arrest or not depends on whether a person is deprived of his personal liberty to move about where

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[2]Websters *7th new Judicial Dictionary.*

[3]Wharton's *Law Lexicon.*

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

[5]Kamlapati v State of West Bengal AIR 1979 SC 777.

he pleases not on the legality of his confinement. When the term is used in legal sense this procedure is connected with criminal offence. Arrest consists of taking one into custody under the authority of law for the purpose of detaining him or holding him so as to answer questions on the criminal charge framed on him or prevent commission of criminal activity.

The Black's Law dictionary defines arrest as;

"Arrest. to define a person of his liberty by legal authority taking under real or assumed authority, custody of another for the purpose of holding or detaining him to criminal charge or civil remand."[6]

Halsbury's*Law of England* defines arrest as:

"arrest consists of in the seizures or touching of a person's body with a view to his restraint; words may, however amount to an arrest in the circumstances of the cases, they are calculated to bring and do bring to a person's notice that he is under compulsion and he thereafter submits to compulsion."

3. Principles governing bail:

The following principles emerge for grant or refusal of bail under section 437, CR.P.C.[7]

i. Bail should not be refused unless the crime charged is of the highest magnitude and the punishment of it assigned by law is of extreme severity;
ii. Bail should be refused when the Court may reasonably presume, some evidence warranting that no amount of bail would secure the presence of the convict at the stage of judgment;
iii. Bail should be refused if the course of justice would be thwarted by the person who seeks the benignant jurisdiction of the Court to be freed for the time being;
iv. Bail should be refused if there is likelihood of the applicant interfering with witnesses for the prosecution or otherwise polluting the process of justice; and

[6] Black's *law dictionary*,5th Ed. Vol. II, Para 99.
[7] *SidharthVashisth alias Manu Sharma* v. *State of Delhi*, 2004 Cri LJ 684

v. Bail should be refused if the antecedents of a man who is applying for bail show a bad record, particularly a cored which suggests that he is likely to commit serious offences while on bail.

The magistrate while granting bail must take into consideration the following matters into consideration. One must remember that when wherever proviso (a) to section applies the magistrate has no discretion and he is bound to grant bail. When bail is granted under this proviso and after that charge sheet is filed the release order of bail continues to be in practice. And bail can be cancelled under section 437(5) of CR.P.C[8]. Except where the proviso (a) to s. 167 of CR.P.C is attracted, bail needs to be granted on these guidelines:

i. That there is a reasonable ground for believing that the accused has committed the offence with which he is charged.
ii. The nature and gravity of the charge.
iii. Severity of degree of punishment which might follow in the particular circumstance in case of a conviction.
iv. The danger of the accused absconding if he is released on bail.
v. The character means and standing of the accused.
vi. The danger of the alleged offence being continued or repeated assuming that the accused is guilty of having committed that offence on the past.
vii. The danger of witness being tampered with.[9]

The Supreme Court has also held in g. *Narasimhulu* v *Public Prosecutor*[10] that the public justice is in center to the whole scheme of law of bail that endeavors to serve both social defense and individual emendation in anti-criminal direction.

In a case, while investigation of the case by a custom officer in connection with the offence committed by the accused under the custom act the bail

[8] *Raghubir Singh* v *State of Bihar* AIR 1987 SC 149.
[9] *State* v *Jagjit Singh* AIR 1962 253 SC.
[10] 1978 AIR 429, 1978 SCR (2) 371

granted by the magistrate was set aside by the additional Sessions Judge the legality if such cancellation has been challenged before the High Court. The High Court found that:

- Before the magistrate granted bail with well-reasoned order the applicant had been interrogated by the officer of the custom department for a considerable amount of time and a detailed statement had been recorded.
- That before his arrest the investigation was almost completed.
- That the other accused people had already been arrested and released on bail and that in the circumstances the plea of the department that the officers require the applicant's custody would not justify in upholding the contention unless the department could factually justify the correctness of the demand. The learned Judge being satisfied that the detention of the petitioner is not necessary for further investigation has held that the additional Sessions Judge only on the plea of the department that the custody of the accused is necessary for further investigation should not have cancelled the bail. The learned Judge has clearly observed that while it is essential that Court should provide investigating authorities with reasonable time to carry out their investigation but it is equally necessary that the Court strike a correct balance between this requirement and equally compelling consideration that the curtailment of the liberty a citizen cannot be done until the circumstances completely justified it.[11]

In a similar question before the High Court of Rajasthan arose that whether further custody of the accused was required in relation to an offence relating to Foreign Exchange Regulation Act 1973. The applicant's had been refused by the Sessions Court. It was disclosed that the investigating agency got a month full time to collect materials while the petitioner was in custody. The petitioners were charged with offences with maximum seven years of imprisonment. So it was held that conditional bail be granted to the applicant to secure their attendance during their trial, and that the applicant can be released on bail.

[11] *Mulchand*v *Assistant Collector of Customs 1991(2) Crimes 88 (Bom).*

a. Under the English Law:

Under the English Law the considerations to be taken into account by the crown Court or magistrate while granting bail are:[12]

i. Nature or seriousness of offences. The more serious the offence charged the stronger the temptation to abscond is likely to be since the defendant who is liable, if convicted to receive a long sentence of imprisonment is more sensitive to run away than one facing a less serious charge. While the seriousness of the class of offence is an important factor, it is not necessarily conclusive.
ii. Character, antecedents and community ties of the defendant. The Court should next consider the defendant's antecedents. These are valuable guidance but need to be interpreted with some care. If the defendant has abused the grant of bail in the past or is already in bail in respect of another charge, these facts should count strongly against him. Stability of the defendant's background and employment is likely of considerable influence in determining whether he has a good bail risk. One aspect of the defendant's community ties is the type of accommodation in which he lives. The fact that the defendant has no fixed abode is often advanced as good reason for opposing bail.
iii. Defendant's earlier record.
iv. Strength of the evidence of the defendant having committed the offence and other relevant matters.

b. Under the American Law:

The American Law takes into account following considerations.[13]

i. Place the person in custody of a designated person of organization agreeing to supervise him.
ii. Place restriction travel, association or place of abode of the person.
iii. Requiring the execution of bail bond with sureties or the deposit in cash in lieu thereof
iv. Requiring the execution of an appearance bond in a specified amount and deposit in registry of the Court in cash or other security as

[12] M.R. Malik; Bail Law & Practice, fourth edition, page 258,259
[13] M.R. Malik; Bail Law & Practice, fourth edition, page 260

directed' of a sum not to exceed 10% of the amount of the bond, such deposit to be returned on the performance of the condition of the release.

4. Who can grant bail?

a. Police:

The code of criminal procedure confers the power to the police to release a person on bail. Any person arrested by police has to be released on bail if he is arrested without warrant or order from the magistrate under the circumstance mentioned in section 41 of the CR.P.C and that if the offence with which he is charged is a bailable offence.

Also in case a person when arrested by the police in relation to a non-cognizable offence on the ground that he refused to give his correct name or address, may be released on executing a bond with or without sureties, to appear before a magistrate if required.

The officer in charge of the police station may in his discretion release any a person accused of or suspected of the commission of non bailable offence and arrested or detained by him without warrant. But such power cannot be exercised even in his discretion if there appear sufficient grounds for believing that such person has been guilty of an offence punishable with death or imprisonment for life.

b. Bail by Executive Magistrate:

Section 44 (1) 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.[14] So he has to be produced before a competent magistrate under section 167 (1) of CR.P.C.

[14] M.R. Malik; Bail Law & Practice, fourth edition, page 54.

Under section 81 the executive magistrate has the power to grant bail to a person who is charged of a bailable offence and arrested under warrant and that the offence was committed in any other district.

c. Judicial magistrate:

Bail before a judicial magistrate can be moved at any stage of investigation, enquiry or trial, at the time of the commitment or after conviction until a proper bail order is obtained from the appellate Court.

d. Bail by Sessions Judge:

Section 439 of the CR.P.C 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. The power of the Sessions Judge is concurrent with that of the High Court. The power upon the Sessions Judge or the High Court under section 439 to enlarge the accused on bail is as an original Court. But the Sessions Judge can impose appropriate conditions on bail. Section 439 also empowers the Sessions Judge to set aside or modify any condition imposed by the magistrate while admitting the accused on bail.

In *Sangappa*v *State of Karnataka*[15] the Karnataka High Court held that the power of Session or the High Courts under section439 is wider than that of the magistrate under section 437 of CR.P.C. Also that even then the reasonable limitation in section437 (1) should not ordinarily be departed from by the Court of Sessions or the High Court except in special cases.

In *Gurcharansingh*v *State*[16] the Supreme Court has clearly drawn the distinction between the powers of magistrate under section 437 and that of the Court of Session of High Court under section 439 of CR.P.C. If a person 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.

[15]ILR (1978) 1 Kant 891.
[16] AIR 1978 SC 179.

e. Bail by High Court:

The High Court has been given wide power to grant bail as Court of superior jurisdictions, as a Trial Court, as an Appellate Court or as a Court of Revision. Power has also been given to the High Court either to reduce the bail granted by the magistrate, or by the Sessions Judge on being satisfied that the amount of bail is excessive and has also the power to cancel the bail granted either by the magistrate or by the Sessions Judge on being satisfied that the bail has been improperly granted ad regard to being had to the facts and circumstances of the case and in the interest of the public order and for fair trail of the case pending against the accused, his bail should not be granted. The High Courts have been given wide discretionary powers in matters of granting or refusal of bail.[17]

f. Bail by Supreme Court:

The constitution of India under Article 134 and 136 confers a limited appellate jurisdiction to the Supreme Court. The Supreme Court has got the powers under Article 142 of the constitution to enforce its decrees etc. Article 145 confers power upon the Supreme Court to make rules for regulating generally the practice and procedure of the code.

Under Article 134 the Supreme Court can entertain an appeal from any judgment, final order or sentence in a criminal proceeding of a High Court.

Under 136 the Supreme Court can grant special leave to any appeal from any Judgment, decree, or determination or sentence etc. Made by any Court in India.

Article 142 the Judgment of the Supreme Court a law and it is enforceable throughout the territory of India.[18]

5. Bail: A matter of right.

At times when a person other than a person accused of a non bailable offence or detained without warrant by police, or is brought before the

[17]M.R. Malik; Bail Law & Practice, fourth edition, page 172.
[18]The Constitution of India.

Court, and is prepared at any time to while in custody of such officer or at any stage of the proceeding before such Court to give bail, such person shall be released on bail. This is the provision of bail for any person who is accused of a bailable offence. Section436 of CR.P.C makes provisions for grant of bail to any person who is accused of a bailable offence whether arrested or detained by police without warrant of arrest or appears or is brought before the Court of law. He has to be released on bail. It is a matter of right. The law commission also has also recommended some broader principles which are adopted in the CR.P.C with regard to bail. Some of them are:

a. Bail is a matter of right if the offence is bailable.
b. Bail is a matter of discretion if the offence is non bailable
c. Bail shall not be granted by the magistrate if the offence is punishable with death of imprisonment for life.
d. The Session Court and the High Court have wider discretion in granting bail, even if the offence is punishable with death or imprisonment for life.

The division bench of the High Court of madras has held that the essential distinction between a bailable and non bailable offence is that; in bailable offences bail would be granted as a matter of course, if the arrested person is willing to furnish bail, whereas in latter case it is the discretion of the Court considering the application to grant bail or not. This would obviously depend on the facts and circumstances of the different cases. It is however pointed out that even in non- bailable offences bail may be granted, but that would depend upon the circumstances of the case, and it must be assumed that he shall be, so released as a matter of course.[19]

6. Bail is a security for appearance.

Bail in its fundamental concept is a security for the prisoner's appearance to answer the charge at a specified time and place. It is natural and relevant for

[19]M.R. Malik; Bail Law & Practice, fourth edition, page 215.

any Court to consider such security in relation to and in the light of the nature of the crime charged and the likelihood or otherwise of the guilt of the accused there under. At any early stage when accused asks for bail, the Court has necessarily to act on a reasonable and intelligent anticipation which ex-hypothesis must, to a certain extent, be problematical because the trial has not run its course.

In matters of bail the test to be applied is the test of reasonable belief as opposed to decision and conclusion which marks the ends of the trial. The available materials for the Court in considering the question of granting bail are the charges made, the attendant facts including the police report, facts stated in the petition for bail and the grounds of opposition to the granting of that petition. The release on bail does not change the reality and from that fact alone, it cannot be said that he is not a person arrested for an offence. A person released on bail is still considered to be detained in the constructive custody of the Court through his surety. He has to appear before the Court whenever required or directed. Therefore, to that extent, his liberty is subjected to restraint. He is notionally in the custody of the Court and hence continues to be a person arrested. Even in spite of the fact that the accused had been released on bail, he continues to be a person arrested on a charge of commission of an offence.

I(b) - TYPES of OFFENCES.

1. Classification of Offence:

The code of criminal procedure classifies offences into two main categories. viz.

i. Bailable
ii. Non - bailable.

This classification is done on the basis of gravity of theoffence and also punishment for the same. Normally, abailable offence is regarded less grave and serious compared to a non-bailable one. Offences are defined in the clause (a) of S. 2 of the Cr. P.C. as:

(a) "Bailable Offence" means an offence which is shown as bailable in the First Schedule, or which is made bailable by anyother law for the time being in force; and "non-bailable offence "means any other offence;"[20]

It is important to note that every offence under The Indian Penal Code have been individually declared as bailable or non-bailable in the first part of the first Schedule to Cr.P.C. to find out which offence is bailable and which non-bailable. However, in the absence of any such declaration under the parent Act, general rules mentioned in second part of the first Schedule of Cr. P.C. needs to be referred to decide whether the category of the offence.

Cr.P.C classifies offences into two categories, namely bailable or, non-bailable depending on the seriousness or gravity of the offences and punishment the Code (of 1973) provides. The main provision regarding bail in bailable offences is contained in Section 436, of the Code (of 1973) and those relating to non-bailable offences are given in Section 437 of the code. The classification of offences into these categories can be explained like;

[20] The Code of Criminal Procedure, 1973, (2 of 1974)

i. Bailable offences are generally considered less grave and serious compared to non-bailable ones. It is very clear that S. 436 of Cr. P.C. (of 1973) recognizes that a person who is accused of bailable offence has a right to be released on bail.
ii. And bailable offences have been defined under Section 2 (a), Cr.P.C. which means offences which are shown bailable in the first Schedule, or one that is made bailable by any other law in force at that time.

Non-bailable offence means any offence other than the above mentioned[21]. The first Schedule of Cr. P.C. comprisesof two parts, the first is regarding offences under the Indian Penal Code and the second is regarding offences under any other law. The second part holds that if the offence is punishable with less than three years of imprisonment only then it will be bailable and be tried by any Magistrate.

2. Different Bail Provisions for Bailable and Non-Bailable Offences:

In the matter of granting bail, the Cr. P.C. makes a difference between bailable and non-bailable offences. The granting of bail to one accused of a non-bailable offence is discretionary under Section. 437 of Cr. P.C. [1973] and the person granted bail may again be arrested by the order of the of High Court or Session court or the Court granting the bail. Under this Section the High Court or the Court of Session may release any person on bail and by a subsequent order may rearrest him. A person accused of a bailable offence is treated differently.[22] He at any time during detention without a warrant and at any stage of the proceedings before the Court before which he is brought he has the right to be released on bail.

If at any stage of the case, it is found that the person accused of a bailable offence is tampering with or intimidating the prosecution witnesses or is making attempt to escape , the High Court can cause him to be

[21] *KanubhaiChhagnlalBrahmbhat*v. *State of Gujarat*, 1973 Cri LJ 533 at p. 536 (Guj).
[22] Ezinearticles.org

rearrestedand to commit him back to custody for a period it considers fit. This jurisdiction rises from the overriding powers of the High Court which can be invoked at times of exceptional cases and that the High Court is satisfied that the ends of justice will be defeated if the accused remains out on bail. The person rearrested under the orders of the High Court cannot ask for his release on bail under Section 437, but the High Court by a subsequent order may grant him bail again.[23]

The contrast between Sections. 436 and 437 of Cr. P.C. is apparent. Under S. 436 the Magistrate has no discretion as he has to grant bail to person accused of bailable offence, if he is prepared to give bail; while under Section 437, the Magistrate may refuse to release him on bail on grounds of certain circumstances that may be brought to his notice.

If the offence is bailable, bail has to be granted under Section 436, but if it is a non-bailable one, the Courts are to decide on the question of granting the bail keeping in mind considerations like;

i. the nature and seriousness of the offence,
ii. a reasonable possibility of the presence of the accused being secured at the trial,
iii. a reasonable apprehension of the evidence being tampering with and the quantum of punishment.
iv. Whenever an application for bail is presented before a court, the first question to be decided is whether the charge slapped on the accused is bailable or not . If bailable, then bail will be granted under S.436 of the Code. if the offence is non- bailable, further considerations will arise before the Court and it will decide the question and then grant or reject bail. Further considerations like;
    - Seriousness and nature of offence.
    - Character of evidence.
    - Circumstances which are unique to the accused.
    - A reasonable possibility of accused's presence not being secured at the

    time of trial, reasonable apprehension of witnesses being tampered.

[23] Manupatra.com

- The larger interests of public or the state. And similar considerations that arise in a court when asked for bail in non-bailable offence.[24]

3. Classification of Non-Bailable Offences.[25]

i. If the offence is not punishable with death or imprisonment for life.
The accused person may be admitted bail.

ii. If there are no reasonable grounds for believing that the person is guilty of an offence punishable with death or imprisonment for life.
The accused may be released on bail.

iii. If there are reasonable grounds for believing that the accused is guilty of an offence punishable with death or imprisonment for life.
The accused shall not be released on bail.

iv. If there are reasonable grounds for believing that the accused person is guilty of an offence punishable with death or imprisonment for life but is less than sixteen years of age, is a woman or is sick or infirm.
The accused person may be released on bail.

v. If there do no reasonable grounds for the accused person believe that the accused person has committed a non-bailable offence but there are sufficient grounds for further inquiry into his guilt.
The accused shall be released on bail.

[24] www.wikipedia.com
[25] indiankanoon.com

vi. If, in any case triable by a Magistrate, the trial of a person accused of a non-bailable offence is not concluded within sixty days from the first date fixed for taking evidence and such person has been in custody throughout.
The accused shall be released on bail.

vii. If after the conclusion of the trial of a person accused of a non-bailable offence and before judgment is delivered the court is of opinion that the accused is not guilty of any such offence.
The accused shall be released on bail[26].

It will thus appear that the occasion for the exercise of judicial discretion either in favour or against the accused arises only under (i), (ii) and (iv), otherwise the legislature itself has taken a liberal view of the matter. As far as the case of an accused under (iii) is concerned, it is submitted, that he cannot be released by the Magistrates. So far as the courts of Session or High Court is concerned, their power is not fettered by the fact that there are reasonable grounds for believing that they are involved in offences punishable by death or imprisonment for life.[27]

Thus it has been held in an Allahabad case that a Magistrate has no jurisdiction to grant bail where there are *prima facie* reasons to believe that the accused is guilty of attempt to murder (section 307, I.P.C). But, in such a case Sessions Judge by invoking the aid of section 439, Cr. P. C, may admit the accused to bail. The question has been exhaustively dealt with while discussing the scope and ambit of the provisions of section 439 of the code.

Besides the considerations catalogued above which weigh with a court while considering the question of bail in a non-bailable case, there may be other situations which may influence the decisions of the court.

[26] www.shodhganga.com
[27] Manupatra.com

The classification of offences into bailable and non-bailable offences and recognizing the right of bail in bailable as a matter of right is definitely to make the law regarding the bail reasonable. Only in respect of non bailable offences bail is a matter of discretion of the concerned court. However of the offence is punishable with death of imprisonment for life the magistrate before whom the accused is produced or surrender cannot release him of bail except in certain specified circumstances and for that purpose that the concerned magistrate has to assign reasons for granting bail. However even in respect of offences punishable with death or imprisonmentfor life the sessions judge and the high court have been given wider discretion in matter of bail all these provisions have been made to make the bail law fair and reasonable. In section 304 Cr.P.C the court has the duty to engage lawyer to every accused who seeks legal assistance having no financial capability to engage a lawyer.[28]

4. Conversion of Case from Bailable to Non-Bailable Offence:

In the case of *Hamida*v. *Rashid*,[29] bail had been granted to the accused for offences under Ss. 324,352 and 506 IPC (which were bailable offences) on the day of their arrest itself. Subsequently, the victim succumbed to the injuries and died after which the offence was converted into S. 304 IPC. The accused file a petition under S. 482 before the High Court seeking a direction to allow them to continue on same bail even after the conversion of the offence into S, 304 IPC.

The High Court accepted their prayer. On appeal, the Supreme court held that the accused could have applied for bail afresh after the offence had been converted into one under Section 304 IPC. They deliberately did not do so and filed a petition under section 482 Cr. P. C. in order to circumvent the procedure where in *Talab Haji Husain* v.

[28] Shodhganga.com
[29] 108 (2008) I SCC 474

MadhukarPurshottamMondkar,[30]*RatilalBhanji Mithani* v. *Asstt Collector of Customs*,[31] under they would have been required to surrender as the bail application could be entertained and heard only if the accused were in custody.

It was held that as no order adverse to the accused had been passed by any court nor was there any miscarriage of justice or any illegality, in such circumstances, the High Court committed manifest error of law in entertaining a petition under Section 482 Cr.P.C. and issuing a direction to the subordinate court to accept the sureties and bail bonds for the offence under Section 304 IPC. It was observed that the effect of the order passed by the High Court was that the accused after getting bail in an offence under Sections 324,352 and 506 IPC on the very day on which they were taken into custody, got an order of bail in their favour even after the injured had succumbed to his injuries and the case had been converted into one under Section 304 IPC without any court examining the case on merits, as it stood after conversion of the offence. The procedure laid down for grant of bail under Section 439 Cr. P. C., though available to the accused, having not been availed of, and the exercise of power by the High Court under Section 482 Cr. P.C. was clearly illegal. Accordingly, the aforesaid order passed by the High Court was set aside.

In the aforesaid case of *Hamida*v.*Rashid*[32], in a petition under S. 482 Cr.P.C., the High Court had allowed the continuation of the same bail which was granted to accused in a bailable offence even after its conversion into an offence under S. 304 IPC. While setting aside the said order, the Supreme Court held that in spite of its repeated pronouncements that inherent power under Section 482 Cr.P.C. should be exercise sparingly with circumspection in rare cases and that too when miscarriage of justice is done, the High Court entertained the petition under Section 482 Cr.P.C., the ultimate result where of was that the order of bank granted in favour of the accused for an offence under sections 324,352 and 506 IPC ensured to their benefit even after the offence had been converted into one under section 304 IPC and also

[30] AIR 1958 SC 376
[31]Bombay, 1967 Cri LJ. 107 (2008) I SCC 474
[32] 108 (2008) I SCC 474

subsequently when charge had been framed against them under section 302 read with Section 34 IPC. The accused did not remain in custody even for a single day nor did they approach the Court of Chief

Judicial Magistrate or sessions Judge for being granted bail under section 304 or 302 IPC, yet they got the privilege of bail under the aforesaid offences by virtue of the said order passed by the High Court. Highlighting that the dockets of the High Court are full and there is a long pendency of murder appeals in the High Court from which the instant case had arisen, the Supreme court held that ends of justice would be better served if valuable time of the High Court is spent in hearing those appeals rather than entertaining petitions under Section 482 Cr. P. C. at an interlocutory stage which are often filed with some oblique motive in order to circumvent the prescribed procedure, as was the case in the instant case, or to delay the trial which would enable the accused to win over the witnesses by money or muscle power or they may become disinterested in giving evidence, ultimately resulting in miscarriage of justice. In a case, the accused were arrested for the commission of bailable offence and accordingly they were released on bail by the Magistrate. Subsequently, the charge was altered and S. 307 IPC was included which is non-bailable and exclusively triable by the Court of Session. Only on that ground the police arrested the accused without the bail being cancelled by the Court. In other words, the police did not move the Court to cancel the bail, make out a case that they are required for an offence under S.307, IPC. Therefore, the arrest by the police itself was illegal. Subsequently when the accused were produced before the Magistrate, the Magistrate also did not look into the fact that they were released by the same Court on earlier occasion in the same crime number.[33]

Therefore, before remanding the accused, the Magistrate ought to have considered whether their bail application should be cancelled or not. Without cancelling the bail which was granted by the same Court and remanding the accused without assigning any reasons, the said order was illegal. If the police is allowed to arrest the accused who has been released on bail by the

[33] *Rati Singh* v *State of Bihar AIR1988, SC 457*

Court, it will lead to disastrous consequences as the police will be able to arrest the same accused under the same crime number by altering the section, making it a non-bailable offence. Therefore, it is absolutely necessary that before the accused is re-arresting in the same crime number, if he is released on bail, the prosecution has to seek cancellation of bail making out prima facie case for non-bailable offences or for arresting him in view of the serious nature of the offence, etc. In the event the bail is cancelled by the Court either under S. 437(5) or S. 439(2), Cr. P.C., as the case may be, the accused can be arrested. In the event the accused is re-arrested and produced before the Magistrate, it is incumbent on the Magistrate to look into all the material particular and after being satisfied only, he may pass orders according to law. In *Nathuram*v.*State of Rajasthan*[34], initially a case under ss. 447, 323 IPC was registered against the petitioners. However, subsequently, Ss. 307 and325 IPC were also added to the case. They approached the High Court under S. 482 Cr. P. C. alleging that by addition of these section, the bailable offence was converted into an non-bailable offence and their right to bail had been divested by the police due to that reason. The High Court refused to intervene in the matter on the ground that so long as the investigation proceeds in conformity with the mandates of the Cr. P. C., the domain of investigation circumscribed by the provisions of the Cr. P. C., on attempt should be made by the Court to stifle or impinge upon the progress of the progress of the investigation unless the salient
features of illegality, irregularity, or mala fide, misuse of power by the police conscientiously persuades the Court to believe that personal liberty of the citizen is at stake at the hands of arbitrary exercise of power by the State machinery. Moreover, it was clarified that on the apprehension of arrest by the police, the citizens have the right to move for anticipatory bail for the reasons available to them in the facts and circumstances.[35]

[34] AIR 1958 SC 376

[35] Indiankanoon.com

I (c)- RIGHT to LIBERTY.

1. Liberty:

liberty according to Dicey means "the right to personal liberty as understood in England means in a substance a person's right not to be subjected to imprisonment arrest or other physical coercion in any other manner that does not admit of legal justification" in other words personal liberty means freedom from physical restraint and coercion which is not authorized by law.[36]

Article 21 of the constitution guarantees to everyone the right to life and personal liberty. It states that no person shall be deprived of his life or personal liberty except according to the procedure established by law. This right to life and personal liberty is available to the entire person whether citizen or non-citizen within the territory of India. The Supreme Court has held:

"Even those who are not citizens of this country and come here merely as tourists or in any other capacity will be entitled to the protection of their lives in accordance with the Constitutional provisions. They also have a right to "Life" in this country. Thus, they also have the right to live, so long as they are here, with human dignity. Just as the State is under an obligation to protect the life of every citizen in this country, so also the State is under an obligation to protect the life of the persons who are not citizens."[37]

In the early years of the commencement of the constitution the Supreme Court interpreted the Article very literally and other aspects of life and liberty were not taken into account, but very plain meaning. In *A K Gopalan's*[38] case an attempt was made to persuade the Court the Supreme Court to hold that the Courts could adjudicate upon the reasonableness of the preventive detention act or for that matter any law depriving a person of his personal liberty and cannot

[36] http://www.slideshare.net
[37] *The Chairman, Railway Board &Orsvs Mrs. Chandrima Das* AIR 2000 SC 988.
[38] AIR 1950 SC27

be valid unless it incorporates these principles in the procedure laid down by it.[39]

The law was read as it is and not as it should be, i.e. a positivist approach. The law on preventive detention act was challenged on the ground that it was unreasonable and did not conform to the principles of natural justice. But the Supreme Court rejected all the arguments. On the other hand FAZL ALI, J disagreed with the majority view, and held that the principle of natural justice that no one shall be condemned unheard was part of the general law of the land and the same should accordingly be read into Article 21.

This view prevailed for about three decades until the Judgment of *Maneka Gandhi*[40].

In the case of *Kharak Singh* v *State Of Uttar Pradesh* [41] the Court held that consistent domiciliary visits to a person by the police who was earlier convicted was a violation of right to liberty of the person. This hinders the movement of the person and also his privacy. The person should be allowed to live freely.

"No doubt the expression "personal liberty" is a comprehensive one and the right to move freely is an attribute of personal liberty. It is said that the freedom to move freely is carved out of personal liberty and, therefore, the expression "personal liberty" in Art. 21 exclude that attribute. In our view, this is not a correct approach. Both are independent fundamental rights, though there is overlapping. There is no question of one being carved out of another. The fundamental right of "life and personal liberty" has many attributes and some of them are found in Art. 19. If a person's fundamental right under Art. 21 is infringed, the State can rely upon a law to sustain the action; but that cannot be a complete answer unless the said law satisfies the test laid down in Art. 19 (2) so far as the attributes covered by Art. 19 (1) are concerned. In other words, the State must satisfy that both the fundamental rights are not infringed by showing that there is a

[39] M.P. Jain, Indian Constitutional Law Lexis NexisButterworthsWadhwa ,Sixth Ed page 1179.
[40] 1978 SCC, 248

[41]AIR 1963 SC 1295,

law and that it does amount -to a reasonable restriction, within the meaning of Art. 19 (2) of the Constitution."[42]

2. The *Maneka Gandhi*[43]case:

This is a land mark judgment of the post emergency period.it also gave an entirely new view point to look at the chapter III of the constitution prior to *Maneka Gandhi's* decision, Article 21 only guaranteed the right to life and personal only against the action of the executive and not from the legislature. This case in broad sense extended the protection against the legislative action.[44] Earlier the arbitrary action of the legislature could not be challenged but now even the action of the legislature could be challenged. Now even the legislature had to keep in mind while making any law whether it was arbitrary or it was in conformity with the natural law. It shows how liberal tendencies have influenced the Supreme Court in the matter of interpreting fundamental rights; especially Article 21 there came a great transformation in the judicial attitude towards the protection of personal liberty. It was after the painful experience of the emergency during 1975-1977. It became clear in the case of *Shukla*[45] that the interpretation of Article 21 as done in *Gopalan's* case could not play the any role in providing any protection against any harsh law seeking to deprive a person of his life or personal liberty enshrined in Article 21. It was the dissent of justice FAZL ALI which is vindicated in the law subsequently developed by the Supreme Court culminating in *Maneka*.[46]

The Court made a number or proposition seeking to make Article 21 much more meaningful than hither to. The Court observed:

" Each freedom has different dimensions and there may be overlapping between different fundamental rights and therefore it is

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[42]*Kharak Singh vs The State Of U. P.* AIR 1963 SC 1295,

[43] 1978 SCC, 248

[44] http://www.slideshare.net

[45]*ADM Jabalpur* v *Shivkant Shukla*1976 AIR 1207.

[46]*Maneka Gandhi* v *Union of India*,AIR 1978 SC 597.

not a' valid argument to say that the expression 'personal liberty' in Article 21 must be so interpreted as to avoid overlapping between that Article and Article 19(1). The expression 'personal liberty' in Article 21 is of the widest amplitude and it covers a variety of rights which go to constitute the personal liberty of man and some of them have been raised to the status of distinct fundamental rights and given additional protection under Article 19." [47]

The phrase "personal liberty" was given an expansive meaning. The Court emphasized that the expression 'personal liberty' is of the widest amplitude covering a variety of rights which contribute to personal liberty of man. Some of the attributes have been raised to the status of distinct fundamental rights and given additional protection under Article 19.

"Personal liberty makes for the worth of the human person. Life is a terrestrial opportunity for unfolding personality, rising to Higher states, moving to fresh woods and reaching out to reality which makes our earthly journey a true fulfillment - not a tale told by an idiot full of 'sound and fury signifying nothing, but a fine frenzy rolling between heaven and earth. The spirit of Man is at the root of Art. 21. Absent liberty, other freedoms are frozen."[48]

The hon'ble Supreme Court in this case laid down a number of other propositions which made 'the right to life' or 'personal liberty' more meaningful. Maneka Gandhi case has a great significance in the development of Constitutional law of India.

The Court interpreted the hidden meaning of the Article and explained the hidden meaning of it. The other aspects of life that makes life worth living and not merely an animal existence.

The most important aspect of *Maneka Gandhi* case was that it reinterpretation of the "term procedure established by law" which is used in Article 21.

The term personal liberty used in Article 21 has been given a liberal interpretation. it does not only mean the liberty of the body i.e.

[47] *Maneka Gandhi* v *Union of India*,AIR 1978 SC 597.

[48] *Maneka Gandhi* v *Union of India*,AIR 1978 SC 597.

freedom from physical restraint or freedom from confinement within the bounds of a prison in other words it means not only freedom from arrest or detention from false imprisonment or wrongful confinement, but means much more than that. The term personal liberty is not used in a narrow sense but has been used in Article as a compendious term to include within it all those variety of rights of a person which go to make up the personal liberty of man. Liberty of an individual has to be balanced with duties and obligations towards his fellow citizens.[49]

After the *Maneka Gandhi* [50] case there were many cases that additionally widened the scope of Article 21 in famous case it was held that personal liberty includes the right to have interviews with members of family. Even this is an aspect of right to liberty. It was further discussed in *Francis Coralie's* case. Some other aspects of life and personal liberty were discussed. It included a person's meeting with family members and giving interview to them as a matter of right.The right to have interview with lawyer and family members" is part of a detenu's 'personal liberty' guaranteed under Article 21 of the Constitution and cannot be interpreted with except in accordance with reasonable, fair and just procedure established by law. The Court made the following observation:

"Considered from the point of view also of the right to personal liberty enshrined in Article 21, the right to have interviews with members of the family and friends is clearly part of personal liberty guaranteed under that Article. The expression "personal liberty" occurring in Article 21 is of the widest amplitude and it covers a variety of rights which go to constitute the personal liberty of a man and it also includes rights which "have been raised to the status of distinct Fundamental Rights and given additional protection under Article 19". Therefore, personal liberty would include has right to socialize with members of the family and friends subject,"[51]

[49] M.P. Jain, Indian Constitutional Law Lexis NexisButterworthsWadhwa ,Sixth Ed page 1190
[50]1978 SC 597.

[51]*Francis Coralie Mullin v The Administrator,* AIR 1981 SC 746

3. Article 21 and right to bail:

In *GudikantiNarasimhulu v Public Prosecutor*[52] the Supreme Court had observed as follows:

"Personal liberty, deprived when bail is refused, is too precious a value of our constitutional system recognized under Art. 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.The significance and sweep of Art. 21 make the deprivation of liberty '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 Art. 19……reasonableness postulates intelligent care and predicates that deprivation of freedom- by refusal of bail is not for punitive purpose but for the bi-focal interests of justice-to the individual involved and society affected.

In *Hussainara Khatoon v State of Bihar*[53]the Supreme Court had cautioned that pre-trail detention is not to be encouraged nor is encourageable pre- trial release on sureties that if the Court is satisfied after taking into consideration that the accused has his roots in the community and is not likely to abscond he can safely be released in his personal bond.

The protection of Article is available to all persons arrested or detained be he a citizen or a non-citizen. Such freedom also extends even to person convicted subject only to the limitations imposed by his conviction under the law[54]. The object of Article 21 is to prevent encroachment upon personal liberty by the executive save in accordance with law and in conformity with provisions thereof. Before a strictly followed and must not be departed from to the disadvantage of the person affected.[55]

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[52] 1978 SCR (2) 371
[53] AIR 1979 SC 1360
[54]*Sunil batra v delhiadmn.*
[55]*Bashina v State of Uttar Pradesh(1969) SCR 3.*

In *Narendr*a v *Gujral*[56] the Supreme Court held that whenever the liberty of the subject is involved whether under penal law of a law of preventive detention it is the bounden duty of the Court to satisfy itself that all the safeguards provided by law have been scrupulously observed

The expression deprived according to the view expressed in *Gopalan* case has been used as total loss of liberty and it has no application in case of a restriction upon the right of free movement which comes under Article 19(1)(d).

The above restricted meaning of the word deprived has not been adhered to by the Supreme Court in later decisions. The view expressed in *Gopalan's* case has been modified by holding that when there is restriction of personal liberty Article 21 is infringed[57]

The expression personal liberty according to *Gopalan'*s case means freedom from physical restraint from physical restraint of person by incarceration of otherwise. But in the later decisions the Supreme Court has abandoned the meaning of personal liberty as given in *Gopalan'*s case and in view of these later decisions the "personal liberty" includes all varieties of rights which go to make up a person's liberty other than those which are already included in several clauses of Article 19.[58]

Even the expression "procedure established by law which was originally interpreted by the Supreme Court in *Gopalans*'s case as state made or enacted law and not as an equivalent law embodying the principles of natural justice yet gradually the expression has gone significant change in later Supreme Court decisions .

However in order to be a law it must be a valid law. In order to be a valid law it must not only be a law enacted by a competent legislature but also a law which does not violate other fundamental rights.[59]

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[56] AIR 1979 SC 420
[57] *Kharaksinghvstate of utta Pradesh* AIR 1963 SC 1925
[58] *Maneka Gandhi v union of India* AIR 1978 SC 597
[59] *Makhansingh v state of Punjab,* AIR 1964 SC 381.

In *Maneka Gandhi's* case it has been observed that a procedure which is arbitrary, oppressive or fanciful is no procedure at all and that a procedure which is unreasonable violates art. 14 because the concept of reasonableness permeates art 14.

So in view of the latest view of the Supreme Court the procedure established by law does no linger mean simply a procedure enacted by a competent legislature. The enacted law must also be reasonable fair and just.

In view of the insertion of Article 39A to the directive principle the procedure established by the law would further mean that legal aid is available to the indigent accused and when there is no such provision for making available legal aid to an accused person who is too poor to engage a lawyer then that procedure to be a procedure established by law.[60]. In *Hussainara Khatoon v State of Bihar*[61] the Supreme Court held had ordered release of the under trial prisoners who were in jail for a period linger that the maximum term tor which he could have been sentenced if convicted. In that decision as well as in other decisions the Supreme Court has also held the procedure to be which does not provide for speedy trial[62]

The new code of criminal procedure 1973 including the provisions regarding the bail have been enacted regard being to the new dimensions which the Supreme Court as given to the expressions deprived personal liberty and personal liberty and procedure established by law in Article 21 of the constitution

However in *Rajesh RanjanYadav*v *CBI*[63] the right of bail of an accused in light of fundamental rights enshrined in Article 21 of the constitution has been explained by the Supreme Court. It is pointed out that while it is true that Article 21 of the constitution has been explained by the Supreme Court. It is pointed out that while it is true that Article 21 is of great importance as it enshrines the fundamental right to the individual liberty. But at the same time a balance has to be struck between the right of individual liberty and

[60] *Haskat v state of maharashtra* AIR 1978 SC 1548
[61] AIR 1979 SC 1360
[62] *Kadra v state of Bihar AIR* 1981 SC 939
[63] AIR 2007 SC 451

the interest of the society that no right can be absolute and reasonable restrictions can be placed on them. It is also made clear that it is true that one of the consideration in deciding whether to grant bail to an accused r not is whether he has been in jail for long, but the Court has also to take into consideration other facts and circumstances such at the interest of society and that ground of bail depends on facts and circumstances of each case and it cannot be said there is any absolute rule that because ling period of imprisonment has expired bail must necessarily be granted.

When a Court adjourns a proceeding under s 344 of the code of criminal procedure of 1898 without making an order of remand to custody as required by that section then there is no valid order of remand and the person so detained without any order of remand is entitled to be release in *habeas corpus* proceeding.[64] An accused is also entitled to apply for bail as of right when it is found there is no valid order of detention. But when application for bail as of found when it is found that there is a valid order of detention the accused cannot be released on bail as right only because at some earlier period there was no valid order of detention.[65] If there is no order of detention under s 309(2), CrPC the detention is illegal no doubt. But that is cured by passing detention order subsequently and the accused is not entitled to bail on the ground of his previous illegal detention[66]

Article 21 has a very wide scope and right to liberty has very large dimensions. It includes many other aspects that make life worth living. Some other aspects of life as discussed in *Olga Tellis*[67] case. The Supreme Court observed:

"The right to work is the most precious liberty because, it sustains and enables a man to live and the right to life is a precious freedom."Life", as observed by Field, J. in Munn v. Illinois (1877) 94 U.S. 113, means something more than mere animal existence and

[64]*Ram v Narain v State of Delhi* 1953 SCR 652
[65]*BeniMdhav v State* 1983 Cr LJ 633
[66]BeniMdhav v State 1983 Cr LJ 633
[67] *Olga Tellis v Bombay Municipal Corporation* : AIR1986SC180

the inhibition against the deprivation of life extends to all those limits and faculties by which life is enjoyed".

I (d)-JUDICIAL DECISIONS.

1. Power of High Court to grant bail:

The High Court is the final authority in any state. In matters of bail the High Court normally become the final authority. The doors of the Supreme Court should be knocked only at the last if a grave error has occurred and that justice has been denied. Ordinarily the Supreme Court is loath to interfere with the order of granting or refusing bail but it cannot be insurmountable obstacle in the way of rectifying an order which tends to disclose miscarriage of justice:

"the apex Court must interfere only in the limited class of cases where there is a substantial question of law involved which needs to be finally laid at rest by the apex Court for the entire country or where there is grave, blatant and atrocious miscarriage of justice.…..the Judges of the apex Court may not shut their eyes to injustice but they must equally not keep their eyes too wide open, otherwise the apex Court would not be able to perform the High and noble role which it was intended to perform according to the faith of the Constitution makers. It is for this reason that the apex Court has evolved, as a matter of self-discipline, certain norms to guide it in the exercise of its discretion in cases where special leave petitions are filed against orders granting or refusing bail or anticipatory bail.[68]

2. Bail a matter of discretion:

Bail in non bailable offences is a matter of discretion. The Courts look into the individual cases and then take any decision. One cannot claim it as a right or compare it with the other cases which may appear similar. All the cases are different and need to be looked differently. In the case *of Mansab Ali* v*Irsan*[69] the Supreme Court made the following observation:

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[68] *Bihar Legal Support Society v The Chief Justice of India* AIR 1987 SC 38

[69] 2002 AIR SCW 5391

"The provisions of Criminal Procedure Code confer discretionary jurisdiction on criminal Courts to grant bails to accused pending trials or in appeals against convictions. Since the jurisdiction is discretionary it is required to be exercised with great care and caution by balancing valuable right of liberty of an individual and the interest of the society in general. In granting or refusing the bail, the Courts are required to indicate, may be very briefly, the reasons for grant or refusal of bail. The jurisdiction has not to be exercised in a casual and cavalier fashion"[70]

3. Bail not a common practice:

Bail is not granted to everyone. It depends upon the facts and circumstances of the case. It was held in *State of Uttar Pradesh* v*Jairam*[71]

"Grave illness or pressing and personal business may justify an order of release in detention cases for a short period suited to the exigencies of the particular occasion. But a detenu cannot be released on bail as a matter of common practice, on considerations generally applicable to cases of punitive detention."

4. Subsequent application for bail:

When a person is denied bail once, he may apply for next bail application on the ground of changed circumstance and that he be granted bail the following observation was made by the Supreme Court in the case of *Kalyan Chandra Sarkar*.[72]

"Under the criminal laws of this country, a person accused of offences which are non bailable is liable to be detained in custody during the pendency of trial unless he is enlarged on bail in accordance with law. Such detention cannot be questioned as being

[70]*Mansab Ali v Irsan* 2002 AIR SCW 5391

[71]AIR 1982 SC 942

[72]AIR 2005 SC 921

violative of Article 21 since the same is authorized by law. But even persons accused of non bailable offences are entitled for 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 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 situations require it to do so. 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. In such cases if the circumstances then prevailing requires that such persons to be released on bail, in spite of his earlier applications being rejected, the Courts can do so."

But every case is different from the other and also the situation and the charged on the co-accused. So if the co-accused is acquitted it is not a ground for the applicant to be granted bail. the following was observed in *Nanha Khan* v *State of Uttar Pradesh*[73]:

"Simply because the co-accused has been granted **bail** cannot be the sole criteria for granting **bail** to an accused. Even at the stage of second or third **bail** the Court has to examine whether on facts the **case** of the applicant before the Court is distinguishable from other released co-accused and the role played by the applicant is such which may disentitle him to **bail**. i.e. the norms laid down by the Supreme Court in *Gurcharan Singh's***case**"

In case of *State Of M.P.* v*ChandrahasDewangan* [74] a question arosewhether the subsequent bail application during pendency of trial in other Court has to be disposed of by the same Judge if available? The Supreme Court made the following observation:

"The filing of repeated bail applications found favour in the decision of Supreme Court in *Babu Singh v. State of Uttar Pradesh*[75] wherein it was held that

[73]1993 Cri LJ 938
[74]1992 Cri LJ 711
[75]AIR 1978 SC 527

"an order refusing an application for bail does not necessarily preclude another, on a later occasion, giving more materials, further developments and different considerations. The Court is not barred from second consideration at a later stage. It was held that an interim direction is not conclusive adjudication, and updated reconsideration is not over turning an earlier negation."[76]

In one of the cases, ShriBatt J. while rejecting the bail application of the accused observed,

"There is no justification for grant of bail to the applicants-accused on any terms, whatsoever, till the disposal of the case against them, since there is already more than sufficient incriminating evidence, for their inculpation, in the investigation done so far."

On a reference the Division Bench in *Ram Sahodar v. State of M.P.*[77] held that while dismissing a bail application, it is not permissible to make an order to the effect that the applicant cannot be released on bail on any terms whatsoever till the disposal of the case against him.

5. Applying for bail before another Judge once rejected by one:

Another land mark decision was rendered *in* *ShahzadHasan Khan v. IshtiaqHasan Khan*[78] AIR. It was held that the subsequent bail application should be placed before the Judge who had disposed of the earlier bail application.

In this The accused filed bail applications successively but they were all rejected by Justice Kamleshwarnath. The accused again made another application for bail this time the application was placed before Justice Bajpai who directed that the application be placed before Justice Kamleshwarnath. Two days later, another application was made by the accused before Justice Bajpai for

[76] *State Of M.P.* v*ChandrahasDewangan*, 1992 Cri LJ 711
[77] 1985 JLJ 750 : 1986 Cri LJ 279
[78] AIR 1987 SC 1613

recalling his order directing his application to be placed before Justice Kamleshwarnath. This application was allowed and Justice Bajpai recalled his previous order and granted bail to the accused. The order granting bail was challenged before the Supreme Court. The Supreme Court observed that the bail application should have been placed before Justice KamleshwarNath who had passed the earlier orders and who was available also. The convention that subsequent bail applications should be placed before the same Judge who may have passed earlier orders has its roots in principle. It prevents abuse of process of Court inasmuch as an impression is not created that a litigant is shunning or selecting a Court depending on whether the Court is to his liking or not, and is encouraged to file successive applications without any new factor having cropped up. If successive applications on the same subject are permitted to be disposed of by a different Judge there would be conflicting orders and a litigant would be pestering every Judge till he gets an order to his liking resulting in the credibility of the Court and the confidence of the other side being put in issue and there would be wastage of Courts' time. Judicial discipline requires that such matter must be place before the same Judge, if he is available for orders.

The observations of the Supreme Court that the subsequent bail application must be placed before the same Judge, if available, are based on judicial discipline and long standing conventions prevailing in High Courts to achieve the object viz. to prevent a litigant from shunning or selecting a Court and to discourage filing of successive applications without any new factor till he gets an order to his liking. If such a practice is permitted, there would be conflicting orders, the credibility of the Court would be affected and would result in wastage of Courts' time.

6. Conditional bail:

Bail is always granted with conditions. Even if the conditions are not stipulated in the application, certain conditions are implied. As observed in *Rizvan Akbar Hussain* v *Mehmood Hussain*[79]:

"even if no condition is specifically stipulated, the accused, while on bail, is not supposed to tamper with evidence. It is an implicit condition in every bail."

7. Refusal of bail:

Grant of bail in non bailable offences is at the discretion of the Court. The Court looks into the case and then decides whether or not to grant bail on basis of the nature of the charge and other factors the decision is made by the Court.

In the case of *RajeshRanjanYadav* v CBI[80] .

"Merely because of the death of the appellant's father, there is no one to look after the case is no ground to enlarge the accused on bail when the charges are serious."

In *Mool Chand* v *State* (through the director of CBI).[81]

"The investigation has to go long way ad hence sufficient time will be required for the investigating agencies to complete the investigation. Further having regard to the seriousness of the allegations leveled against the petitioner as pointed out by the designated Court , the release of the petitioner on bail at this crucial stage may frustrate the effort of the investigation agencies in collecting evidence. Hence his bail application is dismissed at this stage"

In case of *Ramesh Kumar Singh* v*Jhabbar Singh*[82]the Court held the following:

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[79]2007 Cri LJ 3255 (3256) (SC)

[80]2008 Cri LJ 1033 (1034) (SC)

[81]AIR1992 AC 1640

"An accused who has misutilised the liberty that was granted to him earlier by committing murder while on bail, was not entitled to the privilege of being released on bail."

"The accused did not misuse his liberty while on temporary bail is no ground to grant bail in a murder case."[83]

Cancellation of bail

Bail once granted is not absolute. It may be cancelled in there arises any question where the normal course of justice may be affected. It was held in the case of *Raghubir Singh* v *State of Bihar*. [84]

"Generally the grounds for cancellation of bail, broadly, are, interference or attempt to interfere with the due course of administration of justice, or evasion or attempt to evade the course of justice, or abuse of the liberty granted to him. The due administration of justice may be interfered with by intimidating or suborning witnesses, by interfering with investigation, by creating or causing disappearance of evidence etc. The course of justice may be evaded or attempted to be evaded by leaving the country or going underground or otherwise placing himself beyond the reach of the sureties. He may abuse the liberty granted to him by indulging in similar or other unlawful acts. Where bail has been granted under the proviso to s. 167(2) for the default of the prosecution in not completing the investigation in sixty days, after the defect is cured by the filing of a charge sheet, the prosecution may seek to have the bail cancelled on the ground that there are reasonable grounds to believe that the accused has committed a non-bailable offence and that it is necessary to arrest him and commit him to custody. In the last mentioned case, one would expect very strong grounds indeed."

8. On fear of fleeing:

on fear of fleeing the Court held in *Narayan Ghosh v State of Orissa*[85]

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[82] 2004 SCC (Cr) 1067

[83] *GobabhaiNaranbaiSingla*v *State of Gujrat* 2008 Cri LJ 1618

[84] AIR 1987 SC 149

"the appellants are residents of Banagaon District which is on the Bangladesh border and, therefore, there is every likelihood of their fleeing from the judicial process"

9. Bail for childcare :

In *AkhtariBai*v*State Of MP* [86] the Court made the following observation was made if woman has a child to take care of.

"the son of the appellant and co-accused with her, has died while giving birth to a male child, who under the compulsion of circumstances was also kept in jail to be looked after by the appellant till he attained the age of three years. Now the said child has been sent out as the jail authorities did not permit the child to remain with the appellant after attaining the age of three years. Keeping the appellant further in jail is likely to deprive the said child of the parental love, affection and care which he needs at this stage. There is no law by which such a child can also be directed to be kept with the appellant in jail. Depriving the appellant from looking after the child would not only be against the interests of the child but against the interests of the society as well."

10. Anticipatory bail:

Anticipatory bail is granted to a person before his arrest and that there exists a n apprehension of being arrested. The Supreme Court made the following observations regarding granting anticipatory bail. *Hari Kumar Jha*v*State Of Bihar:*[87]

"Only distinction in between Sections 438 and 439 Cr.P.C. is that **bail** granted in exercise of jurisdiction under Section 438 Cr.P.C. is before the arrest of the accused and under Section 439 Cr.P.C, it is granted when the accused has either surrendered or has been taken into custody. The privilege which is given to the accused under both the sections are the same, but only distinction is of stage."

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[85]Cri LJ 1625 (1627) (SC)
[86]AIR 2001 SC 1528
[87](2003) 8 SCC 77

"On account of certain changes and amendment brought in Section 438 Cr.P.C., in **case** of grant of anticipatory **bail**, the petitioners-accused has to surrender before the Court concerned. In **case** where anticipatory **bail** has been granted for a limited period, till submission of the charge-sheet, the petitioner again has to make a fresh prayer for **bail**, since, already on earlier occasion he had to surrender before the concerned Court and had furnished **bail** bond, so on submission of charge- sheet, the first pre-requisite for grant of anticipatory **bail** i.e. the person concerned must not have been arrested or surrendered before any Court, is not available to him. He has lost the requisite criteria of granting anticipatory **bail**, in that **case** except the surrendering before the competent Court for grant of regular **bail**, he is left with no other option."[88]

"when any person has reason to believe that he may be arrested on an accusation of having committed a non-bailable offence, the High Court or the Court of Session may, if it thinks fit, direct that in the event of such arrest, he shall be released on bail and in passing that order, it may include such conditions having regard to the facts of the particular case, as it may deem appropriate. Anticipatory bail is granted in anticipation of arrest in non-bailable cases, but that does not mean that the regular Court, which is to try the offender, is sought to be by-passed and that is the reason why the High Court very rightly fixed the outer date for the continuance of the bail and on the date of its expiry directed the petitioner to move the regular Court for bail."

"….. anticipatory bail orders should be of a limited duration only and ordinarily on the expiry of that duration or extended duration the Court granting anticipatory bail should leave it to the regular Court to deal with the matter on an appreciation of evidence placed before it after the investigation has made progress or the charge-sheet is submitted. It should be realized that an order of anticipatory bail could even be obtained in cases of serious nature as for example murder and, therefore, it is essential that the duration of that order should be limited and ordinarily the Court granting anticipatory bail

[88] *Hari Kumar Jha*v *State Of Bihar,* (2003) 8 SCC 77

should not substitute itself for the original Court which is expected to deal with the offence. It is that Court which has then to consider whether, having regard to the material placed before it, the accused person is entitled to bail."[89]

11. Bail not to be arbitrary:

In *Shashi Aggarwal* v. *State Of Uttar Pradesh* [90]it was emphasized that the possibility of the Court granting bail is not sufficient nor is a bald state- ment that the detenu would repeat his criminal activities enough to pass an order of detention unless there is credible information and cogent reason apparent on the record that the detenu, if enlarged on bail, would act prejudicially. The same view was reiterated in *AnandPrakash*case where the detenu who was in jail was served with a detention order as it was apprehended that he would indulge in prejudicial activities on being released on bail. The contention that the bail application could be opposed, if granted, the same could be questioned in a Higher forum, etc., was negated on the ground that it was not the law that no order of detention could validly be passed against a person in custody under any circumstances.

12. Action against judicial officer:

Recklessness and negligent way of dealing with the judicial proceedings, particularly **bail cases** pertaining to serious offence like rape, have to be dealt with seriously and if the act of the judicial officer in more than 30 **cases** is found to be nothing but a reckless and negligent act contrary to well set norms and principles of law, then a Senior Judicial Officer like the petitioner, who had more than 20 years of service, can be proceeded for the action taken. Inviting our attention to the scope of judicial review.

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[89]*SalauddinAbdulsamadShaikh* v *The State Of Maharashtra*

[90], [1988] SCC 436

13. Long time in jail:

In*Takht Singh* v *State of Madhya Pradesh* [91] the following observation was made when one is languishing in jail for a very long time.

"The appellants had already in jail for 3 years and 3 months . There was no possibility of early hearing of the appeal in the High Court. In the aforesaid circumstances, the applicants are released on bail."

But so was not in the case of *Rajeev Ranjan*[92]. He was denied bail though he claimed that he had been in the custody for three and half years, as his charges were grave.

[91]2003 SCC (Cr) 800

[92]2008 Cri LJ 1033 (1034) (SC)

II. PROVISIONS RELATING to BAIL UNDER CrPC.

1. Section 436. In what cases bail to be taken?

(1) When any person other than a person accused of a non-bailable offence is arrested or detained without warrant by an officer in charge of a police station, or appears or is brought before a court, and is prepared at, any, time-, while-in, the custody of such officer or at any stage of the proceeding before such court to give bail, such person shall be released on bail:

Provided that such officer or Court, if he or it thinks fit, [2][may, and shall, if such person is indigent and in unable to furnish surety, instead of taking bail] from such person, discharge him on his executing a bond without sureties for his appearance as hereinafter provided:

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

(2) Notwithstanding anything contained in sub-section (1), 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 refuse to release him on bail, when on a subsequent occasion in the same case he appears before the court or is brought in custody and any such refusal shall be without prejudice to the powers of the court to call upon any person bound by such bond to pay the penalty thereof under section 446.

In respect of bailable offences, a person has to remain in jail for his inability to furnish bail, till the case is disposed of. Sub-section (1)

has been amended to make a mandatory provision that if the arrested person is accused of a bailable offence and he is an indigent and cannot furnish surety, the Court shall release him on his execution of a bond without sureties.[93]

The Supreme Court does not interfere with an order granting bail but judicial discipline will be sacrificed at the alter of judicial discretion if jurisdiction under article 136 is refused to be exercised; *State of Maharashtra* v *Captain BuddhikotaSubhaRao*[94]

2. Section 436 A. Maximum period for which an under trial prisoner can be detained.

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

Provided that the Court may, after hearing the Public Prosecutor and for reasons to be recorded by it in writing, order the continued detention of such person for a period longer than one-half of the said period or release him on bail instead of the personal bond with or without sureties:
Provided further that no such person shall in any case be detained during the period of investigation inquiry or trial for more than the maximum period of imprisonment provided for the said offence under that law.

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

There have been instances, where under-trial prisoners were detained in jail for periods beyond the maximum period of

[93] 154th Law Commission report
[94], (1989) Cr LJ 2317: AIR 1989 SC 2292

imprisonment provided for the alleged offence. As remedial measures section 436a has been inserted to provide that where an under-trial prisoner other than the one accused of an offence for which death has been prescribed as one of the punishments, has been under detention for a period extending to one-half of the maximum period of imprisonment provided for the alleged offence, he should be released on his personal bond, with or without sureties. It has also been provided that in no case will an under-trial prisoner be detained beyond the maximum period of imprisonment for which he can be convicted for the alleged offten.The provisions of this section cast a statutory duty upon the officer in charge of the police station to release on bail a person who was involved in a bailable offence. The power to release either on bail or on a personal recognizance i.e. bonds without sureties extends to the time the accused is in the custody of such officer. The right of the accused to be released arises only when the person under arrest or detention is prepared and able to give bail. He cannot be taken into custody unless he is unable or unwilling to offer bail or to execute a personal bond.[95]

3. **Section 437. When bail may be taken in case of non-bailable offence.**

(1) When any person accused of, or suspected of, the commission of any non-bailable offence is arrested or detained without warrant by an officer in charge of a police station or appears or is brought before a court other than the High Court or Court of Session, he may be released on bail, but-

(i) Such person shall not be so released if there appear reasonable grounds for believing that he has been guilty of an offence punishable with death or imprisonment for life;

(ii) Such person shall not be so released if such offence is a cognizable offence and he had been previously convicted of an offence punishable with death, imprisonment for life or imprisonment for seven years or more, or he had been previously

[95]The *Crown* Vs. *MakhanLal*48 Cr. L. J. 656.

convicted on two or more occasions of a cognizable offence punishable with imprisonment for three years or more but not less than seven years.
Provided that the court may direct that a person referred to in clause (i) or clause (ii) be released on bail if such person is under the age of sixteen years or is a woman or is sick or infirm:[96]

Provided further that the court may also direct that a person referred to in clause (ii) be released on bail if it is satisfied that it is just and proper so to do for any other special reason:

Provided also that the mere fact that an accused person may be required for being identified by witnesses during investigation shall not be sufficient ground for refusing to grant bail if he is otherwise entitled to be released on bail and gives an undertaking that the shall comply with such directions as may be given by the court:

Provided also that no person shall, if the offence allege to have been committed by him is punishable with death, imprisonment for life, or imprisonment for seven years or more be released on bail by the Court under this sub-section without giving an opportunity of hearing to the Public Prosecutor.

(2) If it appears to such officer or court at any stage of the investigation, inquiry or trial as the case may be, that there are not reasonable grounds for believing that the accused has committed a non-bailable offence, but that there are sufficient grounds for further inquiry into his guilt, the accused shall, subject to the provisions of section 446A and pending such inquiry, be released on bail or, at the discretion of such officer or court on the execution by him of a bond without sureties for his appearance as hereinafter provided.

(3) When a person accused or suspected of the commission of an offence punishable with imprisonment which may extend to seven years or more or of an offence under Chapter VI, Chatter XVI or Chapter XVII of the Indian Penal Code (45 of 1860) or abetment of, or conspiracy or attempt to commit, any such offence, is released on bail under sub-section (1) the Court shall impose the conditions,-

[96]Ram singh v state (1989) Cr LJ 2317: AIR 1989 SC 2292

(a) That such person shall attend in accordance with the conditions of the bond executed under this Chapter,

(b) that such person shall not commit an offence similar to the offence of which he is accused, or suspected, of the commission of which he is suspected, and

(c) that such 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 or tamper with the evidence, and may also impose, in the interests of justice, such other conditions as it considers necessary.[97]

(4) An officer or a court releasing any person on bail under sub-section (1), or sub- section (2), shall record in writing his or her reason for so doing.
(5) Any court which has released a person on bail under sub-section (1), or sub- section (2), may, if it considers it necessary so to do, direct that such person be arrested and commit him to Custody.

(6) If, any case triable by a Magistrate, the trial of a person accused of any non bailable offence is not Concluded within a period of sixty days from the first date fixed for – taking evidence in the case, such person shall, if he is in custody during the whole of the said period, be released on bail to the satisfaction of the Magistrate, unless for reasons to be recorded in writing, the Magistrate otherwise directs.[98]

(7) If, at any time after the conclusion of the trial of a person accused of a non bailable offence and before Judgment is delivered the Court is of opinion that there are reasonable grounds for believing that the accused is not guilty of any such offence, it shall release the accused, if he is in custody, on the execution by him of a bond without sureties for his appearance to hear judgment delivered.

Cr PC (Amendment) Act, 2005
Section 437 has been amended to provide that if a person commits a cognizable and non-bailable offence and he has previously been convicted on two or more occasions of a cognizable offence

[97] Raja Ram v State of Haryana, AIR 1997SC 785
[98] 203rd Law commission Report

punishable with imprisonment for 3 years or more but not less than 7 years, he shall not be released except in the circumstances specified in the provision.

It has further been provided that if an accused appears before the Court while in judicial custody and prays for bail, or a prayer for bail is made on his behalf, the Court shall grant bail only after giving an opportunity of hearing to the prosecution, if the offence allege to have been committed by the accused is punishable with death, imprisonment for life or imprisonment for not less than 7 years.

Under sub-section (3) the Court has got the discretion to impose certain conditions for the grant of bail. Under section 441 (2), where any condition is imposed for the release of a person on bail, the bond shall contain that condition also. In order to make the provision stringent and to see that the person on bail does not interfere or intimidate witness, sub-section (3) has been amended to specify certain conditions, which are mandatory.

COMMENTS

(i) In non-bailable cases in which the person is not guilty of an offence punishable with death or imprisonment for life, the court will exercise its discretion in favour of granting bail subject to sub-section (3) of section 437 if it deems necessary to act under it; *Anil Sharma v. State of Himachal Pradesh,*[99]

(ii) Unless exceptional circumstances are brought to the notice of the court which may defeat the proper investigation and fair trial, the court will not decline bail to a person who is not accused of an offence punishable with death or imprisonment for life; Anil Sharma v. State of Himachal Pradesh, (1997) 3 Crimes 135 (HP).

(iii) It has been held that since the jurisdiction is discretionary, it is required to be exercised with great care and caution by balancing valuable right of liberty of an individual and the interest of the society in general; *Mansab Ali v. Irsan*[100]

[99](1997) 3 Crimes 135 (HP).

[100]AIR 2003 SC 707.

The power to release on bail a person accused of a non-bailable offence is conferred upon only one class of police officers, namely an officer-in-charge of the Police Station under section 437 sub Section (I). Since the power to grant bail is permissive and not obligatory, it has to be exercised with great caution because of the risk and stakes involved. Before exercising his power, a station officer ought to satisfy himself that the release on bail would not prejudice the prosecution in bringing home the guilt of the accused. In case the officer in charge admits an accused to bail, it is mandatory for him to record the reasons or special reasons in the case diary and preserve the bail bonds until they are discharged either by the appearance of the accused in court or by the order of a competent court. For the purpose of bail in non-bailable offence, the Legislature has classified them under two heads:

(1) Those which are punishable with death or imprisonment for life;

(2) Those which are not so punishable. In case of an offence punishable with death or imprisonment for life a station officer cannot enlarge a person on bail, if there appears reasonable grounds for believing that he has been guilty of such offence. The age or sex or sickness or infirmity of the accused cannot be considered by a police officer for the purpose of granting bail. These matters may be taken in view by a court only. An officer in-charge of the police station may grant bail only when there are no reasonable grounds for believing that the accused has committed a non-bailable offence or when the non-bailable offence complained of is not punishable with death or life imprisonment.[101]

4. Section 438. Direction for grant of bail to person apprehending arrest.

[1][(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:-
(i) The nature and gravity of the accusation;

[101]shodhganga.inflibnet.ac.in

(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) Where the accusation has been made with the object of injuring or humiliating the applicant by having him so arrested, either reject the application forthwith or issue an interim order for the grant of anticipatory bail:

Provided that, where the High Court or, as the case may be, the Court of Session, has not passed any interim order under this sub-section or has rejected the application for grant of anticipatory bail, it shall be open to an officer in-charge of a police station to arrest, without warrant the applicant on the basis of the accusation apprehended in such application.[102]

(1A) 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.

(1B) The presence of the applicant seeking anticipatory bail shall be obligatory at the time of final hearing of the application and passing of final order by the Court, if on an application made to it by the Public Prosecutor, the Court considers such presence necessary in the interest of justice.

(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 and when required;

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[102] *Anil Sharma v. State of Himachal Pradesh* (1997) 3 Crimes 135 (HP).

(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,

(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 sub-section (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 sub-section (1).

Section 438 has been amended 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, it should, forthwith give notice to the Public Prosecutor and Superintendent of Police and the question of bail would be re-examined 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.[103]

STATE AMENDMENTS

Maharashtra:

For section 438, the following section shall be substituted, namely.

[103]Cr PC (Amendment) Act, 2005

"438 Direction for grant of bail to person apprehending arrest.-(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 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.

(i) The nature and gravity or seriousness of the accusation as apprehended by the applicant;

(ii) The antecedents of the applicant including the fact as to whether he has, on conviction by a court previously undergone imprisonment for a term in respect of any cognizable offence;[104]

(iii) The likely object of the accusation to humiliate or malign the reputation of the applicant by having him so arrested, and

(iv)The possibility of the applicant, if granted anticipatory bail, fleeing from justice. Either reject the application forth with or issue an interim order for the grant of anticipatory bail:

Provided that where the High Court or, as the case may be, the Court of Session, has not passed any interim order under this sub-section or has rejected the application for grant of anticipatory bail, it shall be open to an officer in charge of a police station to arrest, without warrant the applicant on the basis of the accusation apprehended in such application.

(2) Where the High Court or, as the case may be, the Court of Session, consider it expedient to issue an interim order to grant anticipatory bail under sub-section (1), the court shall indicate therein the date, on which the application for grant of, anticipatory bail shall be finally heard for passing an order thereon, as the court may deem fit; and if the court passes any order granting anticipatory bail, such order shall include inter area the following conditions, namely:-

[104] CrPC Ammendment Act 2005

(i) That the applicant shall make himself available for interrogation by a police officer as and when required;

(ii) That the applicant shall not, directly or indirectly, make any inducement, threat or promise to any person acquainted with the facts of the accusation against him so as to dissuade him from disclosing such facts to the court or to any police officer;

(iii) That the applicant shall not leave India without the previous permission of the court: and

(iv) Such other conditions as may be imposed under sub-section (3) of section 437 as if the bail was granted under that section.

(3) 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 Commissioner of Police, or as the case may be, the concerned 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.

(4) The presence of the applicant seeking anticipatory bail shall be obligatory, at the time of final hearing of the application and passing of final order by the court, if on an application made to it by the Public Prosecutor, the court considers such presence necessary in the interest of justice.

(5) On the date indicated in the interim order under sub-section (2), the court shall hear the Public Prosecutor and the applicant and after due consideration of their contentions, it may confirm, modify or cancel the interim order made under [105]

Orissa:
In sub-section (1) of section 438, the following proviso shall be added, namely.

[105]Ins. by Act 25 of 2005, sec. 37

"Provided that where the apprehended accusation relates to an offence punishable with death, imprisonment for life or imprisonment for a term of not less than seven years, no final order shall be made on such application without giving the State notice to present its case".

Uttar Pradesh:
Section was omitted.

West Bengal:

In section 438, for sub-section (1), the following sub-sections shall be substituted, namely:-

"(1) (a) 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 or the Court of Session for a direction under this section that in the event of such arrest, he shall be released on bail:

Provided that the mere fact that a person has applied to the High Court or the Court of' Session for a direction under this section shall not, in the absence of any order by that court, be a bar to the apprehension of such person, or the detention of such person in custody, by an officer-in-charge of a police station.

(b) The High Court or the Court of Session, as the case may be, shall dispose of an application for a direction under this sub-section within thirty days of the date of such application:[106]

Provided that where the apprehended accusation relates to an offence punishable with death, imprisonment for life or imprisonment for a term of not less than seven years, no final order shall be made on such application without giving the State not less than seven days' notice to present its case.

(c) If any person is arrested and detained in custody by an officer-in-charge of a police station before the disposal of the application of such person for a direction under this subsection, the release of such

[106]Ins. by Act 25 of 2005, sec. 34

person on bail by a court having jurisdiction, pending such disposal shall be subject to the provisions of section 437.

(1A) The provisions of sub-section (1) shall have effect notwithstanding anything to the contrary contained elsewhere in this Act or in any judgment, decree or order of any court, tribunal or other authority".

COMMENTS

(i) Section 438 makes no distinction whether the arrest is apprehended at the hands of the police or at the instance of the Magistrate; *Sennasi v. State of Tamil Nadu*,[107]

(ii) Anticipatory bail may be granted for a duration which may extend to the date on which the bail application is to be disposed of or even a few day thereafter to enable the accusesd to move the higher court if he so desires; *Sennasi v. State of Tamil Nadu,*[108]

5. Section 439. Special powers of High Court or Court of Session regarding bail.

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

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

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

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

[107](1997) 3 Crimes 112 (Mad).

[108]1993 Crimes 112 (Mad).

to he recorded in writing, of opinion that it is not practicable to give such notice.

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

STATE AMENDMENTS
Punjab and Union Territory of Chandigarh:
In its application to the State of Punjab and Union Territory of Chandigarh after section 439, following section shall be inserted, namely.

“439-A. Notwithstanding anything contained in this Code, no person-

(a) Who, being accused or suspected or committing an offence under any of the following sections, namely- sections 120 B, 121, 121A, 122, 123, 124A, 153A, 302, 304, 307, 326, 333, 363, 364, 365, 367, 368, 392, 394, 395, 396, 399, 412, 431, 436, 449 and 450 of the Indian Penal Code, 1860, sections 3, 4, 5, and 6 of the Explosive Substances Act. 1908, and sections 25, 26, 27, 28, 29, 30 and 31 of the Arms Act, 1959, is arrested or appears or is brought before a court; or

(b) Who, having any reason to believe that he may be arrested on accusation of committing an offence as specified in clause (a), has applied to the High Court or the Court of’ Session for a direction for his release on bail in the event of his arrest shall be released on bail or, as the case may be, directed to be released on bail, except on one or more of the following grounds, namely:-

(i) That the court including the High Court or the Court of Session for reasons to be recorded in writing is satisfied that there are reasonable grounds for believing that such person is not guilty of any offence specified in clause (a);

(ii) That such person is under the age of sixteen years or a woman or a sick or an infirm person;

(iii) That the court including the High Court or the Court of Session for reasons to be recorded in writing is satisfied that there are exceptional and sufficient grounds to release or direct that release of the accused on bail".[109]

Tripura

After section 439, the following section shall be inserted namely.

"439A. Power to grant bail notwithstanding anything contained in this Code, no person,

(a) Who, having any reason to believe that he may be arrested on an accusation of committing an offence as specified in clause (a) has applied to the High Court or Court of Session for a direction for his release, on bail in the event of his arrest shall be released on bail or, as the case may be, directed to be released on bail except on one or more of the following grounds, namely.

(i) That the court including the High Court or the Court of Session for reasons to be recorded in writing,, is satisfied that there are reasonable grounds for believing that such person is not guilty of any offence specified in clause (a);

(ii) That such person is under the age of sixteen years or a woman or a sick or infirm person;

(iii) That the Court including the High Court or the Court of Session, for reasons to he recorded in writing, is satisfied that there are exceptional and sufficient grounds to release or direct the release of the accused on bail."[110]

6. Section 440. Amount of bond and reduction thereof.

(1) The amount of every bond executed under this chapter shall be fixed with due regard to the circumstances of the case and shall not be excessive.

(2) The High Court or Court of Session may direct that the bail required by a police officer or Magistrate be reduced.

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[109]Ins. by Act 25 of 2005, sec. 24
[110]Ins. by Act 25 of 2005, sec41

When any Magistrate is of opinion, whether on application made to him in this behalf or otherwise, that it is expedient in the interest of justice that aninquiry should be made with regard to an offence punishable under sections 193,194, 195, 196, 199, 200, 205, 206, 207, 208, 209, 210, 211, 228 of the Indian Penal Code or any offence described in section 463 or punishable under section471, section 475 or section 476 of IPC which appears to have been committed in relation to a proceeding in that court, such court may, after such preliminaryinquiry, if any, as it thinks necessary, record a finding to that effect and make acomplaint thereof, in writing, signed by himself, and shall forward the same to aMagistrate of the First Class having jurisdiction. After the court has recorded itsfinding and decided to make a complaint, the power to detain in custody orrelease on bail accrues to the complainant court under this section. If the offencecomplained of is bailable the court may take sufficient security for the appearanceof the accused before the transferee Magistrate or if the alleged offence is non-bailableit may, if it thinks necessary so to do, send the accused to such Magistrate in custody. But unless the court has finally made up its mind that acomplaint should be made it has no power to consider either that the offencealleged is bailable or non-bailable or that the person should be taken in custody ornot.47 If a court has taken a person into custody illegally, that is to say, withoutmaking a final order about filing a complaint the remedy of a prisoner is by wayof the writ of *habeas corpus* and not under section 439, Cr.P.C.

Section 441.Bond of accused and sureties.

(1) Before any person is released on bail or released on his own bond, a bond for such sum of money as the police officer or court, as the case may be, thinks sufficient shall be executed by such person, and, when he is released on bail, by one or more sufficient sureties conditioned that such person shall attend at the time and place mentioned in the bond, and shall continue so to attend until otherwise directed by the police officer or court, as the case may be.

(2) Where any condition is imposed for the release of any person on bail, the bond shall also contain that condition.

(3) If the case so requires, the bond shall also bind the person released on bail to appear when called upon at the High Court, Court of Session or other court to answer the charge.

(4) For the purpose of determining whether the sureties are fit or sufficient, the court may accept affidavits in proof of the facts contained therein relating to the sufficiency or fitness of the sureties, or, if it considers necessary, may either hold an inquiry itself or cause an inquiry to be made by a Magistrate subordinate to the court, as to such sufficiency or fitness.

Section 441 A. Declaration by sureties.

Declaration by sureties. Every person standing surety to an accused person for his release on bail shall make a declaration before the Court as to the number of persons to whom he has stood surety including the accused, giving therein all the relevant particulars.[111]
Cr PC (Amendment) Act, 2005
Section 441A has been inserted to provide that a person standing surety for an accused person shall disclose as to in how many cases he has already stood surety for accused persons.

Section 442. Discharge from custody.
(1) As soon as the bond has been executed, the person for whose appearance it has been executed shall be released; and when he is in jail the court admitting him to bail shall issue an order of release to the officer in charge of the jail, and such officer on receipt of the orders shall release him.

(2) Nothing in this section, section 436 or section 437 shall be deemed to require the release of any person liable to be detained for some matter other than that in respect of which the bond was executed.

443. Power to order sufficient bail when that first taken is insufficient.
If, through mistake, fraud, or otherwise, insufficient sureties have been accepted, or if they afterwards become insufficient, the court

[111]Ins. by Act 25 of 2005, sec. 39

may issue a warrant of arrest directing that the person released on bail be brought before it and may order him to find sufficient sureties, and on his failing so to do, may commit him to jail.

Section 444. Discharge of sureties.
(1) All or any sureties for the attendance and appearance of a person released on bail may at any time apply to a Magistrate to discharge the bond, either wholly or so far as relates to the applicants.

(2) On such application being made, the Magistrate shall issue his warrant of arrest directing that the person so released be brought before him.

(3) On the appearance of such person pursuant to the warrant, or on his voluntary surrender, the Magistrate shall direct the bond to be discharged either wholly or so far as relates to the applicants, and shall call upon such person to find other sufficient sureties, and, if he fails to do `so, may commit him to jail.[112]

Section 445. Deposit instead of recognizance.
When any person is required by any court or officer to execute a bond with or without sureties, such court or officer may, except in the case of a bond for good behaviour, permit him to deposit a sum of money or Government promissory notes to such amount as the court of officer may if in lieu of executing such bond.

Section 446. Procedure when bond has been forfeited.
(1) Where a bond under this Code is for appearance, or for production of property, before a court and it is proved to the satisfaction of that court or of any court to which the case has subsequently been transferred, that the bond has been forfeited,

or where in respect of any other bond under this Code, it is proved to the satisfaction of the court by which the bond was taken, or of any court to which the case has subsequently been transferred, or of the

[112] 152nd Law Commission report

court of any Magistrate of the first class, that the bond has been forfeited, the court shall record the grounds of such proof, and may call upon any person bound by such bond to pay the penalty thereof or to show cause why it should not be paid.

Explanation: .A condition in a bond for appearance, or for production of property, before a court shall be construed as including a condition for appearance, or as the case may be, for production of property before any court to which the case may subsequently be transferred.

(2) If sufficient cause is not shown and the penalty is not paid, the court may proceed to recover the same, as if such penalty were a fine imposed by it under this Code:

Provided that where such penalty is not paid and cannot be recovered in the manner aforesaid, the person so bound as surety shall be liable, by order of the court ordering the recovery of the penalty, to imprisonment in civil jail for a term which may extend to six months.[113]

(3) The court may, after recording its reasons for doing so], remit any portion of the penalty mentioned and enforce payment in part only.

(4) Where a surety to a bond dies before the bond is forfeited, his estate shall be discharged from all liability in respect of the bond.[114]

(5) Where any person who has furnished security under section 106 or section 117 or section 360 is convicted of an offence the commission of which constitutes a breach of the conditions of his bond, or of a bond executed in lieu of his bond under section 448, a certified copy of the judgment of the court by which he was convicted of such offence maybe used as evidence in proceedings under against his surety or sureties, and, if such certified copy is so used, the court shall presume that such offence was committed by him unless the contrary is proved.

Cr PC (Amendment)

[113]Ins. by Act 63 of 1980, Sec. 6 (w.e.f. 23-9-1980).

[114]1. Ins. by Act 63 of 1980, Sec. 7 (w.e.f. 23-9-1980).

Under sub-section (1) of section 446, where a bond for appearance before a Court is forfeited the Court records the grounds of such proof and calls upon persons bound by such bond to pay a penalty thereof or to show cause why it should not be paid. The Court, however, has a discretion to remit any portion of the penalty and enforce payment in part only. In order to see that such a penalty is rest reduced liberally, sub-section (3) has been amended to provide that the Court shall record reasons before reducing the penalty.

COMMENTS

Forfeiture of a bond would entail the penalty against each surety for the amount which he has undertaken in the bond executed by him. Both the sureties cannot claim to share the amount by half and half as each can be made liable to pay*; Mohd.Kunju v. State of Karnataka,*[115]

When an offence, as is described in section 175, Section 178, 179, 180 or 228 ofI.P.C. is committed in the view or presence of a Criminal Court and that court instead of proceeding under section 345, Cr.P.C., considers that the person[116]

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Section 446A.Cancellation of bond and bail bond.

Without prejudice to the provisions of section 446, where a bond under this Code is for appearance of a person in a case and it is forfeited for breach of a condition-

(a) The bond executed by such person as well as the bond, if any, executed by one or more of his sureties in that case shall stand cancelled; and

(b) Thereafter no such person shall be released only on his own bond in that case, 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 cause for the failure of the person bound by the bond to comply with its condition:

[115]AIR 2000 SC 6: 2000 Cr LJ 165

[116]*Mohammad Khan* V. *Emperor*, 45 Cr.L.J. 768: AIR 1944 Lah 328

Provided that subject to any other provision of this Code he may be released in that case upon the execution of a fresh personal bond for such sum of money and bond by one or more of such sureties as the Police Officer or the court, as the case may be thinks sufficient.

Section 447.Procedure in case of insolvency or death of surety or when a bond is forfeited.

When any surety to a bond under this Code becomes insolvent or dies, or when any bond is forfeited under the provisions of section 446, the court by whose order such bond was taken, or a Magistrate of the first class may order the person from whom such security was demanded to furnish fresh security in accordance with the directions of the original order, and if such security is not furnished, such court or Magistrate may proceed as if there had been a default in complying with such original order.

Section 448. Bond required from minor.

When the person required by any court, or officer to execute a bond is a minor, such court or officer may accept, in lieu thereof, a bond executed by a surety or sureties only.

Section 449. Appeal from orders under section 446.

All orders passed under section 446 shall be appealable, –

(i) In the case of an order made by a Magistrate, to the Sessions Judge;

(ii) In the case of an order made by a Court of Sessions, to the court to which an appeal lies from an order made by such court.[117]

Section 450.Power to direct levy of amount due on certain recognizances.

The High Court or Court of Session may direct any Magistrate to levy the amount due on a bond for appearance or attendance at such High Court or Court of Session.

[117]Ins. by Act 25 of 2005, sec. 53

III. - Guidelines of the Court:

The Supreme Court and the High Courts in their judgements have laid down various guidelines so that the courts while deciding cases on bail are effectively able to deal with different situations. The following need to be kept in mind while deciding cases on bail.

1. Nature of crime and accused.

The Courts lot of stress on the nature of accusations, the nature of evidence produced, the severity of the punishments for the the crime the person is accused. If the accusations are of severe crimes the chances of the accused being granted bail becomes less. Also if there is reasonable suspicion that the accued may interfere with the evidences or influence the witnesses then the accused may not be granted bail. The guidelines were observed by the Supreme Court as:

(a) the nature of the charge is the vital factor and the nature of the evidence also is pertinent. The punishment to which the party may be liable, if convicted or conviction is confirmed, also bears upon the issue.
(b) Another relevant factor is as to whether the, course of justice would be thwarted by him who seeks the benignant jurisdiction of the Court to be freed for the time being.

Thus the legal principle and practice validate the Court considering the likelihood of the applicant interfering with witnesses for the prosecution or otherwise polluting the process of justice. It is not only traditional but rational, in this context, to enquire into the antecedents of a man who is applying for bail to find whether he has a bad recordparticularly a record which suggests that he is likely to commit serious offences while on bail. In regard to habituals, it is part of criminological history that a thoughtless bail order has enabled the, bailee to exploit the opportunity to inflict further crimes on the members of society. Bail discretion, on the basis of

evidence.about the criminal record of a defendant, is therefore not an exercise in irrelevance.[118]

In an another case further detalid guidelines were discussed mentioning the accused's tendency to tamper with the evidence. The learned judge observed as follows:

"Grant of bail though being a discretionary order but, however, calls for exercise of such a discretion in a judicious manner and not as a matter of course. Order for Bail bereft of any cogent reason cannot be sustained. Needless to record, however, that the grant of bail is dependent upon the contextual facts of the matter being dealt with by the Court and facts however do always vary from case to case. While placement of the accused in the society, though may be considered but that by itself cannot be a guiding factor in the matter of grant of bail and the same should and ought always be coupled with other circumstances warranting the grant of bail. The nature of the offence is one of the basic consideration for the grant of bail more heinous is a crime, the greater is the chance of rejection of the bail, though, however, dependent on the factual matrix of the matter.

Apart from the above, certain other which may be attributed to be relevant considerations may also be noticed at this juncture though however, the same are only illustrative and nor exhaustive neither there can be any. The considerations being:"[119]

(a) While granting bail the Court has to keep in mind not only the nature of the accusations, but the severity of the punishment, if the accusation entails a conviction and the nature of evidence in support of the accusations.

(b) Reasonable apprehensions of the witnesses being tampered with or the apprehension of there being a threat for the complainant should also weigh with the Court in the matter of grant of bail.

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[118] *GudikantiNarasimhulu v Public Prosecutor, High Court of Andhra Pradesh. Air 1978 Sc 429.*

[119] *Ram GovindUpadhyayvsSudarshan Singh AIR (2002) 3 SC 598*

(c) While it is not accepted to have the entire evidence establishing the guilt of the accused beyond reasonable doubt but there ought always to be a prima facie satisfaction of the Court in support of the charge.

(d) Frivolity in prosecution should always be considered and it is only the element of genuineness that shall have to be considered in the matter of grant of bail and in the event of there being some doubt as to the genuineness of the prosecution, in the normal course of events.

Prahlad Singh Bhati v *NCT of Delhi*[120] the character means of the accused were also inserted into the guidelines and also the circumstances that prevail during the time. The observations were as:

While granting the bail, the Court has to keep in mind

i. the nature of accusations,
ii. the nature of evidence in support thereof, the severity of the punishment which conviction will entail,
iii. the character, behaviour, means and standing of the accused,
iv. circumstances which are peculiar to the accused,
v. reasonable possibility of securing the presence of the accused at the trial,
vi. reasonable apprehension of the witnesses being tampered with,
vii. the larger interests of the public or State and similar other considerations.

"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 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 excepted , at this stage, to have the evidence establishing the guilt of the accused beyond reasonable doubt."

[120]AIR 2001 SC 1444

In case of Deputy Commissioner v State [121] , the following observation was made:

"the Court before granting bail in cases involving non-bailable offences particularly where the trial has not yet commenced should take into consideration various matters such as the 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.

It appears that a prima facie case is made out against the respondent. The gravity of the offences is quite obvious. They relate to the security of the State, Espionage and intelligence are utilised to pass on information regarding military plans, equipment, technical advances etc. of one country to another. Naturally passing on of such information from our country to a foreign country is bound to be most harmful to our country. The persons accused along with the respondent are admittedly ex- military men well versed in military affairs who are capable of establishing bridges with the sensitive sections of the defence services. The respondent is also alleged to be having some dealings with the defence department and Jasbir Singh is in the employment of the respondent. The allegations made by the prosecution which no doubt have still to be established at the trial suggest that the respondent and the persons accused along with him are persons of easy conscience in so far as the interests and security of the country are concerned. The current situation in the country is such that it can be easily be exploited by unscrupulous men to their own or to some foreign power's advantage. These aspects of the case do not appear to have been considered by the High Court.

Held that decision that the material collected by the prosecutions and the evidence to be adduced at the trial would not be sufficient to sustain a conviction appears to be a premature one in the

[121] AIR 1987 SC 1456

circumstances of this case. Since the trial is yet to begin, bail granted by the High Court was cancelled."[122]

Observations in case of *State of Gujrat v Salimbhai Abdul Gaffar Sheikh*[123]

"The considerations which normally weigh with the Court in granting bail in non-bailable offences are the 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 interest of the public or the State and other similar factors which may be relevant in the facts and circumstances of the case. While hearing an application for cancellation of bail under Sub-section (2) of Section 439 of the Code, the Courts generally do not examine the merits of the order granting bail. What is normally relevant to be examined in such a proceeding is whether the accused is trying to tamper with the evidence subsequent to his release on bail or has threatened the witnesses or has committed any other offence while on bail or is trying to adopt dilatory tactics resulting in delay of trial or has absconded or that the offence committed by him has created serious law and order problem. The Court has to see as to whether the accused has misused the privilege of bail granted to him. Only in exceptional cases where the order granting bail is vitiated by any serious infirmity and in the interest of justice it becomes necessary to interfere with the discretion exercised in granting bail that the order would be interfered with on merits."

In *Vijay Kumar* v*Narendra*[124]

"The principle is well-settled that in considering the prayer for bail in a case involving serious offence like murder, punishable under Section 302 IPC, the Court should consider the relevant factors like

[122]*State (through deputycommr. Of policespecialbranch,delhi) v jaspalsingh*AIR1984 SC1503

[123]AIR 2003 SC 3224
[124]*AIR 2003 SCC (Cr)1195*

the nature of the accusation made against the accused, the manner in which the crime is alleged to have been committed, the gravity of the offence, and the desirability of releasing the accused on bail after they have been convicted for committing the serious offence of murder."

GajanandAgarwal v State of Orissa[125]

There is a need to indicate in the order, reasons for prima facie concluding why bail was being granted particularly where an accused was charged of having committed a serious offence. It is necessary for the Courts dealing with application for bail to consider among other circumstances, the following factors also before granting bail, they are:

1. The nature of accusation and the severity of punishment in case of conviction and the nature of supporting evidence;

2. Reasonable apprehension of tampering of the witness or apprehension of threat to the complainant;

In the case of *Rajeev Chaudhary v. State (NCT) of Delhi*[126]

"it is apparent that pending investigation relating to an offence punishable with imprisonment for a term not less than 10 years, the Magistrate is empowered to authorise the detention of the accused in custody for not more than 90 days. For rest of the offences, period prescribed is 60 days. Hence in cases, where offence is punishable with imprisonment for 10 years or more, accused could be detained up to a period of 90 days. In this context, the expression not less than would mean imprisonment should be 10 years or more and would cover only those offences for which punishment could be imprisonment for a clear period of 10 years or more. Under Section 386 punishment provided is imprisonment of either description for a term which may extend to 10 years and also fine. That means, imprisonment can be for a clear period of 10 years or less. Hence, it

[125] *AIR 2006 SC 3248*

[126] *AIR 2001 SC 2369*

could not be said that minimum sentence would be 10 years or more. Further, in context also if we consider clause (i) of proviso (a) to Section 167(2), it would be applicable in case where investigation relates to an offence punishable

(1) with death;

(2) imprisonment for life; and

(3) imprisonment for a term of not less than ten years.

It would not cover the offence for which punishment could be imprisonment for less than 10 years. Under Section 386 of the IPC, imprisonment can vary from minimum to maximum of 10 years and it cannot be said that imprisonment prescribed is not less than 10 years.

2. Danger of Accused Absconding.

One of the most serious objections which the prosecution makes when an application for bail is moved and the most important circumstances which a Court considers is the possibility that an accused person may abscond and defeat the ends of justice.

The primary object of arrest and detention is that the accused should not only take the trial but also not to impede the progress of the trial by occasional absences. If there is no such apprehension in the mind of the Court, it would not ordinarily refuse bail. When the prosecution evidence is over-whelming, the Court should presume that there is a danger of the accused not appearing to take the trial.[127]

Where an accused person has been acquitted he is in a better position than a person who has been convicted and, therefore, when an appeal against acquittal has been filed, his release on bail is but proper because there it cannot be seriously alleged that he would abscond.[128] Where the offence alleged is not of a serious nature an application for bail cannot be refused merely on the ground that the prosecution apprehends that the accused would jump bail.

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[127] *Observation of Kaul C. J. referred to in RamchandraVs. State, 1953 CrLJ 17, 18*
[128] *State of Kutch Vs. AherVastaHadhu, 1953 CrLJ 1916: AIR 1953 Kutch 50*

Similarly when a Court is satisfied that there are reasonable grounds for believing that no case has been made out or is likely to be made out against the applicant and there is no reason to suspect that the accused would abscond, it should not withhold the grant of bail.[129]

3. Danger of Tempering of Prosecution Evidence.

A Court must bear in mind whether as a result of the granting of bail to an accused person, the prosecution witnesses are likely to be terrorized and would experience considerable difficulty in stepping into the witness box at the time of the trial.[130]

It is well established that the grant of bail in a non bailable offence is a concession and not a right. It is a sort of trust reposed in the applicant by a Court. A Court presumes that the privilege is not to be abused in any manner. An accused person who has been enlarged on bail must not come into contact with the prosecution witnesses with a view to either to destroy the evidence against him or to minimize its effect. As soon as he misuses his liberty thus granted to him he disentitles himself to that privilege granted to him.[131]

The most important ground on which the prosecution resists an application for bail is that a person accused of
a serious offence, whatever his fortitude, cannot resist the temptation of destroying the evidence against himself. A Court ought not to show undue leniency and misplaced sympathy and ignore human conduct completely. A man
accused of a serious offence will pay any price, if he can afford it, in order to save his life or reputation; otherwise he will influence or create terror. The Patna High Court has gone so far as to observe that opportunities in India for the corruption of witnesses are so great

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[129] *HardwariLalVs. Emperor, 33 CrLJ 773.*
[130] *State Vs. PritamDass, 1956 CrLJ 986: AIR 1956 Bom 559.*

[131] *Hikayat Singh Vs. Emperor, 33 CrLJ 574: AIR 1932 Pat 209.*

that the risks involved in enlarging a person on bail cannot be exaggerated.[132]

This is one side of the picture. But at the same time it is
the duty of the Court to see that an accused person is not unnecessarily detained in prison and hampered in his defence merely because there is an apprehension that
he would tamper with the prosecution witnesses. In two important pronouncements the Oudh Chief Court has prominently brought out the other side of the picture. WazirHasan C.J. observed in the case of *BishambharNathv. Emperor*:[133]

"The learned counsel for the crown, Mr. Gupta expressed:
apprehension in the course of his arguments as to these accused tampering with the prosecution evidence. The apprehension, however, will not be sufficient ground for me to refuse bail if I otherwise think that it should be granted. So far these apprehensions are merely chimerical. But if they turn out to be real at any stage of the trial, it will be open to the learned counsel who I understand is in charge of the case for prosecution to move the trial Court to cancel bail". In the case of *K.E. v. Rani AbhairajKunwar,*[134] Thomas C.J. observed

"All the important witnesses for the prosecution have already been examined and if they are witnesses of the type who are prepared to change their statements on receipt of a few hundred rupees, they will do so whether the Rajmata and Kunwar Sahib are on bail or are in the lock-up. If the accused are in the lock-up, there is no doubt
that they have got a host of people looking after the case who are just as capable of tampering with the evidence as the accused themselves. It is my duty to see that
both sides are not hampered. I must see that the crown does not get a free hand and the accused are locked up or hampered in their

[132] *Hikayat Singh Vs. Emperor, 33 CrLJ 574: AIR 1932 Pat 209*

[133] *CrLJ 1132: 81 IC 956.158*

[134] *40 CrLJ 841*

defence simply only the ground that it is alleged or feared that they will tamper with the evidence".

It is the usual slogan of the prosecution that the accused will destroy the prosecution evidence if he is released on bail. If the allegation is of a vague and general nature, it is not worth much consideration.[135] The same view was taken by Sind Chief Court in the case of Emperor Vs. Wahidino.[136] It was observed by the learned Judge "The accused have been at large for four weeks, and I think no real damage is likely to occur at this stage if the accused are not locked up again. They have had time to approach the prosecution witnesses and in any case whether they
are in prison or free, the defence will have no difficulty in tempering with witnesses, if they are open to influence". In the cases of Rani AbhirajKunwar and of Wahidino and in the case of JaminiMullick the learned judges have observed that when the prosecution opposes an application for bail on the ground that there is a likelihood of the witnesses being tampered with, it does not appeal very Highly of the efficiency of the police, nor of the integrity of the witnesses.

A vague and general allegation that the accused would tamper with the evidence, is not enough. If there is material on record to show that the accused has tried to tamper with the evidence a Court will never enlarge the applicant on bail so as to defeat the ends of justice.[137]
In the case of *MadhukarPurshottamMondkar vTalab Haji Husain*[138]the Bombay High Court cancelled bail in a bailable case whenit was satisfied that the accused had tampered or attempted to tamper with the prosecution evidence.[139] The view was upheld by the Supreme Court.[140]

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[135]*SubbramaAyetVs. State, 1953 CrLJ 263: AIR 1953 Tra Co.25.*

[136] *30 CrLJ 845: AIR 1929 Sind 137: 23 SLR 340*
[137]*Subbarama Ayer Vs. State, 1953 CrLJ 263: AIR 1953 Tra Co. 25*
[138]*AIR 2006 SC 3248*

[139] *1958 CrLJ 1308:AIR 1958 Bom 406*
[140]*Talab Haji Husain Vs. MadhukarPurshottamMondker and another, 1958 CrLJ 701:*

Where one of the accused persons was found to be tampering with the prosecution evidence the other accused should not be penalized by refusing theirbail.

4. Character, Means and Standing of the Accused.

Where a prisoner is possessed of considerable property as to rule out the possibility of his jumping bail and there is no allegation that he is likely to abscond, a Court is entitled to release him on bail.[141] It may, however, be noted that in this case bail was allowed not on the ground of applicant's status alone but because he had been acquitted on the charge by the trial Court and the question of bail arose an appeal against the order of acquittal.

The unanimous view of the High Court is that the social position or status of an accused person should not be taken into consideration when rejecting or allowing bail. The same view has been taken by the High Court of Allahabad, Patna, Nagpur, Calcutta and Hyderabad.[142]

"The grant or refusal of bail will not depend upon the respectability or otherwise of an accused person. As a matter of fact the richer the accused is, the more easy it is for him to find bail and the less desirable it is to release him on bail. It is a stock argument on behalf of a young offender coming from respectable family that he should not be allowed to come in
association with bad characters in jail. Though the argument has some force, yet after all it is an argument which can be raised in almost every case because respectable men even if they are older may suffer deterioration from detention in
jail. A man is kept in prison not only to prevent his absconding but if there is reason to believe that he has committed crimes of a certain type to prevent him from being a possible danger to the community.

[141] *Nanda Kumar ShuklaVs. State 1952 CrLJ 1085.*
[142] *Fazal Nawaz Jung Vs. State of Hyderabad, 1952 CrLJ 873.*

The mere respectability of a man per se is not a sufficient ground to allow bail when he has been convicted of a criminal offence. Sometimes the position and status of a person instead of being a ground for allowance of bail becomes an impediment in that, it is feared that a
fair trial would be put in jeopardy. A Court has then to consider whether as a result of the grant of bail prosecution witnesses are likely to be terrorized and would experience considerable difficulty in stepping into the witness box at the time of the trial. Just as a High social position and status of the accused do not justify an order of release on bail, in the same way the bad character of a man does not disentitle him from being bailed out if the law allows it. [143]
A Court, however, will take into consideration the social status or the position of an accused person in relation to other members of his family, if he happens to be the only adult male
member or the only earning member of the family, other being either women or children, in deciding the question whether bail should or should not be allowed. His Lordship observed in the case of *Ahmad Ali* v. *Emperor.*[144]
"His mother now puts in an affidavit complaining that she is in a serious distress as the petitioner is the only member of the family who earns anything for its support. The family consists of the petitioner's wife and two small children in addition to his mother. It further appears that innocent persons are suffering by the reason of the petitioner's incarceration.

His Lordship enlarged the accused on bail. This was a case under section 363, IPC. But in a case of murder the fact that the accused was a 'Gosain' and there was no member in his family who could look after his case was not considered a good ground by Bennet, J to release him on bail.115
In the case of *Raja NarendraLal Khan*,[145]a superficial reading of the judgment might give the impression that the accused was released on

[143] *113 RaoHarnam Singh Vs. State, 1958 CrLJ 563: AR 1958 Punj 123.*

[144]*16 CrLJ 705: 301 C 993.*

[145] *9 CrLJ 375: 36 Cal 166*

bail because he was a man of wealth and position. The reason for his release was that there was
no convincing direct evidence against him when the application for bail was moved on his behalf.

5. Health of Accused.

The proviso to section 437, Cr. P.C. authorizes the Magistrate to admit a sick or infirm accused to bail even when he is reasonably believed to be involved in an offence punishable with death or life imprisonment etc. One M. Hanumantha Reddy was charged with an offence under section 307, I.P.C. He was the son of a responsible officer in government service. The doctor who was treating the accused certified that the petitioner suffered from neurasthenia associated with mental delusions and a suicidal frame of mind. In these
circumstances the Mysore High Court granted bail to the accused.119 But it is not every sickness or infirmity that entitles a person to be released on bail. The circumstances of the case and the cumulative effect, the seriousness of sickness or infirmity, the availability of necessary medical treatment and reasonable amenities have also to be borne in mind. Where a Court does not consider it desirable to enlarge an accused person on bail on the ground of sickness or infirmity, he may request the Court that is may recommend to the state government to afford him adequate facilities and more genial surroundings, subject of course, to the jail discipline.[146]

If an accused person desires to be released on bail on the ground of the health, he must produce some evidence at least in the shape of an affidavit to enable the Court to exercise the discretion in his favour. A mere medical certificate of illness is not sufficient; the certificate must also show that the health of the accused will deteriorate if he is not released. Bail on the ground of sickness is to be refused when

[146] *Fazal Nawaz Jung Vs,.State of Hyderabad, 1952 CrLJ 873*

proper treatment is available in jail. When E. C.G. result is not correlated to prescription of doctor and there is no illness necessitating immediate release and there is assurance of better looking after in jail hospital and proper medical assistance, bail is to be refused.[147]

Sickness contemplated in the proviso to section 437 is one which involves danger to life of the accused. In a case Supreme Court released a lady-prisoner, a foreigner who was serving life imprisonment and was also facing trial in other criminal cases, on bail she had been suffering from ovarian cancer at secondary stage necessitating chemotherapy. In that case the Supreme Court permitted her to go back to Canada, her home-land where her parents lived.[148]

In a case Simpson A.J.C. considered the extreme old age of the applicant as one of the grounds for grant of bail to the petitioner.[149]

6. Age or Sex of the Accused.

Under the proviso to sub-section (1) of section 437 a Court may direct thatany person under the age of sixteen years or any woman, accused of an offence,even though punishable with death or imprisonment for life, may be released onbail. The question arose whether the proviso is discriminatory on ground of sexand age and hence ultravires of the constitution in the case of *Mst. Chokhiv State*[150]

"because article 15 of the constitution provides that the state shall not

[147] *Sucheta Singh Vs. State of M.P. 1981 CrLJ (MP) Notes 132.*
[148] *Marie Andra Leclerc Vs. State (Delhi Administration),(1984) 2 SCC 443*
[149] *Abhairam Bali Vs. Emperor, 26 CrLJ 1286: AIR 1925 Oudh 489: 89 IC 150*
[150] *AIR 2006 SC 3248*

discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any one of them".

In the same article in sub-clause (3) it has been provided that nothing in this article shall prevent the state from making any special provision for women and children. Therefore, it is open to the state to make laws containing special provision for women and children but no
discrimination can be made against them on account of their sex etc. The proviso to section 437 which accords a special treatment to the case of women and children, is, therefore, not inconsistent with article 15 of the constitution of India. Although in this case his Lordship did not allow bail to Mst. Chokhi on the sole ground that the petitioner was a woman, nonetheless, this consideration also weighed with the Court in the allowance of bail.

In the case of K.E. Vs. RaniAbhairajKunwar [151] bail had been allowed to Rajmata by the Session Judge on the ground that she was an old woman and suffered from heart trouble. The Oudh Chief Court did not interfere with the discretion exercised by the Sessions Judge
and allowed her to remain on bail.

The word "may" in the first proviso is not to be construed as mandatory. A woman under 16 years of age may be released on the discretion of the Magistrate.[152]

The 1st proviso to section 437 (1) does not mean that persons specified in the proviso should necessarily be released on bail. The proviso is an enabling provision. [153] If "may" was 'must' there was no necessity to consider any other factors like age and compassion at all.[154] Where the applicant woman though was charged for murder of

[151] *40 CrLJ 841: AIR 1940 Oudh 8*
[152] *Pramod Kumar ManglikVs. Sadli Ana Rani, 1989 CrLJ 1772 (All) [1986 CR.LJ] 365*

[153] *Prahlad Singh BhatiVs. NCT Delhi AIR 2001 SC 1444: (2001) 4 SCC 280 (283).*

[154] *B.S. Rawat, Asstt. Collector of Customs Vs. Andre Christopher Mydlar, 1988 (2) Crimes*

another woman, was suffering from major depressions / prolonged treatment as certified by the Medical Officer Central Jail, two other accused women had been granted bail on ground of illness and being women, the applicant was also enlarged on bail.[155] In heinous offences like dowry death cases, the provisions of bail to woman, sick and old persons are not mandatory, but discretionary. The provisions of section 37, NDPS Act, 1985 override the provisions of section 437. First proviso, the accused woman is not entitled to the special consideration in matter of grant of bail.[156]

7. Previous Convict when not to be Released on Bail.

According to sub section 1 (ii) A person shall not be released on bail if the offence is cognizable offence and he had been previously convicted of an offence punishable with death or imprisonment for life or imprisonment for seven years or more, or he had been previously convicted on two or more occasions of a cognizable offence punishable with imprisonment for three years or more but not less than seven years unless such person is under the age of 16 years or is a woman or is sick or infirm. This is a new provision added by Cr.P.C. (Amendment) Act 2005 (25 of 2005).

8. Danger of Repetition of Crime.

When a Court has reason to believe that an accused person is likely to

commit similar or any other offence if he is enlarged on bail, it would refuse bailn whatever other considerations there may be in favour of the accused. In a case before Himachal Pradesh Judicial Commissioner's Court one Paras Ram who was charged with offences under sections 302 and 307 read with section 34 applied for bail on a number of grounds. His case was that he had been acquitted by the Sessions Judge and was facing a retrial on the orders of the

[155] *ZarereefaVs. State, 2004 Cr. LJ 4088 (4089)) (J&K)*

[156] *ZarereefaVs. State, 2004 Cr. LJ 4088 (4089)) (J&K)*

judicial commissioner's Court, that there was no possibility of his tampering with the prosecution witnesses who were related to the deceased, that he was the only adult member in the family who was outside the jail, that there was no one in the family to make proper arrangements for his defence, that he had to raise money for his defence by disposing of the property, that he had undergone a long ordeal in the previous trial. Setting aside all those considerations Banerji J.C., observed as follows:

"It is true that a men is kept in prison not only to prevent his absconding but if there is reason to believe he has committed crimes of a certain type, to prevent him from being a possible danger to the community. From the materials on record, it appears to this Court that the parties were at daggers drawn. They have been the bitterest foes for a long time. They have long standing civil and criminal disputes between themselves. It has been said that the petitioner is a man of violent and ungovernable temper. It is also stated that he is a man who has no respect for life and property, when aroused. From the inferences dawn from materials before me, after giving my anxious consideration, I feel that the enlargement of the petitioner on bail will be fraught with considerable danger to the parties of the deceased. Gopal (petitioner's brother) being in jail and the petitioner admittedly in some danger of his own life, it is quite reasonable to infer that, after being released on bail, he may feel desperate for lack of funds or want of suitable legal advice to take the life of some of the members of the opposite party, especially of the complainant. I agree with the contention of the Government counsel that the petitioner is very likely to feel that he can, after all be hanged but once. He may run amuck and become a possible danger to the community".

The same view was taken earlier by the High Court of Allahabad in the cases of *AchhaibarMisirVs. K.E.* [157] and *Hutchinson Vs. Emperor*.[158] The Bombay High Court held as follows:

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[157] *AchhaibarMisirVs. Emperor, 30 CrLJ 718: AIR 1929 All 614: 1929 ALJ 927*
[158] *K. N. JoglekarVs. Emperor, 33 CrLJ 94: AIR 1931 All 356*

"Very great weight must be attached to the fact that according to the allegations before the Magistrate, the complainant was under police prosecution and hardly left in a taxi, when he was surrounded by several persons and struck with knives and sticks. This is a crime of a very determined nature and any of his assailants might, if released on bail, renew the attack and try to kill this man, so that his evidence may not be availed of against them".[159]

As has been pointed out earlier in this chapter the considerations which have weighed with a Court in the matter of allowing bail cannot be classified exhaustively. But generally, it is the sum total of all the circumstances in a particular case which determines whether a bail ought to be allowed or not. But under no circumstances can an accused person claim bail on the ground that he has not been "charged" with a particular offence so long as he is "accused" of that offence. Hence the fact that the Court did not frame a charge against the accused will not entitle him to bail so long as the accusation is not disproved.[160]

9. Imposition of Conditions

This sub-section empowers the Court to impose conditions in cases mentioned in sub cls. (a), (b) and (c). Thus, the Court may, under this sub-section, while granting bail to a person, ask him to surrender his passport. The accused cannot be subjected to any condition other than the one contemplated in this section. A duty is cast upon Courts to ensure that the condition imposed on the accused is in consonance with the intendment and provisions of this section, and not onerous. Where a civil suit was pending between the parties, imposition of condition restraining the accused from entering on the suit land was held unjustified, and as such set aside. When prayer for police custody was declined.

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[159] *Emperor Vs. Narainji, 29 CrLJ 901: AIR 1928 Bom 244.*

[160] *Osman PirooVs. Emperor, 38 Cr.LJ 94: AIR 1936 Sind. 187*

10. Poor man and bail.

In our country where pverty is a big problem there are many languishing in jail even for petty offences that too under trials. This usually happens when the accused is not able to furnish the required amount of money for bail. The Supreme Court laid certain guidelines in this regard so that all the sections of the people are able to seek bail. The observation made by the Court were in *Motiram v State Of Madhya Pradesh*[161]

"Bail covers both release of ones own bond , with or without surities. When surities should be demanded and what sum should be insisted on are dependent variables

Even so poor men – Indians are in monetary terms indigents -- young persons infirm individuals and women are weak categories and Courts ashould be liberal in releasing them on their own recognisances –put whatever reasonable conditions you may.

It shocks one's conscience to ask a mason like petitioner to furnish surities from his own district. What is a malayalees, kannadigatamil or telugu to do if arrested for alleged misappropriation or theft or criminal trespass in bastar or any where? He cannot have surities owning properties in these places distant places. He may not knowony one there and might have come in a batch to seek a job or in a morcha; judicial disruption oonindian unity is surest achieved by such provincial allergies. What law prescribes sureties from outside or non regional language applicatrions? What law prescribes geographical discrimination omplicit in asking for sureties from the Court district? This tendency takes many forms sometimes geographic, linguistic sometimes legalistic

i. We mandate the magistrate to release the petitioner on his own bond in asumof Rs 1000.
ii. if a mason and millionaire were treated alike, rgregious inequality is an inevitability. Like geofraphic allergy at the judicial level makes mockery of equal protection of the laws

[161] *AIR 1978 SC 1594*

within the territory of india. India is one and not a conglomeration of districts, untouchably apart.

In the case of ***Babu Singh v The State of U.P*** similar points were discussed:

That deprivation of freedom- by refusal of bail is not for punitive purpose but for the bi-focal interests of justice-to the individual involved and society affected.

i. It makes sense to assume that a man on bail has a better chance to prepare or present his case than one remanded in custody. And if public justice is to be promoted, mechanical detention should be demoted.
ii. Bad record and police prediction of criminal prospects to invalidate the bail plea are admissible in principle but shall not stampede the Court into a cornplacent refusal.
iii. the period in prison already spent and the prospect of the appeal being delayed for hearing, having regard to the suffocating crowd
iv. The delicate light of the law favours release unless countered by the negative criteria necessitating that course. The coffective instinct of the law plays upon release orders by strapping on to them protective and curative conditions.
v. Heavy bail from poor men is obviously wrong.[162]

RanjitsingBrahmjeetsing Sharma v state of Maharashtra[163]

"It is, furthermore, trite that for the purpose of considering an application for grant of bail, although detailed reasons are not necessary to be assigned, the order granting bail must demonstrate application of mind at least in serious cases as to why the applicant has been granted or denied the privilege of bail."

[162] *1978 AIR 527*
[163] AIR 2005 SC 2277

11. Session Court cannot cancel bail without strong reasons

In case of *Gurcharan Singh v State* (Delhi Administration)[164]

under Section 439(2) of the new Code a High Court may commit a person released on bail under Chapter XXXIII by any Court including the Court of Session to custody, if it thinks appropriate to do so. It must, however, be made clear that a Court of Session cannot cancel a bail which has already been granted by the High Court unless new circumstances arise during the progress of the trial after an accused person has been admitted to bail by the High Court.

"If, however, a Court of Sessions had admitted an accused person to bail the State has two options. It may move the Sessions Judge if certain new circumstances have arisen which were not earlier known to the State. The State may as well approach the High Court being the superior Court under s. 439(2) to commit the accused to custody.

When, however, the State is aggrieved by the order of the Sessions Judge granting bail and there are no new circumstances that leave copied up except those already existed, it is futile for the State to move the Sessions Judge again and it is competent in law to move the High Court for cancellation of the bail. This position follows from the subordinate position of the Court of Session vis-a- vis the High Court.

Considerations in granting bail to which we adverted to earlier and which are common both in the case of Section 437(1) and Section 439(1), Cr. P.C. of the new Code are the nature and gravity of the circumstances in which the offence is committed, the position and the status of the accused with reference to the victim and the witnesses; the likelihood, of the accused fleeing from justice; of repeating the offence; of jeopardising his own life being faced with a grim prospect of possible conviction in the case; of tampering with witnesses; the history of the case as well as of its investigation and

[164] *AIR 1978 SC 179*

other relevant grounds which, in view of so many variable factors, cannot be exhaustively set out."

4 (a)- LAW COMMISSION of INDIA 36th REPORT.

1. Suggestion regarding conditional bail:

Suggestion regarding section 497: The amendment suggested by some state government to replace section 497 (1) are as follows-:

"(1) when any person accused of or suspected of the commission of any non – bailable offence is arrested or detained without warrant by an officer in charge of a police station or appears or brought before a Court he may be released on bail which may be subject of to such conditions as may appear necessary in a particular case if the offence is one punishable with imprisonment extending to seven years or more or is one falling under chapters 6, 16 and 17 of the Indian Penal Code including abetment conspiracy or attempt to commit any such offence but shall not be so released if there is reasonable grounds for believing that:

a. He is likely to tamper with the evidence or
b. That he has been guilty of an offence punishable with death or imprisonment for life."

Provided that the Court may direct that any person under the age of 16 years or any woman or any sick or infirm person accused of such an offence be released on bail.

Explanation-: in granting a conditional bail the Court may impose condition like requiring the person to

reside in a particular locality or to report to the police station or any other specified authority".

2. Suggestion of the U.P. Police Commission.

The above suggestion regarding amendment of section 497 was made by the Uttar Pradesh Police Commission. The suggestion of the U P Police commission read as:

"We have received overwhelming evidence that after being bailed out the bullies and gundas tamper with evidence threaten witnesses and sometimes commit crimes afresh. It was urged that the powers of the session Court to grant bail are too wide and restrictions similar to those applicable to magisterial Court should be played on its powers. We agree that the Court which has the power to try and acquit an accused should have full powers to deal with interim matters. We also feel that any absolute restriction of the powers of the session Court would lead to inconvenience and expense in as much as the accused will have more often to run to the high Court. We however recommend that the law should be amended in appropriate cases relating to specified offences such as dacoity murder etc."

a. In granting a conditional bail the Court may impose conditions requiring the person to reside in a particular locality or to abstain from a particular locality or to report daily to the police or any other specified authority.
b. It should also be considered whether the accused is likely to tamper the evidence.

The law commission agreed with the recommendation regarding the first point that was related to section 497. The existing position as to the power to impose conditions is recognized by most high Courts. The proposed change will settle the law. It is however necessary that the conditions to be imposed must be such as are linked up with preventing the escape of the

accused or preventing repetition of the offence or otherwise required in the interest of justice. More ever a condition tantamount to refusal of bail ought not to be authorized.

The commission did not agree much with the suggestion regarding the second point, as it did not find it necessary to mention to mention tamperingwith evidencespecificallyasaground forprohibitingbail as release in the caseofanon-bailable offenceisat the discretionofthe Court. TheCourt can, therefore,even now takeinto account the possibility of' tamperingwith evidence.

The observations in a supreme Court case also makes this clear. It would not be necessary to emphasize this consideration while granting or refusing bail. The law commission agreed with the suggestions subject to the above modifications.

3. **Suggestion regarding 498(1)**

.A State Governmenthad suggestedamendment of sub section(1) ofsection498in the followingwords:

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"498(1):- The amountof every bond executed under this Chaptershall be fixedwith due regard to the circumstancesofthe case,and shall not beexcessive;and the HighCourt orthe Court ofSessionmay, inany case,whetherthere bean appeal onconviction or not, direct that any person be admittedto bail (subject tosuchconditions asmay appearnecessary in thecircumstances ofthe case),orthat the bailrequired by apolice officer ormagistratebereduced."

Theamendment wasonthe samelines tothoseproposed to section497(1),except that there was no restrictionas totheoffences.

4. Recommendations:

I. On section 498.

In section498ofthe principalAct,-

a. In sub section (1) insert the words or that any condition imposed by the magistrate be set aside or modified at the end;
b. after sub-section (1),insert the following subsection namely:

"(lA) The High Courtor Court of Sessionof186o may, when relating to bail under sub-section:

(1) a personaccusedoforsuspected ofthecommissionofanoffencepunishable with imprisonment for aperiodwhich may extend toseven yearsormore oran offence under Chapter VI, Chapter XVI orChapter XVII ofthe Indian Penal Code or abetment oforconspiracy toorattempt tocommit any suchoffence,impose anycondition which,inthe circumstances ofthe case, the Court considers necessary.

(a) In order to ensure that such person shall attend in accordance with the conditions ofthe bondexecuted under this Chapter, orin ordertoensure tha.tsu.chperson shallnot commit an offence similar to the offence ofwhich he is accused or of the commission of which he issuspected, or

(b) Otherwise in the interests of justice."

II. On Section 499:

Insection 499of theprincipal Act,after sub-section(1) insert the following sub-section,namely:-

"(lA) Where any condition is imposed for the release ofany person onbail,the bond shall alsocontain that condition."

4 (b)-LAW COMMISSION

of INDIA 41st Report.

The 41st law commission also took up the issue of bail. The report was discussed as follows:

1. **Broad principles regarding bail.**
   a. The broad principles adopted in the code in regard to bail are;
   b. Bail is a matter of right, if offence is bailable;
   c. Bail is a matter of discretion if the offence is non bailable;
   d. Bail shall not be granted by the magistrate if the offence is punishable death of or imprisonment for life; but if the accused is under 16 years of age, a woman, a sick or infirm person , the Court has the discretion to grant bail;
   e. The session Court or the High Courts have wider powers to grant bail even in respect of offences punishable with life imprisonment or death;
   f. Person breaking bail bonds not to be released on bail;

Under section 496 (of the code of 1898), the right to bail is absolute in case of bailable offences. It was suggested that where a person released on bail has absconded or has fails to appear before the Court he shall not be entitled to bail whenever brought before the Court on subsequent date. The commission recommended the acceptance of this of this suggestion and that refusal of bail under such circumstances shall be without prejudice to any action that may be taken under section514 for forfeiture of the bail bond.

Accordingly section 496 may be renumbered as subsection (1) and following sub section may be added (2)

(2) “notwithstanding anything contained in subsection (1) where a person who having been released on bail, has failed to comply with the conditions of the bail bond as regards the time and place of attendance, the Court may refuse to release him on bail when, on a subsequent occasion in that case, he appears before the Court or is

brought on custody. Any such refusal shall be without prejudice to the power of the Court to call upon any person bound by such bond to pay the penalty thereof under section514."

a. Section 497 (1)

With reference to section 497(1), a state government had suggested that the words "there appears sufficient ground for inquiry onto his guilt" be substituted for the wounds "of there appear reasonable grounds for believing" (that he has been guilty of an offence punishable with death or imprisonment for life). The reason given was that persons accused of serious offences again committed serious crimes during release on bail. the commission did not agree with the suggestion. It would be unduly restrictive of the power to grant bail.

If the test of "sufficient ground for inquiry" is substituted, it would amount to denial of bail in almost every case. If in a particular case, a person released on bail was reported to have committed a fresh offence, or otherwise misused his liberty, the Court may be moved to cancel his bail bond.

A bar association has suggested that section 497(1) should be made liberal by providing that if the offence is not punishable with death, bail ought to be granted. We are. The commission again did not agree with such recommendation as offences punishable with imprisonment for life are serious enough to justify the present provision.

Another suggestion was to the effect that in section 497(1) for the words "he may be released on bail" be substituted "he shall be released on bail" unless the Court for reasons recorded in writing otherwise directs". The commission again disagreed with this suggestion either as its acceptance would practically amount to an abolition of the distinction between bailable and non- bailable offences.

b. Section 497 (3A)

It had been stated in certain suggestions that sub section (3A) of section 497 has created difficulties and should be deleted. This sub-section was inserted in order to avoid hardship to accused persons in non bailable cases where the proceedings are prolonged beyond a certain period of sixty days. In such cases, the sub section provided, that the accused shall be released on bail (unless the magistrate directs). Having regard to the fact that this provision was inserted only in 1955 it was opined that much more experience of its working was required before its deletion on the ground of personal difficulties can be recommended.

c. Grant of bail with conditions. A new subsection (1A) to 497

"Cases often arise under section 497, where though the Court regards the case as fit for the grant of bail. It regards the imposition of certain conditions as necessary in the circumstances. Whether such a power exists now and recommended an amendation and propose that the following sub section may be added in the section after subsection (1)."[165]

The new sub section read as follows:

(1A) when a person accused or suspected of the commission of an offence punishable with " imprisonment which may extend to seven years or more of an offence under chapter 6 or 14 or 17 of the IPC or of the abetment of or conspiracy or attempt to commit, any such offence, is released on bail under subsection (1)

The Court may impose any condition which is necessary—

- In order to ensure that a person shall attend in accordance with the conditions of the bond executed under this chapter, or
- In order to ensure that such person shall not commit an offence of which he is accused or of the commission of which he is suspected, or
- Otherwise in the interests of justice.

[165] The 41st law commission report, para 39.5

2. Delay in investigation.

A suggestion was made[166]that a subsection be inserted in section 497 to the effect that where the investigation is delayed beyond 60 days the accused in (non – bailable cases) should be released on bail, it may be pointed out that where the investigation is delayed the review of the detention of the accused shall automatically come up before the Court, and the Court shall be free to pass such orders as it thinks fit and is not precluded from ordering release on fail. A rigid provision is not necessary on this subject.

b. Section 497 and 498:

Both the sections relate to similar issues so was considered together. Also section 498 was a composite section in which two separate matters, which are not closely related, and have been put in the same sentence.in order to make it clear, it is desired that a that a recasting of these provisions be made. The main ideas of these sections are;

a. Power of the Court which has granted bail to a person; direct for his rearrest for and put him in custody—section 497(5), in part and
b. Special power of the Sessions Court and High Court. To order the release of any person (section 498(1)) and
c. To order that a person released on bail under any of the sections of 497 and 498 be arrested to put him in custody,
d. The amount of bail be not excessive, and the power of High Court and Sessions Court reduce the bail required by magistrate or police officer.

It must be noted that the first is the general power given to all Courts and the second a special power to the superior Courts and the third an ancillary power.

It was proposed that the first be put as section 497(3A) so that it appears just after the first three sub sections i.e. the sub sections that relate to bail. As a result the existing ones i.e. subsections be renumbered as subsection (3B).The second will form a separate

[166] F.3 (2)/55-LC Pt.III S. No21 (suggestion of Himachal Pradesh administration).

section as- section 497B. The third may be retained in the earlier section i.e. section 498.

c. other changes suggested.

The first being related to the power of the Courts to cancel the bails granted earlier by it.The relevant part of it being its applicability to the Sessions and the High Court, when it is granted by the High Court. The phrase "every other Court" be replaced by "any Court" as it creates a contrary impression.

Regarding the second proposition, the power of superior Courts falls under two heads:

a. Power to direct release on bail.
b. And power to direct rearrest of any person released on bail.

The first power being expressed in section as "the High Court or Court of Session may in any case whether there be an appeal on conviction or not direct that any person be admitted on bail"[167] it was suggested that the power be made more precise as the language may be interpreted to be applicable to both bailable and non bailable offence, and the meaning should be as "release on bail".

And lastly the phrase "whether there be and appeal on conviction or not" are unnecessary and confusing, hence be omitted.

Power under the head (b) is already contained in section 497(5) where the superior Courts are authorized to " to cause any person who has been released under this section to be arrested" and to "to commit him to custody". When these two cases are read together mean cancellation of bail granted to a person granted by a superior Court.

a. Released on bail by an inferior Court[168] in a case relating to non bailable offence; or
b. Released on bail in a case where the release was ordered under special power by the superior Court itself.

[167] 41st law commission report, para 39.6

[168] Section 497(5), in so far as it relates to cancellation of bail by the Court which granted it, has been already dealt with.

These do not cover cancellation of those bails which are granted in relation to bailable offence. Now it is established that the High Court has the power to cancel bail even if it was granted in relation to bailable offences. This power of the High Court has been put beyond doubt by decisions of the Supreme Court and the High Courts. Since there was a lack of express provision in this regard, it was considered as a lacuna in a judgment of the Supreme Court. Hence it should be expressly provided in this chapter and that these powers should be given to Session Courts as well. Hence an amendment was proposed for section 498.

No changes were recommended for the third proposition.

3. Suggestions of High Court Judges[169]:

That the trial Courts should also be given the power to cancel the bail at the close of arguments, even in case the bail was granted by Higher Courts. It was presumed that that the purpose behind the suggestion was to cover the cases where the Court consider s that it is very likely that it will convict the accused at the close of the argument. The accused is required to be present at the time the judgment is pronounced.

A question arose in the High Court of Bombay: in a case if a Court 'A' grants bail to a person and the case is transferred to another Court B. So can the other Court cancel the bail? The High Court approved the cancellation of the bail by Transferee Court. Though this situation creates doubt, the commission did not make any recommendation.

An insertion of sub- section 3A to section 497 was recommended. The subsection read as follows;

"any Court which has released a person on bail under sub section(1) or (2) may if it considers it necessary so to do, direct that such person be arrested and commit him to custody."

[169] F.3(2)/55-L.C. Pt II.S.No.33(b), page 137, (suggestion of two High Court judge)

It was further suggested that the sub section 3A be numbered as 3B and subsection (5) be omitted, and the section 498 be written as:

Section 498. (1) A High Court or a session Court may direct:-

I. That a person accused of an offence and in custody be release on bail; or
II. That any condition imposed by the magistrate when releasing any person on bail be set aside or modified, or
III. That any person who has been released on bail under sub section (a) section 496 or 497 be arrested and commit him to custody.

(2) When a person is accused or suspected of the commission of an offence punishable with imprisonment for a period which may extend to seven years or more or an offence under chapter VI, XVI or XVI of the Indian penal code, or of the abetment of or conspiracy or attempt to commit any such offence is released on bail under sub section (1) by the High Court or Court of session that Court may impose any condition which it considers necessary.

a. In order to ensure that such person shall attend in accordance with the condition of the bond executed under this chapter or
b. In order to ensure that such person shall not commit an offence similar to the offence of which he is accused or of the commission of which he is suspected, or
c. Otherwise in the interest of justice[170].

Amount of bond and reduction thereof. The commission also made an opinion on the value of bond to be executed while granting bail. the idea was dealt in section 498 (1) which read as follows:

(1) The amount of every bond executed under this chapter shall be fixed with due regard to the circumstances of the case and shall not be excessive.

(2) The High Court or the Session Court may direct that the bail required by a police officer or magistrate be reduced”

4. Anticipatory bail.

The commission carefully considered the suggestion on anticipatory bail. The need for granting anticipatory bail at times when at times some influential people try to implicate their rivals on false charges in order to disgrace them or to get them detained in jail for some time. So in this case the recommendation was that when the person accused of any offence is not likely to abscond, or otherwise misuse his liberty when out on bail then there is no need to detain that person in custody.

Direction of grant of bail to person apprehending arrest. The provisions relating to anticipatory bail read as follows:

a. Section 497A. (1)

when any person has a reasonable apprehension that he would be arrested on an accusation of having committed a bob bailable offence, he may apply to the High Court or the Court of session for a direction under this section. That Court may in its discretion, direct that is the event of his arrest he shall be released on bail.

(2 A magistrate taking cognizance of an offence against that person shall while taking steps under section 204(1), either issue summons or a bailable warrant as indicated in the direction of the Court under subsection (1).

(3) If any person in respect of whom such a direction is made is arrested without warrant by an officer in charge of a police station of an accusation of having committed that offence, and is prepared either at the time of arrest or at any time while in the custody of such officer to give bail, such person shall be released on bail."

Note: It was suggested by the commission that it is not practical to enumerate all those conditions and that it would be prejudging the case. Hence it must be left at discretion of statutory provision. That the superior Courts will exercise their discretion properly.

b. Section 499.

Two suggestions regarding section 499 were made. Subsection (1 A) was recommended to be added. The subsection read as;

“Where any condition is imposed for the release of any person on bail, the bond shall also contain that condition”.

Regarding Sections 500-502.no suggestion was made.

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

1. Anticipatory bail

Para 31 of the 48th law commission discussed in short on the bill[171] recommended by the 41st law commission report. 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"[172]

[171] CrPC Bill clause 447.
[172] 48th Law Commission report.

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

The chapter VI of the 154th Law commission report dealt again with the issue of bail, anticipatory bail and allied issues likesureties. The introduction to chapter read as follows:

1. A Brief Discussion of Laws on Bail:

"The Law relating to bail is contained in sections 436 to 450 of chapter XXXIII of the Code of Criminal Procedure, 1973.The law of bails,which constitutes an important branch of the procedural law dovetails two conflicting interests namely, on the one handthe requirements of shielding the society from the hazards of those committing crimes and on the other, the fundamental principle of criminal jurisprudencenamely, the presumptionof innocence of an accused till found guilty."[173]

The Code ofCriminal Procedure has not defined the term "bail"the terms"bailableoffence" and "non-bailableoffence" havebeendefined." Bail in actual essencemeans security for the appearance ofthe accused person ongivingwhichhe is released while investigation or trial is pending. The Supreme Court in *Moti Ram* v *State of Madhya Pradesh*[174]has held that bail covers both release onone'sown bond, or without securities.

The Codehasclassifiedall offencesinto "bailable"and "non-bailable" offences. Under S. 2(a) "bailable offences" are those whichlisted as bailable in the First Schedule or which is made bailableby any other law for the time being in force and "non-bailableoffence" means any other offence.The Code doesnotprovide any criteria

[173] The 154th Law Commission Report
[174]1979 SCR (1) 335

todetermine whether anyparticular offenceisbailableor non-bailable.It all depends on whether it has been shown as bailableor non-bailable in the First Schedule. An examination of the provisionsof the Schedule would reveal that the basis of the classification isbasedon divergent considerations. However,the gravity of the offences.Usually the offences with three or less than three years of punishment have been treated as non-bailable offences. But this being not a hard and fast rule as there are exceptionsto theit.

A person accused ofa bailable offenceisentitled to be released on bail as a matter of right if he is arrested or detained without warrant.But ifthe offence is non-bail able, depending upon the facts and circumstancesof the case, the court may grant bail onits discretion. The scope of discretion varies in inverse proportionto the gravity of the crime. The courts have formulated the following guidelines for grant of bail in non-bailable offences.:

a. the enormity of the charge;
b. the nature of the accusation;
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;
h. opportunity to the applicant for preparation of his defense and accessto his counsel,
i. the health, age and sex of the accused;
j. the nature and gravity of thecircumstances in which the offence committed:
k. The positionand statusof theaccused withreference to the victim andthe witnessesand
l. Theprobability of theaccused committing more offences if released on bail,etc.

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 thebail system discriminate against thepoor?"

On this question, the Report of theLegalAidCommittee appointed by the Government of Gujarat, in 1971 had commentedon the bail somewhat this way.

"The bail system causesdiscriminationagainst the poor since the poor wouldnot be able to furnish bail 011 account of their poverty while the wealthier persons otherwise similarly situate would be able to secure their freedom because they can afford to furnish bail.Thisdiscrimination arises even if the amount of bail is fixed by the magistrate is not high,for a large majority of those who are brought before the Courts in criminal cases are so poor that theywould find it difficult to furnish bail even in a small amount.

The evil of the bail system is thateither the poor accused has to fall back on touts and professional sureties for providing bail or suffer pre-trial detention. Both these consequences are fraught with great hardship to the poor. in many casesthe poor accused arefleeced of his moneys by touts and professional sureties and sometimes even has to incur debts to make payment to them for securing his release in the other hedeprived of his liberty without trial and conviction and this leads to grave consequences,name

(I) though presumedinnocent he is subjected to the psychologicalphysical deprivations of freelife;

(2) he loses his job,if he has one,and is deprived of an opportunity to work to support himself and his family with the result that burden of his detention falls heavily on the innocent members of the family, (3) he is prevented from contributingto the preparation of his defense,and

(4) Thepublic exchequerhas to bear the cost of maintaininghim in thejail.[175]

An opinion on this thus reads as follows:

“We think that a liberal police of conditional release without monetary sureties or financial security and release on one's own recognizance with punishment provided for violation will go a long way to reform the bail system and help the weaker and poorer sections of the community to get equal justice under law. Conditional release may take the form of entrusting the accused to the careof hisrelativesor releasinghim on supervision. The court or the authority granting bail mayhave to use thediscretion judiciously. When the accused is too poor to find sureties, there willbe no point in insisting on his furnishing bail with sureties,as it will only compel him to be in custody with the consequent handicaps in making his defense."[176]

The Law commission made the following observation

“orderto eliminatethediscrimination againstthepoor and the indigent accused in the grant of bail for bailable offences, Clause 40 ofthe Criminal Procedure Amendment Bill,1994seeks to amend section 436 of the Code to make a mandatory provision that if the arrested personsaccused of a bailable offence is an indigent and cannot furnish security, the court shall release him on his execution ofabondwithout sureties. The amendment is as follows:

[175]The 154th Law Commission Report, chapter VI,Para 8.2
[176] Report of Central Legal Aid Committee, 1971

In section 436, the sub-section (1)

a. the first proviso, for the words "may, instead of taking bail," the words "may, and shall, if such person is indigent and is unable to furnish security". Shall be substituted
b. after the first proviso to the following explanation shall be inserted:

explanation; where a person is unable to give bail within a week of his arrest, it shall be be sufficient ground for the officer or the court to presume that he is an indigent person for the purpose of the proviso.

The commission in these issues agreed with the suggestion and agreed with them. It held that the poor accused committing bailable offences should not be denied bail.

2. Pre-trial Detention:

The commission wa of the opinion that purpose of pre-trial detention isnot punishment. A survey of decided cases revealedthat the law favors releaseof accusedon bail, which is the rule, and refusal istheexception.The plight of under trial prisoners was brought out in *Hussainara khatoon* v *Home Secretary*[177] .one of the judges R.S.Pathak opined that there should be a clear provision in the CrPC which enables the release in of an under trial prisoner on his bond without sureties and without any monetary obligation.

[177] 1979 AIR 1369, 1979 SCR (3) 532

The first *Hussainara* decision was followed by orderspassed by the Supreme Court" from time totimefurnishing guidelines for release ofunder trials languishing injails for want of expeditious disposal of pending cases.In *HussainaraKhatoonVII"* a criminal miscellaneouspetitionwasfiled seeking general orders on the basis of guidelinesalready issued by the court, namely tor undertaking an inquiry for setting up of additional courts in every state, providing investigating agencies with more experts, simplifying the procedure for sanction of prosecution, strict compliance with s.167of the Code, circulation of guide lines to the courts in states and revision ofcategories of under trials in Bihar jails.The Supreme Court, thoughrefraining from issuing general orders[178].

To prevent the under trial prisoners from languishing in jails for periods longer than the period of maximum period of imprisonment for the alleged offence clause 41 of the CrPC(amendment) bill proposes to insert a new section 436A in order to make certain amendments that under trials be released on personal bond with or without sureties if the person is in detention for more than half the maximum period of imprisonment.

[178] 154th Law Commission Report, para 9.3, chapter VI

The directions issued by the Supreme Court in *Common Cause* v *Union of India* were that if a person is charged of an offence with imprisonment for less than three years of imprisonment and his trial is pending for more than a year and the accused is in jail for more than six months then he may be released on bail

3. Anticipatory Bail

Section438empowers theSessionsCourt andthe High Court to grant anticipatory bail, namely adirection toreleaseaperson onbailevenbefore he is arrested. The 41st Law Commission also recommended the incorporation of a provision of anticipatory bail. The commission observed:

"the necessity of granting anticipatory bail arises because sometimes influential persons try to implicate their rivals in false cases of the purpose of disgracing them or for other purpose for detaining them in in jail for some days, in recent times with the accentuation of political rivalry.

The Law Commission inits41stReport recommended the incorporation of a provision on anticipatory bail. The Commissionhadobserved":

The necessity for granting anticipatory bail arises mainly because sometimesinfluential persons try to implicate their rivals infalsecasesfor the purpose ofdisgracing them or forother purposes by getting them detained injail for somedays. In recenttimes.with the accentuation of political rivalry, this tendency is showing signs of steady increase. Apart from false cases, where there are reasonable grounds for hold ingthat a person accused of an offence is not likely to abscond. or otherwise misuse hisliberty whileon bail, there seemsnojustification to require him firstto submit to custody. remain in prison for some days and then apply for bail.

The Code of Criminal Procedure as amended in 1973has incorporated the concept of grant of anticipatory bail in Section 438.

The Code of Criminal Procedure Amendment Bill in clause 43 seeks to amend section 438. echoing the recommendations of the Law Commission in its 48th Report and also on some other grounds referred to above. inthe following manner :

"In section 438 of the principal Act for sub-section (I), the following sub-sections shall be substituted, namely :

a. Where anypersonhasreasontobelievethat hemay be arrested on accusation of having committed a non-bailable offence, he may apply to the High Court or the Court of Sessionfor a direction under this section t~.atin 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:
b. Thenature and gravity ofthe accusation:

c. The antecedents ofthe applicant including the fact astowhether hehaspreviously undergone imprisonment onconviction by aCourt inrespectofanycognizable offence:

d. the possibility of the applicant *to* fleefrom justice: and

wherethe accusation has been made with theobjection ofinjuringorhumiliating theapplicant byhavinghim soarrested. Eitherrejecttheapplication forthwithorissueaninterim orderfor thegrant ofanticipatory bail:

Provided that, where the High Court or, as the case may be, the Court of Session, has not passed any interim order under this sub-section or has rejected the application for grant of anticipatory bail, itshall be open to an officer-in-charge of a police station to arrest, without warrant the applicant, ifthere are reasonable grounds for such arrest.

(IA) Where the Court grants an interim order under sub-section (1), it shall forthwith cause a notice being not less than seven days no• tice, 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 ofbeing heard when the application shall befinally heard by the Court.

(lB) The presence of the applicant seeking anticipatory bail shall be obligatory at the time of finalhearing of the application and passing of final order by the Court, if on an application made to it by the Public Prosecutor, the Court considers such presence necessary in the interest ofjustice."

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

1. Introduction

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.[179] 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 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

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

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)*[180].

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:-

"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

[180]®, 1987 Cri. L.J.1200

interim order as well as of the final orders will be given to the Superintendent of Police forthwith,"[181],

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.

(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

[181] [48 th Report of Law Commission of India, July 1970

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[182]

(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

[182] 203rd law commission report

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:

(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. We recommend accordingly.

V. 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

violative of Article 21 as the same is authorized by law.[183] But 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 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.[184]

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

[183] *Kalyan Chandra Sarkar* v. *Rajesh Ranjan,* (2005)2 SCC 42 at p. 52
[184] *ShaliniRawat*v. *State*, 1998 Cri LJ 1815 at pp. 1817-18 (Del)

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*[185],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 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

[185] 1992 Cr.LJ 1976

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 NareshMirajkar'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.