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**Right to Bail With Special Reference to Judicial Discretion
Relating to Non-Bailable Offences**

Treasa Ann John

CHAPTER 1 – INTRODUCTION

The law of criminal procedure is intended to provide a mechanism for the enforcement of criminal law. Without proper procedural law, the substantive criminal law which defines offences and provides punishments for them would be almost worthless. Because, in the absence of enforcement machinery, the threat of punishment held out to the law-breakers by the substantive criminal law would remain empty in practice. Empty threats do not deter, and without deterrent effect, the law of crimes would have hardly any meaning or justification. If “thieves “and “murderers” are not detected, prosecuted, and punished, what is the use of meticulously defining the offences of ‘theft’ and murder and prescribing “deterrent” punishments for them.

Thus, the law of criminal procedure is meant to be complementary to criminal law and has been designed to ensure the process of its administration. In view of this objective, the law of criminal procedure creates the necessary machinery for the detention of crime, arrest of suspected criminals, collection of evidence, determination of guilt or innocence of the suspected person, and the imposition of proper punishment on the guilty person. The law of criminal procedure also aims at providing safeguards against possible harms and violation of human rights of innocent persons in its process of sifting criminals from non-criminals. It further attempts to strike a just balance between the need to give discretionary powers to the functionaries under the code to make the investigative and adjudicatory processes strong and effective, and the need for controlling the probable misuse or abuse of these powers. It is therefore, right to say, as the Supreme court has said, that it is the procedure that spells much of the difference between the rule of law and the rule of whim and caprice¹.

1.1 IMPORTANCE OF CRIMINAL PROCEDURE

The law of criminal procedure is significantly important for three main reasons:²

1. It is more constantly used and affects a greater number of persons than any other law.
2. The nature of its subject-matter is such that human values are involved in it to a greater degree than in other laws.
3. As the law of criminal procedure is complementary to the substantive criminal law, its failure would seriously affect the substantive criminal law which in turn would considerably affect the protection that it gives to society. Therefore, it has been rightly said that too much expense, delay and uncertainty in applying the law of criminal procedure would render even the best of penal laws useless and oppressive.

¹ Iqbal Ismail Sodawala v State of Maharashtra (1975) 3 SCC 140

² See 37th report I-2

The right to liberty is one of the fundamental rights guaranteed by the modern constitutions of all the civilized countries. The right is as well recognized in India as in other foreign countries and the constitution of India contains detailed provisions relating the fundamental rights. Further, the Constitution reflects the tendency of modern civilization to shift the emphasis from the individual to the community and social control. It is in this background of the Constitution that the law relating to 'bail' is being shaped and as such a brief survey of the fundamental rights has been made in the first chapter of this book.

CHAPTER 2 – BAIL

2.1 BAIL MEANING:

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

“Bail is a security given for the due appearance for the prisoner in order to obtain his release from imprisonment; a temporary release of a prisoner upon security of one who provides bail”³

According to **Black's Law Dictionary** 'bail' means:

“To procure the release of a person from legal custody, by undertaking that he shall appear at the time and place designated and submit himself to the jurisdiction and judgment of the court.”⁴

In **Encyclopaedia Britannica**, the 'bail' is defined as : “the procedure by which a judge or magistrate sets at liberty one who has been arrested and imprisoned in connection with a legal matter, criminal or civil upon receipt of security to ensure the released prisoner's later appearance in court for further proceedings in the matter”.⁵

“To set at liberty a person arrested or imprisoned on security being taken for his appearance on date at a certain place, which security is called bail because the person arrested or is delivered on the hands of these who bind themselves or become bail for his due appearance when required in order that he may be safely protected from prison to which of they have, of they fear his escape, etc; the legal power to deliver him”.⁶

³ Webster's 7th new Judicial Dictionary.

⁴ Black's Law Dictionary 181 (3rd ed., 1933).

⁵ 2 Encyclopaedia Britannica 1046 (1968).

⁶ Wharton's Law Lexicon

The definition of bail as given in **Webster's Third New International Dictionary** is : "the process by which a person is released from custody."⁷

“To set at liberty a person arrested or imprisoned or security being taken for his appearance on a day and at a place certain..... because the party arrested or imprisoned is delivered into the hands of those who bind themselves or become bail for his due appearance when required in order that he may be safely protected from the prison.....”⁸

The Supreme Court defines bail as “a technique which is evolved for applying effective synthesis of two basic concepts of human value, viz., the right of an accused to enjoy his personal freedom and the public’s interest on which a person’s release is conditioned on the surety to produce the accused person in the Court to stand the trial”⁹.

2.2 ARREST:

Arrest means the apprehension of a person by a legal authority which results in deprivation of his liberty. For example, when a police officer apprehends a thief, then he is arresting the thief, but when an armed robber apprehends a person with an intention to steal money, the robber is not arresting that person but is wrongfully confining him. Also, every compulsion or physical restraint is not arrest, but when the restraint is done and deprivation of liberty is complete, this act would amount to arrest.

Definition of Arrest in Halsbury’s Law of England:

Here it is defined 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.”

The Black’s Law dictionary defines arrest as:

“Arrest is to deprive 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.”¹⁰

It is necessary to conduct Arrest of a person under the following circumstances:-

(1) For securing attendance of an accused at trial-

When a person is to be tried on the charge of some crime, his attendance at the time of trial becomes necessary. If his attendance is not likely to be ensure by issuing a

⁷ 1 Websters Third New International Dictionary 163 (1959).

⁸ Venkatrammaiya’s Law Lexicon, 2nd edition, vol I at pp 260-61

⁹ Kamlapati v State of West Bengal AIR 1979 SC 777.

¹⁰ Black’s law dictionary,5th Ed. Vol. II, Para 99.

notice or summons to him, probably his arrest and detention is the only effective method of securing his presence at the trial.¹¹

(2) As a preventive or precautionary measure- If there is imminent danger of the commission of a serious crime (cognizable offence), arrest of the person intending to commit such a crime may become necessary as a preventive measure.¹² There may be other circumstances where it is necessary as a precautionary measure to arrest a habitual offender or an ex-convict,¹³ or a person found under suspicious circumstances.¹⁴

(3) For obtaining correct name and address- Where a person, on being asked by a police officer, refuses to give his name and address, then under certain circumstances, it would be proper on the part of the police to arrest such a person with a view to ascertain his correct name and address.¹⁵

(4) For removing obstruction to police- Whoever obstructs a police officer in the execution of his duty would be and should be liable to be arrested then and there by such a police officer.¹⁶ This is essential for the effective discharge of police duties.

(5) For retaking a person escaped from custody- A person who has escaped from lawful custody should be arrested forthwith by the police.¹⁷

2.3 PRINCIPLES GOVERNING BAIL:

The principles governing bail can be inferred from the case of *Sidharth Vashisth alias Manu Sharma v. State of Delhi*¹⁸ in which the granting of bail was depended on the following principles such as:

- i) The severity and the magnitude of the crime is of extreme nature, then bail should not be granted.
- ii.) Refusal of Bail maybe carried out is there is a reasonable presumption by the court that there exists evidence which shows that Bail, if granted would amount to not securing the convict in the judgment stage.
- iii.) The refusal of bail can be allowed if facts show that course of justice would be ineffective and disturbed by the accused who seeks the benignant jurisdiction of the court in order to be of free from detention.

¹¹ See S.204 read with S.87, cls (a) and (c) of Ss.41(I) and 43.

¹² See S.151.

¹³ See S.41(2) in respect of persons specified in S.110; see also S.41 (I)(h).

¹⁴ See cls. (b) and (d) of S.41(I); see also , S.41(2) in respect of persons specified in S.109.

¹⁵ See S.42.

¹⁶ See S.41(I) (e).

¹⁷ Ibid.

¹⁸ 2004 Cri LJ 684

- iv.) Bail can be refused if it appears that the applicant will cause interference with prosecution witness and disrupts the mechanism of justice.
- v.) Bail can be refused if the past conduct, behavior or history of the applicant is in bad nature as per records and which would suggest that he is in all probability to commit grave offences if he is granted bail.

While granting bail, the magistrate must factor into consideration the following matters. Wherever proviso (a) to section applies, then the magistrate will not have discretion and he is duty bound to grant bail on the same and when the bail is granted by the magistrate according this proviso and after the charge sheet is filed, the release order of the bail continues to be in practice.

We can see that Bail can be cancelled under section 437(5) of Cr.PC.¹⁹, and except where the proviso (a) to s.167 of Cr.P.C is seen to be attracted, bail needs to be granted on the guidelines as follows:

- i) Reasonable ground exists for believing that the accused in the case, has committed the offence, which he was charged for.
- ii) Gravity and Nature of the charge so accused of.
- iii) As per circumstance of the case, the Severity of the degree of punishment in the happening of a conviction.
- iv) The consequences of absconding if the accused is granted bail.
- v) The means of standing and character of the accused in the case.
- vi) On presumption that the Accused is guilty and has committed such similar offences in the past time, the possibility of such offences being repeated or the alleged offence being continued.
- vii.) Possibility of tampering the witness.²⁰

The Supreme Court has stated 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."²¹

The question arose in a case where - further custody of the accused was required in relation to an offence, which relates to Foreign Exchange Regulation Act 1973, Here the Sessions court rejected the applicants. Subsequently, it was found out that the investigating agency had one month of time available in collecting the materials relating to the case, while the petitioner was in custody/detention for the accusation against them. The petitioners in this case were charged with offences which have a maximum seven years limit in terms of punishment of imprisonment. Hence by

¹⁹ Raghur Singh v State of Bihar AIR 1987 SC 149.

²⁰ State v Jagjit Singh AIR 1962 253 SC.

²¹ Narasimhulu v Public Prosecutor 1978 AIR 429, 1978 SCR (2) 371

taking all factors into consideration, it was held that conditional bail can be granted to the applicant, for securing their attendance during the trial proceedings, also the applicants can avail their release on bail.

2.4 WHO CAN GRANT BAIL?

a. POLICE

Police officers are empowered to grant bail, to persons arrested without a warrant under sections 41, 42, 43 or 151 of the CrPC, or to a person arrested under a bailable warrant issued by a court or to an accused person to appear before the court where required²².

The provisions of Cr.P.C enable the Police, the power for releasing a person on bail.

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 one's arrest, he also has the power to release him on bail. It has been held that a magistrate arresting a person is not a Court, so detaining such a person beyond 24 hours would be illegal normally.²³

Hence such a person should be produced before a competent magistrate which is prescribed by section 167 (1), CrPC.

c. Bail by Judicial Magistrate:

At any stage of investigation process, enquiry or trial, a bail can be moved before a Judicial Magistrate. This can be at the time of committing the offence or after the event of conviction and such an order can reside until a proper bail order is obtained from the appellate Court.

d. Bail by Sessions Judge:

The Sessions Judge can take up bail application of an accused against which the investigation is pending and at the initial stages of investigation the bail of such an accused has been declined by a Sessions Judge. This power is given under Section 439 of the CrPC.

with life imprisonment or death, then the Magistrate will not have any discretion in granting bail²⁴

2.5 BAIL AS A RIGHT.

Individual freedom is the basic concept in a democracy in which Liberty of every citizen must be valiantly guarded by the courts. Every person including an

²² PV Ramakrishna's Law of Bails, 7th edition, Lexis Nexis.

²³ M.R. Malik; Bail Law & Practice, fourth edition, page 54.

²⁴ Gurcharansingh v State, AIR 1978 SC 179.

accused is entitled to his freedom and he cannot be punished by the act of keeping him behind bars unless he is found to be guilty by a court of law which is competent.

Hence, the basic rule should be “bail and jail” except where there are circumstances suggestive of the accused fleeing the course of justice, possibility of his repeating offences and the like²⁵.

Bail is a right in the following circumstances:

I) Bailable Offences:

Where a person accused of a bailable offence is arrested or detained without warrant or appears or is brought before a court and is prepared to give bail, the police officer or the court having custody of such person shall release him on bail. The police officer or court, instead of taking bail from him may release him on his executing a bond without sureties.

Section 436 of CrPC contains provisions for grant of bail to any persons, who is accused of bailable offences in which he is arrested/detained by police without a warrant of arrest or that person appears or is brought before the Court of law.

II) Where investigation is not over within prescribed period (‘Default bail’)

Section 167(2) provides that where a person is in custody and the investigation is not over in ninety days where such investigation relates to an offence punishable with death, imprisonment for life or imprisonment for ten year or more in sixty days, where such investigation relates to any other offence, the accused is entitled to get bail as of right after the period of ninety days or sixty days, as the case may be, is over. The language of section is clear and it is a mandate of the Legislature. The right is absolute. It is known as “order on default”.

III) Where further investigation is necessary.

Where any person accused or suspected of commission of any non-bailable offence is arrested or detained without warrant by a police officer or appears or is brought before a court, and it appears to such officer or court at any stage of investigation, inquiry or trial that there are no reasonable grounds for believing that the accused has committed, a non-bailable, but there are sufficient grounds for further inquiry into his guilt, the accused shall pending such inquiry be released on bail after recording reasons. The accused will execute a bond without sureties for his appearance as directed by such officer or court.²⁶

IV) Where maximum period of detention is over.

Section 436 A, as inserted by the CrPC (Amendment) Act,2005 mandates that an undertrial prisoner, other than the one accused of an offence punishable with death, shall be released on bail if he has been under detention for a period of more than one

²⁵ Law Commission’s 41st Report;para 39.1

²⁶ S.437(2).(4).

half of the maximum sentence provided for the alleged offence.²⁷

V) Where trial is not over within prescribed period.

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 period, be released on bail unless the magistrate directs otherwise by recording reasons for doing so.²⁸

VI) Where there are no reasonable grounds to believe accused guilty.

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 the opinion that there are reasonable grounds for believing that the accused is not guilty of any such offence, it shall release the accused on bail, if he is in custody²⁹.

2.6 BAIL IS A SECURITY FOR APPEARANCE

One of the main characteristics of Bail is that it is a security for the prisoner's appearance so that he is able to answer the charge at a time and place as specified by the concerned authorities. It is highly relevant for any Court in considering such security in relation to and in the light of the nature of the crime charged, likelihood or otherwise of the guilt of the accused there under.

During early stages when the accused asks for bail here the Court has to function on a reasonable and intelligent anticipation which an ex-hypothesis must, to a certain extent, be problematical because the trial has not run its natural course. Thus in matters relating to bail the test which is to be applied is the test of reasonable belief as different to the normal process of decision and conclusion which usually result in the completion of the trial. The materials which are available for the Court in considering the question of granting of bail are the charges made, the attached facts such as the police report, facts stated in the bail petition, the grounds of the opposition, to the granting of that petition. By releasing an accused on bail, will not change the reality of the alleged offence and from that very fact, it cannot be led to believe that he is not a person arrested for an offence. By the act of surety, A person who has been released on bail is still considered to be detained in the constructive custody of the Court of law and He is bound by law to appear before the Court whenever specified to him. Hence his Liberty is on restraint conditions. On paper, he is in the custody of the Court and hence continues to be considered as a person arrested. Hence it is reasonable to conclude that even though the accused has been released on bail he is deemed to be a person arrested on a charge of commission of an offence punishable by law.

²⁷ Pramod Kumar v Union of India,(2008) 9 SCC 685;2008 CrLJ 4697

²⁸ S.437(6).

²⁹ S.437(7).

CHAPTER 3 – BAIL IN CASE OF BAILABLE AND NON-BAILABLE OFFENCES

3.1 WHEN -BAIL IS A MATTER OF RIGHT.

In Bailable offences, it is a matter of right. In cases of non-bailable offence, the granting of bail will be a matter left to the discretion of the authorities in charge. The Scope of such a discretionary power will depend on many factors such as:

- i) The discretionary power increases with the gravity of the crime. The more serious nature is the offence, the discretion to release the offender on bail will be less likely in nature.
- ii) Judicial officers have wider discretionary powers than police officers.
- iii) Courts such as High Court or a Sessions court have wider discretionary powers than that of individual judicial officers.

Examining the scope of the discretion, if the discretion in granting of bail is wide or narrow in nature, it must not be arbitrary in manner of availing. “Discretion when applied to a court of justice , means sound discretion guided by law. It must be governed by rule, not by humour; it must not be arbitrary, vague and fanciful, but legal and regular”.³⁰

The discretion to grant bail in cases of non-bailable offences has to be exercised according to certain rules and principles as laid down by the code and judicial decisions. The following sub-paragraphs deal with the different aspects of the use of such discretion.

- a) Discretion in granting bail, how to be exercised- “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” as per section 437. “The word ‘may’ in the above provision clearly indicate that the police officer or the court has got discretion in granting bail. However, there are certain principles which should guide the police officers and the courts in the exercise of this discretion. It should be noted at the outset that the object of detention pending criminal proceedings, is not punishment and that the law favors allowance of bail, which is the rule, and refusal is the exception”.³¹

In granting of bail in case of non-bailable offences, there are no fixed rules. However, the courts can follow a guideline in the following situations:

- i) the size of the charge
- ii) the nature of the accusation on the accused
- iii) the severity of the punishment.
- iv) prima-facie evidence on accusation
- v) the likelihood of the accused person’s absconding if granted bail

³⁰ Mansfield, quoted in Gudikanti Narasimhulu v Public Prosecutor .A.P (1978) 1 SCC 240; 1978 SCC (Cri)115,118;1978 Cri LJ 502, 504.0

³¹ Rao Harnarain Singh v State AIR 1958 Punj 234 CrLJ 563.

- vi) the threat to prosecution witnesses
- vii) the nature of the trial proceedings
- viii) right of accused to prepare his defence and the right to consult his counsel.
- ix) the age, gender and health condition of the accused.
- x) the position and status of the accused in the society.
- xi) the chances of the accused committing further offences if he/she is released on bail.
- xii) Societal Interest at Large.

“There are also other considerations and the above is by no means an exhaustive catalogue of the factors which should weigh with the court”.³²

“The previous convictions and the criminal record of the accused person, and also likelihood of the repetition of the offences by the accused person if released on bail are also to be taken into account while deciding the question of bail”.³³

“The previous convictions and the criminal record of the accused person and also the likelihood of the repetition of the offences by the accused person if released on bail are also to be taken into account while deciding the question of bail”.³⁴

“Granting bail to the accused person merely on the concession made by the public prosecutor would amount to non-exercise of the judicial discretion in granting bail and was therefore held to be improper and wrong”.³⁵

“Simply because a co-accused has been granted bail an accused cannot be granted Bail. Even at the stage of second or third bail application, the court has to examine whether on facts of the case of the applicant before the court is distinguishable from the other released co-accused and the role played by the applicant is such that It may disentitle him to bail”.³⁶

Courts used to grant bail on the basis of parity. The Allahabad High court in 1999 recapitulated ³⁷ .the application of this principle thus:-

“As regards the principle on parity in matter of rejection of bail application, it may be observed that law of parity is a desirable rule. In matters of release on bail to the co-accused is identically similar but cannot be denied bail, merely on the ground that the bail of another accused has been rejected by the courts earlier, the obvious reason being that while the earlier bail order denying bail to another co-accused was passed, the latter co-accused applying for bail was not heard.”³⁸

The M.P High Court, however, in *Ramesh Kateha v State of M.P*³⁹, cancelled a bail order granted on principle of parity as the accused suppressed the fact of rejection of application for bail once. But

³² Ibid.

³³ *Sagri Bhagat v State of Bihar*, AIR 1951 Pat 497; 52 Cri LJ 657.

³⁴ *Sagri Bhagat v State of Bihar*, AIR 1951 Pat 497;52 Cri LJ 657.

³⁵ *Rama v Dattatraya*, 1981 CrLJ 1605, 1612(Bom).

³⁶ *Nanha v State of U.P* 1993 Cri LJ 938 (All)

³⁷ *Yunis vs State of U.P.*

³⁸ Ibid, at 4096.

³⁹ 1999 Cri Lj 4243(MP)

the same High Court in *Vishnu Maheshwari v State of M.P.*⁴⁰, sustained a similar bail order through the fact of rejection for bail by one co-accused was not mentioned in his application. The Court reasoned that for suppression of fact the applicant was not responsible and that it was the duty of his counsel and prosecutor to have informed the court about the rejection of application of bail.

The law gives a specific negative direction while considering the application of the discretion in the matter of bail. If bail is denied on the ground that the accused will have to be present in order to be identified by the witness during the course of the investigation, this will not be an adequate ground to refuse bail if on other grounds he is normally entitled to be granted bail and he also gives an undertaking that he will comply with the directions that the court prescribes. This is explained in the third proviso of section 437(1).

An order refusing an application for bail does not necessarily preclude another, on a later occasion, giving more details, materials, further developments and different considerations.⁴¹ It has been held that a bail application after having been rejected by an Additional Sessions Judge, would be maintainable in the sessions court⁴². But it may not be appropriate if a person seeks and gets bail from a Sessions Court after having been denied bail by the High Court.⁴³

Any officer or court releasing any person on bail in a case of non-bailable offence is required to record in writing his or its reasons for doing so (section 437(4)). The requirement would enable the High Court or court of sessions to see whether the discretion in the matter of bail was properly exercised. However, detailed examination of the evidence and elaborate documentation of the merits of the case is to be avoided while passing the orders on bail applications; because that might create the impression in the mind of the party that his case has been prejudiced.⁴⁴

The word “appears” in section 437(1) is wide enough to include voluntary appearance of the accused person. The Actual physical presence and surrender of the accused with submission to the jurisdiction of the court is judicial custody, and the accused may be released from such custody on bail⁴⁵ and even when he is on bail notionally he is in the custody of the court.⁴⁶

In sub-paragraph (d), Wide range of power is given to both Sessions Court and High Courts of the state with respect to the bail matter. The Supreme Court is of the view that: “where the offence is non-bailable, various considerations such as those indicated above have to be taken into account before bail is granted in a non-bailable offence.”⁴⁷

b) Offences punishable with death or life imprisonment.

Section 437(1)(i) stipulates that “In case of a person who is under arrest or detention and there appears reasonable grounds for believing that he has been guilty of an offence punishable with death

⁴⁰ 1999 CrLJ 4403 (MP).

⁴¹ *Babu Singh v State of U.P.* (1978) 1 SCC 579 1978 SCC (Cri) 133;134;

⁴² *Rajesh Chowdhary v State of Rajasthan*, 1978 CriLJ 441 (Raj).

⁴³ *Mahendra Singh v State of U.P.* 1997 Cri LJ 4099 (All)

⁴⁴ *State of Gujarat v Hiralal Motilal Advani*, 1982 Cri LJ 1541 (Guj);

⁴⁵ *State of Assam v Mobarak Ali*, 1982 Cri.LJ 1816 (Gau)

⁴⁶ *Thaniel Victor v State of T.N.* 1991 Cr LJ 2416 (Mad).

⁴⁷ *State v Jagjit Singh (Capt)*, AIR 1962 SC 253;

or imprisonment for life, he shall not be released on bail”. Exception given under first proviso of 437(i) is that “the court may direct that any person under the age of sixteen years or any woman or any sick or infirm person accused of such an offence be released on bail⁴⁸. Section 437(1)(a)(ii) that “an accused who was earlier convicted of an offence punishable with imprisonment for three years or more but not less than seven years shall not be released on bail”.

If a person is accused of offences of serious nature offences which have punishments like imprisonment for 7 years or more, life sentence, capital punishment, then the added proviso to section 437 prescribes for the compulsory hearing of the prosecution before such an accused is granted bail.

The conditions that the court may impose may include the following:

That such a person:-

- a) shall follow with the conditions of the bail bond which is signed and executed,
- b) shall not commit similar offence like the one he is suspected or accused of.
- c) shall not directly or indirectly make any inducement, threat or promise to any person acquainted with the fact of the case so as to dissuade him from disclosing such facts to the court or to any police officers or tamper with the evidence.

The court can also impose other conditions in the interest of justice.⁴⁹

It has been held that the word “may” in the first proviso to sub-section (1) of section 437 should not be read as mandatory. The discretion conferred on the judge by section 437 is very wide and depending upon the circumstances of the case he can exercise it judiciously.⁵⁰

Except in the cases of children, women and sick or infirm persons, the discretion to grant bail has been taken away by the above rule in cases of non-bailable offences punishable with death or life imprisonment. The Basis for this rule is that the graver the offences in the charge, the chances of the accused making himself unavailable or scarce but the abscondence or by delaying collection of evidence by threatening witnesses or scaring them away are more. A female or a person belong 16 years of age or a sick or infirm person, because of their physical handicaps and or/immaturity, is not likely to interfere with the investigation or to delay the trial by abscondence or interference.⁵¹

The words “there appear reasonable grounds for believing” do not usually mean in the nature of a mere suspicion. It means that such grounds as are based on reasons and logic and are not without sufficient reasons for the same. The grounds specified should be of the nature such that it will lead to considering or to believe that such an accused person is guilty of commission of that offence. “It is not only the probability of the ground being creative of a belief but even the possibility of such a belief which is sufficient to give rise to the interdiction referred to in the sub-section. There the degree of certainty of belief expected is far less than the degree of conviction which a court is

⁴⁸ Shakuntala Devi v State of U.P, 1986 Cri LJ 365 (All).

⁴⁹ Amendments affected by Code of Criminal Procedure (Amendment) Act, 2005.

⁵⁰ Pramod Kumar Manglik v Sadhna Rani, 1989 Cri LJ 1772 (All).

⁵¹ Nirmal Kumar Banerjee v State, 1972 CrLJ 1582,1583 (Cal).

required to possess while finding a man guilty of an offence”.⁵²

The phrase “an offence punishable with death or imprisonment for life” should be read disjunctively as if it meant “offence punishable with death or punishable with imprisonment for life”.⁵³

The Kerala High court has taken the view that the prohibition against granting bail in section 437 is confined to cases where the sentence is either death or alternatively imprisonment for life and that the prohibition does not extend to offences punishable with life imprisonment only⁵⁴.

“It is not every sickness that entitles an accused person to the grant of bail under the first proviso to section 437(1) mentioned above. The sickness contemplated by the proviso is a sickness which involves a risk or danger to the life of the accused person”.⁵⁵

The court when releasing any person on bail under the first proviso to section 437(1) will have to record in writing its reasons for the same as per section 437(4).

Habitual offender or person previously convicted of serious offence not to be released on bail-

If a person has been previously convicted of an offence which is punishable with 7 years or more imprisonment, life imprisonment or death penalty or in the past has been convicted on two or more cases of non-bailable and cognizable offences and is accused or suspected of the commission of cognizable or any non-bailable offences and is now arrested or detained without a warrant by the officer in charge of a police station or he is brought before a court of law other than the Court of sessions or the High Court, then he shall not be granted bail.

Exception is given under section 437(1)(ii) which says that “if such a person is under the age of sixteen years or is a woman or is sick or infirm, or for any other special reason the court considers it just and proper to release him on bail, the court may direct that he be released on bail”. Section 437(4) prescribes that “While so directing the release on bail, the court shall record reasons or special reasons for doing so”.

3.2 WHEN BAIL MAY BE TAKEN IN CASE OF NON-BAILABLE OFFENCE-SECTION-437,CRPC:

If a person who is accused or suspected of the commission of any non-bailable offence is arrested or detained without a warrant by the officer-in-charge of a police station and appears or is brought before a court of law other than court of session or high court then such a accused person can be granted bail except as per the following circumstances that such a person:-

i) Shall not be released, provided there exists reasonable grounds which can lead to believe that he has been guilty of committing an offence which is punishable with death penalty or life sentence.

ii) Shall not be released if the offence is of the nature of a cognizable offence and has been previously convicted of an offence which is punishable with death penalty or life sentence or

⁵² State v Harbans Lal, 1975 Cri LJ 1705,1706(J&K).

⁵³ King- Emperor v Nga San Htwa, AIR1927 Rang 205: 28 Cri LJ 773,775.

⁵⁴ Satyan v State, 1981 Cri LJ 1313 (Ker)

⁵⁵ Fazal Namaz Jung v State of Hyderabad, AIR 1952 Hyd 30; 1952 Cri LJ 873, 875.

imprisonment for seven years or more, or he has been convicted in the past on two or more incidents cognizable and non-bailable offence.

Exceptions are: the court may direct that a person as prescribed in clause (i) and (ii) be released in bail, if such a person is under the age of sixteen years or is a woman or is sick or infirm.

The court may also direct that a person as per clause (ii) be released in bail if the court has reasons to believe that it is just and proper and for any other special reason.

The mere fact that an accused person will be required for being identified by a witness during the stages of investigation process, shall not be a sufficient ground for the refusal to be released on bail, if he is otherwise entitled to be granted bail and also gives a mandatory undertaking, which prescribes that he shall comply the directions which is given by a court of law.

(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 is accused or suspected of the commission of an offence, which is punishable with imprisonment which may extend to seven years or more of an offence under Chapter VI, Chapter XXVI or chapter XXVII of the Indian penal code or abetment of or conspiracy or attempt to commit such an offence is released on bail under sub-section (1), the court may impose any condition which the court considers necessary in order to ensure that such a person:-

(a)- shall attend in accordance with the conditions of the bond executed under this Chapter.

(b)- shall not commit an offence which is similar to the offence of which he is accused, or of the commission of which he is suspected.

(c) The interest of justice is followed.

(4)-

An officer or a court of law who is releasing any person on bail as provided under the sub-section (1) or sub-section (2) shall record in writing the reasons or special reasons for doing the same.

(5)-

A court which has released a person on bail as per sub section(1) or sub section (2) can at its discretion thinks it is necessary to do so can direct that such a person be arrested and confine him to custody.

(6)- If the particular case is triable by a magistrate then the trial of the accused person who has committed a non-bailable offence is not concluded within a period of sixty days, from the first date fixed for taking evidence in the case then such a person shall if he is in the custody during the whole of the said period can be released on bail to the satisfaction of the magistrate unless there exists

reasons to be recorded in writing which the magistrate otherwise prescribes or has reasons to believe so.

(7)- If at any time after the conclusion of the trial of an accused person who is believed to commit a non-bailable offence, and during the time period before judgment is delivered on that case if the court is of the opinion that, there exists sufficient grounds for believing that the accused is not guilty of the commission of such an offence, then the accused shall be released provided that he was detained in custody and that he executes a bond without sureties for his appearance to hear till the judgment delivered on the case.

3.3 REFUSAL OF BAIL, WHERE BAILABLE WARRANT ISSUED IN NON-BAILABLE OFFENCE

Issuance of bailable warrants cannot simplicitor provide guarantee of bail in a non-bailable case, though it may be relevant factor to be considered along with others while deciding the question of bail under **S.439** of the CrPc. Undoubtedly, the offence was not bailable and therefore, merely because the magistrate thought it proper to issue bailable warrants the jurisdiction of the sessions judge to refuse bail cannot be curtailed or fettered. Further, in such cases where tax evasion is prima facie of a very high value, the question of bail should be considered seriously and it should not be granted as a matter of course. Tax evasion of high value certainly jeopardizes the entire economy of the country, and is an economic crime of serious magnitude.

Leaving apart anticipatory bail which should normally be out of question, even if the court would have considered the original application for bail after arrest, the rejection, other things remain same, would have had the edge over acceptance as jail and not bail should be the rule in such serious cases.⁵⁶

CHAPTER 4 – CONCLUSIONS AND SUGGESTIONS

Mankind has evolved and grown through his ability to be a social creature that has the freedom of movement which has facilitated interaction between societies which again led to intellectual development, language, trade and commerce. This liberty of man to do what he likes and to travel and navigate the spheres of land has contributed impeccably to the growth of societies. However the modern society envisages certain restrictions on the conduct of man so as to protect individual and state interest in a collective scheme. This benefit for all while sacrificing absolute free rights makes the state control the order of the society for efficient growth and wellbeing for the society. The criminal justice system prescribes arrest and detention for person accused of committing offences as envisaged by the law. Such laws of criminal conduct such as the Indian penal code and the Criminal Procedure Code, prescribes offences and the administrative remedy for persons committing the same. Such a preventive action is to conduct the criminal proceedings in an organised manner in order to establish the guilt of the accused and punish him or let him free if he found not guilty.

⁵⁶ Income tax officer, Central Circle I v Gopal Dharmani 1988 Cr LJ 1079, 1082 (Raj).

This has created a barrier between the Rights of the individual such as his freedom of movement and the justice enforcement mechanism of the state. The law of bails is a safeguard which provides the individual to be not confined to custody or detention but at the same time ensuring that he attends the proceedings of the trial as prescribed by law. Bail is a right in some cases such as I) Bailable-Offences as per Section 436 II) Where investigation is not over within prescribed period as per Section 167(2). The right is absolute. It is known as “order on default”. III) Where further investigation is necessary, the accused shall pending such inquiry be released on bail after recording reasons. The accused will execute a bond without sureties for his appearance as directed by such officer or court.

IV) Where maximum period of detention is over, Section 436 A, as inserted by the CrPC (Amendment) Act, 2005 V) Where trial is not over within prescribed period.

These safeguards are drastically different when compared to non-bailable offences. In granting of bail in case of non-bailable offences, there are no fixed rules. However, the courts can follow a guideline in the following situations: i) the magnitude of the charge, ii) the nature of the blame on the indicted, iii) the sternness of the penalty, iv) prima-facie indication on indictment, v) the likelihood of the liable person's departure if granted bail. vi) the hazard to prosecution witnesses, vii) the nature of the trial actions viii) right of defendant to prepare his protection and the right to access his counsel, ix) the age, gender and health condition of the accused, x) the position and status of the accused in the society, xi) the chances of the accused committing further offences if he/she is released on bail, xii) Societal Interest at large.

However these are just guidelines that the court follows and the extent of judicial discretion can cause many disparities in many cases that has different set of circumstances. The societal conditions existing in that area, the nature of judicial authorities and precedents that are being followed in that state etc also play a minute yet a drastic role in the turning of tide between custody and bail. Hence even though judiciary has been guided to apply sound reasoning and application of mind on a case to case basis, as well as inspecting the background of the accused in his character, past conduct and behavioural record would help a great deal in providing necessary balance in the freedom of the individual and the administrative correctional facilities that the law prescribes in the form of criminal justice system which is enforced through police and judicial officers.

BIBLIOGRAPHY

Books

R.V Kekar's Lectures on Criminal Procedure 5th edition by Dr. K.N. Chandrasekharan Pillai.

Criminal Procedure Code by M.P Tandon

Law of Bails by J.S Dubey

Criminal Procedure by C.K. Thakker

Articles

Claire Macken - *Preventive Detention and The Right Of Personal Liberty And Security Under The International Covenant On Civil And Political Rights*, 1966.

Tanya Singh, Pramod Kumar Singh, Rajeev Kumar Singh - *Arrest And Detention Laws In India: An Overview*

Sudesh Kumar Sharma - *Dimensions Of Judicial Discretion In Bail Matters*.

B. P. Srivastava - *Right Against Arbitrary Arrest And Detention Under Article 9 Of The Covenant As Recognized And Protected Under The Indian Law*.

Charles Richmond Henderson - *Control of Crime in India* - Journal of the American Institute of Criminal Law and Criminology Vol. 4, No. 3 (Sep., 1913), pp. 378-401)

Online Resources

www.jstor.org

www.manupatra.com

lawcommissionofindia.nic.in