

“The issue of bail is one of liberty, justice, public safety and burden of the public treasury, all of which insist that a developed jurisprudence of bail is integral to a socially sensitized judicial process”. – Justice V.R. Krishna Iyer

Introduction:

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

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

The literal meaning of the word “bail” is surety. Bail, therefore, refers to release from custody, either on personal bond or with sureties. Bail relies on release subject to monetary assurance either one’s own assurance (also called personal bond / recognizance) or through third party sureties. The Supreme Court has also reiterated this definition in the Moti Ram Case¹

According to Black’s Law Dictionary,² what is contemplated by bail is to “procure the release of a person from legal custody, by undertaking that he/she shall appear at the time and place designated and submit him/herself to the jurisdiction and judgment of the court.”

Objective of Bail:

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

However the leading authority which could be referred to for explaining the objective of bail in detail is Sanjay Chandra v CBI.³

It defined the objective of bail as follows in bail applications, generally, it has been laid down from the earliest times that the object of bail is to secure the appearance of the accused

¹ (1978) 4 SCC 47

² Black’s Law Dictionary 177 (4th ed.)

³ (2012) 1 SCC 40

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

Legal Provisions

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

Types of Bail:

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

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

1. Bail in bailable offence

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

2. Bail in case of non-bailable offence

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

3. Anticipatory Bail

Anticipatory bail means bail in anticipation of an arrest. Any person who apprehends arrest under a non-bailable offence in India can apply for Anticipatory Bail under the provisions of section 438 of The Code of Criminal Procedure, 1973.

3.1. Scope and Ambit of Anticipatory Bail

The court in the case of **Siddharam Satlingappa Mhetre v. State of Maharashtra**⁴, here discussed the scope and ambit of anticipatory bail and said that principles regarding it has been laid down in the Sibia's case should be followed by the court.

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

It has been held in the **Gurbaksh Singh Sibbia v. State of Punjab**⁵ that s. 438 of Cr.PC was enacted to protect those people who are implicated by their rivals in false cases for the purpose of disgracing them or for other purposes by detaining them in jail

⁴ AIR 2011 SC 312.

⁵ AIR 1980 SC 1632

4. Bail on Default

Section 167(2) of the Criminal Procedure Code, 1973 empowers judicial magistrates to authorize custody of an accused person in cases wherein investigation cannot be completed in twenty-four hours. It provides for the maximum period of custody that can be authorized. It further contains a mandate that if the investigation is not completed within the stipulated maximum period, the accused is to be released on bail whatever may be the nature of accusation against him. The object of this provision manifests the legislative anxiety that once a person's liberty has been interfered with, the arrest made without a warrant or a court order, the investigation must be conducted with utmost urgency. Persons who are detained for committing an offence and undergoing investigation are statutorily eligible for bail under Section 167(2) of Code after ninety days where the investigation relates to an offence punishable with death, imprisonment for life or imprisonment for not less than ten years; and sixty days where the investigation is relating to any other offence, if the investigating authorities fail to complete their investigation and file a charge-sheet within this period.

5. Interim Bail

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

6. Bail after conviction

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

Cancellation of Bail:

The basic criteria for cancellation of bail are interference or even an attempt to interfere with due course of justice or any abuse of indulgence/ privilege granted to the accused. In **Ram Govind Upadhya Vs. Sudarshan Singh**⁶ it was held by the Hon'ble Apex court, that the power of the Court under section 437(5) CrPC to cancel bail can be invoked either by the state itself or by any aggrieved party or even suo motu the same was also held in the case of *Puran vs. Ramvilas*.⁷

⁶ 2002 Cr.L.J 1849 (S.C.)

⁷ AIR 2001 SC 2013.

As per Section 437 (5) of Cr.P.C. any Court which has released a person on bail may, if it considered it necessary so to do, cancel the bail and direct that such person be arrested and committed to custody. In **R.J Sharma Vs. R.P. Patankar**⁸, it was held that Magistrate ought to pursue the application for cancellation of bail and afford an opportunity to accused to be heard.

In **Dolat Ram v. State of Haryana**⁹ The Hon'ble Supreme Court has held that once bail has been granted, it can only be cancelled based on cogent and overwhelming circumstances. Proceedings for the cancellation of bail are not in the nature of an appeal from the grant of bail, and therefore, a court must look for circumstances that warrant cancellation of bail, such as interference or attempt to interfere with the due course of justice, or abuse of concession of bail granted to the accused in any manner. Bail granted to an accused with reference to bailable offence can be cancelled only if the accused (1) misuses his liberty by indulging in similar criminal activity, (2) interferes with the course of investigation, (3) attempts to tamper with evidence of witnesses, (4) threatens witnesses or indulges in similar activities which would hamper smooth investigation, (5) attempts to flee to another country, (6) attempts to make himself scarce by going underground or becoming unavailable to the investigating agency, (7) attempts to place himself beyond the reach of his surety, etc. These grounds are illustrative and not exhaustive. However, a bail granted to a person accused of bailable offence cannot be cancelled on the ground that the complainant was not heard.

⁸ 1993 Cri.L.J. 1993 [Bombay].

⁹ (1955) 1 SCC 349