CHAPTER – VI

LAW RELATING TO BAIL IN INDIA: A CRITICAL ANALYSIS

6.1 INTRODUCTION

Bail is very important part of criminal justice system as its meaning is concerned that is procurement of release from prison of a person awaiting trial. As bail is about the release of the person so the relevancy of the individual liberty as guaranteed by Article 21 of the Constitution comes in question while deciding bail application.\(^1\) Moreover bail serve two interest one is individual liberty and other is interest of the society. A man on bail has a better chance to prepare or present his case than remand in custody. And if public justice is to be promoted mechanically detention should be demoted. The considerable public expense in keeping in custody where no danger of disappearance. In cases of bail in non-bailable cases the judicial discretion to be exercise on just and human grounds and on some codified provisions.\(^2\)

Personal liberties and freedom are guaranteed by the Constitution. Right to bail is a right with a vital importance. Prior to independence and formation of the Constitution, the right to bail was provided under the provisions of code of criminal procedure, 1973. When bail is rejected the personal liberty of an accused is deprived, the judiciary must exercise the powers to grant the bail. The significance and the sweep of Article 21 makes the deprivation of liberty, a matter of grave concern and permissible only when the law authorise.\(^3\) 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

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\(^1\) The Constitution of India, 1950.
\(^3\) http://etheses.saurashtrauniversity.edu/id/eprint/749; Researcher:- Shukla Rajendra Ranjan Kumar, at page 178.
can afford and furnish bail. This discrimination arises even if the amount of the bail set by the Magistrate is not so 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 small amount.’

Bail now become a big industry, due to monetary bond as security for requires attendance of the accused at the time of trial. The Courts in India are judge-centric and state-centric. Bail is rejected as a rule and granted as exception, the maxim Bail is a rule and jail is exception is a myth, in practice the reverse is followed. The worse situation is when a person arrested on mere suspicion who if a respectable member of the society compel to live in the prison due to refusal of bail. On the other hand as due to poverty some prisoners not grant bail due to their inability to deposit the security as also in case of Hussainara Khatoon v. State of Bihar, in these type of cases it should be grant on natural ground as due exercise of judicial discretion of grant of bail.

The poor cannot afford bail monetary security set by courts. The majority earn negligible livelihoods as wage labourers or joint family tillers of tiny farms, the result of the land alienation and fragmentation of holdings which we have seen in recent decades. The former cannot afford bail. The latter can, but at the cost of mortgaging their only source of income. They hesitate to sacrifice the well-being of the family for the freedom of the individual.

6.2 RIGHT TO BAIL

As we know bail is matter of judicial discretion. While considering whether to grant or not to grant bail, conflicting claims of individual liberty of the accused and the larger societal interest have to be taken into considerations. Article 21 of the Constitution of India recognizes the right of a speedy trial to every

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5 AIR 1979 SC 1369.
citizen. The object of the new The Code of Criminal Procedure, 1973 is the expeditious trial. The delay in the conclusion if the trial violates the Constitutional guarantee of a fair, just and reasonable procedure and in fact a fundamental right of speedy trial.\(^7\)

Police and the magistrate have been given power to grant bail under code. However, in bailable offences, bail can be claimed as a matter of right. Police or Magistrate has no discretion in this regard. However, police uses discretion in granting bail as the people are not aware of statutory provisions. There is urgent need to impart awareness in this regard so that police may not misuse its powers for extraneous considerations.

Police officer has no discretion to refuse release under Section 436 makes it clear that grant of bail need not necessarily by the Court only. The police officer has also the jurisdiction to release the person on bail with or without surety.\(^8\) In 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. In the instant case it was held that as the accused was prepared to furnish security, the respondent police officer was bound to release him on bail.\(^9\) In the case of a bailable offence, the police officer arresting an accused, himself will give bail and if for any reason he fails to do so, the court will necessarily give bail.\(^10\) In the case of *Dharmu Naik v. Rabindranath Acharya*\(^11\), the appellant and his brother were involved in a bailable offence and were arrested by the respondent police officer inspite of bail granted to them earlier by the magistrate. It was held by the High Court that the respondent police officer illegally arrested the appellant and his brother and detained them in police custody though they had been previously enlarged on bail and the bail order was produced before him. It was held that it was hard

\(^7\) *Om Parkash v. State of Rajasthan*, 1996 Cri LJ 819 at pp. 820-21(Raj).

\(^8\) *Chowriappa Constructions v. Embassy Constrains and Devpt P. Ltd.*, 2002 Cri LJ 3863 at p. 3865 (Kant).


\(^11\) 1978 Cri LJ 864 at p. 867 (Ori).
to believe that the appellant and his brother, who had, in apprehension of their arrest, obtained the release order after surrendering in Court, would keep quiet and would not produce the bail order and would silently submit to police custody without protest. It was further observed that even assuming that no bail order was produced before the respondent police officer, yet evidence showed that surety was offered at the time of arrest of the appellant and that therefore the respondent was bound to release him on bail in view of the fact that in a bailable offence the 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. Accordingly, the respondent police officer was convicted under Section 342 IPC for wrongful confinement.

6.3 WHO CAN GRANT BAIL?

6.3.1 Police Officer

The code of criminal procedure confers the power to the police to release a person on bail. Any person arrested by police has to be released on bail if he is arrested without warrant or order from the magistrate under the circumstance mentioned in Section 41 of code and that if the offence with which he is charged is a bailable offence. Also in case a person when arrested by the police in relation to a non-cognizable offence on the ground that he refused to give his correct name or address, may be released on executing a bond with or without sureties, to appear before a magistrate if required. The officer in charge of the police station may in his discretion release any a person accused of or suspected of the commission of non bailable offence and arrested or detained by him without warrant. But such power cannot be exercised even in his discretion if there appear sufficient grounds for believing that such person has been guilty of an offence punishable with death or imprisonment for life.
6.3.2 Bail by Executive Magistrate

Section 44 (1) authorizes any magistrate either judicial or executive to arrest or order the arrest of any person who has committed any offence in his presence. Since he can order ones arrest, he also has the power to release him on bail. It has been held that magistrate arresting a person is not a court, so detaining such person beyond 24 hours would be illegal normally. So he has to be produced before a competent magistrate under Section 167 (1) code.

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

6.3.3 Judicial Magistrate

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

6.3.4 Bail by Sessions Judge

Section 439 confers the power upon the sessions judge to take up bail application of an accused against whom the investigation is pending and the bail of such accused has been refused by the sessions judge at the investigation stage. The power of the sessions judge is concurrent with that of the High Court. The power upon the sessions judge or the High Court under Section 439 to enlarge the accused on bail is as an original court. But the sessions judge can impose appropriate conditions on bail. Section 439 also empowers the sessions

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12 M.R. Malik; Bail Law & Practice, Fourth edition, p. 54.
Judge to set aside or modify any condition imposed by the magistrate while admitting the accused on bail.\textsuperscript{15}

\section*{6.3.5 Bail by High Court}

The High Court has been given wide power to grant bail as Court of superior jurisdictions, as a trial Court, as an appellate Court or as a Court of revision. Power has also been given to the High Court either to reduce the bail granted by the magistrate, or by the sessions judge on being satisfied that the amount of bail is excessive and has also the power to cancel the bail granted either by the magistrate or by the sessions judge on being satisfied that the bail has been improperly granted ad regard to being had to the facts and circumstances of the case and in the interest of the public order and for fair trail of the case pending against the accused, his bail should not be granted. The High Courts have been given wide discretionary powers in matters of granting or refusal of bail.\textsuperscript{16}

\section*{6.3.6 Bail by Supreme Court}

The Constitution of India under Article 134 and 136 confers a limited appellate jurisdiction to the Supreme Court. The Supreme Court has got the powers under Article 142 of the Constitution to enforce its decrees etc. Article 145 confers power upon the Supreme Court to make rules for regulating generally the practice and procedure of the code. Under Article 134 the Supreme Court can entertain an appeal from any judgment, final order or sentence in a criminal proceeding of a High Court. Under 136 the Supreme Court can grant special leave to any appeal from any Judgment, decree, or determination or sentence etc. Article 142 the Judgment of the Supreme Court a law and it is enforceable throughout the territory of India.\textsuperscript{17}

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6.3.7 Bail or Security

The expression occurs in Section 81 which lays down that the executive magistrate, district superintend of police, or commissioner of police, before whom any person, intended to be arrested by the Court is produced, can, when such person is brought before him to take such bail or security, as the case may be in cases of offence conferred on the chief judicial magistrate (subject to the provisions of Section 437, or the sessions judge of the district in which the arrest is made on consideration of the information and the documents referred to in Sub-section (2) of Section 78, release him on bail. Nothing in the section shall, however be deemed to prevent a police officer from taking security under Section 71 of the code.\textsuperscript{18}

6.3.8 Security

The word security has been used in several sections of the code such as Sections 71, 81, 106, 107, 108, 109, 110, 117, 119, 122, 123, 124, 170, 330, 340 and 346. Section 71 provides that a Court, issuing a warrant for the arrest of any persons has the discretion to direct, by endorsement on the warrant, that the officer, to whom the warrant is directed, has to take security and release such person from custody, but such release must be subject to his executing a bond with sufficient surety for his attendance before the court. The endorsement of on the warrant must state:\textsuperscript{19}

(a) The number of sureties.

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

\textsuperscript{18} Asim Pandey, Law of Bail, Practice and Procedure, 2\textsuperscript{nd} edition, 2015, Lexis, Nexis, pp. 43-44.

\textsuperscript{19} The criminal Procedure Code,1973.
(c) The time he is to appear before the Court. Further duty cast upon the officer, to whom the warrant is directed, is to forward the bond to the court whenever a security is taken under this section.20

Sections 106 to 124 (both inclusive) finds place in Chapter VIII of the code. These sections deal with the procedure for proceedings arising out of security for maintain peace and for good behaviour. Sections 106 and 107 deal with security for keeping peace on conviction and in other cases respectively. The difference between the two sections is that, while Section 106 empowers a court of sessions or court of a magistrate of the first class, while convicting a person of certain offences or abetting any such offence, to order the convicted person to execute a bond, with or without sureties for keeping peace for such period not exceeding three years as it thinks fit, Section 107 empowers an executive magistrate to issue show cause notice to any person who is likely to commit a breach of peace or disturb public tranquillity on why he should not be ordered to execute a bond, for keeping peace.21

Sections 108, 109 and 110 of the code respectively deal with security for good behaviour from persons disseminating seditious matters, suspected persons, and habitual offenders. In all these sections, an executive magistrate has been empowered to require such persons to show cause why he should not be ordered to execute a bond with or without surety for his good behaviour. Under Sections 108 and 109, the duration of such bond must not exceed one year while under Section 110 such duration must not exceed three years. Under Section 110 the bond must be with surety unlike Sections 108 and 109 where the bond may be with or without sureties. While Section 117 of The Code of Criminal Procedure deals with the provisions relating to the order to furnish

20 Supra note 18 at p. 44.
security, Section 119 provides for the commencement of period for which security is required.\textsuperscript{22}

Section 117 of the Code, \textit{inter alia}, provides that when it is proved upon inquiry that it is necessary for keeping peace or maintain good behaviour, as case may be, that the person, against whom the inquiry is made should execute a bond, with or without security, the magistrate shall make, an order accordingly.

Section 119 of the code provides that when a person has been ordered to give security under Section 106, or Section 117, if at the time such order is made, he has been sentenced to, or is undergoing a sentence of, imprisonment, the period of security shall commence on the expiry of that period of sentence. In other cases the period shall commence on and from the date of the order unless the order directs that it will commence at a later date.\textsuperscript{23}

Section 122 of the criminal procedure code provides for imprisonment in default of security. Section 123 confers powers on the High Court, the court of sessions and the chief judicial magistrate to release persons imprisoned for failing to give security, and Section 124 provides for security for unexpired period of bond.\textsuperscript{24}

Section 122 of the Code, \textit{inter alia}, provides that if a person ordered against under Section 106 or Section 117 does not give security as ordered, he shall be detained in prison when the period of security does not exceed one year but when such period exceeds one year the magistrate shall detain him in prison pending the order of the sessions judge before whom the proceedings shall be conducted as expeditiously as possible. The sessions judge, after examining such proceedings and after giving the concerned person a reasonable opportunity of being heard, may pass such orders as he thinks fit, but in case of

\textsuperscript{22} Supra note 18 at p. 44-45.
\textsuperscript{23} Ibid.
\textsuperscript{24} Section 122 of Criminal Procedure Code, 1973.
imprisonment the period must not exceed three years. Imprisonment for failure to give security for keeping peace shall be simple but when the proceedings have been taken under Section 109 or Section 110 such imprisonment may be rigorous or simple as the sessions judge or magistrate in each case directs.\textsuperscript{25}

6.3.9 Bail by Police

The power of a Police Officer, to release on bail a person accused of an offence and taken into custody by him, may be divided under two heads: (a) when the arrest was made without any warrant; and (b) when the arrest was made in pursuance of warrant of arrest. Power of police to grant bail under head (a) may be gathered from Sections 42, 43, 56, 59, 169, 170, 436, 437 and Schedule I Column 5 of the Code. The powers of police to grant bail under head (b) are controlled by directions endorsed under Section 71 of the Code.\textsuperscript{26} Section 81 of the Code however, allows a police officer to take bail when the person arrested or produced before him has been accused of the commission of a bailable offence even though warrant of arrest does not contain any direction to that effect. In case of non-bailable offence the endorsement on the warrant has to be strictly followed. Endorsement on warrant however should be by name.\textsuperscript{27}

6.4 BAIL WHEN ARREST MADE WITHOUT WARRANT

(i) Bail under Section

Sections 41 and 42 are the only sections under which a police officer may arrest a person for non-cognizable offence. But this power can be exercised under the conditions specified in the section. Section 41 enumerated nine categories of cases in which a police officer may arrest a person without an order from magistrate and without a warrant. The powers of the police to arrest a person without a warrant are only confined to such persons who are accused


\textsuperscript{26} Section 71 of Criminal Procedure Code, 1973.

or concerned with offences or are suspects thereof. A person who is alleged to have been in possession of an illicit arm once upon a time, can neither be called presently an accused nor a suspect thereof. Section 42 can be invoked when the offender refuses to give name and address or gives a name and address which the police officer considers to be false. If those particulars are within the knowledge of the police officer, neither the question of arrest nor the question of bail will arise. As soon as name and address has been ascertained the police officer cannot detain him, if he is willing to execute the necessary bonds.\(^{28}\) If for any reason, the true name and address of the arrested person cannot be ascertained with 24 hours, the provisions of Sections 56 and 59 will come into operation. A special feature of this section is that the bond of an offender who is not a resident of India shall be secured by the surety or sureties whose residence is in India. No similar restriction as to the residence of a surety is to be found in the other provisions of the code. The power to arrest and to release on bail can be exercised by any police officer not necessarily by an officer-in-charge of the police station because this section has been enacted to provide for a particular non cognizable offence does not put any restrictions on the power of a Police Officer to enlarge a person on bail after the correct name and residence have been ascertained.\(^{29}\)

(ii) **Bail under Section 43**

The Code of Criminal Procedure provides for the arrest of person by a private person also though his powers of arrest are very limited. A private individual may arrest a person only when:-

1. He is proclaimed offender, or

2. He in his presence, commits a non-bailable and cognizable offence.

\(^{28}\) Cr. L.J. 381, AIR 1999, All 160 (161).

After the arrest has been made the arrested person should be, without unnecessary delay handed over to a police officer, or in his absence, be brought to the nearest police station. The question of bail will depend upon what opinion the police officer forms about the person brought before him.

1. If there is no sufficient ground to believe that the arrested person has committed any offence, he shall at once be released.

2. If there is reason to believe that such person comes under the provisions of Section 41, a police officer shall re-arrest him and then the normal procedure of investigation, determination of the question whether a non-bailable case is made out or not and the desirability of release on bail etc. will arise.

3. If there is reason to believe that he has committed a non-cognizable offence he shall be released as soon as his name and residence have been ascertained as provided under Section 42. A chowkidar, not being a police officer is not entitled to receive a person arrested under this section. But where a chowkidar is a police officer as under the Chota Nagpur Rural Police Act, (Act I of 1914) he can received a person arrested under Section 59, Criminal Procedure Code (old) and detain him in custody.

6.4.1 Bail under Sections 56, 57 and 59

Section 56 mandates that a police officer effecting an arrest without warrant must take or send the offender arrested, before a magistrate having jurisdiction in the case of before the officer in charge of a police station. But in Section 56, there is an inbuilt provision authorizing police officer to admit the arrested offender to bail, but power of the police officer is subject to the provisions herein contained as to bail.

30 46 CWM 162, ILR 3 All 60.
31 33 Cr. L. J. 572, AIR 1932 Pat. 214.
Section 57 provides that person arrested not to be detained more than twenty-four hours. The intention of the legislature is that an accused person should be brought before a Magistrate competent to try or commit with as little delay as possible. Section 57 is pointer to the intendment to uphold liberty and to restrict to the minimum curtailment of liberty.\footnote{Mohd. Ahmed Yasin Mansuri v. State of Maharashtra, 1994 Crl.1854 (Bom.DB).}

Section 59 provides that no person who has been arrested by a police officer shall be discharged except on his own bond, or on bail, or under special order of a magistrate.

\subsection*{6.4.2 Bail under Section 169}

The section refers to the grant of bail not at the start but only on the making of an investigation under chapter XII of the code. Till then bail is not authorized under the provisions of this section. The power to release on bail a person in custody vests in officer in charge of the police station or the police officer making the investigation. Under Section 36, a police officer superior in rank to an officer in charge of a police station can exercise the same powers of investigation as can be exercised by an officer in charge of the police station. Section 169 provides that if upon an investigation it appears to the officer-in-charge of police station that there is no sufficient evidence or reasonable ground of suspicion to justify the forwarding of the accused to a magistrate, such officer shall release him on his executing a bond with or without sureties as such officer may direct, to appear, if and when so required before a magistrate empowered to take cognizance of the offence on a police report and to try the accused or commit him for trial. An “officer-in-charge of police station” includes, when the officer-in-charge of police station is absent from the station house or unable from illness or other cause to perform his duties the police officer present at the station house who is next to such officer and is above the rank of constable or when the state government so desires, any other police officer so present. An officer-in-charge of the police station or an
investigating officer cannot release a person on bail if he has appeared as an accused before the magistrate on the basis of a complaint in respect of the incident which the police also is investigating. If the accused is in custody, he must be released if after completion of the investigation there is no sufficient evidence or reasonable ground of suspicion against him. The magistrate, however, can direct the police to make further investigation. There is no provision, which empowers the magistrate to release/discharge an accused pending investigation before submission of the final form and taking cognizance of the offence.

6.4.3 Bail under Section 170

Under this section the authority to grant bail accrues to an officer in charge of the police station, “if the offence is bailable”. Do these words also mean that a station officer shall release a person on bail if the offence made out during investigation was only a bailable offence though the initial accusation was in respect of a non-bailable offence of which the police took up the investigation, or that a station officer shall release a person on bail if the offence is bailable and the investigation was made under Section 155 (3) of the Code, that is to say, the original accusation should be of a non-cognizable offence in order to empower a station officer to admit a person on bail? It is submitted that a station officer is empowered to grant bail if investigation has disclosed the offence to be bailable and it is immaterial what the initial accusation against him was.

6.4.4 Bail under Section 436

The provisions of this section cast a statutory duty upon the officer in charge of the police station to release on bail a person who was involved in a bailable

33 Rohal Husain v. Emperor, 35 Cr. L.J. 208 AIR 1933 All 582.
offence. The power to release either on bail or on a personal recognizance i.e. bonds without sureties extends to the time the accused is in the custody of such officer. The right of the accused to be released arises only when the person under arrest or detention is prepared and able to give bail. He cannot be taken into custody unless he is unable or unwilling to offer bail or to execute a personal bond.\textsuperscript{36}

\textbf{6.4.5 Bail under Section 437}

The power to release on bail a person accused of a non-bailable offence is conferred upon only one class of police officers, namely an officer-in-charge of the police station under Section 437, Sub-section (1). Since the power to grant bail is permissive and not obligatory, it has to be exercised with great caution because of the risk and stakes involved. Before exercising his power, a station officer ought to satisfy himself that the release on bail would not prejudice the prosecution in bringing home the guilt of the accused. In case the officer in charge admits an accused to bail, it is mandatory for him to record the reasons or special reasons in the case diary and preserve the bail bonds until they are discharged either by the appearance of the accused in court or by the order of a competent Court.\textsuperscript{37} For the purpose of bail in non-bailable offence, the Legislature has classified them under two heads:

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

(2) Those which are not so punishable.

In case of an offence punishable with death or imprisonment for life a station officer cannot enlarge a person on bail, if there appears reasonable grounds for believing that he has been guilty of such offence. The age or sex or sickness or infirmity of the accused cannot be considered by a police officer for the purpose of granting bail. These matters may be taken in view by a Court only.

\textsuperscript{36} The Crown v. Makhan Lal, 48 Cr. L.J. 656.

\textsuperscript{37} Section 436 of Criminal Procedure Code, 1973.
An officer-in-charge of the police station may grant bail only when there are no reasonable grounds for believing that the accused has committed a non-bailable offence or when the non-bailable offence complained of is not punishable with death or life imprisonment.

6.5 BAIL BY POLICE WHEN ARREST MADE IN PURSUANCE OF WARRANT

The relevant provisions of Code of Procedure in connection with above heading are confined in Sections 71 and 81 of Criminal Procedure Code.

(i) **Bail under Section 71.** A Police officer executing a warrant under this section cannot exercise any power beyond those contained in the endorsement, so that if the arrested person is to be released on his personal bond, a police officer cannot demand sureties from the prisoner. It is a matter entirely in the discretion of the Court issuing a warrant under this section to give a direction for the release of the arrested person on bail or not. Even in bailable offence, a Court may not give such direction. When a person to arrested is not arrested until the date on which he has to attend the Court, the direction regarding the taking of bail lapses. But since the warrant itself remains in force under Section 70 (2) of the code, the person against whom the warrant had been issued can be arrested even after the date on which he was to be in attendance in Court. This section makes it clear that a magistrate is competent to issue a warrant of arrest for the production of a particular person before his own Court and not before a police officer.

38 *Lachhmi Narain v. Emperor*, 40 Cr. LJ 283, AIR 1939 All. 156.
39 10 Cr. L. J. 479, 41 and case 31.
40 1 CWN 154; ILR 24 Cal. 320.
6.5.1 Bail under Sections 80 & 81

When a warrant of arrest is executed outside the district in which it was issued any police officer who is not a district superintendent of police or the commissioner of police may release an arrested person according to the directions contained in the endorsement. But a district superintendent of police, the commissioner of police in presidency town with in the local limits of whose jurisdiction the arrest was made shall release on bail the arrested person, if the offence is bailable and such person is ready and willing to give bail to their satisfaction.⁴¹

In short, when a warrant of arrest is to be executed within the district in which it was issued or it is to be executed out-side the district in which it was issued a police officer has not to engage himself in the determination of the question whether the arrested person is accused of a bailable or a non-bailable offence. He has to comply strictly with the contents of the endorsement if any. He cannot release a person on bail simply because the arrested person is accused of a bailable offence. In case of a warrant which is executed out side the district in which it was issued, the proviso to Sub-section (1) of Section 81 empowers a district superintendent of police or the commissioner of police within the local limits of whose jurisdiction the person was arrested to release him bail, if the offence is bailable, provided such person is ready and willing to give a satisfactory security even though there was no direction by the court issuing the warrant.

6.5.2 Bail by Magistrate

Bail remains an undefined term in the Code of Criminal Procedure, 1973. Nowhere else the term has been statutorily defined conceptually, it continues to be understood as a right for assertion of freedom against state imposed

restraints. Since the U.N. Declaration of Human Rights of 1947, to which India is a signatory, the concept of bail has found a place within scope of human rights. A right to get admitted to bail can lawfully be circumspect if the police needs the arrested person any time for purpose of investigation of the case. The code provides that a person suspected of having committed a cognizable offence can be remanded to police custody. In case of arrest without warrant, the request for remand in case of a suspect begins with a formal arrest. Any person who is arrested by a police officer should be produced before the judicial magistrate within 24 hours from the time of his arrest. If a person commits a bailable offence, then the magistrate grant him bail but if he commits any non-bailable offence, then it is on the discretion of the Magistrate that whether bail should be granted to him or not. Sections 59, 44 (1), 88, 167, 436, 437 etc. deals with powers of Judicial Magistrate to grant bail.

6.5.3 Bar of Discharge except on Bail under Section 59

The first provision in the code which deals or appears to deal with the power of a magistrate to discharge an arrested person is contained in Section 59. What the section lays down is that a person arrested by the police cannot be discharged except:

(i) on personal recognizance, or
(ii) on bail, or
(iii) Under a special order of a Magistrate.

6.5.4 Bail when Warrant Executed Outside Territory under Section 81

Section 81 corresponds to old Section 86 with some distinction: Section 81 provides that an arrested person outside the jurisdiction of a Court issuing the

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42 The Universal Declaration of Human Rights 1948, in its preparation of an International Bill of Rights the Commission at its 1st session early in 1947 known as a preliminary draft International Bill of Human Rights.

warrant of arrest is to be produced before the issuing court where it is within 30 km of the place of arrest or nearer than Executive Magistrate, or District Supt. Or Commissioner of police. The police authorities above or the Executive Magistrate then shall direct the removal of the arrested person to the custody of the court issuing the warrant. But, if the offence is bailable, before such removal the person arrested may be enlarged on bail. If the offence is non-bailable one, it is only the C.J.M. subject to the limitation provided in Section 437 or it is the sessions judge who are empowered to release such person on bail. But, these provisions would not curtail the power of the police officer to take security under Section 71. Section 187 does not override the provisions of Sections 70 to 81.44

6.5.5 Requiring one to Execute Bond under Section 88

The scope of this section is limited that it only empowers a Court to require a person present in Court to execute a bond, with or without sureties for appearance before the Court taking the bond or before the court to which the case may be transferred for trial. And the section is only applicable to persons who are present in Court and does not authorize a magistrate to go to the house of a person and compel him to execute a bond for appearance in Court.45

The requirements of this section are:-

i. The person is present in Court.

ii. For his appearance the Court can issue a summons.

iii. For his appearance the Court can issue a warrant. It is in the discretion of the Court to require a person to give a bond for appearance with or without sureties. While the charge is pending, an accused whether guilty or not must obey such bond.46

44 Velappan v. State, AIR 1965 Ker. 72.
45 37 Cr. L. J. 837: 163 Ind C. 413.
46 20 Cr. L. J. 384: AIR 1919 All 158.
6.5.6 Security for Peace and Bail under Section 106

The section authorizes the taking of security for keeping the peace. The offences in which the section applies are:

i. Offences under Chapter VIII, Indian Penal Code, namely offences against public tranquillity e.g., Sections 141 to 160 except offences under Sections 153-A, 153-B and 154 I.P.C.

ii. Assault or using criminal force or committing mischief.

iii. Any offence involving breach of peace.

iv. Criminal intimidation.\(^{47}\)

6.5.7 Bail under Section 309

The scope of Section 309\(^{48}\) is different from the old and corresponding Section 344. As held in *Natabar Parida v. State of Orissa*\(^{49}\), Section 309 is attracted only after magistrate takes cognizance of offence. During this period magistrate may admit the accused to bail doubtlessly. Even during the interregnum between the period of submission of charge-sheet and commitment to courts of session, magistrate can grant bail to accused or remand him to custody.\(^{50}\)

6.5.8 Bail to Lunatics under Section 330

Bail cannot be claimed as a matter of right for persons of unsound mind. Courts have been vested with great powers and wide discretion in the matter of grant or refusal of bail. Section 330 does not speak of bailable or non-bailable offences. The nature of offence and the severity of punishment awardable for the commission of a particular offence are not matters to be considered when the question of release on security of a lunatic arises. A magistrate may release

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\(^{48}\) *Ibid.*


a person of unsound mind on bail even though he is charged of an offence of
the most heinous type and may refuse bail in bailable case if he is of the
opinion that bail should not be allowed. An accused of unsound mind may be
released on security, irrespective of the offence with which he is charged not
only on the finding by the Court that the accused is of unsound mind, but also
prior to such finding, during the pendency of the inquiry into his state of mind.
The nature of security for release of a lunatic accused is different from the
security for the release of other persons, in that, in the former it is binding not
only for appearance but also for preventing the accused from causing injury
either to himself or to any other person. But any condition which is not
specified in Section 330 cannot be imposed and if the magistrate imposes any
new condition, it is illegal and unenforceable.\(^{51}\) There are no words in Section
330 that security for appearance is confined to the duration of the inquiry or
trial. Security under this section is for appearance of the accused “when
required before the magistrate or Court or such officer as the magistrate or
court appoints in this behalf since the security under Section 330 does not
contemplate only appearance at the proceedings of the inquiry or trial for the
offence for which the accused is charged, it does not terminate with the
termination of the inquiry or trial. A person standing security may be called
upon to produce the person released on his security even after the trial has
terminated. He will not be heard to say that his undertaking came to an end
with the termination of the trial.\(^{52}\)

There is yet another distinction between the execution of security under Section
330 and Sections 436 to 439. A bond executed under chapter XXXIII of the
code (Sections 436 to 439) is binding only with every date of hearing of such
offence and for the purpose of answering such charge. A surety does not
undertake to be responsible for the attendance of the accused to answer charges
in respect of offences that might be committed at some future date. When

security is given under Section 330 a surety not only undertakes to be responsible for the attendance of the accused to answer charges in respect of offence or offences already committed but also guarantees that he would prevent the accused “from doing injury to himself or to any other person”. Thus the purpose of bail under Section 330 is different from the purpose of bail under Sections 436 to 439.53

6.5.9 Bail for Misuse of Liberty under Section 360

Under Section 360(9), the question of release on bail may arise when a convicted offender to whom the benefit of Section 360 was given fails to observe any of the conditions of his recognizance and is apprehended on a warrant issued by a magistrate who convicted him, or by a magistrate who could have dealt with the offender in respect of his original offence. An offender when he is apprehended on such warrant may either be remanded to custody until the case is heard or he may be admitted to bail with a sufficient surety conditioned on his appearing for sentence.54

6.5.10 Bail to Witness under Section 349

If any witness or person called to produce a document or thing before a criminal Court, refuses to answer such questions as are put to him or to produce any document or thing in his possession or power which the court requires him to produce, and does not offer any reasonable excuse for such refusal and persists in his refusal he may be dealt with according to the provisions of Sections 345 to 346. Under this section a complainant is not a witness and a witness is not bound to answer a question which is irrelevant to the issue.55 A witness is also not bound to answer any question asked by the Court which tends to incriminate him in criminal proceedings because of the protection

55 ILR 13 Bom 600. 50.
afforded to him under Section 165, The Evidence Act, 1972\textsuperscript{56} nor is he bound to produce a document in respect of which he claims privilege under Sections 123 or 124, Indian Evidence Act.\textsuperscript{57}

Bail to First offender etc. under Section 360, Sub-section (1) of Section 360 deals with the power of a court or a magistrate of the second class specially empowered by the state government in this behalf, to release a convicted offender on his entering into a bond, with or without sureties, to appear and receive sentence when called upon during such period (not exceeding three years) as the magistrate may direct, and in the meantime to keep the peace and be of good behaviour. The magistrate thus has discretion either to punish the offender with imprisonment or release him on probation of good conduct. The proviso to Sub-section (1) of this section lays down the procedure to be adopted by a magistrate of the second class not specially empowered by state government in this behalf, when such magistrate is of opinion that the powers conferred by Section 360 should be exercised in favour of the convicted person. An interesting question arises as to what should a magistrate, who is not competent to release a convict forthwith, do, when there are more than one accused before him and he is of the opinion that one or more of them, but not all, deserve the benefit under this section. It was held by the Madras High Court in \textit{re Pitamanayaga Pandaram} that such magistrate should dispose of the case of the other accused himself first and then submit the case of the accused who in his opinion deserves the benefit of this section.\textsuperscript{58} The same view was taken by the Bombay High Court.\textsuperscript{59} In a later ruling by the same High Court it was held that there is nothing in the language of either old Section 562 or old Section 380 which prohibits a Magistrate of the second or third class sending up all the accused, the whole case, and the entire proceedings to the sub

\textsuperscript{56} ILR 10 Bom 185.
\textsuperscript{57} The Indian Evidence Act, 1972.
\textsuperscript{58} 44 Cr.L.J. 568: AIR 1943 Mad. 390 available at http://shodhganga.inflibnet.ac.in/bitstream/10603/7790/9/09\_chapter\_203.pdf
\textsuperscript{59} Emperor v. Yesu, 2.Bom LR 449.
divisional magistrate in a case where he suggests that action should be taken under Section 562 against only one or few of the accused persons.  

6.6 POST-CONVICTION AND PRE-APPEAL BAIL UNDER SECTION 389

The section contemplates post-conviction and pre-appeal period. Pending an appeal against conviction appellate Court may release the convict on bail and High Court can exercise this power when appeal lies to Sessions Court. So far as the Court convicting the accused is concerned, the Court is bind to admit the accused to bail pending order passed by appellate Court or High Court when-

(a) The accused was already on bail and has been sentenced to imprisonment for a term not exceeding three years.

(b) When the offence was a bailable one. Even on fulfilment of the condition Court on convicting the accused may refuse bail if there exists a special reason. Under this section an intention to present an appeal on the part of the convicted person is sufficient reason to justify the release of a convicted person on bail. It may further be noted that an order of bail under this section is for a limited period only and is applicable only to “convicted” persons and not to those who are bound over.

6.6.1 Bail under Section 437

Section 437 deals with bail in bailable offence. Grant of bail is a rule and refusal is an exception. A person accused of bailable offence has the right to be released on bail. Bail in cases of bailable offences is compulsory bail. In the matter of admission to bail the code of criminal procedure makes a distinction between bailable and non-bailable offences. The grant of bail to a person accused of non-bailable offence is discretionary. But a person accused of

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60 Palli Munisami, 48, Cr.L.J. 361: AIR 1948 Mad 86.
bailable offence at any time while under detention without a warrant at any stage of the proceeding has the right to be released on bail in view of Section 436.\(^{62}\) Even when a person suspected of committing a bailable offence is produced before a magistrate and he is prepared to give bail, magistrate has no option but to release him on appropriate bail.

### 6.6.2 Balancing Personal Liberty and Investigational Powers of Police the Society has a Vital Stake in Both Interests

Personal liberty and the investigational powers of the police, though their relative importance at any given time depends upon the complexion and restraints of political conditions.\(^{63}\) The horizon of human rights is expanding. At the same time, the crime rate is also increasing. Observing thus, the Supreme Court noted in a case that of late, it had been receiving complaints about violation of human rights because of indiscriminate arrests. Stressing a need to strike a balance between the two, the Supreme Court held that a realistic approach should be made in this direction.\(^{64}\)

The police in India have to perform a difficult and delicate task, particularly in view of the deteriorating law and order situation, communal riots, political turmoil, student unrest, terrorist activities, and among others the increasing number of underworld and armed gangs and criminals. Many hard core criminals like extremists, the terrorists, drug peddlers, smugglers who have organized gangs, have taken strong roots in the society. It is being said in certain quarters that with more and more liberalization and enforcement of fundamental rights, it would lead to difficulties in the detection of crimes committed by such categories of hardened criminals by soft peddling interrogation. It is felt in those quarters that if court lay too much of emphasis on protection of their fundamental rights and human rights, such criminals may

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go scot-free without exposing any element or iota of criminality with the result, the criminal would go unpunished and in the ultimate analysis the society would suffer. The concern is genuine and the problem is real. To deal with such a situation, a balanced approach is needed to meet the ends of justice. This is all the more so, in view of the expectation of the society that police must deal with the criminals is an efficient and effective manner and bring to book those who are involved in the crime. The cure cannot, however, be worse than the disease itself.\(^\text{65}\)

### 6.7 PROVISION OF ANTICIPATORY BAIL

The anticipatory bail terminology is nowhere used in The Criminal Procedure Code, 1973. Section 438 of the code, according to which a person may apply to High Court or Court of Session for anticipatory bail. So anticipatory bail is granted where there is reasonable apprehension that the person may be arrested in a non-bailable cases. Anticipatory bail means at the time the person to be arrested he to be released on bail at the same time. Moreover anticipatory bail is releasing from custody not from arrest. Police officer may arrest but bound to release at the very movement of arrest. There was no provision of anticipatory bail in old Criminal Code, 1898. The law commission in its 41\(^\text{st}\) report recommend the introduction of a provision enabling High Court and Court of Session to grant, “Anticipatory bail”. The commission 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.

Section 438 was introduced in the Code of Criminal Procedure on recommendation of the Law Commission in its forty first report. Section 438

contemplates an application by a person on an apprehension of arrest in regard to the commission of non-bailable offence. 66

Section 438 provides relief to the person apprehending arrest even though the court may not have jurisdiction to deal with the offence. He can seek relief in the Court within whose jurisdiction he ordinarily resides. Anticipatory bail of limited duration can be granted with a direction to the petitioner to approach the Court concerned. Thus, an application under Section 438 should be finally decided by only the Court within whose jurisdiction the alleged offence has been committed. 67

Section 438(1) of the code lays down a condition which has to be satisfied before anticipatory bail can be granted. The applicant must show that he has “reason to believe” that he may be arrested for a non-bailable offence. The use of the expression “reason to believe” shows that the belief that the applicant may be so arrested must be founded on reasonable grounds. Mere ‘fear’ is not ‘belief’, for which reason, it is not enough for the applicant to show that he has some sort of a vague apprehension that someone is going to make an accusation against him, in pursuance of which he may be arrested. The grounds on which the belief of the applicant is based that he may be arrested for a non-bailable offence, must be capable of being examined by the Court objectively, because it is then alone that the Court can determine whether the applicant has reason to believe that he may be so arrested. Section 438(1) cannot be invoked on the basis of vague and general allegations, as if to arm oneself in perpetuity against a possible arrest. 68

Anticipatory bail refers to a pre-arrest order passed by a Court that says that in the event a person is arrested, he is to be granted bail. The ‘anticipatory’ labelling of the order can be misleading as it is not an order which grants a

person bail before he is arrested as bail cannot come into effect before a person is arrested. Having said that, the fundamental difference between an order for bail and one for anticipatory bail is that the former is granted only after arrest (and becomes operative subsequently) but the latter is granted before arrest and hence is operative from the moment of arrest.\(^{69}\) Under Section 438 of the Criminal Procedure Code there is a provision for a person to seek ‘Anticipatory Bail’. This means that an individual can seek or request to get bail in anticipation or in expectation of being named or accused of having committed a non-bailable offence. Anticipatory bail is meant to be a safeguard for a person who has false accusation or charges made against him, most commonly due to professional or personal enmity, as it ensures the release of the falsely accused person even before he is arrested.

To get anticipatory bail the person seeking it, must approach the Court of Sessions or the High Court and citing Section 438 of the code as well as giving proper reason, apply for it. If the Court, based on a number of conditions and the nature of the case, sees merit in the petition the bail is granted. Hence if and when the person is arrested, he will be immediately released on the basis of the anticipatory bail.

### 6.7.1 Object and Purpose of Anticipatory Bail

The object of the provision under Section 438 is to give relief to a person from unnecessary harassment and discourage in case of apprehension of arrest for non-bailable offence. This privilege could be granted on an application filed before the High Court or the Sessions Court. An order of anticipatory bail constitutes, an insurance against police custody following upon arrest for offence or offences in respect of which the order is issued. In other words, unlike a post-arrest order of bail, it is a pre-arrest legal process which directs that if the person in whose favour it is issued is thereafter arrested on the

accusation in respect of which the direction is issued, he shall be released on bail. Section 46(1) of the code which deals with how arrests are to be made, provides that in making the arrest, the police officer or other person making the arrest “shall actually touch or confine the body of the person to be arrested, unless there be a submission to the custody by word or action”. A direction under Section 438 is intended to confer conditional immunity from this ‘touch’ or confinement.\(^70\)

The purpose of anticipatory bail is basically to protect the applicant from unnecessary harassment due to curtailment of his right to personal liberty. Anticipatory bail is basically bail in anticipation of arrest and can be obtained only in cases of non-bailable offence because in bailable offence bail is granted as a right. The object of anticipatory bail is to relieve a person from unnecessary apprehension or disgrace. Section 438 is an extraordinary and should be resorted to only in special cases. Some very compelling circumstances must be made out for granting anticipatory bail. Where the conduct of petitioner in not responding to summons issued showed that he wanted to flee from justice, it should not be said that the accusation made against the petitioner was mala-fide or with ulterior motive and, therefore, it would not be a fit case for granting anticipatory bail.\(^71\)

The object of Section 438 is to prevent undue harassment of the accused persons by pre-trial arrest and detention. The fact, that a Court has either taken cognizance of the complaint or the investigating agency has filed a charge-sheet, would not by itself, in our opinion, prevent the concerned Courts from granting anticipatory bail in appropriate cases. The gravity of the offence is an important factor to be taken into consideration while granting such anticipatory bail so also the need for custodial interrogation, but these are only factors that must be borne in mind by the concerned Courts while entertaining a petition for grant of anticipatory bail and the fact of taking cognizance or filing of charge.


sheet cannot by themselves be construed as a prohibition against the grant of anticipatory bail. In our opinion, the Courts i.e. the Court of Sessions, High Court has the necessary power vested in them to grant anticipatory bail in non-bailable offences under Section 438 even when cognizance is taken or charge sheet is filed provided the facts of the case require the Court to do so.\textsuperscript{72}

In order to obtain anticipatory bail one has to prove before the Court of Session or the High Court some tangible material on the basis of which the Court can infer the likely hood of an impending arrest of accused in some non-bailable cases. Whereas anticipatory bail does not grant an absolute immunity from arrest rather it grants immunity from custody upon arrest i.e. anticipatory bail directs the arresting officer to release the accused on bail upon arrest provided the accused furnish the bail. Thus in fact a non-bailable offence converts into bailable one for the purpose of arrest in that particular case. Anticipatory bail is a device to secure the individual liberty, and it is neither a passport to the commission of crime nor a shield against any and all kinds of accusation likely or unlikely. It confers on the High Court and the Court of Session the power to grant anticipatory bail if the applicant has reason to believe that he may be arrested on the accusation of having committed a non-bailable offence.\textsuperscript{73}

The first part of the section sets out the conditions under which a person can make an application for anticipatory bail. The second part confers jurisdiction on the High Court or the Court of Session. Thus, the second part can be viewed as strictly jurisdictional, that High Court and the Court of Session have concurrent jurisdiction. Once a Court is invested with jurisdiction, that jurisdiction subsists all along unless taken away expressly or by implication. There are no express words in the section itself, indicating that the jurisdiction is taken away under any circumstances. It does not appear that by implication even the jurisdiction of either of the Courts is taken away or put an end to. It

\textsuperscript{73} Ashok Daga v. State, 1984 GLH 758 (para 4).
seems that the legislators did not intend to exclude the one or the other of the two courts the High Court or the Court of Session. Had it been so intended, the legislators would have taken care to express that clearly, as they have done in Sub-section (3) of Section 397 or Sub-section (3) of Section 399 of old code.\textsuperscript{74} Anticipatory bail cannot be claimed as a matter of right, it is essentially a statutory right conferred long after the coming into force of the Constitution. It is not an essential ingredient of Article 21 of the Constitution\textsuperscript{75}

### 6.7.2 Regular Bail and Anticipatory Bail

There is not much of difference between the “bail” and “anticipatory bail”. The only distinction between bail and anticipatory bail is that whereas the former is granted after arrest and therefore means release from the custody of the police, the latter is granted in anticipation of arrest and is therefore \textit{effective at the very moment of arrest}. As such, the pre-arrest bail and post-arrest bail are one and the same, since both would relate to the release after arrest. From the collection and scheme of the code and Section 438, it becomes explicitly clear that the legislature intended to bring anticipatory bail within the category of bail and not to treat it as something different from bail.\textsuperscript{76}

Unlike a post-arrest order of bail, it is a pre-arrest legal process which directs that if the person in whose favour it is issued is thereafter arrested on the accusation in respect of which the direction is issued he shall be released on bail. A direction under Section 438 is intended to confer conditional immunity from the touch as envisaged by Section 46(1) confinement.\textsuperscript{77} There is no substantial difference between Sections 438 and 439. So far as appreciation of the case as to whether or not a bail is to be granted is concerned. However, neither anticipatory bail nor regular bail can be granted as a matter of rule. The anticipatory bail being an extraordinary privilege should be granted only in

\textsuperscript{74} The Code of Criminal Procedure, 1898.
\textsuperscript{76} \textit{Natturasu v. State}, 1998 Cri LJ 1762 at p. 1765 (Mad).
exceptional cases. The judicial discretion conferred upon the court has to be properly exercised after proper application of mind to decide whether it is a fit case for grant of anticipatory bail.\textsuperscript{78}

The distinction between an ordinary order of bail and an order of anticipatory bail is that whereas the former is granted after arrest and thus means release from the custody of the police, the latter is granted in anticipation of arrest and is therefore effective at the very moment of arrest.\textsuperscript{79} Police custody is an inevitable concomitant of arrest for non-bailable offences. The grant of “anticipatory bail” to an accused who is under arrest involves a contradiction in terms, in so far as the offence or offences for which he is arrested, are concerned. After arrest, the accused must seek his remedy under Section 437 or Section 439 of the code, if he wants to be released on bail in respect of the offence or offences for which he is arrested.\textsuperscript{80}

\textbf{6.8 FOR ANTICIPATORY BAIL ACCUSED NEED NOT MOVE THE SESSIONS COURT FIRST}

The language of Section 438 is clear and unambiguous. In explicit terms, it confers power on “the High Court or the Court of Session” for granting directions. It is true, in the hierarchical set up of Courts, the High Court exercises superintendence and control over the Court of Session, the latter is subordinate to the former. Should such subordination become a relevant factor in the interpretation of Section 438? The answer is emphatically in the negative. When the language of an enactment is plain, the intention must be gathered from the language itself and departure from this will be justified only if the literal meaning leads to absurdity or undermines the purpose of the enactment. In the face of the express language of the provision conferring concurrent jurisdiction on the High Court and the Court of Session, it will not

\textsuperscript{78} Criminal Appeal Nos. 525-526 of 2012 (Arising out of SLP (Crl.) Nos. 304-305 of 2012).
\textsuperscript{79} Sunita Devi v. State of Bihar, 2005 SCC (Cri) 435; Supra Note 4 at para 57.
\textsuperscript{80} http://www.lawctopus.com/academike/anticipatory-bail-india-critical-analysis/
be proper on the part of the High Court declining to entertain the application under Section 438 on the ground that the party has not moved the Court of Session in the first instance. Contrary to the legislative command there can be no rule of practice. If a person has reason to believe that he may be arrested on an accusation of having committed a non-bailable offence, under Section 438(1) it is open to him “to apply to the High Court or the Court of Session” for anticipatory bail.\(^{81}\)

6.8.1 **Apprehension of Arrest Necessary for Anticipatory Bail**

For anticipatory bail, it is trite knowledge that Section 438 is made applicable only in the event of there being an apprehension of arrest, and where the accused is inside the prison bars upon arrest against cognizable offences, the question of relieving the accused from unnecessary disgrace and harassment would not arise.\(^{82}\) Section 438 contemplates an application to be made by a person apprehending arrest of an accusation of having committed a non-bailable offence. It is indicative of the fact that an application for anticipatory bail is pivoted on an apprehension of arrest which invites the exercise of power under Section 438.\(^{83}\)

As a condition precedent to its application, Section 438 makes it incumbent that there must be an existing accusation of having already committed a non-bailable offence. On such an accusation there must be reason to believe that applicant may be arrested. A mere apprehension of arrest will not suffice. That must be on the basis of an accusation of having committed a non-bailable offence. That means the apprehension must be reasonable and based on existing facts. Imaginary accusation or future possible accusations will not be sufficient. On such accusations which are yet to come there cannot be any reasonable apprehension of an existing threat of arrest. It is a condition

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precedent for an application under Section 438 that there must be an existing reasonable apprehension of arrest on the existing accusation of having already committed a non-bailable offence prior to the point of time of filing the application. That accusation will have to be specified in the application and the direction to be sought for is for release in case of arrest in connection with that accusation. Protection under Section 438 could be claimed only against specified accusation and not against possible arrest in general against unspecified existing accusations or accusations likely to arise in future.84

6.8.2 Anticipatory Bail has all Legal Consequences of “Bail”

The expression “anticipatory bail” has not been defined in the code. But as observed in Balchand Jain v. State of M.P.85, “anticipatory bail” means “bail in anticipation of arrest”. The expression “anticipatory bail” is a misnomer inasmuch as it is not as if bail is presently granted by the court in anticipation of arrest. When a competent Court grants “anticipatory bail”, it makes an order that in the event of arrest, a person shall be released on bail. There is no question of release on bail unless a person is arrested and, therefore, it is only on arrest that the order granting anticipatory bail becomes operative.86

From the scheme of chapter XXXIII and the language of Section 438, it becomes explicitly clear that the Legislature intended to bring “anticipatory bail” within the category of “bail” and not to treat it as something different from “bail”. Thus, “anticipatory bail” falls within the category of “bail” or, to be more precise, the term “bail” includes “anticipatory bail” also.87 It is an admitted position of law that bail is granted under Chapter XXXIII of the Code and which is specially covered by Sections 436 to 439 of the code, Section 438 governs anticipatory bail forming a part of it. It is also clear that even if the

84 Thayyanbadi Meethal Kunhiraman v. S.I. of Police, Panoor, 1985 Cri LJ 1111 at p. 1113 (Ker) : 1985 Mad LJ (Cri) 263.
85 AIR 1977 SC 366.
grant of bail is permissible under any other provisions of the code under certain special circumstances, the said release on bail will either be deemed to have been granted under chapter XXXIII of the code or the same will have to be granted subject to the provisions of the code relating to bail, which again means chapter XXXIII of the code. For example, bail under the proviso (a) of Sub-section (2) of Section 167 and under Sub-clause (b) of Section 209 of the code. Once bail is granted to the accused under chapter XXXIII, it naturally follows that the bail would continue to remain in force till it is cancelled under Section 437(5) or under Section 439(2). In short, anticipatory bail is also a bail with all its legal consequences and effects. Legally speaking, there is no substantial distinction between anticipatory bail and regular bail except that the former is a pre-arrest legal process, whereas, the latter is a post-arrest legal process.

6.8.3 Requirement of Obtaining Regular Bail within the Duration of Anticipatory Bail not Envisaged by Law

It is a golden rule of statutory interpretation that when the language of a particular statutory provision is clear, such provision should be interpreted in its plain and natural sense except where the plain and natural interpretation leads to absurdity. The rule stated by Tindal, C.J. in Sussex Peerage case, still holds the field. The aforesaid rule is to the effect:- If the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense. The words themselves do alone in such cases best declare the intent of the lawgiver. Recourse to construction or interpretation of statute is necessary when there is ambiguity, obscurity, or inconsistency therein and not otherwise. True meaning of a provision of law has to be determined on the basis of what provides by its

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91 Sussex Peerage case (1844) 11 Cl and F 85.
clear language, with due regard to the scheme of law. Scope of the legislation on the intention of the legislature cannot be enlarged when the language of the provision is plain and unambiguous.\textsuperscript{92}

In other words statutory enactments must ordinarily be construed according to its plain meaning and no words shall be added, altered or modified unless it is plainly necessary to do so to prevent a provision from being unintelligible, absurd, unreasonable, unworkable or totally irreconcilable with the rest of the statute.\textsuperscript{93} The plain and literal meaning of Section 438 does not provide for obtaining bail twice that is to say first anticipatory bail and then regular bail. By no canon of interpretation such a procedure of universal application can be read in to the provisions of Section 438.

6.9 INTERIM OR TRANSIT ANTICIPATORY BAIL IN SOME CASES

Court can entertain an application for grant of interim bail to accused to enable him to surrender before the Court having jurisdiction in a case wherein he is accused of the offence committed outside the jurisdiction of the Court where the accused ordinary reside.\textsuperscript{94} The Court of Sessions or the High Court within whose jurisdiction a person ordinarily resides, may apply for anticipatory bail and the same may be entertained by the said Court only with a view to providing an immediate relief so as to enable him to approach the Court of Sessions or the High Court within whose territorial jurisdiction the offence alleged to have been committed. Thus, an application under Section 438 should be finally decided only by the court within whose territorial jurisdiction the alleged offence has been committed. The Court entertaining application for anticipatory bail at the first instance which does not have the territorial


\textsuperscript{94} Sanjeev Chandel v. State of H.P., 2003 Cr LJ 935(HP) (paras 6, 9).
jurisdiction can give protection only for a brief period on adequate condition with a view to enabling the person apprehending arrest to approach the court within whose territorial jurisdiction the offence alleged to have been committed.\textsuperscript{95}

The power under Section 438 cannot be exercised by a Court having no territorial jurisdiction other than the limited jurisdiction for the transitional period, that is, arrest and release on bail by the arresting authority or the magistrate on whose order person arrested is required to be produced before the judicial magistrate having jurisdiction in the other state or union territory. Thus, the High Court cannot exercise its jurisdiction under Section 81 as the power to grant bail is confined to the authorities mentioned in the second proviso appended thereto. The High Court, however, can exercise a limited jurisdiction so that a person upon arrest may not be taken into custody by the arresting officer. Such arresting authority may be directed to release him on bail subject to the fulfilment of the terms and conditions as may be imposed. The terms and conditions may provide for execution of bond that he shall, within a reasonable time, and not beyond the period of 24 hours, appear before the Courts as mentioned in the second proviso appended to Section 81 of the code of criminal procedure and obtain a regular bail from such authority on such terms and conditions as the Court may deem fit and proper.

6.9.1 Provision of Cancellation of Bail

The Code of Criminal Procedure, 1973 makes clear provisions for cancellation of bail and taking accused back in custody. Section 437(5) states that any court which has released a person on bail under Sub-section (1) or Sub-section (2) of Section 437, may, if it considers it necessary so to do, direct that such person be arrested and commit him to custody. Similarly Section 439 confers on the

High Court and the Court of Session power to cancel bail. Cancellation of bail necessarily involves the review of a decision already made and can by and large be permitted only if, by reason of supervening circumstances, it would be no longer conducive to a fair trial to allow the accused to retain his freedom during the trial. Cancellation of bail is a serious matter. Bail once granted can be cancelled only in the circumstances and for the reasons which have been clearly stated by our Court in a catena of judgments. If an accused who has been granted bail misuses his liberty and absents himself without proper cause in a proceeding before a Court, that Court has the inherent jurisdiction to cancel the bail. Even where a magistrate finds that an order of bail passed by him without jurisdiction. He could commit the accused to custody forthwith and should not allow the accused to remain on bail pending the passing of the final order cancelling the bail.

The Sub-section (5) of the Section 437 of the Criminal Procedure Code, 1973 provides that any court releasing any person on bail may direct that such person be arrested and commit him to custody. Hence the High Court or Court of Session can cancel the bail.

In cancellation of bail the conduct of the accused subsequent to release on bail and supervening circumstances will be relevant. However power of a superior court to cancel bail in appropriate cases on other grounds is not restricted.

Section 439 of the code confers very wide powers on the High Court and the Court of Sessions regarding bail. But while granting bail, the High Court and the Sessions Court are guided by the same considerations as other Courts. That is to say, the gravity of the crime, the character of the evidence, position and status of the accused with reference to the victim and witnesses, the likelihood

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of the accused fleeing from justice and repeating the offence, the possibility of his tampering with the witnesses and obstructing the course of justice and such other grounds are required to be taken into consideration. Each criminal case presents its own peculiar factual scenario and, therefore, certain grounds peculiar to a particular case may have to be taken into account by the court. The court has to only opine as to whether there is prima facie case against the accused. The court must not undertake meticulous examination of the evidence collected by the police and comment on the same. Such assessment of evidence and premature comments are likely to deprive the accused of a fair trial. While cancelling bail under Section 439(2) of the code, the primary considerations which weigh with the court are whether the accused is likely to tamper with the evidence or interfere or attempt to interfere with the due course of justice or evade the due course of justice. But, that is not all. The High Court or the Sessions Court can cancel bail even in cases where the order granting bail suffers from serious infirmities resulting in miscarriage of justice. If the Court granting bail ignores relevant materials indicating prima facie involvement of the accused or takes into account irrelevant material, which has no relevance to the question of grant of bail to the accused, the High Court or the Sessions Court would be justified in cancelling the bail.\textsuperscript{101}

### 6.9.2 The Consideration for Cancellation of Bail under Section 439(2)

Differ from the consideration applicable for the grant or refusal of bail. However, in a case for cancellation, the court may delve into assessing considerations behind the grant of bail in the first instance, if it finds the reasons for granting bail to be insufficient.\textsuperscript{102} A bail, granted in a case of private complaint can be cancelled at the instance of the complainant. But when the police have taken cognizance of the offence and the charge-sheet has

\textsuperscript{101} Kanwar Singh Meena v. State of Rajasthan, 2012 (10) SCR 847: AIR 2013 SC 296: JT 2012 (10) SC 262: 2012 (12) SCC.

\textsuperscript{102} Ram Govind Upadhyay v. Sudarshan Singh, AIR 2002 SC 1475.
been submitted in relation to the same, and the public prosecutor is conducting the prosecution on behalf of the state, then the de facto complainant may apply for cancellation of bail. Even in a murder trial a private party has locus standi to move for cancellation of bail when the trial court grants bail. The power to take back in custody a person accused of an offence who is enlarged on bail has to be exercised with care and circumspection. But the refusal to exercise that wholesome power will reduce it to a dead letter and will render the courts to be silent spectators to the subversion of the judicial process.

6.9.3 Grounds for Cancellation

Generally speaking, the grounds for cancellation of bail are interference or attempt to interfere with the course of administration of justice or evasion or attempt to evade the due course of justice or abuse of the concession granted to the accused in any manner. However, these instances are merely illustrative and not exhaustive. One such ground of cancellation of bail would be where ignoring material and evidence on record in perverse order granting bail is passed in a heinous crime.

However, strict proof is not necessary. The prosecution can establish its case by showing on a preponderance of probabilities that the accused has abused his liberty and or has attempted to tamper or has tampered with its witnesses. That the accused has abused his liberty or that there is 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. The Court, before the cancellation of bail, is to determine whether the prosecution has succeeded in proving its case by the above standard that the accused has tampered with its witnesses and that there is a reasonable apprehension that he will continue to indulge in such a

103 Goenka (Smt.) v. Rajesh Goenka, 1986 (1) Crimes 325.
104 Sant Ram v. Kalicharan, 1977 Cr.LJ 486.
course of conduct if he is allowed to remain at large. 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 cases, when by a preponderance of probabilities it is clear that the accused is interfering with the course of justice by tampering with witnesses. The Court has to strike a balance between two necessities, namely, of not allowing the course of justice to be deflected and of allowing liberty to the accused until he is found guilty. Grant of bail is not like a commodity to be bargained by the court with the accused. It is clearly beyond the competence of the courts to indulge in such bargaining. The accused cannot be subjected to any condition other than contemplated in Section 437(c) of the code. In *Ram Nath Shanna v. Khalil Khan*[^106^], the condition imposed by the chief judicial magistrate, Ghaziabad was absolutely illegal and was liable to be set aside as it was a condition undoubtedly repugnant to the provisions of Section 437(iii) of the code. Moreover, the chief judicial magistrate had further fallen in error in compelling , the opposite party, to furnish an undertaking to the effect that if he failed to hand over the charge of the office of Pradhan to the officer concerned, he would have to pay Rs. 4,000 as penalty to the government. The courts must refrain from contracting a bargain with the accused while granting bail. A duty is cast upon courts to ensure that the condition imposed on the accused is in consonance with the intendment and provisions of Section 437.[^108^]

The ground for cancellation of bail should be those which arose after the grant of bail and should be preferable to the conduct of the accused while on bail.[^109^]

Grounds for Cancellation of Bail Ordinarily the High Court will not exercise its discretion to interfere with the bail granted by the session’s judge in favour of the accused and where cancellation of bail is sought in an application, the

prosecution has to prove its allegation by preponderance of probabilities.\textsuperscript{110} Cancellation of bail necessarily involves the review of a decision already made and can by and large be permitted only if, by reason of supervening circumstances, it would be not conducive to a fair trial to allow the accused to retain his freedom during the trial. A bail once granted cannot be cancelled on the off-chance or on the supposition that witnesses have been won over by the accused. But in an application for cancellation of bail, the prosecution can establish its case by showing a preponderance of probabilities, and not beyond reasonable doubt, that the accused has attempted to tamper or has tampered with its witnesses, or has abused his liberty or that there is a reasonable apprehension that he will interfere with the course of justice. The power to take back in custody an accused, who has been enlarged on bail, has to be exercised, with care and circumspection. But the power, though of an extraordinary nature, is meant to be exercised in appropriate cases; refusal to exercise that wholesome power in such cases, few though they may be, will reduce it to a dead letter and will suffer the courts to be silent spectators to the subversion of the judicial process.\textsuperscript{111} Improper grant of bail is one of the circumstances for cancellation of the same.\textsuperscript{112} Very cogent and overwhelming circumstances are necessary for an order seeking cancellation of the bail and the trend today is towards granting bail because it is now well-settled that the power to grant bail is not to be exercised as a punishment before trial. The material considerations in such a situation are whether the accused would be readily available for his trial and whether he is likely to abuse the discretion granted in his favour by tampering with the evidence.\textsuperscript{113} Power to cancel bail can be exercised only when the accused is on bail and not when he is in custody.

The ground for cancellation of bail should be those which arose after the grant of bail and should be preferable to the conduct of the accused while on bail.\textsuperscript{114} Submission of charge-sheet subsequent to admission of bail in exercise of the power under proviso (a) to Section 167(2), is not a sufficient ground for cancellation of bail and keeping the accused in custody.\textsuperscript{115} The order cancelling bail should not be arbitrary, even if the bail was granted in a non-bailable offence.\textsuperscript{116} The following are some of the important grounds on which bail may be cancelled:

(i) when the accused continues or repeats the same offence while he is on bail;\textsuperscript{117}

(ii) where the accused tampers with the prosecution evidence or otherwise impedes the course of justice;\textsuperscript{118}

(iii) where fresh evidence for believing that the accused has been guilty of an offence punishable with death or imprisonment for life has been discovered; and

(iv) where bail is granted in wrong exercise of discretion;\textsuperscript{119}

(v) where the accused runs away to a foreign country or goes underground or beyond the control of his sureties; or

(vi) when he commits acts of violence, in revenge, against the police and the prosecution witness and those who have booked him or are trying to book him.\textsuperscript{120}


\textsuperscript{119} Emperor v. B.B. Singh, AIR 1943 Oudh 419; Narendra Lal Khan v. Emperor, ILR 36 Cal 166.
According to Section 437(5) any Court which has released a person on bail under (1) or Sub-section (2) of Section 437 may if considers it necessary so to do, direct that such person be arrested and committed to custody.

The power to cancel bail has been given to the court and not to a police officer. Secondly, the court which granted the bail can alone cancel it. The bail granted by a police officer cannot be cancelled by the Court of a magistrate. For cancellation of bail in such a situation, the powers of the High Court or Court of Session under Section 439 will have to invoked. Rejection of bail when bails applied for is one thing; cancellation of bail already granted is quite another. It is easier to reject a bail application in a non-bailable cases than to cancel a bail granted in such case. Cancellation of bail necessary involves the review of a decision already made and can large be permitted only if, by reason of supervening circumstances it would be no longer conducive to a fair trial to allow the accused to retain his freedom during the trial. However, bail granted illegal or improperly by a wrong arbitrary exercise of judicial discretion can be cancelled even if there is absence of supervening circumstances. If there is no material to prove that the accused abused his freedom court may not cancel the bail. In Public Prosecutor v. George Williams, the Madras High Court pointed out five cases where a person granted bail may have the bail cancelled and be recommitted to jail:

(a) Where the person on bail, during the period of the bail, commits the very same offence for which is being tried or has been convicted, and thereby proves his utter unfitness to be on bail;

(b) If he hampers the investigation as will be the case if he, when on bail; forcibly prevents the search of place under his control for the corpus delicti or other incriminating things;

120 Public Prosecutor v. George Williams, AIR 1951 Mad 1042: (1952) ILR Mad 414: 1951 Mad WN 625: 64 Mad LW 809: (1952) 1 Mad LJ (Cr) 801: 1951 Mad WN (Cr) 199: 1952 All WR (Supp) 52: 1952 Cr LJ 213.

121 1951 Mad 1042.
(c) If he tampers with the evidence, as by intimidating the prosecution witness, interfering with scene of the offence in order to remove traces or proofs of crime, etc.

(d) If he runs away to a foreign country, or goes underground, or beyond the control of his sureties; and

(e) If he commits acts of violence, in revenge, against the police and the prosecution witnessed & those who have booked him or are trying to book him. Mere assertion of an alleged of an alleged threat to witnesses should not be utilised as a ground for cancellation of bail, routinely. Otherwise there is ample scope for making such allegation to nullify the bail granted. The Court should, in each case carefully weigh the acceptability of the allegations and pass orders as circumstances warrant in law. Such matters should be dealt with expeditiously so that actual interference with the ordinary and moral course of justice is nipped in the bud and an irrelevant stage is not reached.\(^\text{122}\) In cancelling bail the Court can consider whether irrelevant materials were taken into consideration by Court granting bail.\(^\text{123}\) The antecedent of the accused is also a factor to be taken into consideration as per the pronouncements of this Court and the nature of the crime committed and the confinement of the victim for eight days, the Court is disposed to interfere with the order impugned.\(^\text{124}\)

6.9.4 Cancellation of Bail by the Sessions Judge

The Court of Session has the power to cancel bail and order that the accused on bail be rearrested and committed to custody. It is not necessary that for the cancellation of bail some new circumstances must have taken place subsequent

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124 Ash Mohammad v. Shiv Raj Singh @ Lalla Babu, 2013 (1) RCR (Cri) 277.
to the offender being released on bail. The cancellation of bail by the sessions judge on the ground that the magistrate could not have granted bail as the proviso to Sub-section (1) of Section 437 did not apply was upheld by the High Court. The sessions judge has power to cancel the bail granted under Chapter XXXIII of the code. But he has no power to cancel the bail granted under Rule 184 of the Defence of India Rules.

6.9.5 Anticipatory Bail also can be Cancelled

The High Court as well as the Court of Sessions has the power to cancel anticipatory bail granted under Section 438, as under Section 439 (2) each of them has been given power to cancel the bail given “under this chapter”.  

Anticipatory bail granted by the sessions judge under Section 438 was cancelled by the High Court. A fresh application for cancellation of anticipatory bail was rejected as there were no fresh materials for cancelling it.

6.9.6 Object Underlying Cancellation of Bail

The object underlying the cancellation of bail is to protect the fair trial and secure justice being done to the society by preventing the accused who is set at liberty by the bail order from tampering with the evidence in the heinous crime and if there is delay in such a case the underlying object of cancellation of bail practically loses all its purpose and significance to the greatest prejudice and the interest of the prosecution. Once a person is released on bail in serious criminal Cases where the punishment is quite stringent and deterrent, the accused in order to get away from the clutches of the same indulges in various activities like tampering with the prosecution witnesses, threatening the family

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members of the deceased victim and also creates problems of law and order situation.\textsuperscript{128}

6.9.7 Criterion for Cancellation of Bail

While it is true that availability of overwhelming circumstances is necessary for an order as regards the cancellation of a bail order, the basic criterion, however, is interference or even an attempt to interface with the due course to administration of justice and/or any abuse of the indulgence/privilege granted to the accused.\textsuperscript{129} Tampering with the evidence and threatening of the witnesses are two basic grounds for cancellation of bail.\textsuperscript{130} Before an order cancelling the bail under Section 439(2) of the code can be passed it is necessary for the prosecution to show some act or conduct on the part of the accused person from which a reasonable inference may be drawn that he has tampered with the prosecution witnesses or has in any other manner misused or abused the liberty allowed to him. The bail may also be cancelled if the prosecution succeeds in showing that there is a reasonable apprehension that the accused will interfere with the course of justice in case he is allowed to remain on bail. The serious nature of the accusation against the accused is certainly a relevant factor while considering his release on bail but once an accused person or released on bail in spite of such nature of the offence, this factor by itself will not justify the cancellation of the bail already granted without some supervening circumstances of the type referred to above.\textsuperscript{131}

Normally bail when granted is not to be cancelled unless there are very cogent and overwhelming circumstances. The grounds for cancellation of bail are interference or attempt to interfere with the due course of administration of justice or evasion or attempt to evade the course of justice, or abuse of the liberty granted to the accused. Therefore the consideration for granting the bail

\textsuperscript{129} Ram Govind Upadhyay v. Sudarshan Singh, AIR 2002 SC 1475 at p.1478.
\textsuperscript{130} Ibid.
are different than the consideration which are to be weighed in mind at the time of considering the application for cancelled and re-committed to the jail.\textsuperscript{132} (i) Where while on bail he commits the very same offence for which he was being tried or has been convicted; (ii) If the hampers the investigation; (iii) If the hampers the investigation; (iv) If he runs away to a foreign country or goes underground or beyond the control of his sureties; and finally; (v) If he commits acts of violence in revenge. The liberty once granted to an accused by way of bail cannot be curtailed by cancellation of bail, unless certain conditions are fulfilled.\textsuperscript{133} The grounds for cancellation of bail under Sections 437(5) and 439(2) of the code are identical.\textsuperscript{134} The following legal principles, amongst others, would be relevant in the matter of consideration of the question of cancellation under Section 439(2) of code by the High Court anticipatory bail granted under Section 438 or of bail granted under Section 439(1) by the sessions judge.\textsuperscript{135} (i) An order granting anticipatory bail under Section 438 or bail under Section 439(1) is amendable 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.

\textbf{6.9.8 Some Instances where Cancellation of Bail may be Ordered}

(a) Where the accused had not only contravened the conditions imposed on them while granting bail, but were trying to ensure that the sole eye witnesses, viz., the son of the deceased was either kidnapped or was also

\textsuperscript{132} \textit{Ashok Kumar v. State}, 1992 Cri LJ 3821 at p. 3822 (Del).
\textsuperscript{133} \textit{Ram Naresh Singh v. State of M.P.}, 1995 CriLJ.
\textsuperscript{135} \textit{A.K. Murmu v. Prasenji Chowdhury}, 1999 Cri LJ 3460 at p. 3468(Cal).
killed, so that no evidence would be available for the prosecution to substantiate their case.\(^\text{136}\)

(b) A perusal of the case diary shows that more materials had been collected by the time of granting statutory bail under Section 167(2) and on consideration of those materials if the magistrate considers it necessary to cancel the bail he may do so.\(^\text{137}\)

(c) The accused on bail has committed a misconduct or violated the terms of the bail bond or tampered with the evidence or tried to abscond after the charge-sheet has been filed.\(^\text{138}\)

(d) When the accused has imperilled the smooth course of investigation or has been involved in such acts as in the opinion of the court, are sufficient to cancel the bail already given.\(^\text{139}\)

(e) Where by a preponderance of probabilities, it is clear that the accused is interfering with the course of justice by tampering with the witnesses.\(^\text{140}\)

(f) Where the court come to the conclusion that after the challan had been filed there are sufficient grounds that the accused had committed a nonbailable offence and that it is necessary that he should be arrested and committed to custody or that he had been tampering with the evidence or that his being at large is not in the interest of justice.\(^\text{141}\)

(g) Where the person bailed out has done something which may cause intention in or obstruction to the smooth trial of the case against him.\(^\text{142}\)

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6.9.9 Cancellation of Bail for Concealing Earlier Rejection of Bail

Sections 439 of code and Section 44 of Evidence Act\textsuperscript{143}, the applicants had deliberately withheld the factum of the rejection of their bail application by the High Court in their second bail application filed before the in-charge sessions judge in order to obtain bail by playing fraud upon the Court. The in-charge sessions judge was absolutely justified in recalling his order of bail dated 31 July, 1987 by his order dated 14 August, 1986 having been satisfied that the bail order was obtained by practising fraud upon the Court. The in-charge sessions judge had rightly taken into account the fact of rejection of the bail having been suppressed by the applicants as relevant in view of the provisions contained in Section 44 of the Evidence Act, which provides as follows: Fraud or collusion in obtaining judgment, or in competency of the court may be proved. Any part to a suit or other persons may show that any judgment, order or decree which is relevant under Sections 40, 41 or 42 and which has been proved by the adverse party was delivered by the court not competent to deliver it or was obtained by fraud or collusion.\textsuperscript{144} Concealment of rejection of previous applications for bail by the Session’s Court as well as the High Court can render the fresh bailable application to be rejected.\textsuperscript{145}

6.9.10 Law on Cancellation of Bail

Cancellation of bail is a serious matter. Bail once granted can be cancelled only in the circumstances and for the reasons which have been clearly stated by the Apex Court in a catena of judgments. It would be appropriate to refer to a few of them before dealing with the rival contentions. Thus, Section 439 of the code confers very wide powers on the High Court and the Court of Sessions regarding bail. But, while granting bail, the High Court and the Sessions Court are guided by the same considerations as other Courts.\textsuperscript{146} That is to say, the

\textsuperscript{143} The Indian Evidence Act, 1972.
\textsuperscript{145} State of Madhya Pradesh v. Bardantilal Ahirwar, 2006 (43) AIC 733 (MP HC 18).
\textsuperscript{146} P.V. Ramakrishna, Law of Bails, 9\textsuperscript{th} edition, 2016, Universal Law Publishing, p. 234.
gravity of the Crime, the character of the evidence, position and status of the accused with reference to the victim and witnesses, the likelihood of the accused fleeing from justice and repeating the offence, the possibility of his tampering with the witnesses and obstructing the course of justice and such other grounds are required to be taken into consideration. Each criminal case presents its own peculiar factual scenario and, therefore, certain grounds peculiar to a particular case may have to be taken into account by the Court. The court has to only opine as to whether there is prima facie case against the accused. The Court must not undertake meticulous examination of the evidence collected by the police and comment on the same. Such assessment of evidence and premature comments are likely to deprive the accused of a fair trial. While cancelling bail under Section 439(2) of the Code, the primary considerations which weigh with the court are whether the accused is likely to tamper with the evidence or interfere or attempt to interfere with the due course of justice or evade the due course of justice. But, that is not all. The High Court or the Sessions Court can cancel bail even in cases where the order granting bail suffers from serious infirmities resulting in miscarriage of justice.\textsuperscript{147} If the court granting bail ignores relevant materials indicating prima facie involvement of the accused or takes into account irrelevant material, which has no relevance to the question of grant of bail to the accused, the High Court or the Sessions Court would be justified in cancelling the bail. Such orders are against the well-recognised principles underlying the power to grant bail.\textsuperscript{148} Such orders are legally infirm and vulnerable leading to miscarriage of justice and absence of supervening circumstances such as the propensity of the accused to tamper with the evidence, to flee from justice, etc, would not deter the court from cancelling the bail. The High Court or the Sessions Court is bound to cancel such bail orders particularly when they are passed releasing accused involved in heinous crimes because they ultimately result in weakening the prosecution case and have adverse impact on the society.

\textsuperscript{147} Ibid. at p. 235.

\textsuperscript{148} Ibid.
Needless to say that though the powers of the Apex Court are much wider, the apex court is equally guided by the above principles in the matter of grant or cancellation of bail.¹⁴⁹

### 6.9.11 Conditions for Cancellation of Bail

It is well settled in law that once a bail is granted to an accused, if the Court granting the bail on being moved by an application under Section 439(2) finds that the accused while on bail has misused his liberty and has acted in such manner which is prejudicial to the case of the prosecution, e.g., has attempted to gain over witnesses, has committed further criminal acts on the informant or any other person belonging to the prosecution party or has attempted by the court granting such bail. No doubt, the High Court being a superior Court can also invoke this power under Section 439(2) by initiating suomotu proceeding for cancellation of bail if such grounds are prima facie made out. The power to grant bail by a sessions judge is a discretionary power.¹⁵⁰ No doubt, such power should not be arbitrarily used. But, however, if the learned Sessions Judge, on perusal of the materials comes to the conclusion that it is a fit case where bail should be granted, the said bail order cannot be interfered with on the ground that it suffers from error of record, in a proceeding under Article 226 of the Constitution, as such a proceeding cannot be considered to be an appeal against the order of bail. A bail order once granted can only be cancelled under the provisions of Section 439(2) and not otherwise.

Cancellation of bail power under Section 439(2) has to be exercised sparingly by the Court only on fulfilment of certain conditions.¹⁵¹ Principles Underlying the cancellation of bail The High Court would not ordinarily interfere with the discretion of the lower Court in granting or refusing bail, but in a case where

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bail has been granted on irrelevant considerations, such as the status or influence of the person accused and regardless of the nature of the accusation and relevancy of the materials on record, the court would not hesitate to interfere, in the interests of justice.\(^\text{152}\) Granting bail in a non-bailable offence is a concession allowed to an accused and it presupposes that this privilege is not to be abused in any manner and that such accused should not contact the prosecution witnesses or exert any undue influence on them so as to destroy the evidence or minimise its effect against him. It is a sort of trust reposed in him by Court and if it is found that he has betrayed this trust in any manner or that he has misused the liberty thus granted to him by the Court he disentitles himself to the privilege so granted.

This is more specially so, when he happens to occupy a dominating position in relation to the witnesses concerned and can injure or benefit them by his own fist. It is no doubt true, that the object of Section 437(5)\(^\text{153}\) is not punitive but it is equally true that the interests of the administration of justice demand that nobody should be allowed to impede the course of justice or hamper its administration in any manner.\(^\text{154}\) It is certainly open to a court to cancel a bail granted by it, but it is now well-settled that cancellation should be resorted to only when it is found that it is no longer conducive to a fair trial to allow the accused to retain his freedom during the trial.\(^\text{155}\) The relevant fact that should be taken by the Court into consideration for cancellation of a bail is to see whether from the affidavit filed by the prosecution it has, by a preponderance of probability made clear whether the accused are interfering with the course of justice by tampering with witnesses or have contravened the conditions imposed on them and thereby abused the liberty granted by the Court. It is no doubt true that when the accused have been let off or enlarged on bail, Courts


\(^{153}\) Section 497(5) of Cr PC 1898.


have to be careful and cautious in exercising the power of taking them back in custody unless there is a reasonable apprehension that the accused would interfere with and pollute justice warranting the cancellation of bail.\textsuperscript{156}

Grant of bail under Section 437(1) is at one stage of the investigation, and cancellation of bail under Section 437(5) is at another. The position changes as investigation progress and more circumstances come to light. The overriding considerations in granting bail under Section 437(1) are, \textit{inter alia}, the nature and gravity of the circumstances in which the offence is committed and the likelihood of the accused fleeing from justice and his tampering with prosecution evidence relating to ensuring a fair trial in a Court of justice.

These considerations can arise when materials are produced. There can be, therefore, no controversy that when the accused has been admitted to bail under Section 437(1) or (2) it cannot be cancelled unless new circumstances come into existence warranting such cancellation.

\textbf{Object of Section 437(5).} The object of Section 437(5) is to enable the court, on sufficient materials being placed before it to cancel the bail granted or to direct that such person be arrested and committed to custody. This sub-section contemplates a situation where a person enlarged on bail has misused the freedom granted or has disobeyed the conditions imposed or has imperilled the smooth course of investigation or has done such acts, as, in the opinion of the Court, are sufficient to cancel the bail already granted. To extend the principle contained in Section 437(5) for remanding the accused to police custody for the purpose of securing recovery under Section 27 of the Evidence Act would not only be doing violence to Section 437(5) but would also override the principles under which a citizen’s liberty is safeguarded.\textsuperscript{157} It has been observed by the Supreme Court that rejection of bail when applied for is one thing, cancellation

\textsuperscript{156} \textit{State v. Veerapandy}, 1979 Cr LJ 455 (457) (Mad).

of bail already granted is quite another. It is easier to reject a bail application in a non-bailable case than to cancel a bail granted in such a case. Cancellation of bail necessarily involves the review of a decision already made and can, by and large, be permitted only if, by reason of supervening circumstances, it would no longer be conducive to a fair trial to allow the accused to retain his freedom during the trial. The fact that prosecution witnesses have turned hostile cannot by itself justify the inference that the accused has won them over. In other words, the objective fact that the witnesses have turned hostile must be shown to bear a causal connection with the subjective involvement therein of the respondent. Without such proof, a bail once granted cannot be cancelled on the off-chance or on the supposition that the witnesses have been won over by the accused. Inconsistent testimony can no more be ascribed by itself to the influence of the accused than consistent testimony, to the pressure of the prosecution. It is therefore necessary for the prosecution to show some act or conduct on the part of the respondent from which a reasonable inference may arise that the witnesses have gone back on their statements as a result of an intervention by or on behalf of the respondent.  

Bail for Non-bailable Offence Cancelled on more Serious Offence being made out by the Investigation, Propriety of Relief under Section 438 not Allowed  

It was contended that the accused were granted liberty of bail under Section 436 for offence under Section 365 of the IPC. They should not be denied the liberty of continuing on bail, now under Section 438 merely because at a later point of time, the offence has been converted to one under Section 364 of the IPC. Bail was directed to be conciliated in exercise of the powers conferred by Section 437(5) and on the ground that the accused applicants were let out on bail because till then they were accused only of an offence under Section 365 of the IPC, but later on the offence was converted into those under

Sections 364, 387 and 120B of the IPC. The Court held that the learned chief judicial magistrate was fully justified in exercising the powers under Section 437(5) and cancelling the bail with a direction to the accused to surrender before the Court because he was convinced that the concession of bail was granted while the accusation did not go beyond Section 386 of the IPC, but the investigation and discovery of new material evidence pointed out to the commission of a more heinous crime under Section 364 of the IPC. The crime alleged to have been committed related to kidnapping a boy returning from school in broad daylight from within the populated area of a township and holding him to ransom under threat of death. Prime facie there is evidence against the accused applicants the Court thus ruled.¹⁵⁹

**Power of High Court to Cancel Bail Granted by Session Court.** There is no provision in the new code of 1973 excluding the jurisdiction of the High Court in dealing with an application under Section 439(2) of the code of cancel bail after the sessions judge had been moved and an order had been passed by him granting bail. The High Court has undoubtedly jurisdiction to entertain an application under Section 439(2) of the code for cancellation of bail notwithstanding that the Session Judge had earlier admitted the accused person to bail.¹⁶⁰ Ordinarily, the High Court will not exercise its discretion under Section 439(2) by cancelling a bail granted by the session judge in favour of an accused but if bail has been granted to an accused in a non-bailable offence punishable with death or imprisonment for life in a manner which smacks of arbitrariness, capriciousness or perversity, on the part of the Court of Session granting such bail, the High Court has not merely the discretion but a duty laid on it under Section 439(2) to cancel the bail and order the accused to be rearrested.¹⁶¹ Ordinarily the High Court will not exercise its discretion to

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interfere with an order of bail granted by the sessions judge in favour of an accused.\footnote{Gurcharan Singh v. State (Delhi Admn.), AIR 1978 SC 179 at p. 186 : (1978).}

**Criteria for Bail at Appellate Stage.** Following detailed relevant criteria for grant or refusal of bail were laid down in *Gudikanti Natasimhulu case*\footnote{Gudikanti Narasimhulu v. Public Prosecutor, High Court of A.P., AIR1978.} by the Supreme Court in the case of a person who has either been convicted and has appealed or one whose conviction has been set aside but leave has been granted by the Supreme Court to appeal against the acquittal:

(i) The delicate light of the law favours release unless countered by the negative criteria necessitating that course. The corrective instinct of the law plays upon release orders by strapping on the them protective and curative conditions.

(ii) Another relevant factor is as to whether the course of justice would be thwarted by him who seeks the benignant jurisdiction of the Court to be freed for the time being.

(iii) Another relevant factor is as to whether the course of justice would be the thwarted by him who seeks the benignant jurisdiction of the Court to be freed for the time being.

(iv) The legal principal and practice validate the court considering the likelihood of the applicant interfering with witnesses for the prosecution or otherwise polluting the process of justice. It is not only traditional but rational, in this context, to enquire into the antecedents of a man who is applying for bail to find whether he has a bad record, particularly a record which suggests that he is likely to commit serious offences while on bail. In regard to habitual, it is part of criminological history that a thoughtless bail order has enabled the bailed to exploit the opportunity to inflict further crimes on the members of society. Bail discretion, on
the basic of evidence about the criminal record of a defendant, is therefore not an exercise in irrelevance.

(v) When the crime charged (of which a conviction has been sustained) is of the highest magnitude and the punishment of it assigned by law is of extreme severity, the court may reasonably presume, some evidence warranting, that no amount of bail would secure the presence of the convict at the stage of judgment, should he be enlarged.

(vi) The significance and sweep of Article 21 of the Constitution make the deprivation of liberty a matter of grave concern and permissible only when the law authorizing it is reasonable, even-handed and geared to the goals of community good, and State necessity spelt out in Article 19. The consideration set out as criteria are germane to this constitutional proposition. Reasonableness postulates intelligent care and predicates that deprivation of freedom by refusal of bail is not for punitive purpose but for the bi-focal interests of justice – to the individual and society affected.

(vii) Contrary factors need to be weighed to answer the test the reasonableness, subject to the need for securing the presence of the bail applicant. It makes sense to assume that a man on bail has a better chance to prepare or present his case than one remanded in custody. And if public justice is to be promoted, mechanical detention should be demoted. The considerable public expense in keeping in custody where no danger of disappearance or disturbance can arise, is not a negligible consideration. Equally important is the deplorable condition, verging on the inhuman, of the sub-jails, that the unrewarding cruelty and expensive custody of avoidable incarceration makes refusal of bail unreasonable and a policy favouring release justly sensible.
(viii) Conditions may be hung around bail orders, not to cripple but to protect. Such is the holistic jurisdiction and humanistic orientation invoked by the judicial discretion correlated to the values of our Constitution.

(ix) When a person, charged with a grave offence, has been acquitted at a stage, the intermediate acquittal has pertinence to a bail plea when the appeal before the Supreme Court pends. Having enjoyed the confidence of the court’s verdict once, the panic which might prompt the accused to jump the gauntlet of justice is less. Again, the ground for denial of provisional release become weaker when the fact stares the court in the face that a fair finding, if that be so, of innocence has been recorded by one court. It may not be conclusive, for the judgment of acquittal may be ex facie wrong, the likelihood of desperate reprisal, if enlarged, may be a deterrent and his own safety may be more in prison then in the vengeful village where feuds have provoked the violent offence. Antecedents of the man and socio geographical circumstances have a bearing only from this angle. Police exaggerations of prospective misconduct of the accused, if enlarged, must be soberly sized up lest danger of excesses and injustice creep subtly into the discretionary curial technique. Bad record and police prediction of criminal prospects to invalidate the bail plea are admissible in principle but shall not stampede the court into a complacent refusal.

(x) A circumstance of some consequence, when considering a motion for bail, is the period in prison already spent and the prospect of the appeal being delayed for hearing having regard to the suffocating crowd of dockets pressing before the few Benches.

(xi) Heavy bail from poor men is obviously wrong. Poverty is society’s malady and sympathy, not sternness, is the judicial response.
Provision for cancellation of bail is provided in Section 439(2) which contemplates that the Court of Session or the High Court can cancel the bail granted to an accused. The said section is reproduced hereunder for ready reference:

439(2). A High Court or Court of Sessions may direct that any person who has been released on bail under this chapter be arrested and commit him to custody.

Bail is a vital and crucial right of an accused enshrined under the right to freedom, once the person is released on bail, it is in exceptional circumstances that the Courts cancel his bail. The pre-conditions as defined by various courts for cancellation of bail can be summarized as under:

I. The interference or attempt to interfere with the due course of administration of justice by the accused.

II. The evasion or attempt to evade the course of justice by the accused.

III. The accused has abused to the liberty granted to him by the Court.

IV. The accused misuses the liberty by indulging in similar criminal activity.

V. The accused interferes with the course of the investigation.

VI. The accused attempts to tamper with the evidence or the witnesses.

VII. The accused threatens witnesses or indulges in similar activities.

The powers as provided under Section 439 (2) are wide and sweeping. The said powers can be exercised for cancelling any bail however if the bail has been granted by the Court of Session, the same would be cancelled by the Court of Session or the High Court. If the bail has been granted by the High Court, the same can only be cancelled by the High Court.
There is an exception under Section 167(2) of the code of criminal procedure which contemplates that if an accused has been granted bail due to default on the part of the investigating agency in filing the charge sheet within 60/90 days, then the accused is granted, bail on the Count of default. Even the bail granted due to default on the part of the investigating agency and by the exercise of the powers under Section 167(2) of the code of criminal procedure can be cancelled after filing of the charge sheet and after raising strong grounds for cancellation of the bail as mentioned above. Thus, it is clear that cancellation of bail is a separate and independent power of the Court which is mainly based on the preconditions imposed by the Court and the eventualities expressed by the Court in its various judgments as quoted hereinabove would.\(^{164}\)

### 6.10 NEED FOR REFORM IN INDIA

In India, where a person is accused of a serious crime and is likely to be convicted and punished severely for such a crime, he would be prone to abscond or jump bail in order to avoid the trial and consequential sentence. If such person is under arrest, it would be rather unwise to grant him bail and restore his liberty. Further, where the arrested person, if released on bail, is likely to put obstructions in having a fair trial by destroying evidence or by tampering with the prosecution witnesses, or is likely to commit more offences during the period of his release on bail, it would be improper to release such a person on bail. On the other hand, where there are no such risks involved in the release of the arrested person, it would be cruel and unjust to deny him bail.

### 6.10.1 Judicial Approach

Analysing the statutory provisions and observation of the Apex Court, it may be submitted that though the Magistrate has the power to grant or refuse the bail, yet it is his duty to follow judicial observations, he has to act judicially not to be affected by personal whims. As stated earlier, the Code of Criminal

Procedure divides the offences into two categories under Schedule 1. In respect of bailable offences, the accused under Section 436 has the right to be released on bail and in respect of non-bailable offences, Section 437 of the Code amended by the Act of 1980 lays down the provisions regarding the circumstances under which the Officer In Charge of the Police station of a court other than a High Court or a Court of Session can release any person accused or suspected of committing any of the non-bailable offence when arrested or detained without warrant by Officer-in-Charge of a police station. In respect of bailable offences there is no question of discretion in granting bail, as the wording of the section is imperative. Therefore, when any person accused of a bailable offence is arrested or detained without warrant by the officer In-charge of the police station and is prepared at any time while in the custody of such officer to give bail, such person shall be released on bail. So it is a general rule that the bail is to be granted in bailable offence, it to refuse in very rare cases. In *K. Joglekar v. Emperor*\(^{165}\) it was held that there is no hard and fast rule regarding the discretion of Magistrate in granting bail. The only principle is that there should be a careful exercise of that discretion. The discretion should be used in the interest of justice. Justice Bhagwati also reiterated the same in *Kashmira Singh v. State of Punjab*\(^{166}\). It would be travesty of justice to keep a person in jail for a period of five or six years for an offence which is ultimately found to have not been committed by him. Can the courts ever compensate him for incarceration which is found to be unjustified.

### 6.10.2 Factors into Consideration While Granting Bail

Therefore, the Courts in India have adopted liberal use of discretionary power of bail in order to avoid the long pre-trail incarceration. The Courts in India usually keep the following factors into consideration while exercising their discretionary powers:

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\(^{165}\) AIR 1931 All 504.

1) The nature of accusation.

2) The nature of the evidence in support of the accusation.

3) The severity of the punishment which conviction will entail

4) Whether the sureties are independent or indemnified by the accused.

On the other hand, if the crime charged is of the highest magnitude and the punishment for it, as assigned by law is of extreme severity, in such a case the court may reasonably presume that no amount of bail would secure the presence of accused at the stage of judgment.

Regarding the monetary surety in furnishing the bail, the Supreme Court in Moti Ram v. State of M.P.\(^{167}\) made it clear that the magistrate should abandon the antiquated concept under which pre-trial release could be ordered only against monetary bail. The Court held that monetary concept is out-dated and experience shows that it has done more harm than good. If a magistrate is satisfied after making an inquiry into the condition and background of the accused that the accused has got these roots in the community and is not likely to abscond, he can safely be released on order to appear. Explaining the negative effects of monetary bail system, Justice Bhagwati cautioned that the poor find it difficult to furnish bail and highlighted that poverty and been transformed into crime and subordinate Courts have forgotten that 22,000 persons whom they sent to jail were languishing in prisons not because they were guilty but because they were too poor to afford bail. Justice Bhagwati further laid down a test to determine “roots in society”. He emphasized upon the following factors to be kept into account:

1) His residence in the society.

2) His employment, status, family ties and relationships.

3) His reputation, character and monetary position.

4) His prior criminal record.

5) The identity of responsible members of society who would vouch for his reliability.

6) The nature of offence charged the apparent probability of conviction and the likely sentence.

7) Any other factor indicating the ties of the community or bearing on the risk of wilful failure to appear.

The accused, therefore, in appropriate cases, after considering the above factors, should be released on his personal bond without monetary obligation. As deprivation of one’s personal liberty for the reason of financial poverty only is an incongruous element in a society raised on the pillars of equality and social justice assuring dignity of individual’s life.\textsuperscript{168}

Finally, it may be submitted that bail was not inserted in the Indian Constitution as a fundamental right, but by judicial activism it has been implicit in Article 21 as component of personal liberty. But the bail system in India suffers from property-oriented approach and is conspicuous of the erroneous assumption that the risk of monetary loss is the only deterrent against fleeing from course of justice. Thus, it is submitted that the court must abandon this antiquated approach under which pre-trial release is ordered only against bail sureties. Thus, the focus of judicial discretion in bail should always be upon the aspects of personal liberty and equality of the individual provided under Articles 14, 19 and 21 of the Constitution of India.\textsuperscript{169}

\textsuperscript{168} \textit{Ibid.}

The bail amounts ought not to be excessive and the demand for verification of surety should not be unreasonable. The amount can be changed with change in circumstances. Though the amount can be changed with change in circumstances. Conditions may be imposed on the accused about his attendance in the Court on a fixed date and place. A condition requiring daily attendance in the Court is, however, illegal. Thus, the magistrate directed the accused in a bailable case that he should report daily twice to the commissioner of police, the order was repugnant to the provisions of the code. However, no statutory limits exist on the amount of bail bond or the number of sureties that may be required. The entire matter is left to the discretion of the Court without giving any guidelines. The imposition of conditions can, therefore, be in the nature of prescribing certain requirements to be fulfilled for securing a release. A condition imposed must have a bearing with the nature or purpose of the bail, which for all practical purposes is a process of the system of criminal justice besides being a mode to secure the accused’s freedom. Thus, an order that the accused would appear on the requisition by the police when needed is a competent order, or a direction to attend to investigation when needed is valid.

Precedents continue to show that it is well within the Court’s jurisdiction to impose some restrictions on the freedom secured by an accused who has been granted bail, irrespective of the fact restrictions really relate to the purpose of the bail or not. Unreasonable restrictions on freedom, however, cannot be justifiable imposed in any case. A court cannot impose conditions which may restrict liberty of a person.

From the above discussion researcher after analysing the statutory provisions of bail that there is need of reform because present bail practice is anti-poor. We

172 Prosecutor v. A. Raghuramiah, (1952) 2 and WR 383.
174 Giani Meher Singh V. Emperor, AIR 1959 Cal. 714.
need a proper implementation of guidelines specified by our judiciary. Thus High Court or Court of Session have been given special powers to grant bail. However, the bail powers are not to be exercised in a casual and cavalier fashion. The Supreme Court has laid down a number of tests and guidelines in this regard to protect the liberty of the citizens.