CHAPTER - 4
RIGHT TO BAIL AND ACCUSED

(I) PRELUDE

There is no definition of bail in the Code although offences are classified as bailable and non-bailable.¹ Bail, though primarily a legal term, has acclaimed usage both by law men and laymen. It however, has not been statutorily defined.² Literally the expression 'bail' denotes a security for appearance of a prisoner for his release.³ The word is derived from French verb 'bailer' means to "give" or "to deliver."⁴ A bail is a security given for the due appearance of a prisoner in order to obtain his release from imprisonment, a temporary release of a prisoner upon security.⁵ But bail means release of a person from legal custody; it presupposes that he is in custody.⁶ In the concept of bail a technique is evolved for effecting a synthesis or the two basic concepts of human value, namely - the right of an accused to enjoy his personal freedom and the public interest on which a person's release is conditioned on the surety to produce the accused person in the court to stand the trial.⁷ Bail is thus a grant of conditional liberty to an accused who assures or on whose behalf assurance is given that he would be present at the trial.⁸ Bail is related with arrest as the bail can be granted only when a person has been arrested by police. A police officer can arrest a person without a warrant in cognizable offences or under a warrant issued by a magistrate.⁹ If the arrest is made without a warrant in a bailable case, the

² Verma, S.K., (Ed) Right to Bail, ILI, publication (2000), New Delhi, p.3.
⁴ See Webster's New International Dictionary.
⁵ Webster's 7th New Judicial Dictionary.
⁶ Varkey Paily Madthikudiyil, AIR 1967 Ker. 189; see also Narayen Prasad, AIR 1963 MP 276.s
⁸ Supra note 2, p.3.
⁹ Term arrest is not defined in the Code of Criminal Procedure 1973. Sec. 46 Cr.P.C. prescribes the procedure for making arrest and Secs. 41(1), 107, 109, and 151, Cr.P.C. empowers a police officer to make arrest without warrant.
accused should be informed of his right to be released on bail after furnishing sureties. The intent of the arrest being only to compel an appearance in court at the writ, that purpose is equally answered whether the sheriff detains his person or takes sufficient security for his appearance called bail (from the French word Baillor, to deliver) because the defendant is bailed or delivered to his sureties upon their giving security for his appearance. The system of bail was prevalent from ancient times in one or other form. During British rule "criminal courts were using two well understood and well defined forms of bail for release of a person held in custody. These were known as Zamanat and muchalka. A release could be effected on a solemn engagement or a declaration in writing. It was known as muchalka which was an obligatory or penal bond generally taken from inferiors by an act of compulsion... Another form of judicial release was a security with sureties known as Zamant in which the Zamin (surety) because answerable for the accused on the basis of a written deed deposited by him with the trying court. 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 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. The offences in penal law are classified into two categories i.e., bailable and non-bailable. In the former class, the grant of bail is a matter of course. It may be given either by the police officer-in-charge of a police station having the accused in his custody or by the court. The release may be ordered on the accused executing a bond and even without sureties. Classification of offences as bailable and non-bailable is not based on any just criterion. The criterion that should underlie the categorisation of

12. Supra note 2, p. 5.
13. Ibid.
non-bailable offences is the individual behaviour and the serious nature of offences itself. A rigid legalistic view is that in the case of a bailable offence, bail for the arrested person is a matter of right. It does not, therefore, leave any option to the court except to release the accused person on bail on his application. The Constitution of India provides right to life and personal liberty to all persons and this cannot be abridged except according to procedure established by law. The 'procedure established by law' has been judicially construed as reasonable, fair and just procedure. If a person is deprived of his liberty under a procedure, which is not reasonable, fair and just, such deprivation would be violative of his fundamental right under Art. 21 of Constitution of India and he would be entitled to enforce such fundamental right and secure his release. The procedure whether criminal or civil, must serve the higher purpose of justice and it is in this context that the right to be released on bail has to be viewed. A release on bail is the consequence of the concept of individual freedom implicit in Constitutional freedom; and so is the interest of society. This can be wiped out of the consideration of the Court exercising its power in the administration of criminal justice. The legislative intention is that investigation in respect of an accused should be completed within 24 hours in view of Section 57 of the Code and if not 15 days from the date when the person arrested was first produced before the magistrate is another view under Section 167. These provisions of the Section attract the arrest under Section 41 and 151 of the Code.

17. Supra note 2, p. 59.
18. Supra note 2, p. 15.
19. Article 21 of the Constitution of India.
20. Ibid.
(II) OBJECT OF BAIL

A person is liable to be arrested by a police officer in case a cognizable offence has been committed by him or when warrant for arrest of a person has been issued by the magistrate. Release of a person on bail is required when person is in custody. The principle underlying release on bail is that an accused person is presumed in law to be innocent till his guilt is proved and as a presumably innocent person, he is entitled to freedom and every opportunity to look after his case provided his attendance is secured by proper security. It is procedural necessity that a police officer making the arrest communicates the grounds of arrest to accused person. Section 50 Cr. P.C. is a new provision. It provides that (i) the person arrested without any warrant should immediately be intimated the full particulars of the offence and the grounds of his arrest; and ii) Where the offence is bailable one, of his right to be released on bail. Where a police officer arrest without warrant any person other than a person accused of a non bailable offence, he shall inform the person arrested that he is entitled to be released on bail and that he may arrange for sureties on his behalf. Release on bail has a number of advantages. It enables the suspect to prepare for his defence, continue to earn his bread, be with his family and be free from psychological and physical deprivation of jail life. From the state point of view, it saves suspect's maintenance during his detention. Therefore, the object of release of accused person on bail is to enable him to enjoy his personal liberty, remain in community and to prepare for his defence.

The broad principle adopted in the Code in regard to bail are - (i) bail as a matter of right, if the offence is bailable; (ii) bail is a matter of discretion if offence is non-bailable; (iii) bail shall not be granted by the magistrate if offence is

26. See Sec. 41(1) Cr.P.C.
27. Sec 74. Cr.P.C.
28. See Supra note 6. The use of word "custody" is genarally under stood in conjunction with the term "arrest" but custody infers protective control over the person. Term may apply equally to persons or commodities; see also Verma S.K., op.cit., p 92,93.
29. AIR 1931 All. 356 at 358 and 359.
punishable with death or imprisonment for life; but if accused is a woman or a minor under the age of 16 years, or sick or infirm person, the Court has a discretion to grant bail. (iv) The Court of Session and the High Court have a wider discretion in granting bail even in respect of offences punishable with death or imprisonment for life. The main purpose of arrest of an accused is to secure his presence on trial and to ensure his being available for punishment on conviction. If the presence of an accused at his trial can be ensured by means other than his arrest or detention, it would be quite possible to allow him the enjoyment of his liberty during his trial.

One of the ways to prevent unnecessary deprivation of the liberty of an accused is 'bail'. The nature of the offence is one of the basic considerations for the grant of bail—more heinous is a crime, the greater is the chance of rejection of the bail, though, however depended on the factual matrix of the matter. While granting bail the court has to keep in mind not only the nature of accusations but the severity of the punishment, if the accusation entails a conviction and the nature of evidence in support of the accusation. The requirement of the law to enlarge a person on bail is an expressive concern towards the right of an accused to enjoy his personal freedom. Hence, to set at liberty a person arrested or imprisoned, or security being taken for his appearance on a day 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 to that he may be safely protected from prison...

(III) BAIL AS A MATTER OF RIGHT

Provisions as regards bail can be broadly classed into two categories: (i) Baillable cases, and (2) non-bailable cases. In the former class, the grant of bail is a matter of course. The statutory fabric of the bail system in India is mainly

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34. The Law Commission of India, 41st Report, para 39.1 (on object of Sec. 436 Cr.P.C.).
35. Supra note 2.
37. Ibid.
prised of some provision of the Code of Criminal Procedure, 1973, particularly extending from Section 436 to 439. When any person accused of a bailable offence is arrested or detained without warrant by officer in-charge of a police station or appears or is brought before a court, is prepared to give bail at any stage of the proceedings shall be released on bail. Section 436 prescribes a doctrine that bail can be had as of right by a person who has been arrested without a warrant. Since arrest without warrant is a serious encroachment upon an individual’s personal liberty, the doctrine comes as a protective check against executive action. In Section 436 clause (1) the use of word ‘shall’ has specific meaning. The Court held as the word ‘shall’ suggests, the grant of bail for a bailable offence as a matter of course the only condition being that the accused “must be prepared to give ‘bail’ i.e., to furnish surety” if undertrial’s answer is positive, the magistrate shall pass order of his bail on the remand papers disclosing the amount and number of sureties. No written application for bail is necessary, intimation showing willingness to furnish bail can be oral and Court is not empowered to refuse bail for want of written application is another view. Bail in a bailable offence is, of course, a matter of right and there is no difficulty for the police or the judicial officer to release the accused person on bail. Bail can however, be granted in both the cases. In non-bailable cases the grant of bail is by way of concession to the accused and the power to grant bail can be exercised by the Court in the interest of justice. In the matter of bailable offences, bail is a right and not a favour and there is no question of discretion in granting it. There is statutory duty imposed on the Court as well as upon the police officer to release a person on bail if he is prepared to give bail. Such a person can also be released on his own bond in a fit case. It is only where the accused is unable to furnish even a moderate security that he should be kept in detention. A strong

41. Verma, S.K., op.cit., p. 12; The real bail law is actually found in judicial decisions.
42. Section 436 (1) Cr.P.C., 1974.
47. Verma S.K., op.cit., p. 461, see also Sec. 437 (1) CrPC, 1973.
judicial perspective sustains that bail in bailable offences is a matter of right and detention in lock up is only the alternative and not the order. 49 Section 50 Cr.P.C. requires a police officer to inform the person arrested that he is entitled to be released on bail and he may arrange sureties on his behalf. 50 The police is not only empowered to arrest a person on reasonable and credible evidence, but also empowered to release an arrested person on bail. 51 The National Police Commission examined the existing law pertaining to bails and observed “The process of releasing an arrested person on bail is another exercise in law attended by several malpractices. Here again the wording of some Sections in Chapter XXXIII of Cr PC particularly the proviso to Section 436 (1) and Section 441 (1), seems to draw a distinction between a release on bail and a release on bail would always require some sureties. This interpretation, of law works to the great disadvantage of the poor and weaker sections of the people who get arrested by police in some connection or the other are therefore, made to languish in jail for months and sometimes even years merely because they are unable to get sureties for their release.” 52 Hence, “......... the bail system causes discrimination against the poor since the poor would not be able to furnish bail on account of their poverty while the wealthier persons otherwise similarly situated would be able to secure their freedom because they can afford to furnish bail. This discrimination arises even if the amount of the bail 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 they would find it difficult to furnish bail even in a small amount. The evil of the bail system is that either the poor accused has to fall back on touts and professional sureties for providing bail or suffer pretrial detention.” 53 In Moti Ram v. State of M.P. 54 the Supreme Court interpreted that bail also covers bond and sureties and held that, “bearing in mind the

49. Raghunandan Prasad v. Emperor, ILR, 32 Cal 180. see also Jolekar v. Emperor, 33 Cr. LJ 75 (All.); Badri v. State, AIR 1953 Cal. 28.
50. See also Article 22 of Constitution of India.
52. The National Police Commission, Third Report, Govt. of India, Jan, 1980, para 29.
53. The report of the legal aid committee appointed by the government of Gujarat in 1970 under the Chairmanship of Justice P.N. Bhagwati, the then Chief Justice of Gujarat High Court.
54. AIR 1978 SC 1594.
need for liberal interpretation in areas of social justice, individual freedom and indigent’s rights, we hold that bail covers both release on one’s own bond with or without sureties, when sureties should be demanded and what sum should be insisted on are dependent on variables. In the case of bailable offences to which Section 436 applies, a police officer has no discretion at all to refuse to release the accused on bail, so long as the accused is prepared to furnish surety. If admission to bail is refused by the police, the arrested person is kept in the police lock up twenty four hours from the time of his arrest. On expiry of this period, he has to be produced before a magistrate. At this stage the police may prefer a charge against the person or may ask for his custody on remand for further investigation. The bail process can be initiated on the production of the accused person before the magistrate. Section (Sec. 436) envisaged an accused person being released on bail when the charge against him is in regard to a bailable offence. The words used are 'such person shall be released on bail' thereby denoting that it is mandatory on the magistrate to admit him in that behalf. He has no discretion to impose any conditions, the only discretion that is left in him being only as to the amount of the bond or whether the bail could be on his bond or with sureties. Any condition subject to which the bail should operate infringes the provisions of Sec. 496 (Sec 436,new). The bail under Section 496(Sec. 436, new), Cr. P.C. should be unconditional one. This view in conformity with the current of authorities of several of the High Courts. Section 436 does not exclude voluntary appearance for the purpose of bail. The Court held with reference to Sec. 436 that "There is nothing in this section either to exclude voluntary appearance or to suggest that the appearance of the accused must be in obedience to a process issued by the Court. No doubt the other expressions used in the section as "is brought before Court" have reference to prior arrest and bringing of such person before Court by the police either in pursuance of a process issued

55. Ibid, p. 1600.
by the Court or otherwise on account of the inability of such person arrested to give bail immediately on being arrested and detained by an officer-in-charge of the police station. The word "appearance" as used in the section it appears, is wide enough to include the voluntary appearance. In Public Prosecutor v. Raghuramaiah, also in bailable offences the magistrate imposed a condition that the accused should appear before the Commissioner of police, Madras, whenever required to do so. In deciding this question Chandra Reddy, J., observed thus:

He has no discretion to impose any conditions, the only discretion that is left in him being only as to the amount of the bond or whether the bail could be on his bond or with sureties.

The accused person is presumed to be innocent, therefore he deserves bail and not the jail. The basic rule may perhaps be tersely put as bail, not jail, except where there are circumstances suggestive of fleeing from justice for thwarting the course of justice or creating other troubles in the shape of repeating offences or intimidating witnesses and the like by petitioner who seeks enlargement on bail from the Court. When a person who has been arrested by police on a criminal charge, moves a bail application in the Court he seeks to protect his freedom under the Constitution. The requirement of the law to enlarge a person on bail is an expressive concern towards the right of an accused to enjoy his 'personal freedom.' A demand on the surety to produce the accused person for purposes of fulfilling his obligation to the Court and to accomplish the objective of the law to determine the liability of 'public interest' implicit in the meaning of bail is also the use of a technique evolved for effecting a symbiosis between these two co-equal values. When bail is refused, it is restriction on personal liberty of individual guaranteed by Art. 21 of the


Constitution and therefore such refusal must be rare.\(^\text{65}\) If a magistrate declines to grant bail to an accused charged with a bailable offence, the proper course for him is to move the appropriate court by an application under the Code and not under Article 226 of the Constitution of India.\(^\text{66}\)

Sub Section (1) of Section 436 corresponds to Sec. 496 of the old Code. Sub-Section (2) has been inserted to carry out the recommendation of the Law Commission to the effect that where a person released on bail has absconded or has failed to appear before a court on the date fixed he should not be entitled to bail, when brought before the Court on any subsequent date and the refusal of bail in such circumstances shall be without prejudice to any action that may be taken for forfeiture of bail bond.\(^\text{67}\) In this connection the bill provided:

A provision is being made that a person who absconds or has broken the condition of his bail bond when he was released on bail in a bailable case on a previous occasion shall not be entitled to bail when brought to Court on any subsequent date even though the offence may be bailable.\(^\text{68}\)

(IV) BAIL AND SURETY AS A MATTER OF JUDICIAL DISCRETION

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 appear or is brought before a Court other than the High Court or Court of Session, he may be released on bail.\(^\text{69}\) But such person shall not be released if there appears reasonable grounds for believing that he has been guilty of an offence punishable with death or imprisonment for life, and/or if such offence cognizable and he has been previously convicted of an offence punishable with death, imprisonment for life or imprisonment for seven years or more or he had been previously convicted on two or more occasions of a non-bailable and cognizable offence.\(^\text{70}\)

The main question to consider, is -are there reasonable grounds for believing that the

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\(^{66}\) AIR 1982 Assam 192.


\(^{68}\) Notes on clauses, p.255.


\(^{70}\) ibid. (1) (i) (ii) : provided that court may direct that a person under the age of 18 years, a woman or Sick or infirm person may be released on bail ; see proviso to Sec. 436 (1).
petitioner is guilty of the offence of which he has been accused; other considerations must also arise in deciding the question of releasing the accused on bail, and one of these, which has always guided courts of justice, both in England and India, is whether there are any grounds for supposing that the accused if released on bail, would abscond and attempt to escape justice by avoiding or delaying an inquiry or trial. But the magistrate may well refuse to enlarge on bail where the prisoner is of such a character that his presence at large will intimidate witnesses, or where there are reasonable grounds for believing that he will use liberty to suborn evidence. 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 understanding that he shall comply with such directions as may be given by the Court. Bail in a bailable offence is, of course, a matter of right and there is no difficulty for the police or the judicial officer to release the accused person on bail. It is only in case of non bailable offence the judicial officer keeping in view the provisions of law, has to use discretion judiciously and not arbitrarily while granting or refusing bail to the accused person. Discretion, when applied to a court of justice, means sound discretion guided by law. It must be governed by rule, not by humor, it must not be arbitrary, vague and fanciful, but legal and regular (attributes to Lord Mansfield). The discretion must be exercised, not in opposition to, but in accordance with, established principles of law. The Supreme Court had the occasion to interpret the term ‘judicial discretion’ in Babu Singh v. State of U.P. The court observed that some jurists have regarded the term “judicial discretion” as a misnomer. Never the less the vesting of discretion is the unspoken but inescapable silent command of our judicial system, and those who exercise it will remember that ‘discretion’ when applied to a court of justice,

72. Hanifabai (1930) 32 Bom, L.R. 1499.
73. See Proviso to Section 436 (1); This is new provision inserted in Code of Criminal Procedure, 1973 which did not exist in old Code.
74. Supra note 46., p. 13.
75. Tingely v. Delby, 14 N.W. 146.
77. AIR1978 SC 527.
means sound discretion guided by law. It must be governed by rule, not by humor, it must not be arbitrary vague and fanciful, but legal and regular. 78 It is also asserted that discretion which refuses bail has no place in the system. 79 Hence, "... the discretion is to be used for implementing the law and policy underlying the process of bail and the bail system is concerned mainly with those persons who are accused of an offence. Since the mechanism of bail has been continued to meet the problems of an apprehended accused, the system excluded the convicts who have been sentenced by a court. A convict who has been sentenced to life imprisonment is under a disability to secure release on bail. 80

The Law Commission while making its recommendations viewed the law on bail and specified broad principles on the subject of bail as (i) bail as a matter of right if the offence is bailable, (ii) bail as a matter of discretion if the offence is non-bailable (iii) bail is not to be granted if the offence is punishable with death or imprisonment for life but the court has the discretion in limited cases to order release of a person. The Law Commission has also stated that even in respect of offence punishable with death or imprisonment for life, the Sessions Court and the High Court ought to have even a wider discretion in the matter of granting bail. 81 The Supreme Court through Justice V.R.Krishna Iyer reminded the courts to apply balanced approach to preserve personal liberty but it is not to be compromised with anti-social activities. The court observed that 'the active role of the courts through the use of discretion in bail process thus becomes significant. The courts need to be reminded in each case of their role and responsibilities so as to enable them to strike a balance between the contending interests. No diagnostic approach is warranted by the law or the policy...judicial discretion is to channelise itself between the diverse interests of security and liberty without giving undue emphasis to either, while the recent Supreme Court pronouncements have asserted fully in favour of

78. Ibid., p. 529.
79. In re D.M. Vizagapatnam, AIR 1949 Mad 77; Banarsi Das v. Emperor, 38 Cr.LJ. 633; In re Daulat Singh ILR 14 All. 45; Rex v. Genda Singh, AIR 1950All. 525; In re Saradamma, (1956) 2 Andh W.R. 299.
80. Lala Jairam Das and others v. Emperor, AIR 1945, PC 94, 97.
personal liberty, the judicial trend in criminal proceedings contains to endorse the fact that the preservation of personal liberty does not necessarily mean that anti-social elements be facilitated to destroy the every fabric of the social order. In Babu Singh v. State of U.P. the matter of bail was considered from the constitutional perspective of personal liberty. Justice Krishna Iyer conceded that the freedom can be abridged on the basis of evidence about the criminal record of a defendant whose release on a thoughtless bail order may enable the bailee to exploit the opportunity thus provided to him to inflict further crimes on the members of the society. If it appears to the court of any stage of investigation, inquiry or trial that there are not reasonable grounds for believing that accused has committed non-bailable offence but there are sufficient grounds for further inquiry the court has the discretion to release such person on bail pending inquiry and subject to the provisions of Sec. 446 A of Cr.P.C. In addition court has discretionary powers to release the person on certain conditions after recording reasons or special reasons in writing. The expansive power in the matter of bail be exercised with judicial discretion on considerations contained in the material before it to see that neither the prosecution nor the defence would be hampered in procuring or preparing its case. The following principles are to be weighed while granting bail to the accused person:

(a) The bail should not be refused as a matter of punishment.
(b) The accused should be presumed to be innocent till his guilt is proved beyond reasonable doubt.
(c) Nature of accusation and extent of punishment are relevant factors.
(d) Bail is the rule and rejection is exception.
(e) Likelihood of jumping the bail and tampering with evidence are relevant factors.

83. AIR 1978 SC 527.
84. Ibid., p. 528.
85. See sub Section (2) of Sec. 437 Cr.P.C.
86. See sub Section, (3) and 4 of Sec. 437 Cr.P.C.
(f) Plea of alibi and all other plausible defences has been held as worth consideration in matters of grant of bail.  

In some cases a release on bail can, be granted with certain restrictions imposed on the freedom of the accused. Section 436 and 437 of the Code provide that conditions can be imposed while granting release to an accused. The conditions are to be incorporated in the bail bond which the arrested person executes for the purpose of his release. These conditions are in the nature of restrictions to be complied with by an accused in order to facilitate the course of justice. The conditions may require the accused to make himself available for investigation of the case, or be of such nature as may ensure his presence for purpose of trial. In re Kota Appala Konda where accused were charged by the police under Sections 147, 148, 447, 324, and 323 IPC, all of which are bailable offences, on their application the magistrate ordered conditional release that they should not enter on the disputed land till disposal of the case. The validity of the condition imposed came up before Madras High Court and Court held that imposition of that condition was illegal on the ground that if the conditions was not fulfilled the court would have to refuse bail, which is not permitted under Section 436 Cr.P.C. Adverting to the scope of Section 437 (Sec. 497 old) Cr.P.C., Justice Horwill observed thus:

with regard to non-bailable offence, I can see no objection to imposing conditions for this kind; for the magistrate has an option to grant bail or to refuse bail and he has also the power under Sections 497(5) (Sec. 437 (5), new) of the Criminal Procedure Code of causing persons so released to be arrested and committed to custody, which sub-section he would apply in case the condition was not fulfilled.

In Jangbahadur v. State, the court said that it has the power to impose conditions on the grant of bail, and has duty to see that the concession is not misused by the accused on being enlarged on bail, if the condition imposed seeks to promote the objective and purpose of bail and directs an accused that he should not

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91. (1942) 2 MLJ, 553: AIR 2. 1942 Mad. 740.
92. Ibid.
93. 52 Cr. LJ. 108. (V.P.) (1951).
misuse his freedom for thwarting the course of justice by his non-appearance or the intimidation of witnesses or tempering with the evidence or the like, such exercise of power on the part of the court is within its jurisdiction. What has been put as prohibition in the discretionary exercise of power to grant bail is the imposing of extraneous conditions that do not have any relevance to the purpose and objective of bail.

Thus, a restriction on the freedom by way of bail is untenable if it requires an accused to appear before the police commissioner, or requires a person not to make speeches during the period of his release or not to enter any disputed land. It would be hardship to an accused if the magistrate, while releasing the accused on bail, requires execution of a bond with or without surety, as the case may be, binding the accused not only to appear as and when required before him but also to appear when called upon in the court of session. It is, therefore, laid down that once the court decides to release a person on bail, it has to see that unnecessary constraints are not put on the way of availing the freedom granted, consequently the courts are to use their power to grant bail in such terms as are not excessively harsh. They are also dispossessed of exercising discretion in a manner which results in imposing unnecessary hardship in further enjoyment of the freedom granted to the accused or his rights and interests as protected under the law and the Constitution. With a view to mitigating the rigours an abundant caution is required in the exercise of discretion so that bail process does not turn into a penal process. In the recent match fixing case the accused were granted bail with the condition of their not leaving the country without prior permission and their passport to continue to remain with the

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95. Umesh Saigal v. RK Dalmia AIR 1969 Del, 214; Emperor v. Chintaram, 38, Cr.LJ, 100 (Nag.) (1937); Rex v. Genda Singh, 51 Cr LJ, 1377(All.) (1950); Joglekar v. Emperor 33 Cr LJ. 94 (All.) (1932).
96. In re Kota Appalakonda, 44 Cr. LJ. 202 (Mad.) (1943).
98. Supra note 73.
investigating officer. While granting bail, it would be legitimate to impose conditions for securing the right of the investigating agency to proceed with the investigation fairly and properly as also for securing a fair trial by the witnesses who may be examined at the trial. While imposing any condition, the court has to strike a balance between personal liberty of the accused and investigational right of the police. The discretionary power of the court to admit to bail is not arbitrary, but is judicial, and is governed by established principles. The object of the detention of the accused being to secure his appearance to abide the sentence of law, the principal inquiry is, whether a recognizance would affect that end. In seeking an answer to this inquiry, courts have considered the seriousness of the charge, the nature of the evidence, the severity of the punishment prescribed for the offence, and, in some instances, the character, means and standing of the accused. Overriding consideration and principles in adjudication of granting bail which are common in case of Section 437(1) and 439(1) appears sometimes are (1) the nature and gravity of the circumstances in which the offence is committed. (2) the position and status of the accused with respect to the victim and the witnesses (3) the likelihood of the accused fleeing from justice, of repeating the offence, of jeopardising his own life being faced with grim prospect of possible in the case, of tempering with witnesses (4) history of case as well its investigation and other relevant grounds which, in so many variable factors, can not be exclusively set out (5) the court has not to investigate facts and comment on merits.

(i) REFUSAL OF BAIL

The detention of an accused during trial should not be regarded as penal; its object is to secure his attendance. It is the rule to allow bail, rather than to refuse
bail and bail ought not to be held as punishment. There is no hard and fast rule in the matter of granting or refusing bail with reference to offences under which the crime is registered. The exercise of power with regard to bail is a judicial act and not a ministerial one. It has been laid down in State v. Jagjit Singh that a person cannot be admitted to bail in relation to any offence concerning "defence, arsenal, naval, military or air force establishment or station, mine, minefield, factory, dockyard, camp, ship or aircraft or otherwise in relation to the naval, military or air force affairs of Government or in relation to any secret official code." If the power to release on bail, as of necessity, includes the power to deny bail, then by necessary implication it confers on the Magistrate a power to remand him to judicial custody. The position is made abundantly clear by sub Section (5) of S. 437 which reads that "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". The court before directing the arrest of the accused and committing them to custody should consider it necessary to do so under Section 437(5). This may be done by the court coming to the conclusion that after the challan had been filed there are sufficient grounds that the accused had committed a non-bailable offence and that it is necessary that he should be arrested and committed to custody. It may also order arrest and committal to custody on other grounds, such as tempering of the evidence or that his being at large is not in the interests of justice. The power to cancel a bail vests in the court that granted it. There are five cases where a person granted bail may have the bail cancelled and be recommitted to jail. (i) Where the person on bail, during the period of bail, commits the very same offence for which he is being tried or has been convicted, and

108. Ibid, at 256.
110. Clause (5) Section 437 Cr.P.C.
112. Sadashiv, (1896) 22 Bom. 549.
thereby proves his utter unfitness to be on bail, (ii) If he hampers the investigation as will be the case if he, when on bail, forcibly prevents the search of places under his control for the corpus delicti or other incriminating things; (iii) if he tempers the evidence, as by intimidating the prosecution witnesses, interfering with the scene of offence in order to remove traces or proofs of crime, etc; (iv) If he runs away to a foreign country, or goes underground, or beyond the control of his sureties; and (v) if he commits acts of violence, in revenge, against the police and the prosecution witnesses and those who have booked him or are trying to book him.\textsuperscript{113} Indeed the grant of bail is a rule and its refusal is an exception; but while granting bail, the court has to be satisfied that in a given case its grant is necessary in the interest of justice. The basic question, which must be present in the mind of the court while considering the question of bail, is whether the grant of bail would thwart the course of justice or would it further the course of justice. While considering the question of grant or refusal of bail, the courts generally take into consideration: (a) the nature of the charge; (b) The nature of accusation; (c) The nature of evidence in support of the accusation; (d) The severity of the punishment to which the accused may be subjected; (e) The danger of the accused abusing the concession of bail by way of absconding or tempering with the evidence; (f) health, age and sex of the accused, (g) The social position or status of the accused and complainant party, and last but not the least, (h) Whether the grant of bail would thwart the course of justice.\textsuperscript{114} In State v. Jagjit Singh,\textsuperscript{115} it was observed by their lordships of the Supreme Court that among other considerations, which a court has to take into account in deciding whether bail should be granted in a non-bailable offence, is the nature of the offence and if the offence is of a kind in which bail should not be granted, considering it seriousness, the court should refuse bail even though it has very wide powers.\textsuperscript{116} The fact that an offence is

\textsuperscript{113} Public Prosecutor v. William, (1952) Mad 414.
\textsuperscript{114} Mazhar Ali v. State, 1982 Cr.LJ. 1223 at pp. 1225, 1226 (J&K).
\textsuperscript{115} AIR 1962 SC 253; (1962) 1 Cr.LJ. 215.
\textsuperscript{116} State (Delhi administration) v. Vipin Kumar Jaggi, (1975) 1 Cr.LJ. 846 at pp. 848-49, 850 (Delhi).
a serious one does not afford a sufficient ground to refuse bail.\textsuperscript{117} In Ram Chand v. Emperor,\textsuperscript{118} Kripa Shankar v. Emperor,\textsuperscript{119} Champa Lal v. State\textsuperscript{120} and State v. Shanti Lal,\textsuperscript{121} it was held that the High Court can exercise its powers under Sec.498 (Sec439, new), Cr. PC uncontrolled by the restrictions mentioned in Sec. 497 (Sec. 437,new), Cr.P.C. The fact that an offence is a serious one does not afford a sufficient ground to refuse bail.\textsuperscript{122} In Bhagwan Singh Judeja v. State of Gujarat,\textsuperscript{123} the Supreme Court observed that seriousness of the offence is not a material consideration for the grant or refusal of bail but it is the probability of the accused being available to face the trial.

The grant of bail to a person accused of a non-bailable offence is discretionary under Section 437 (Sec 497,old) of the code and the person released on bail may again be arrested and committed to custody by an order of the High Court, the court of session and the court granting the bail. A person accused of a bailable offence is treated differently; at any time while under detention without a warrant and at any stage of the proceedings before the court before which he is brought, he has the right under Sec. 436(Sec.496,old)of the Code to be released on bail.\textsuperscript{124} In bailable case the "magistrate has the power to grant bail in a bailable offence but he has no power to cancel the bail granted by him."\textsuperscript{125} In bailable offences bail is the right of the accused person. Can the magistrate cancel the bail of the person in bailable cases? This question came in the High Court of Patna in the matter of Janaradhan Yadav v. State of Bihar\textsuperscript{126} where the petitioners were facing trial for an offence under Section 325 of I.P.C. and were on bail. As they were found threatening the prosecution witnesses, the magistrate after due enquiry cancelled their bail. When the matter came

\textsuperscript{118} 30. Cr.LJ. 1129 : AIR 1929 Lah. 284.
\textsuperscript{119} 48 Cr.LJ. 941 : AIR 1848 All 26.
\textsuperscript{120} AIR 1952 MB 189 (FB).
\textsuperscript{121} AIR 1955 Raj. 141.
\textsuperscript{122} Supra note 116.
\textsuperscript{123} AIR 1984 Cr.LJ. (SC).
\textsuperscript{125} Raj. Jai Janak, op.cit., p..32.
\textsuperscript{126} 1978 Cr LJ. 1318.
to High Court, Patna, the court having gone through the provisions of Code and facts & circumstances of the case observed that magistrate had no power to cancel the bail bond of the petitioners who had been granted bail under bailable offence.\textsuperscript{127} Once a court of competence passes an order of grant of bail under Section 437(1) of the Code of Criminal Procedure, the said order can't be reviewed, revised or set aside by the same court.\textsuperscript{128} Where bail was refused to an accused of bride burning offences under Section 498-A and 302 I.P.C. but later granted by the sessions court on the ground that he spent 26 months in jail, the release order was cancelled by the Delhi High Court saying that there was no new ground on which he could be granted bail.\textsuperscript{129} Bench hunting is a valid ground for the cancellation of bail.\textsuperscript{130} The Supreme Court cancelled the bail where it found that the judge had acted illegally in appreciating the statements of witnesses and materials collected by the investigating officer at the investigating stage.\textsuperscript{131} In the criminal justice system, the administration of bail is patterned to take sufficient care of community interests against possible depredations by individual wrong doers. The use of judicial discretion remains to see that the co-equal interest of liberty and security are carried together. However where the law and circumstances favour an accused he ought to be granted bail.\textsuperscript{132} Generalisation on matters which rest on discretion and the attempt to discover formula of universal application when facts are bound to differ from case to case frustrate the very purpose of conferring discretion.\textsuperscript{133} The Supreme Court held that there can be no inexorable formula in the matter of granting bail. The facts and

\textsuperscript{127} Ibid; see also Sec 439 (2) of Cr.P.C., 1973, under which the power to cancel bail in respect of any offence, bailable non-bailable has been conferred to the Court of Session and the High Court.

\textsuperscript{128} Raj, Jai Janak, op.cit., p. 17; Sec 437(5) of Cr.P.C.; see also Sanjay Gandhi v. Delhi Admn. 1978 Cr. LJ 952; Prashant Kumar v. Manohar Lal, 1988 Cr.LJ. 1463.

\textsuperscript{129} H.C. Gaur v. Rakesh Vij 1990, Cr LJ., 1586 (Del).


\textsuperscript{131} State of Maharashtra v. Ananta Chintaman Dighe, 1990 Cr.LJ. 788 (SC); see also Baikuntanath Dalai v. Bula alias Digambav Jena, 1991 Cr.LJ. 203 (Ori).

\textsuperscript{132} Verma S.K., op.cit., p. 136.

\textsuperscript{133} Gurbaksh Singh v. State of Punjab, 1980 Cr.LJ. 1125.
circumstances of each case will govern the exercise of judicial discretion in granting or cancelling bail.\(^{134}\) However, in every case the cancellation of bail must be based on strong ground.\(^{135}\) Bail should not be cancelled in a mechanical manner, but if obtained by misleading the court, it may be cancelled.\(^{136}\) The basic rule may perhaps be tersely put as bail, not jail except where there are circumstances suggestive of fleeing from justice or thwarting the course of justice or creating other troubles in the shape of repeating offence or intimidating witnesses and the like by the petitioner who seeks enlargement on bail from the court.\(^ {137}\) In the absence of guidelines for grant of bail, some times the accused remain in jail for more than maximum term of the offence and remands are also given in a mechanical manner. In Hussainara Khatoon's case\(^ {138}\) the Supreme Court laid down a criteria and observed:

But even under the law as it stands today the courts must abandon the antiquated concept under which pretrial release is ordered only against bail with sureties. This concept is outdated and experience has shown that it has done more harm than good. The new insight into the subject of pretrial release which has been developed in socially advanced countries and particularly the United States now inform the decisions of our courts in regard to pretrial release. If the court is satisfied, after taking into account, on the basis of information placed before it, that the accused has his roots in the community which would deter him from fleeing, the court should take into account the following factors concerning the accused:

1. Length of his residence in the community,
2. His employment status, history and his financial status,
3. His family ties and relationships,
4. His reputation, character and monetary condition,
5. His prior criminal record including any record of prior release on recognizance or on bail,

\(^{134}\) See Gursharan Singh v. State 1978 Cr LJ 129.

\(^{135}\) Ashok Kumar v. State, 142, Cr.LJ. 3821.

\(^{136}\) Ramesh Ketela v. State of Madhya Pradesh, 1999 Cr. LJ. 4243.


(6) The identity of responsible members of the community who would vouch for his reliability.

(7) The nature of the offence charged and the apparent probability of conviction and the likely sentence in so far as these factors are relevant to the risk of non-appearance, and

(8) Any other factor indicating the ties of the accused to the community or bearing on the risk of willful failure to appear.\(^{139}\)

Later, in another decision\(^{140}\) the court spelt out the considerations which may be kept in view while granting or refusing bail to accused person in non-bailable offences before commencement of trial. These were "(i) The nature and seriousness of offence; (ii) the character of evidence; (iii) circumstances which peculiar to the accused; (iv) reasonable possibility of the presence of the accused not being secured at the trial; (v) reasonable apprehension of witness being tempered with; (vi) the larger interest of the public or the State; (vii) and other consideration which the judge may weigh from case to case."\(^{141}\) In a recent landmark judgement,\(^{142}\) the Supreme Court of India has laid down detailed guidelines for grant of bail to the accused person in the light of Section 437 of Cr PC., which have given a new dimension to the law of bail. The guidelines are:

1 (a) Where the offences under IPC or any other law for the time being in force for which the accused are charged before any criminal court are punishable with imprisonment not exceeding three years with or without fine and if trials for such offences are pending for one year or more and the concerned accused have not been released on bail but are in jail for a period of six months or more, the concerned Criminal Court shall release the accused on bail or on personal bond to be executed by the accused and subject to such conditions, if any, as may be found necessary, in the light of Section 437 of the Criminal Procedure Code.

\(^{139}\) Ibid., p. 1363.
\(^{140}\) State v. Jaspal Singh, 1984 Cr. LJ. 1211.
\(^{141}\) Ibid.
\(^{142}\) Common Cause’ a Registered Society through its Director, v. Union of India, AIR 1986SC 1619.
1 (b) Where the offences under IPC or any other law for the time being in force for which the accused are charged before any criminal court are punishable with imprisonment not exceeding five years, with or without fine, and if the trials for such offences are pending for two years or more and the concerned accused have not been released on bail but are in jail for a period of six months or more the concerned criminal court shall release the accused on bail or on personal bond to be executed by the accused and subject to the imposing of suitable conditions, if any, in the light of Section 437 Cr.P.C.

1 (c) Where the offences under IPC or any other law for the time being in force for which the accused are charged before any criminal court are punishable with seven years or less, with or without fine, and if the trials for such offences are pending for two years or more and the concerned accused have not been released on bail but are in jail for a period of one year or more the concerned criminal court shall release the accused on bail or on personal bond to be executed by the accused and subject to the imposing of suitable conditions, if any, in the light of Section 437 Cr.P.C.

2 (a) Where criminal proceedings are pending regarding traffic offences in any criminal court for more than two years on account of non serving summons to the accused or for any other reason whatsoever, the court may discharge the accused and close the cases.

2 (b) Where the cases pending in criminal courts for more than two years under IPC or any other law for the time being in force are compoundable with permission of the court and if in such cases trial have still not commenced, the criminal court shall, after hearing the public prosecutor and other parties represented before it or their advocates, discharge or acquit the accused, as the case may be, and close such cases.

2 (c) Where the cases pending in criminal courts under IPC or any other law for the time being in force pertains to offences which are non-cognizable and bailable and if such pendency is for more than two years and if in such cases trials have still not commenced, the criminal court shall discharge or acquit the accused, as the case may be, and close such cases.

2 (d) Where the cases pending in criminal courts under IPC or any other law for the time being in force are pending in connection with offences which are punishable with fine only and are not of recurring nature, and if such pendency is for more than one year and if in such cases trial have still not commenced, the criminal court shall discharge or acquit the accused, as the case may be, and close such cases.

2 (e) Where the cases pending in criminal courts under IPC or any other law for the time being in force are punishable with imprisonment up to one year, with or without fine, and if such pendency is for more than one year and if in such cases trials have still not
commenced, the criminal courts shall discharge or acquit the accused, as the case may be, and close such cases.

2 (f) Where the cases pending in criminal courts under IPC or any other law for the time being in force are punishable with imprisonment up to three years, with or without fine, and if such pendency is for more than two years and if in such cases trials have still not commenced, the criminal court shall discharge or acquit the accused, as the case may be, and close such cases.

3 For the purpose of directions contained in clauses (1) and (2) above, the period of pendency of criminal cases shall be calculated from the date the accused are summoned to appear in the court.

4 Directions (1) and (2) made herein above shall not apply to cases of offence involving (a) corruption, misappropriation of public funds, cheating, whether under the Indian Penal Code, Prevention of Corruption Act or any other statute (b) smuggling, foreign exchange violation and offences under the Narcotics Drugs and Psychotropic Substances Act. (c) Essential Commodities Act, Food Adulteration Act, Acts dealing with Environment or any other economic offences, (d) offences under Arms Act, Explosive Substances Act, Terrorists and Disruptive Activities Act, (e) offences relating to the Army, Navy and Air Force (f) offences against public tranquility, (g) Offences relating to public servants, (h) offences relating to coins and Govt stamps, (i) offences relating to elections, (j) offence relating to giving false evidence and offences against public justice, (k) Any other type of offences against the State, (l) offences under the taxing enactments and (m) offences of defamation as defined in Section 499, IPC.

5 The criminal Courts shall try the offences mentioned in para (4) above on a priority basis. The High Courts are requested to issue necessary directions in this behalf to all the criminal courts under their control and supervision.

6 The Criminal Courts and all courts trying criminal cases shall take appropriate action in accordance with the above directions, these directions are applicable not only to the cases pending on this day but also to cases which may by instituted hereafter. As and when a particular case gets covered by one or the other directions mentioned in Directions (1) and (2) read with direction (4) above, appropriate orders shall be passed by the concerned court without any delay.  

Recently, the Law Commission of India have submitted its report recommending that in the offence punishable with imprisonment upto seven years, with or without fine, the normal rule should be bail and denial thereof an exception.  

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(ii) BAIL PENDING INVESTIGATION

A person arrested by police without warrant cannot be detained in police custody for a longer duration than 24 hours. Before the expiration of such period the arrested person has to be produced before the nearest magistrate who can, under S. 167 order his detention for such a term not exceeding fifteen days on the whole. The period for which a magistrate can authorize the detention, of the accused in police custody is fifteen days in the whole, including one or more remands. The novel provision introduced by this section is that if it is not possible to complete the investigation within a period of 60 days (or 90 days in case of offences punishable with death or imprisonment for not less than 10 years) than even in serious cases of ghastly types of crimes, the accused shall be entitled to be released on bail on the expiry of that period from the date of arrest. Magistrate can authorise police remand for a period not exceeding fifteen days. But the police custody is not renewable once the 15 days period has elapsed, because the proviso which relates to further custody beyond 15 days says that such custody must be judicial custody. Police custody is allowed at the stage of investigation only for the facility of investigation and collection of evidence. But once the inquiry or trial has begun, Section 309 (2) would come into play and the custody ordered by the court may only be judicial or jail custody. The accused cannot again be remanded to police custody even for purposes of investigation. Where the report under Section 173(2) as is complete and has been submitted within the period of 60 or 90 days, no question of release on bail on grounds of expiry of the period specified in provision (a) to Sec. 167 (2) can arise. An accused, under this proviso acquires statutory right to be

145. Sec. 57 CrPC.
146. Engadu, (1887) 11 Mad. 98.
147. Krishnaji P. Joglekar, (1897) 23 Bom. 32; Engadu, (1887) 11 Mad. 98.
149. Sec. 167 (2) Cr.P.C.
released on bail on default of prosecution in filing charge sheet within the prescribed period of 90 days and right to proviso (a) of Section 167(2) is absolute, as it is a legislative command" and not "Courts discretion." 155 When police fails to complete investigation and submit police report within 60 or 90 days as the case may be, accused person shall be released on bail. 156 On the expiry of total period of (60 or 90 days) as aforesaid, the accused would be entitled to bail. 157 If however, the accused refuses or is unable to furnish bail the detention will continue under a fresh remand orders for custody by the magistrate. 158 If the police presents a challan makes a report under Section 173 Cr.P.C. and it does not disclose any commission of offence in the eyes of law, the accused has a remedy to approach the High Court for quashing of the said proceedings under Section 482 Cr.P.C. without facing trial court. 159 The National Police Commission has pointed out that the use of police power is considerably abused. The present police practice is to make indiscriminate arrests in the course of investigation. This becomes a source of annoyance and harassment to arrested persons and their families. 160 The court also observed that pretrial release should be obtained on "personal bond without monetary obligation." 161 The power of a police office in-charge of a police station to grant bail and the bail granted by him comes to an end with the conclusion of the investigation except in cases where the sufficient evidence is only that of a bailable offence, in which eventuality he can take security for appearance of the accused before the magistrate on a day fixed or from day to day until otherwise directed. No parity can be claimed with an order passed by Magistrate in view of enabling provision contained in clause (b) of Section 209 ...under which the committal magistrate has been empowered to grant bail until conclusion of trial, which power was otherwise restricted to grant of bail by him

157. Supra note 52 p. 1467.
161. Hussainara Khatoon's case, 1979 Cr.LJ. 1036.
during pendency of committal proceedings under clause (a) of Section 209. The undertrial person stays in jail because of their poverty. While speaking at the signing ceremony of the Bail Reform Act, 1966 the U.S. President, Lyndon B. Johnson observed "Today we join to recognise major development in our system of criminal justice, the reform of the bail system. This system has endured archaic, unjust and virtually unexamined since the Judiciary Act of 1789. The principal purpose of bail is to insure that an accused person will return for trial if he is released after arrest. How is that purpose met under the present system? The defendant with means can afford to buy his freedom. But the poorer defendant can't pay the price. He languishes in jail weeks, months and perhaps even years before trial. He does not stay in jail because he is guilty. He does not stay in jail because he is anymore likely to flee before trial. He stays in jail for one reason only because he is poor..."

There is no reason why "undertrial prisoners should be allowed to continue to languish in jail merely because the state is not in a position to try them within a reasonable period of time." Persons accused of offences should be speedily tried, so that in cases where bail, in proper exercise of discretion is refused, the accused persons have not to remain in jail longer than is absolutely necessary. The courts are thus facing the question of grant of bail on the basis as is whether the release granted to persons fully ensures his recall for trial on the appointed day or not. In arriving at any such decision, the courts have to resort to the use of professional legal assistance and to secure necessary information about the accused for purpose of using that as a determinative factor. In addition, the court has to ascertain for itself firstly that if the release can be granted, it is to be availed of without putting the person to any monetary obligation and secondly, that the court has to chart out a schedule for speedy trial of the accused person, penal law even for a moment longer than what is required under the law. In case of non-bailable offences, the question

165. Ibid., at 1048.
of bail arises at three different stages: (a) when a person is sent for remand during the stage of police investigation, (b) when a person is remanded under Section 309 of the Code of Criminal Procedure, before or after a charge sheet is filed; and (c) during the trial stage.\(^{167}\)

The Supreme Court is A.R. Antulay's case observed:

(a) The period of remand and pre-conviction detention should be as short as possible;

(b) The worry, anxiety, expense and disturbance to his vocation and peace resulting from an unduly prolonged investigation, inquiry or trial should be minimised; and

(c) Undue delay may well result in impairment of the ability of the accused to defend himself, whether on account of death, disappearance or non-availability of witnesses or otherwise.\(^{168}\)

(iii) BAIL, BOND, SURETY, SECURITY AND ACCUSED

The Code of Criminal Procedure, 1973 contains several provisions\(^{169}\) dealing with release of accused person from custody.\(^{170}\) Pretrial release is generally through bail.\(^{171}\) The Code has used various expressions like 'bail' 'bond' 'security' 'surety' etc. which indicates the forms and modes of release of a person from custody and to ensure his appearance in due time before a court.\(^{172}\) The Code prescribes various forms of release on bail and practically these forms are: (i) security, (ii) security with bail, (iii) security with bail and bond, (iv) security with bond, (v) security with bond with or without surety, (vi) security with bond and surety (vii) security with bond without surety, (viii) bail, (ix) bail with sureties, (x) bail without sureties, (xi) bail with bond, (xii)

\(^{167}\) Ibid. p. 53.


\(^{169}\) Ibid., p. 149.


\(^{171}\) Secs. .57; 167, 436 Cr.P.C.

\(^{172}\) Verma, S.K., op.cit., p. 149.
bail with bond and surety, (xiii) bail with bond and (xvi) bond with or without surety.\(^{173}\) The terms bail, bond, surety and security have been used in the Code for effecting release of person from custody but none of them have been defined in the Code.\(^{174}\) The experience has shown that courts grant bail and courts lean towards traditional practice of asking for a personal bond with one or more sureties. A number of cases came to Supreme Court where court have criticised the orders of the magistrates for asking for excessive sureties.\(^{175}\) In Moti Ram v. State of MP,\(^{176}\) the Supreme Court criticised the orders of the magistrate who asked for a surety of Rs. 10,000/ from a detained poor labourer. The order contained some other unreasonable conditions also. This provoked Justice V.R. Krishna Iyer to remark that "the poor are priced out of their liberty in the justice market." There are always chances of in-justice under the existing bail system because of the multiple use of expressions which are ambiguous and confusing in their application.

Section 436-438 of the Code, which deal with bail and bonds, do not specify the meaning of either term, but the expression "release on bail" has been repeatedly used.\(^{177}\) The reading of these Sections provide-(a) release on bail,\(^{178}\) (b) release on execution of a bond by the person himself without furnishing surety.\(^{179}\) (c) release on bail with certain conditions and or directions by the court.\(^{180}\) It is interesting to note that the law does not empower a magistrate to demand cash security in lieu of surety. It is per se illegal.\(^{181}\) The provisions which deal with pretrial release can be grouped under the heads: (a) Bail (b) Bond, (c) Surety (d) Security and (e) arrested modes which have been grouped under the head 'miscellaneous'. It appears that

173. Ibid., p. 149.
174. Definitions of various terms are given in Section 2 of Cr.P.C. but these terms do not find place in it. Sec. 2(a) defines "bailable offence" and non-bailable offence" as the offences which are shown as such in the first schedule or any other law for the time being in force.
176. AIR 1978 SC 1594.
178. Section 436(1) Cr.P.C.
181. R.R. Chari v. Emperor, AIR 1948 All, 238; Rajballam Singh v. Emperor, 45 Cr. LJ. 340 (1945).
none of the above term has been used by the drafters of the Code with sufficient thought and skill. The absence of these expressions in the definition clause as well as the lack of effort in explaining these forms of bail anywhere has been the cause of much ambiguity and confusion.\textsuperscript{182} The Code of Criminal Procedure has classified the offences in two categories, i.e., "bailable offence" and "non-bailable offence\textsuperscript{183} which has made the law of bail work in an unintelligible way.\textsuperscript{184} Other terms discussed above have practically made release of person more complicated and difficult and lot of discretion is left to the court and police.

The "provisions which deal with pretrial release can be grouped under the heads: (a) bail, (b) bond, (c) surety, (d) security and (e) assorted modes.\textsuperscript{185} While the offences under Indian Penal Code and other penal laws have been broadly classified in two categories, i.e., bailable and non-bailable but under procedural law, in addition to expression "bail" other expressions like "bail" "surety" "security" and "recognizance" also find place in various Sections\textsuperscript{186} Different expressions have been used in different Sections of Cr. P.C. The expression "release on bail" and "on his own bond" have been used in Section 389. Sec. 390 makes mention of term "release him on bail." In addition Sec. 397 also provides for release on "on his own bond." The term "released on bail" and "bail bond" have been used in Section 436 to 439 Cr. P.C. Section 443 and 444 provides for "release on bail."

It is clear that 'bail' is recognized by law as a form of release of an arrested person. But it is unclear as to what would be the modality for its implementation. Vaguely it can be suggested that the bail prescribed under the Code connotes release on execution of a bond by an accused without surety.\textsuperscript{187} In re Kota Appalakonda it has been held that a person accused of a bailable offence shall be granted bail

\textsuperscript{182} Verma, S.K., op.cit.p. 150.
\textsuperscript{183} See Sec. 2(a) and Schedule I and II Cr.P.C., 1973.
\textsuperscript{184} Verma, S.K., op.cit., p. 150.
\textsuperscript{185} Ibid., pp. 150.
\textsuperscript{187} Verma, S.K., op.cit.p. 151.
with no conditions except those sanctioned by law.\textsuperscript{188} 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.\textsuperscript{189} A police officer may be directed by the court through endorsement on warrant that if person to be arrested executes a bond with sufficient sureties for his attendance before the courts, he shall be released.\textsuperscript{190} The endorsement as aforesaid shall state:

(a) The number of sureties.

(b) The amount in which they and the person for whose arrest the warrant is issued, are to be respectively bound.

(c) The time at which he is to attend before the court.\textsuperscript{191}

The use of words "bond" and "sureties" in this Section denotes that the sponsors of release have taken undertaking to pay an assured sum in the event of default, therefore, the undertaking is the "bond" and the sponsor is a "surety" which is quite identical with bail because in bail person is a surety for attendance of person in court or else in default he has to pay the sum of bail. Sections 106,108,109,117,360,445, and 187C r. PC. makes mention of term "bond" with or without sureties". Section 110 provides for bond with sureties, Section 121Cr.P.C. speaks of" bond and surety". Sections 107,111 and 118 Cr.P.C. only provides the expression "Bond". The execution of bond is meant for an appearance of the accused before the court. In practice a bond is taken to be meaningful only when such bond is reinforced with an undertaking from the surety. Bond is a form of bail which has come to stay as a written instrument executed by an accused with a promise of good conduct alongwith a stipulation to pay a sum of money in default of the condition set out for his release. Bond is generally from the accused person but a surety may also be asked to furnish similar undertaking. A bond can be treated as penalty in the

\textsuperscript{188} In \textit{re Kota Appalakonda}, 44 Cr.LJ. 202 (1943).


\textsuperscript{190} Sec. 71 (1) of Cr.P.C. 1973.

\textsuperscript{191} Sub Sec. (2). Sec. 71 Cr.P.C., 1973.
event of forfeiture. 192 The expression “recognizance” has been used in various Sections of CrPC. 193 Recognizance as a mode of release is an accepted form in some common law jurisdictions. It is essentially a release on personal undertaking given by an accused to the satisfaction of the magistrate. 194 Section 445 "permits payment of cash or government promissory notes in substitution of passing a bond, except where the bond is one for good behaviour is salutary, and is meant to help an accused who is a stranger to the place. The concession under this section is available to the accused person only and does not extend to sureties. 195

(iv) QUANTUM OF BAIL

Bail bonds for attendance of the accused can be demanded by the court and the amount of the bond has also to be determined by it. 196 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. 197 The procedural law confers drastic powers and discretion on magistrate and judicial officers and quantum of bail, bond and sureties are left to their discretion. 198 There is a complete absence of any standard to determine the amount of bail. The amount refused to be furnished in a case is mostly determined arbitrarily. 199 The bail amount ought not to be excessive and the demand for verification of surety not unreasonable. 200 The amount can be changed with change in circumstances. 201 The quantum of bail amount can be deemed

192. Verma, S.K., op.cit., pp. 155, 156; also see Sec. 446 Cr.P.C.
193. See Secs. 360, 445, and 450 Cr.PC.
198. See supra note 2.
excessive from the general standards since most of the accused persons are from poor economic background... 202. The object of demanding bail is to secure the appearance of the accused at the trial. But if it is fixed at a sum which is beyond the means of the person arrested, and is at the same time disproportionate to the nature of the offence with which he is charged, the provision for bail becomes an empty formality for the person only because of his poverty. 203. In fixing the amount of security the magistrate should consider the station in life of the person concerned and should not go beyond a sum for which there is a fair probability of his being able to find security. The imprisonment is provided as a protection to society against the perpetration of the crime by the individual, and not as a punishment for a crime committed, and, being made conditional on default of finding security, it is only reasonable and just that the individual should be afforded a fair chance at least of complying with the required condition of security. 204. In the country of equal social justice, with individual liberty and indigents rights, bail covers both release on one's own bond with or without sureties. The demand of sureties and the sum to be insisted on are dependent variables. 205. In bail of release an accused's own bond with or without sureties is included, so order rejecting surety because he or his estate was situated in a different district is discriminatory and illegal. 206. Practice of demanding large sum of money from man of ordinary means and also demanding surety from same district was deprecated and it was held that accused should have been released on personal bond. 207. The system has given emergence to professional and bogus sureties who have made it means of income by abusing the process. Now-a-days '...professional bondsmen readily volunteer to furnish sureties for an accused and receive payment...'

for such “services.” The availability of such professional sureties on payment of a
certain percentage of the bail amount brings in corruption and abuse of process of
bail in myriad ways,208 a bond of bogus sureties, with questionable antecedents and
spurious identities have come to stay as an integral part of the system of release on
bail.209 While the system of pecuniary bail has a tradition behind it, the time has
come for rethinking on the subject. It may well be that in most cases not monetary
surety ship but undertaking by relation of the petitioner or organisation to which he
belongs may be better and more socially relevant.210 As pointed out in Hussainara
Khatoon’s case,211 by the Supreme Court that “it would be more consonant with the
ethos of our Constitution that instead of risk of financial loss the system should take
into consideration other relevant factors such as family ties, roots in the community,
job security, membership of stable organisations etc.212 The interpretation of Article
21 of the Constitution by the apex court and liberalising and humanising the interpre­
tation of the said Article court have emphasised the release of accused on personal
bond, Justice P.N. Bhagwati observed “Thus the entire law of bail was” humanised
by a judicial interpretation of Article 21 and the Supreme Court of India held that a
new insight should inform the judicial approach in the matter of pretrial release. If
the court is satisfied after taking into account the information placed before it, that the
accused has roots in the community and is not likely to abscond, it need not insist on
a monetary bond and may safely release the accused on a personal bond. The
human rights norms set out in the international instruments was thus translated into
national practice.213 Therefore, “alongwith the other factors the large interest of the
public or the state is a very relevant consideration.” 214

209. Ibid.
211. Hussainara Khatoon’s case, 1979 Cr. LJ. 1036.
212. Ibid.
213. Justice P.N. Bhagwati, Fundamental Rights in Their Economic, Social and Cultural
(V) ANTICIPATORY BAIL

The expression "anticipatory bail" is not used in the Code of Criminal Procedure, however Section 438(1) provides that "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; and that court may, if it thinks fit, direct that in the event of such arrest, he shall be released on bail." There was no provision corresponding to Section 438 of the 1973 Code (in the old Cr.P.C., 1898) providing for bail in anticipation of arrest. Anticipatory bail was, however, granted in certain cases under the High courts' inherent powers though the preponderant view negatived the existence of any such jurisdiction (emphasis added). The law commission while justifying the requirement of anticipatory bail viewed that "the necessity for granting anticipatory bail arises mainly because sometimes influential persons try to implicate their rivals in false cases 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 steady increase. Apart from false cases, where there are reasonable grounds for holding that a person accused of an offence is not likely to abscond, or otherwise insure his liberty while on bail, there seems no justification to requires him first to submit to custody, remain in prison for some days and then apply for bail." The heading of Section 438 reads "Direction for grant of bail to person apprehending arrest." The word bail presupposes arrest or detention of an accused for which bail is sought for. Bail is granted after arrest whereas in anticipatory bail is a bail in anticipation of arrest and is therefore no effective arrest. For entitlement of anticipatory bail there must exist reasonable apprehension or belief of arrest and not mere suspicion, gossip or wild rumour. The apprehension must be capable of being examined objectively, given this situation the jurisdiction

can be invoked even in the absence of registration of the crime.\footnote{K. Rajasekhara Reddy v. State of AP, 1999 Cr.LJ. 1933.} The facility of anticipatory bail has won a fair legitimacy in the criminal justice system and protection of personal liberty, but it is not taken gladly by all. According to the contrary opinions the inclusion of a provision for anticipatory bail in Chapter XXXIII of Code is bound to create confusion in the concept of bail as well as in the application of principles of bail.\footnote{Ibid.} There are “Two basic principles which must be kept in view while considering the question of grant of anticipatory bail are: (i) that there should be no likelihood of the accused absconding, and (ii) that there should be no likelihood of the accused misusing his liberty. The previous history of the petitioner can be taken into account for ascertaining whether he is likely to repeat similar offences. Likelihood of tempering of prosecution evidence is also to be considered. Status of the accused and the vulnerability of prosecution witnesses are the two factors which go into decision of the question.\footnote{Jagannath v. State of Maharastra, 1981 Cr.LJ. 1808 at pp 1811, 1812 (Bom); State of Assam v. Mabarak Ali, 1982 Cr.LJ. 1816 at p. 1818 (Gau.); Mahanathagonda v. State of Karnataka, 1978 Cr, LJ. 1045 at pp 1046, 1047, (Knt).} Ordinarily, there should be a presumption in favour of every citizen that he is not likely to abscond or otherwise misuse his liberty while on bail. But such presumptions are generally belied and one cannot be granted bail on that account.\footnote{Nar Singh Lal Dage v. State 1977 Cr.LJ. 1776 (Patna) at 1777.}

The Patna High Court observed that the provision of anticipatory bail is to be used in cases where “the court is convinced that the person is of such a status that he would not abscond or otherwise misuse his liberty.”\footnote{Ibid.} Section 438, Cr. P.C. can be invoked only when a person is accused of a non-bailable offence.\footnote{G.Muthu Swami v. State of Kerala, (1980) 2 Cr. LJ. 1021 at p. 1022 (Ker).} The last part of Sec. 438 of the Code is also material, it contains the words in the event of such arrest, the person concerned shall be released on bail. It is therefore, clear that whether it is a case of ordinary bail or anticipatory bail, it must be preceded by an arrest or an attempt to arrest. The only difference is that in a case where a warrant had already been issued, the person concerned has to surrender to a court of competent...
jurisdiction and apply to the same for his bail, but in a case of anticipatory bail the person concerned who is already armed with an order of anticipatory bail, would, in the event of his arrest on accusation of having committed a non-bailable offence shall be released on bail on the basis of the above mentioned order. The person on anticipatory bail is for all practical purposes deemed to be in the custody of the court. The provision for anticipatory bail in Sec. 438 of the Code applies even when there is no first information report and no case for commission of a non-bailable offence has been registered against a person. For grant of anticipatory bail the accused must himself be the petitioner. The Gauhati High Court rejected the application for anticipatory bail on the ground that it was filed by the brother of the accused. In Bal Chand v. state of MP the Supreme Court observed that "the legislature in enshrining the salutary provision in Section 438 of the Code, which applies only to non-bailable offences was to see that the liberty of the subject is not put in jeopardy on frivolous grounds of the instance of unscrupulous or irresponsible person or officers..." Where evidence is available pointing out the accused's participation in crime, grant of bail is improper. In Ambalal Puran Chand Rashmwala v. State, anticipatory bail was refused as non-bailable warrants had already been issued by the concerned courts. Bail must be granted on the ground of parity. Of course, the grant of bail is discretion. But it is a judicial discretion.

224. In re Purna Chandra Chatterjee, 1975, Cr.LJ. 1815 at pp. 1816-17 (Cal.).
227. Pandrab Das v. State of Tripura 1999, Cr.. LJ. 1285 (Gauhati.).
228. 1977 Cr. L.J. 225 (SC).
229. Ibid., p.234 (Per Fazal Ali J.).
230. See C. Abdul Hameed v. State of Karnataka, 1999 Cr. LJ. 3654; Jitendra Singh v. State of Rajasthan, 1999 Cr.LJ. 158 (Raj.).
231. 1992 Cr.LJ. 2373.
Direction not to arrest during the pendency of application, under Section 438 cannot be given. The discretionary power under Section 438 of the Code is, thus, not an exercise of independent jurisdiction, but is dependent on seriousness of the accusation. For grant of anticipatory bail the court has to be guided by a large number of considerations, including those contained in Section 437, which deals with the bail in non-bailable cases. Both the court and the sessions court have concurrent jurisdiction to grant anticipatory bail under Section 438. An impression that the accused should first apply to the sessions court has been disapproved by the Andhra Pradesh High Court. In Devidas Raghu Naik v. State, the appellant's prayer for anticipatory bail was rejected by the sessions court. He, therefore, approached the High Court with the same prayer on the same grounds. The court granted him anticipatory bail clarifying, that there is no bar whatever for a party to approach either the High Court or the Sessions Court as concurrent jurisdiction is given to the High Court and the Sessions Court and the fact that the Sessions Court has refused a bail does not operate as a bar for the High Court entertaining a similar application. It is true that the High Court and the Court of Session have got concurrent jurisdiction to entertain an application for grant of bail both under Secs. 438 and 439 Cr.P.C. But, for that reason, the matter cannot be left completely to the option of the accused person. For the decision of this question no distinction can be made between an application under Sec. 438 and one under Sec. 439 Cr.P.C., and if it is accepted that Sec. 438, Cr.P.C., an accused person has a right to have his prayer for bail considered in the first instance by the High Court, the same argument can very well

237. 1989 Cr.LJ. 252 (Bombay).
238. Ibid.
be pressed into service with respect to application under Sec. 439. It cannot be said with any stretch of imagination that Sec 438, of the Code does not empower the High Court and the Court of Session to grant bail as it would amount to interference with the discretion given to the committing magistrate under Cl.(b) of Sec. 209 of the Code. Therefore, an application for anticipatory bail can lie for directing the committing magistrate not to commit the accused person under custody while committing the case to the Court of Session. In a recent judgment in Smt. Gatubai v State of Rajasthan, it was held that the grant of bail in anticipation of arrest in non-bailable cases does not mean that regular court which is to try the offender is to be by passed. The anticipatory bail should be of limited duration. The court granting anticipatory bail should be of limited duration only and on the expiry of that duration the court granting anticipatory bail should leave it to the regular court to deal with the matter on an appreciation of evidence after investigation or submission of the charge sheet. A question came before the High Court as to whether High Court could grant anticipatory bail after the trial court has taken cognizance of offence and issued processes. The High Court after examining precedents held “the filing of a charge sheet by the police and issuing of a warrant by the magistrate did not end the power to grant bail under Section 438 (1).” It should be realised that an order of anticipatory bail could even be obtained in cases of a serious nature as for example murder and, therefore, it is essential that the duration of that order should be limited and


241. 1999, Cr.LJ. 1741; see also Salahuddin Abdul Samad Shaikh v. State of Maharashtra, 1996 (7) SCALE (SP) 20.

242. Ibid.

ordinarily the court granting anticipatory bail should not substitute itself of 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. A court has inherent jurisdiction to cancel bail previously granted to an accused even by a court which is superior to the one seeking to cancel it, except in cases where express directions to the contrary have been given.

The High Court and the session court have been given wide powers -discretionary -left free in the use of their judicial discretion to grant bail on the facts and circumstances of the case. The court must apply its own mind and decide the question without leaving it to be decided by the magistrate under Section 437 as and when occasion arises. The Calcutta High Court summed up the matters of consideration on the question of cancellation of anticipatory bail granted under Section 438 or bail granted under Section 439 (1) by session judge, by High Court under Section 439 (2) CrPC in the matter of A. K. Murmu v Prasenjit Chowdhary, as follows:

(1) An order granting anticipatory bail under Section 438 or the bail under Section 439 (1) is amenable to appellate / revisional scrutiny and may be cancelled if it was made in arbitrary or improper (and not judicial) exercise of the discretionary power or was made without application of mind or without consideration of all relevant circumstances or was based upon irrelevant considerations or was vitiated by any basic error of law or was otherwise perverse.

(2) An order granting bail may be cancelled in case new or supervening circumstances arise after the release on bail such as abuse or the liberty by hampering the investigation or tempering with witnesses or

244. 2, 1996 SCC, (Cri.) 198.
247. Ibid.
248. 1999 Cr.L.J. 3460.
by committing same or similar offence but existence of any supervening circumstances following the grant of anticipatory bail or bail is not the only criterion for cancellation of such a bail.

(3) Although the discretionary power to cancel bail is extraordinary and is to be exercised sparingly, nevertheless, it is meant to be exercised in appropriate cases, however few those cases might be.

(4) Order granting anticipatory bail or bail must not tantamount to interference with efficient exercise of statutory functions when dealing with economic offences such on those under the F.E.R.A.

(5) Advantage of custodial interrogation should be taken into account in granting anticipatory bail or bail.249

The prosecution can establish its case for cancellation by showing on a preponderance of probabilities that the accused has abused his liberty and or has attempted to temper or has tempered with its witnesses. That the accused has abused his liberty or that there is a reasonable apprehension that he will interfere with the course of justice is all that is necessary for the prosecution to prove by the test of balance of probabilities in order to succeed in an application for cancellation of bail. It should be remembered that the power to take back in custody an accused who has been enlarged on bail has to be exercised with care and circumspection in appropriate case.250 The court have laid down the considerations from time to time and these considerations are: (1) that a person already admitted to bail commits the very same offence for which he is being tried and proves himself to be unfit to remain on bail, (2) that subsequently new materials pointing to the guilt to the accused person are discovered, (3) that the person on bail hampers the investigation in any manner, (4) that the person tempers with the evidence by the intimidating the witnesses, (5) that the accused person on bail is likely to abscond or go underground or is trying to escape from the country to fly from justice, and (6) that the person commits any act of violence against the investigating agency or prosecution witnesses.251

249. Ibid.
(i) BAIL PENDING APPEAL AFTER CONVICTION

Pending any appeal by a convicted person, the appellate court may, for reasons to be recorded by it in writing, order that the execution of the sentence or order appealed against be suspended and also, if he is in confinement that he be released on bail, or on his own bond.\(^{252}\) The power conferred by Section 389 may be exercised by the High Court also in case appeal is filed by convicted person by the court subordinate there to.\(^{253}\) This Section provides that when an order of suspension is made, the appellant may be released on bail or on his own bond, if he is in confinement. It is not provided that for suspension of the sentence of fine a security be taken. When fine can be recovered, it will be meaningless to pass an order for suspension of sentence of fine during the pendency of appeal, if the person in whose favour such an order is made cannot be asked to furnish security for suspension of the sentence of fine has inherent power to have that order carried into effect, or to secure the ends of justice. The ends of justice required that if realization of fine from a person from whom it could be immediately recovered be stayed, pending appeal by him, a security be taken to see that fine was paid on dismissal of appeal and confirmation of the order of fine.\(^{254}\) Where the convicted person satisfies the court by which he is convicted that he intends is present an appeal, the court shall-

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

(ii) Where the offence of which such person has been convicted is a bailable one, and he is on bail,

order that the convicted person be released on bail, unless there are special reasons for refusing bail for such period as well afford sufficient time to present the appeal and obtain the order of the appellate court under sub Section (i); and the sentence of imprisonment shall so long as he is so released on bail, be deemed to be

\(^{252}\) Section 389 (1); Cr.P.C.; The expression 'convicted person' includes a person against whom an order has been passed under Section 107 Cr.P.C. passed as held in Katwaru Rai, (1932) 54 All. 861.

\(^{253}\) Section 389 (2) Cr.P.C.

suspended under Section 389 (3) an accused who is convicted of bailable offence by magistrate the convicting magistrate can order release of such person on bail when he intends to present an appeal against the order of such conviction provided (a) such convicted person is on bail at the time when he is convicted (b) such accused or convict is sentenced for term not exceeding three years (c) the offence for which such person has been convicted is a bailable one. The power under Section 389 (3) is restricted to trial court and it enables trial court to suspend sentence and grant bail to convicted person for such limited period as will afford sufficient time to present an appeal and obtain order from appellate court under Section 389 (1) for which he has to satisfy to trial court. Sub Section (3) of Section 389 "in contra-distinction to sub-Sec (1) makes it obligatory upon the court to grant bail to the person convicted pending presentation of an appeal, if he satisfies the conditions laid down in Cls. (i) and (ii) of the said sub-Section if such conditions are fulfilled the court has no option but to grant bail." There is a distinction between bail and the suspension of sentence and that consequently the order of the Governor under Art.161 of the Constitution suspending the sentence passed by the High Court cannot be said to be an order for bail. Sub Section (1), (2) and 3 (i) do not make any distinction between bailable and non-bailable offences. They are dealt with on the same footing, sub section (3) (i) applies when imprisonment up to three years is ordered (whether for a bailable or non-bailable offence). It is pertinent to note that Section 389 of the Code of Criminal Procedure speaks about the convicted person whereas Section 439 speaks about the accused person. The language of the Section does not justify the inference that bail can be taken only for that period during which the appeal is pending. All that the Section lays down is that the court is authorised to

255. Sub Section (3) of Section 389, Cr.P.C.
257. Lal Ratan and Lal Dhiraj, Cr.P.C op cit., p 381.
260. Raj, Jai Janak, op.cit. p.36.
release a convicted person, if in confinement, on bail during the pendency of the appeal. The order of releasing the accused on bail can be passed while the appeal is pending. but the section does not restrict operation of bail only for the period the appeal is pending. There is no provision requiring the appellant to give advance notice before the appeal is admitted. As a matter of practice it is very seldom that in an application for bail pending the hearing of an appeal by a convicted person that notice is given to the public prosecutor and he is heard. The full bench decision in State of Punjab v. Bachitor Singh, Lal Singh, was a case regarding the grant of bail to the accused persons who were acquitted after trial upon a capital charge (against whom state appeals directed against their acquittal stood admitted in the court) yet the rationale of that judgement on the point of delay, etc, since equally attracted in a case of the present kind, so in the instant case following the full bench discussion it was held that the administration of criminal justice is a matter of substance and not merely one of academics. It would afford scant satisfaction to petitioner, if after serving the sentence of seven years their appeal succeeds and they are merely acquitted of the charge. And the court was of the view that for the aforesaid reasons the petitioners are entitled to the concession of bail during the pendency of their appeal. Practice in Supreme Court as also of the High Courts has been not to release on bail a person who has been sentenced to life imprisonment for an offence under Sec 302 of the Indian Penal Code. The question is whether this practice should be departed from and if so in what circumstances. It is obvious that no practice howsoever sanctified by usage and hallowed by time can be allowed to prevail if it operates to cause injustice. The rationale of this practice can have no application where the court is not in a position to dispose of the appeal for five or six years. An inordinate delay in the disposal of appeals without any

263. Ibid.
264. 1972 Cr.LJ. 341 (P&H).
justification in the interest of justice is the violation of the Constitutional injunction of Article 21, and the appellate court has no justification to refuse a bail to a life prisoner even at the special leave appeal stage. The Supreme Court of India delivered a landmark judgement in *Kashmira Singh v. State of Punjab*. Bhagwati J., speaking for the court observed:

> Every practice of the court must find its ultimate justification in the interest of justice. The practice not to release on bail a person who has been to life imprisonment was evolved in the High courts and in this court on the basis that once a person has been found guilty and sentenced to life imprisonment, he should not be let loose, so long as his conviction and sentence are not set aside, but the underlying postulate of this practice was that the appeal of such person would be disposed of within a measurable distance of time, so that if he is ultimately found to be innocent he would not have to remain in jail for an unduly long period. The rationale of this practice can have no application where the court is not in a position to dispose of the appeal for five or six days. It would be indeed a travesty of justice to keep a person in jail for a period of five, or six years for an offence which is ultimately found not to have been committed by him. Can the court ever compensate him for his incarceration which is found to be unjustified? Would it be just at all for the court to tell a person: 'we have a prima facie case, but unfortunately we have no time to hear your appeal, you must remain in jail, even though you may be innocent.'

> Bhagwati J. further observed:

> Would a judge not be overwhelmed with a feeling of contrition while acquitting such a person after hearing the appeal? Would it not be an affront to his sense of justice? of what avail would the acquittal be to such a person who has already served out his term of imprisonment or at any rate a major part of it? It is therefore absolutely essential that the practice which this court has been following in the past must be reconsidered and so long as this court is not in a position to hear the appeal of an accused within a reasonable period of time, the court should ordinarily, unless there are cogent grounds for acting otherwise release the accused on bail in case where special leave has been granted to the accused to appeal against his conviction and sentence.

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267. *Kashmira Singh v. State of Punjab*, 1977 Cr. LJ. 1746 at p.1747; AIR 1977 SC 2147; This is landmark judgement in which there was departure from the past practice that a life prisoner should not be bailed out so long as his conviction & sentence are not set aside.  
Bail granted under Section 389 cannot be cancelled under Section 439 (2) in as much as the persons whose sentence is suspended and are granted bail continue to remain as convicts rather than mere accused. Section 389 speaks of "convicted persons" whereas Section 439 speaks of accused person. The appellate court feels that the guilt is required to be re-judged if the appellant has served out the sentence or a substantial part of it, in the event of his ultimate acquittal, the sufferings, may become irreversible. Despite this fact the order of release may be recalled any time. Where the accused makes an attempt to intimidate the prosecution witnesses, the bail can be cancelled by a subordinate court under Section 437 (5) only in respect of non-bailable offences. In other cases, it can be cancelled only by the High Court or the sessions court under Section 439 (2). An order on a bail application does not finally determine the guilt or innocence of a person accused or convicted of an offence. All that such an order postulates is that pending an enquiry or trial, and in the case of convicted person, pending or trial, and in the case of a convicted person, pending an appeal by him, it is not absolutely necessary that his liberty should be curtailed. It seems that there is no prohibition against the entertaining of a second application for bail pending an appeal, when an earlier application has been rejected. High Court has inherent power under Sec 482 (Sec 561- old ) Cr. PC. and to order that the appellant to be rearrested and committed to jail custody. Provisions similar to those in Section 437 (5) will attach themselves analogously to cases of bail under this section, also in order to prevent abuse of process of court and to secure the ends of justice. Suspension of execution of the sentence though within the powers of the appellate court to be ordered only in exceptional circumstances where special cause exists and not invariably whenever the appellant is released on

272. See Madhab Chandra Jena v. State of Orissa, 1988 Cr.LJ. 608 (Ori.); Kashmiri Devi v. Delhi Administration, 1988 Cr.LJ. 649 (Del.); State v. Sugathan, 1988 Cr.LJ 1036 (Ker.).
274. In re Balasundra Pavalar, AIR 1951 Mad. 7 at p.9.
Section 389 (1) contemplates suspension of sentence by the appellate court only pending appeal. It follows that before the court orders suspension there must be appeal which is properly filed. The court should dispose of the application for condoning delay before invoking powers under Sec. 389 (1) to sentence the sentence. The two powers conferred on the appellate court are suspension of the sentence or order appealed against and also release of the appellant on bail, if he is in confinement. Under this provision the appellate court has no power to suspend the order of conviction. There is a distinction between bail and suspension of sentence. Suspension of execution of the sentence though within the powers of the appellate court is to be ordered only in exceptional circumstances where special cause exists and not invariably whenever the appellant is released on bail. Bail referred under Chapter XXXIII includes bail to accused persons during pretrial and pending trial period so also post convict pending appeal period. There is no reference in the Code for granting bail to persons who have been tried and convicted. The only Section of provision in the Code so far it relates to the grant to bail to a "CONVICTED PERSONS" is found in Section 389 under Chapter XXIX of the Code. Section 389 deals with power to grant bail to a persons who has been convicted of bailable offence or is sentenced to imprisonment for a term not exceeding three years when such person satisfies the court that he intends appeal against the order of conviction. Hence pendency of an appeal is sine qua non for a convict to invoke Section 389. The present sub-Section [Sec. 389 (3)] confers power on every sentencing court to enlarge a person on bail in respect of the specified offences whenever he satisfies the court that he intends to present an appeal. Such satisfaction is based on the facts of each case. If no appeal is provided under the statute and the court to which an appeal is sought to be brought has no power to grant special leave to appeal, or

280. Ibid., at pp. 404, 405.
281. Ibid ; see also Verma, R.S.,op.cit. p.83.
the time to life an appeal or seek special leave has expired, the sentencing court would refuse to exercise the power for want of proper satisfaction. On the other hand, where the person sentenced satisfies the sentencing court that he intends to present an appeal by recourse to Article 136...for grant of special leave, the sentencing court, in the absence of any special reasons to refuse bail, must necessarily exercise its power under sub-Section (3) although there is no statutory right of appeal. However in later judgments in the matter of *K.M. Salim*, the another bench of Kerala High Court had the view contrary to *Abdullah Haji’s* case and observed that Section 389 cannot apply to any case where the person concerned only intends to file an application for special leave under article 136. This opinion was reiterated by the court in *Mamooty v. Food inspector* and the conflict was resolved. The full bench while upholding *Salim* observed:

> In short the legislature has used the words “intends to present an appeal” and code distinctly and differently, to cover different situations and therefore, there is no scope to vary the meaning of the words “intends to present an appeal” in S. 389 (3) so as to include the words “intends to present a petition” under Art. 136 for special leave to life appeal before the Supreme Court.

In *Bhaskam v. State of Kerala*, the petitioner was acquitted by the Sessions Court. On appeal the high court convicted him under Section 302 read with Section 149 and sentenced to life imprisonment. The petitioner then filed application under Section 389 (3) of the Code and Article 134 (1) (a) read with Supreme Court (Enlargement of criminal Appellate Jurisdiction) Act, 1970 for suspending the

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284. Supra note 78.
285. ibid.
286. 1988 Cr. LJ. 139 (Ker.).
287. Supra note 79.
288. Supra note 82.
289. 1987 Cr. LJ. 1508 (Kerala).
sentence. The court ruled that Section 389 (3) would not be applicable to the case and said that the High Court had already become \textit{functus officio}.^{290}

**(VI) SUM UP**

In this Chapter the matter of bail have been discussed thread bare. Bail has been studied as a matter of right in bailable cases and as a matter of discretion in non-bailable cases.^{291} Where as bail is a matter of course in bailable offences and police and court are duty bound to release the accused person if he is ready to produce the bail.^{292} It is only in case of non-bailable offence the judicial officer, keeping in view the provisions of law, has to use his discretion judiciously and not arbitrarily while granting or refusing bail to the accused person.^{293} The Supreme Court made the observations that refusal of bail should not be used as an indirect process of punishing an accused person before he is convicted.^{294} The judiciary through its interpretative mode have given new direction to the law of bail and viewed it from the angle of individual freedom implicit in constitutional freedom while balancing it with interest of society and justice being the ultimate objective of the criminal justice system.^{295} The studies have established that "... refusal of bail has negative effects. Both on the persons accused of crime, as well as, on the administration of criminal justice. It can well be inferred that refusal of bail has a battering effect on an accused person, so much so that a large percentage among the ones who are denied bail, get induced to bargain for a guilty plea without fully comprehending into consequences. In cases where bail has been granted, the incidence of pleading guilty is lower. It can thus (be) assumed that the accused has been able to secure proper legal aid and

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290. See \textit{Ibid.} at 1591; same view was held in \textit{K.M. Salim, supra note 79}; see also, Verma, S.K., op.cit., p. 130.

291. See Sec. 436 and 437 Cr.P.C.

292. See Sec. 436 (1) CrPc; see also \textit{Dharmu v. Rabindranath}, (1978) Cr.LJ. 864 (Ori.) Raj, Jai Janak, op.cit.p.13; Police is duty bound to inform the accused of his right to be released on bail under Sec. 50 (2) Cr. P.C. if he is arrested without a warrant in any bailable case.


295. See Verma, S.K., op.cit.pp. 60, 48; see also \textit{Talib Haji Hussain v. Madhukar Purshottam Mondkar, AIR 1958 SC 376}. 
advice because he was granted freedom on bail. If there be a 'guilty' plea in such cases it may only be a voluntary one, and must have been opted for by the accused in his own interest." The personal liberty and release of person on bail is not to be compromised with antisocial activities. And where court deem it proper can impose conditions to ensure that accused while on bail may not misuse the liberty.

The unreasonable delay in trial of cases and languishing of undertrial prisoners in court have been taken seriously by Supreme Court and guidelines for release of undertrial have been issued in the matter of 'Common Cause' a Registered Society through its Director, petitioner v. Union of India, the right of the accused for a speedy trial has to be arranged as a matter of right accompanied by necessary legal services. Both these rights are now guaranteed under the law of bails. In Hussainara Khatoon's case, the Supreme Court had the occasion to observe that undertrial prisoners should not be allowed to languish in jail merely because the state is unable to try him. "Hussainara" case led to the release of nearly 2,000 undertrials languishing in the jails of Bihar because the police had not completed investigations within the stipulated time. A study of recent judicial dicta reveals that consideration of delay in proceedings has influenced the courts in granting bails in the cases like Virsa Singh v. State through C.B.I, Mohamad Yousuf Ali v. Asstt. Collector of Customs and Jai Singh v. State of Rajasthan. Now it is settled proposition of law that 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 an

299. AIR 1996 SC 1619. at pp 1620-22.
303. 1992, Cr. LJ. 164.
304. 1992, Cr.LJ. 3285.
305. 1992, Cr. LJ. 2873; see also 'Common Cause' a Registered Society Through Its Director, v. Union of India, AIR 1996 SC 1619.
undertrial prisoner, especially when there is no fault on his part. It was held in Talab Haji Hussain's case that the classification of offences into bailable and non-bailable does not have any material bearing in dealing with the effect of the subsequent conduct of an accused person on the continuance of a fair trial. Fair trial is the main objective of the criminal procedure, any threat to the continuance of a trial must be immediately removed and the smooth progress must be ensured. A study reveals that "an accused who is refused bail may, in terms of probability, be a convict in contrast to the one who could secure bail for himself. There is evidently a strong pointer to indicate an association between bail and the sentence." Different terms have been used in the Code of Criminal Procedure for release of person on bail e. g. bail with bond, bail without bond, personal bond, bond and security and bail with surety etc., and decision about amount of bond, number of sureties have been left to the discretion of court or police officer. The "reliance on judicial discretion has thus been the keynote of recommendations of the Law Commission, all such difficult situations are to be regulated and governed by judicial discretion on case to case basis."

In fact, the "policy consideration for grant of bail or its refusal yet remains to be spelt out clearly and cogently both by legislative and by the courts. In sum, a lack of thought and direction in the composition of a useful bail mechanism have been the basic reason for an erratic functioning of the entire administration of criminal justice. In order to streamline the same, an imperative need is perhaps to work for a systematic law of bail." The concept of anticipatory bail turned into reality in the Code of Criminal Procedure of 1973. Section 438 Cr. PC was enacted with an objective to avert arrest of person as the influential persons try to implicate their rivals in false

308. Ibid; also see Verma, S.K., op. cit. p. 47.
309. Ibid.
310. Talib Haji's case supra.
312. Ibid, p. 60.
cases for disgracing and harassing them by misusing criminal justice system. The distinction between an ordinary bail and anticipatory bail is that the former being after the arrest means release from custody of police, the latter being in anticipation of arrest is effective at the very moment of arrest. Since the concept of anticipatory bail is intended consequence would be to push the co-equal value of security and stability to the sidelines. The provision is thus legal anomaly in relation to the established legal concept of bail. It is a provision more readily available to the affluent but it is definitely prejudicial to the interests of the administration of the bail process in the administration of criminal justice system. There is a stream of thought according to which anticipatory bail is considered as a necessity otherwise number of innocent persons might suffer in jails as their arrest is either made on suspicion or false charge. The court may deny bail or cancel the bail in appropriate cases or impose conditions considering facts and circumstances of the case. Section 389 Cr PC. provides for bail when convicted person intends to prefer appeal. This power has been conferred on trial court to grant bail to enable convicted person to approach higher court. Thus, the law of bail is liberalised to a great extent and the court through its judicial activism have given new direction to it. Now bail is the rule not jail. Jail is exception, where it is not considered in the interest of the society to enlarge the person on bail. The Apex Court and other High Courts have emphasised the need to evolve a mechanism by which State should devolve participation of community in administration of justice in securing presence of prisoner or undertrial. Let us hope that the legislature and courts would feel a necessity of streamlining the law of bail.

317. See Vaskaran v. State of Kerala, 1987 Cr.LJ. 1588; see also Verma, R.S., op.cit, pp 83, 84.