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**BAIL PROVISIONS AND JUDICIAL DISCRETION: A CRITICAL  
STUDY**- Manya Gupta<sup>1</sup>**ABSTRACT**

The attached document provides a comprehensive overview of the legal provisions and judicial interpretations related to bail and anticipatory bail in India. The key points are as follows:

This Chapter contains the classification of bailable and non-bailable offences. The chapter contains the detail explanation of non-bailable and bailable offence with recent judgements. Section 436 which talks about the right of bail in bailable offence, Section 437 explains the power to give bail in non-bailable offence. The provisions and the judicial practice have difference views regarding the bail.

Anticipatory bail is not a matter of right and should not be granted lightly, especially in serious crimes. The apprehension of arrest must be grounded in reality for anticipatory bail to be granted. Anticipatory bail differs from regular bail in that it is granted in advance of arrest. Courts consider various factors when deciding on anticipatory bail, such as the nature and seriousness of the alleged offense, the likelihood of the accused absconding or tampering with evidence, and the larger public interest.

The monetary bail system is criticized for favoring the wealthy over the poor. The Supreme Court has noted the inherent unfairness of this system, as it often determines who gets released based on financial status rather than the merits of the case. Suggestions for reform include adopting a comprehensive bail code, improving the administration of the criminal justice system, and fixing statutory limits for bail bonds and sureties.

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Overall, the document highlights the need to strike a balance between protecting the rights of the accused and the interests of society, while ensuring the bail system is fair and equitable. The recommendations aim to bring more clarity, consistency, and fairness to the bail laws in India.

## **BAIL PROVISIONS UNDER INDIAN LAW**

Depending on the seriousness of the offense and the intended punishment, the Criminal Procedure Code divides crimes into two categories: those that are bailable and those that are not.<sup>1</sup> The Criminal Procedure Code of 1973<sup>2</sup> Section 436 contains the primary provisions pertaining to bail in cases that are eligible for bail, while Section 437 deals with cases that are not eligible for bail.<sup>2</sup> The division of crimes into two categories—bailable and non-bailable—can be justified by the fact that bailable crimes are typically seen as less serious and grave than non-bailable ones.

The division of crimes into two categories—bailable and non-bailable—can be justified by the fact that bailable crimes are typically seen as less serious and grave than non-bailable ones. Given this, it might be difficult to justify, for example, why crimes covered by Indian Penal Code Sections 477, 477A, 475, and 506<sup>3</sup> should be considered bailable while crimes covered by Section 379 should not be. It is undeniable, nevertheless, that Section 486 of the Criminal Procedure Code grants the right to bail for anyone accused of a crime.<sup>4</sup>

The reason to make the classification was, that an accused person is likely to be tempted to tamper with prosecution evidence or flee in order to avoid punishment given the seriousness and gravity of the charge and the potential severity of the punishment. If someone is being held for a crime for which there is no bail, the court may decide to grant bail.

Section 2(a) of the Code defines an offense that is not subject to bail.<sup>5</sup> which states that an offense is considered "non-bailable" if it is any other offense, and "bailable offense" refers to any offense that is listed as such in the first schedule or as defined by any other law currently in effect.<sup>6</sup> Even though the code does not specifically define non-bail offenses, it is made clear

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<sup>2</sup>*Nirmal Kumar Banerjee v. State*, 1972 Cri LJ 1582 at p. 1583 (Cal)

<sup>3</sup>Indian Penal Code, 1860

<sup>4</sup>*Talab Haji Hussain v. Madhukar Pushottam Mondkar*, AIR 1958 SC 376 at p. 378 : 1958 SCR 1226 : 1958 Cri LJ 701

<sup>5</sup>The Criminal Procedure Code, 1973.

<sup>6</sup>[http://shodhganga.inflibnet.ac.in/bitstream/10603/70509/13/13\\_chapter%207.pdf](http://shodhganga.inflibnet.ac.in/bitstream/10603/70509/13/13_chapter%207.pdf)

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that those offenses that are not declared bailable are nonetheless non-bailable by using the phrase "any other offense" in the definition of bailable offense.

### **CLASSIFICATION OF OFFENCES**

#### **1) BAILABLE OFFENCE**

In cases where an offence is eligible for bail, bail is granted upon the satisfaction of specific requirements as outlined in Section 436 of the Criminal Procedure Code of 1973. Crimes that fall under the category of less serious offenses are known as bailable crimes. In these cases, bail is granted upon the imposition of certain conditions, if needed. The Police may grant bail to an accused person at the time of their arrest or incarceration under section 436. Crimes covered by the First Schedule or those designated as such by any other active legislation are considered bailable offenses.

#### **2) NON-BAILABLE OFFENCE**

An offense classified as non-bailable is one for which bail cannot be granted automatically without a judge's approval. Under Sections 437 and 439 of the Code,<sup>7</sup> the accused may request the granting of bail in such circumstances.<sup>9</sup> The Apex Court has mandated that "Bail, not Jail" should be the governing and guiding principle. The Court may grant bail in a case where the offence is not bailable.

### **BAIL PROVISIONS IN BAILABLE AND NON-BAILABLE OFFENCES**

#### **SECTION 436 (BAILABLE OFFENCE)**

The Criminal Procedure Court, 1973 regarding bail makes a distinction between bailable and non-bailable offences. Under Section 436 it is matter of a right after certain conditions but under Section 437 is a discretion of the Magistrate that bail is to given or not as it is for non-bailable offence, also if granted bai under Section 437, it is very well within the powers of the High Court and the Court of Session to arrest him or put him in custody by an order.

Any individual can be released on bail by the High Court or the Court of Session, and they can also order the arrest and custody of anyone who has been granted bail in the future. Individuals charged with a crime for which bail is required are handled differently. According

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<sup>7</sup>The Code of Criminal Procedure, 1973.

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to Section 436 of the Code, he is entitled to be released on bail at any point while he is being held without a warrant and during any phase of the court proceedings. There is no specific provision in the Criminal Procedure Code of 1973 for the cancellation of a bail granted for crimes for which bail is required.<sup>8</sup>

**Section 436 reads as:-** “When any person other than a person accused of a non-bailable offence is arrested or detained without warrant by an officer in charge of a police station, or appears or is brought before a Court, and is prepared at any time while in the custody of such officer or at any stage of the proceeding before such Court to give bail, such person shall be released on bail:

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

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

*Provided further that nothing in this section shall be deemed to affect the provisions of sub-section (3) of section 116 3[or section 446A].*

*(2) Notwithstanding anything contained in sub-section (1), where a person has failed to comply with the conditions of the bail-bond as regards the time and place of attendance, the Court may refuse to release him on bail, when on a subsequent occasion in the same case he appears before the Court or is brought in custody and any such refusal shall be without prejudice to the powers of the Court to call upon any person bound by such bond to pay the penalty thereof under section 446’’<sup>9</sup>*

It is a matter of right to request bail for crimes for which bail is required. The only discretion that the court has is regarding the bond's value and the types of sureties. The proviso to the provision also makes it very clear that the person will only be released by the officer-in-charge or the court, at their discretion, by taking a personal bond and not requiring the surety for the appearance. The clause also makes it clear that the Court is not the only entity that can

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<sup>8</sup>*Ratilal Bhanji Mithani v. Asstt. Collector of Customs, Bombay*, 1967 Cri LJ 1576 at p. 1577.

<sup>9</sup>Section 436 of Criminal Procedure Code, 1973

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grant bail. Additionally, the police officer has the authority to release the subject on bond, either with or without a surety.

According to such section, it is clearly mentioned that “any” person who has committed bailable offence and is arrested or in detention, he “shall” be released on bail. The intention of the legislature that the person who has committed bailable offence should be released on bail at any stage of proceedings.

Provided under this section a person can be released on just executing a bond without sureties for his appearances, if he is unable to furnish a bail surety. It is also mentioned that if any person fails to give bail within a week of his arrest, he will be presumed to be an indigent person.

Under clause (1) if the person does not make appearance or comply with the conditions of the bail-bond such as time and place of attendance, it is within the powers of the court to refuse his bail and cancel his bail or pay a penalty.

When a court receives an application for bail, it must first determine whether the offense for which the accused is being prosecuted is one that can be granted bail. If the offense is bailable, Section 436 of the code will grant bail with or without surety; however, if the offense is not bailable, additional factors come into play, and the court must decide whether to grant bail in light of these factors. These factors include the nature and seriousness of the offense, the quality of the evidence, the accused's unique circumstances, a reasonable possibility that the accused won't be present at the trial, a reasonable fear that witnesses will be tampered with, the larger interests of the public or the State, and other factors that come up when a court is asked to grant bail for an offense that is not bailable.<sup>10</sup>

Section 436 provisions are applicable to all individuals except those who are charged with a crime for which bail is not needed. This means that everyone accused of a crime for which bail is required is covered by this section. The sections' broad provisions apply to everyone except those charged with crimes for which bail is not required. The sole exclusion is stated in the second clause of the section, which states that nothing in Section 436 shall be interpreted to modify the terms of Section 116 or Section 446A's Sub-section (3).

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<sup>10</sup>[http://shodhganga.inflibnet.ac.in/bitstream/10603/7790/9/09\\_chapter%203.pdf](http://shodhganga.inflibnet.ac.in/bitstream/10603/7790/9/09_chapter%203.pdf)

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According to Section 436, if an officer in charge of a police station arrests or detains someone without a warrant, the police officer is required to release the person on bail, and the magistrate is required to provide bail at any point during the court proceedings. According to the language of Section 436, the officer in charge of the police station has the authority to release an individual on bail at any time before the court proceeding. If the individual is not ready to post bail at that time, he may still post bail before the magistrate at any point during the proceedings. Section 50(2) of the court provides additional support for the police's obligation. Legislative intent could not have been achieved by any other interpretation of Section 436 (1), which would inevitably result in an absurd situation where two distinct authorities would be exercising the same power. The Code contains provisions that grant concurrent jurisdiction to two authorities, so the situation where two separate authorities can exercise the same power is not unique. However, in the case of Section 436(1), the legislature does not seem to have intended to grant the police officer and the magistrate concurrent powers.<sup>11</sup> Article 21 of the Constitution also ensures that no person shall be deprived of his life or personal liberty except according to procedure established by law.<sup>12</sup>

#### MAXIMUM PERIOD FOR WHICH AN UNDER TRIAL PRISONER CAN BE DETAINED

Section 436A provides for a maximum period for which a prisoner can be detained during under trial. If someone has been detained for a period of time up to half of the maximum period of imprisonment specified for that offense under that law during the investigation, inquiry, or trial phase of an offense under this Code (not an offense for which the death penalty has been specified as one of the punishments under that law), they will be released by the court on their personal bond, with or without sureties, in accordance with Section 436A.<sup>13</sup>

It is also to be noted that the Court after hearing the Opposite party and reasons which has to be recorded in writing, may order for continuation of detention for a longer period other mentioned in the section, it is within his discretion to release him as well. The continuation of detention can also only go only till the maximum period of imprisonment of the offence, it shall not go beyond the maximum punishment.

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<sup>11</sup>*Romeshbhai Amritlal Chhatral v. State*, 1983 (2) Crimes 186. (Page no. 76 PV).

<sup>12</sup>Article 21 of the Constitution

<sup>13</sup>Section 436A inserted by Act 25 of 2005, (w.e.f. 23-6-2006)

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Undertrial inmates have occasionally been held in jail for lengths of time longer than the maximum sentence allowed for the alleged offense. In order to address the situation, Section 436A was added. It states that an inmate who is awaiting trial and is not the accused of a crime for which the death penalty has been declared is eligible for release on personal bond, with or without sureties, after serving a sentence equal to half the maximum amount of time allowed for the alleged offense. Additionally, it has been stated that an inmate who is awaiting trial will never be held longer than the longest sentence for which he may be found guilty of the crime for which he is accused. The provisions of this section cast a statutory duty upon the officer in charge of the police station to release on bail a person who was involved in a bailable offence. The accused may be released from the officer's custody for the duration of that officer's supervision, either on bond or on personal recognizance, which entails bonds without sureties.

He cannot be placed under arrest unless he refuses to post bail or fulfill a personal bond.<sup>14</sup> The Apex Court recently ruled that subordinate courts ought to be required to adhere to the rules regarding the prompt processing of bail applications.<sup>15</sup>

#### WHETHER CONDITIONS CAN BE IMPOSED IN BAILABLE OFFENCES

When an offender is released on bail, there are no conditions. Since making the accused appear in front of the police would be against Section 436, this condition cannot be applied. When a person provides a sufficient amount of surety, a police officer should grant bail. A wrong refusal of bail would be a breach of the duty imposed upon him. According to the ruling in *In re District Magistrate, Visagapatnam*<sup>16</sup>, the discretion in bailable offenses should be limited to requesting security to guarantee the defendant's presence when needed. The Allahabad High Court has ruled that, aside from security and sureties, there is no legal authority to impose conditions on the granting of bail.<sup>17</sup>

One of the key questions recently addressed and resolved by the Gujarat High Court in *Shantilal Javerchand Jain v. State of Gujarat*<sup>31</sup> was whether the court could impose relevant conditions while releasing an accused person who is suspected of committing a bailable offense. The court held that the court can impose relevant conditions while releasing an

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<sup>14</sup>*The Crown v. Makhan Lal*, 48 Cr. L. J. 656.

<sup>15</sup>*Hussain and Anr. v. Union of India*, (Crl. No. 348 of 2017)

<sup>16</sup>A.I.R. 1949 Mad. 71

<sup>17</sup>*Rex v. Genda Singh*, A.I.R. 1950 All. 525.

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accused person who is accused of committing a bailable offense because the code does not specifically restrict the court's ability to impose relevant conditions. Conditions are usually imposed to strike a balance between the rights of the accused and rights for the victim, accused cannot be given unconditionally right to bail.

In order to prevent needless incarceration, the accused is released on bond, and the prosecution's right to have the accused present during the trial is maintained or safeguarded. It is the court's responsibility to reconcile the two divergent claims. The protection of society from the potential misadventures of an individual accused of committing a crime, along with the fundamental principle of criminal jurisprudence that a person is presumed innocent until proven guilty, as well as the aspect of liberty—one of the most significant fundamental human rights—all need to be taken into account. Stated differently, the utmost caution must be taken to ensure that the rights of the individual and the society as a whole are balanced, even in cases where such liberty is mandated, restricted, or regulated. It is true that no legal provision suggests that this kind of requirement cannot be placed.<sup>18</sup>

#### POWER TO REFUSE BAIL

Clause 2 of Section 436 empowers the Court to refuse bail to an accused person even if the offence is bailable. when the person who is granted bail disregards the terms of the bail bond. The Court's ability to forfeit the bond and collect the penalty from the surety as outlined in Section 446 will remain unaffected by this refusal. The court can refuse to grant someone bail even in cases where the offense is punishable by law. The High Court may, by subsequent order, allow the person committed to custody under its order to be released on bail; however, the person cannot request their release under this section.<sup>19</sup>

An interlocutory order is one that grants or refuses bail. An order denying bail is not conclusive. In the same proceedings, bail may be granted later on even if it is initially denied. It can even be cancelled, changed, or revoked at any time. It is not a final order because it does not put an end to the proceedings or determine a point of contention in the case.<sup>20</sup>

#### SECTION 437 (NON-BAILABLE OFFENCE)

The Criminal Procedure Code, 1973 has conferred the power to grant bail on-

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<sup>18</sup>Asim Pandya, Law of Bail Practice and Procedure, Second Edition, 2015, Lexis Nexis. p. 47

<sup>19</sup>*Rati Pal Bhanji Mithani v. Asst. Collector of Customs*, AIR 1967 SC 1639: 1967 CrLJ 1576.

<sup>20</sup>*K.P. Vasu v. State*, AIR 1975 Ker. 15

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- (1) A police station officer in charge.
- (2) Judge
- (3) Sessions Court
- (4) Supreme Court

A person accused of any crime that is subject to bail as well as some crimes that are not (apart from those that carry a life sentence or the death penalty) may be released by an officer in charge of the police station. The authority granted to the police station commanding officer is only usable for the first twenty-four hours following the arrest. After that, the officer in charge of the police station is required by the Constitution to present an arrested person to a magistrate under Section 57. Once the accused person is produced before the magistrate, the police are no longer able to free the accused on bond. Once an arrested accused is produced before him or appears before him voluntarily, the magistrate has the authority to release an accused person from all bailable offenses and from most non-bailable offenses. Compared to an officer in charge of a police station, a magistrate has far more authority. Although an officer in charge of a police station has the authority to, in theory, free someone accused of a non-bailable offense, in reality, these situations rarely come up when an accused party is given bail for an alleged non-bailable offense.

In the event that the offense is not eligible for bail, Section 437 provides for bail. According to Subsection (1) of Section 437, a person may be released on bail if they are accused of committing any non-bailable offense, are suspected of doing so, are arrested or detained without a warrant by a police station officer, or are brought before a court other than the High Court or Court of Session. "A Court other than High Court or Sessions Court" is the phrase used in it. Stated differently, it refers to the magistrate's authority to set bail for non-bailable offenses. Section 437(1) further stipulates that an individual charged with a non-bailable offence cannot be released from custody if there are reasonable grounds to believe that:

- 1) He was convicted of a crime for which the death penalty or life in prison is the maximum punishment;
- 2) The accused has been found guilty of an offense for which the maximum penalty is life in prison or death, and the offense is cognizable;
- 3) the defendant has been found guilty of a crime for which a seven-year or longer prison term is the maximum penalty;

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4) or he has served three years or more, but not less than seven years, in jail after being found guilty of a cognizable offense two or more times in the past.

The proviso removes the previously mentioned limitation on the magistrate's authority. According to the proviso, if the accused is a woman, under the age of sixteen, ill, or sickly, the magistrate's authority will not be restricted. Additionally, it stipulates that a magistrate may grant bail to an accused person who falls under this excluded category if they are convinced that doing so is appropriate and just for any other unique reason. The section does not specify the possible cause; instead, it is dependent upon the particular case.

Section 437(1) makes it clear that an accused person's need to be identified by witnesses during an investigation is not a good reason to deny him bail if he is otherwise eligible and provides an undertaking to follow any instructions the court may give.<sup>21</sup>

Section 437(2) provides a contingency in which the officer or the court reasonably believes, during the course of the investigation, inquiry, or trial, that the accused has not committed an offense for which he is not eligible for bail, but there are sufficient grounds to investigate his guilt further. When such a belief is confirmed, the accused is released on bail or, subject to the terms of Section 446A and pending such an inquiry, at the officer's or court's discretion, upon the execution by him of a bond without sureties for his appearance.

Under Section 437(3), a magistrate may impose relevant conditions when granting an accused person bail. The court has the authority to impose conditions such as (a) that the person adhere to the bond conditions set forth in this chapter; (b) that the person not commit an offense similar to the offense for which he is accused or found guilty; and so on when an individual is granted bail under Subsection (1) after being found guilty or suspected of violating Chapter VI, Chapter XVI, or Chapter XVII of the Indian Panel Code, or of aiding and abetting, conspiring, or attempting to commit any of these offenses; and (c) that in order to prevent someone from disclosing information to the court, a police officer, or any other party involved in the evidence, they cannot, directly or indirectly, offer any inducement, threat, or promise to anyone who is aware of the facts of the case. In the interest of justice, the court may also impose any additional requirements it sees fit.

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<sup>21</sup>Section 437 of the Code of Criminal Procedure, 1973.

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Section 437(4) requires an officer or magistrate to record the special reasons or justifications for a person's release on bail under Subsection (1) or Subsection (2) in writing.<sup>22</sup>

The provision for bail cancellation by the same court is found in Section 437(5). An officer cannot in such a way revoke bail that he has granted. According to the provisions, a court that has granted bail to an individual under Subsection (1) or Subsection (2) may, if it deems necessary, order the arrest and custody of that person.<sup>23</sup>

If a trial is postponed for more than 60 days following the first scheduled date for gathering evidence, Section 437(6) allows for the accused's release on bond, provided that they remain in custody for the entire 60-day period. The magistrate may, for reasonable reasons, decline to release the accused on bail under this subsection, even though typically such statutory release on bail is to be ordered.

According to Section 437(7), the accused, if in custody, shall be released from custody upon the execution by him of a bond without sureties for his appearance to hear judgment delivered if, at any point after the conclusion of the trial of a person accused of a non-bailable offence and before judgment is delivered, the court is of opinion that there are reasonable grounds for believing that the accused is not guilty of any such offence.<sup>24</sup>

As a result, Section 437 prescribes a fair process for bail in relation to non-bailable offenses. The accused is entitled to bail if there is reason to believe that he has not committed any crimes that are not subject to bail. The accused is typically entitled to bail if the trial is postponed for more than sixty days after the scheduled date of evidence collection without the accused's fault. The magistrate has the authority to release an accused person who is a woman, under 16 years old, elderly, ill, or infirm, even though the offense carries a life sentence or death penalty. It also provides for the release of those convicted of crimes carrying a death penalty or life sentence, provided the magistrate documents their exceptional circumstances in writing.<sup>25</sup>

A person accused of committing a non-bailable offense punishable by death or life in prison cannot be granted bail, according to the main provisions of The Criminal Procedure Code, 1973, unless the accused's guilt is proven beyond a reasonable doubt or is incredibly unlikely. The magistrate in this position would conduct an investigation similar to that envisioned in

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<sup>22</sup>*Ibid*

<sup>23</sup>*Ibid*

<sup>24</sup>The Code of Criminal Procedure Code, 1973

<sup>25</sup>Asim Pandya, Law of Bail Practice and Procedure, Second Edition, 2015, Lexis Nexis, pp. 50, 51

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State of Haryana v. Bhajanlal<sup>54</sup>, meaning that the accused's alleged complicity should, based on the evidence presented or in evidence, lead to the overwhelming, unquestionable, and obvious conclusion that he is innocent.

### SCOPE AND APPLICATION OF BAIL UNDER SECTION

In a case where bail is not allowed, the court or a police officer may, under Section 437, release an accused person on bond if there are reasonable grounds to believe they have committed a crime for which they could be executed or imprisoned for life. However, even though the offense is punishable by death or life in prison, (1) a person under the age of sixteen, (2) a woman, or (3) a sick or infirm person may be released on bail. A person may be released on bail pending additional investigation if they are accused of a non-bailable offense but it turns out during the trial that they are not guilty of the offense.

The clause allows the court that granted the person's release on bond to review the order as a precaution. The magistrate's authority under this section cannot be equated with the Sessions Court's and the High Court's authority under Section 439. The fundamental rule could be stated succinctly as follows: bail is not jail, unless there are indications that the petitioner seeking an extension on bail is attempting to evade justice, obstruct the administration of justice, or cause serious problems by committing crimes repeatedly, intimidating witnesses, or engaging in other similar behaviour. Bail is normally granted; it is only refused in certain situations.

However, before granting it, the Court must be certain that the order is necessary to further justice. The Code's provisions do not allow for the granting of bail based on a promise of a compromise or the cancellation of bail due to a breach of the terms of said compromise. Once bail has been granted under the aforementioned legal provision, neither the trial court nor the high court may revoke it for any reason other than those listed in the aforementioned legal provision. These days, laws pertaining to prisoners' temporary release from custody use the terms "furlough" and "parole," which are two separate concepts. When an inmate is on parole, his release time does not count toward the entirety of his sentence; however, if he is on furlough, his release time may be applied to the entire length of his sentence.<sup>26</sup>

### DISCRETION IN GRANT OR REFUSE BAIL

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<sup>26</sup>Courts need to be Litigant-centric and Citizen Centric rather than Judge-centric and State-centric.

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The decision about bail is mostly a matter of discretion, but this discretion must be used carefully and sensibly in accordance with standards that have by this point been firmly established. The Court's whim and discretion do not determine whether to grant or refuse bail, and extrajudicial factors are not taken into account when making this determination. If the accused is an atheist by nature, the court has no jurisdiction to deny them bail in an effort to convert them. The right to bail granted under Section 436 of the code for bailable offenses is an unassailable, absolute right. Since Section 436's requirements are mandatory, there is no room for discretion when granting bail. There is no question that an accused person can rightfully request bail for a crime for which he is eligible, and if the accused agrees to comply with any reasonable conditions that may be placed upon him, the accused person will be released on bond by the appropriate officer or court.<sup>27</sup>

#### POWER TO GRANT BAIL IN NON-BAILABLE OFFENCE (SECTION 437)

Granting bail for an offence that is not subject to bail under Section 437 (or even Section 439), in contrast to offences for which bail is determined by right under Section 436, is a matter of discretion. In situations where bail is not required, the authorities in question typically have the final say over whether to grant bail. In accordance with Section 437 of the Code, the Magistrate may, in his discretion, release a person on bail if there is no prohibition against it and the requirements for extending bail are met. This applies to anyone accused of or suspected of committing any non-bailable offence. As a result, it grants the jurisdiction that has a discretion that needs to be exercised by judges. It is stipulated that the accused's need to have witnesses identify him is not a sufficient reason for bail to be denied. A person's freedom may be subject to additional restrictions, and in some situations, their already-granted freedom may be taken away by the cancellation of their bail.

In addition to these provisions, the Magistrate's discretionary power is prohibited even in cases where there are reasonable grounds to believe that the accused has committed a crime for which there is a death penalty or life in prison. In these cases, the Magistrate lacks jurisdiction and authority to release the accused on bond, as the phrase "but he shall not so release" makes clear. The clause pertaining to children, the ill or disabled, or women creates an exception to this general prohibition. If the magistrate believes there are reasonable grounds to believe that the person accused of or suspected of committing the crime has been

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<sup>27</sup>*Rasikalal v. Kishore*, (2009) 43 O.C.R. 28 at p. 31 (S.C.): 2009 (2) A.I.R. (Cr.) 50 (S.C.): A.I.R. 2009 S.C. 1340.

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guilty of the crime, he may, at his discretion, grant bail to a woman, a minor under the age of sixteen, or a sick or infirm person. However, if the crime carries a death sentence or a life sentence in prison, the magistrate may not grant bail.

In a case where the accused is not entitled to bail, the court may impose reasonable conditions in addition to setting the bail amount, such as the accused's attendance. In situations where the accused is not facing life or death imprisonment, discretion must be used to determine whether to grant bail, unless there are compelling reasons not to do so. When refusing bail, the order should state these reasons. When an undertrial defendant is accused of committing an offense or offenses, the court is typically asked to determine whether to put him in jail or release him on bond.

The decision must be made primarily in cases where there is no possibility of bail, taking into account the type of crime, the circumstances surrounding its commission, the accused's past, the likelihood that he will breach bail, the potential effects of his release on prosecution witnesses, the impact on society, the potential for retaliation, etc.<sup>28</sup>

### **ANTICIPATORY BAIL: LEGAL PROVISIONS**

There was no section 438 of the 1973 Code pertaining to bail in anticipation of arrest under the Code of Criminal Procedure, 1898. However, anticipatory bail was occasionally granted under the High Courts' inherent jurisdiction, despite the general consensus that no such jurisdiction existed. The Law Commission suggested adding a clause to the Code that would allow the High Court and the Court of Session to award "anticipatory bail" in its 41st Report.

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. In recent times, with the accentuation of political rivalry, this tendency is showing signs of steady increase. Apart from false cases, where there are reasonable grounds for holding that a person accused of an offence is not likely to abscond, or otherwise misuse his liberty while on bail, there seems no justification to require him first to submit to custody, remain in prison for some days and then apply for bail."<sup>29</sup>

The words anticipatory bail are neither found in Section 438 nor in its marginal note. In fact, anticipatory bail is a misnomer as it is not bail presently granted in anticipation of arrest.

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<sup>28</sup>[http://shodhganga.inflibnet.ac.in/bitstream/10603/70509/13/13\\_chapter%207.pdf](http://shodhganga.inflibnet.ac.in/bitstream/10603/70509/13/13_chapter%207.pdf)

<sup>29</sup>Law Commission of India, 41st Report on the Code of Criminal Procedure Vol.I P.311(1969)

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When the court grants anticipatory bail, what it does is to make an order that in the event of arrest, a person shall be released on bail unless a person is arrested and, therefore, it is only upon arrest that an order granting 'anticipatory bail' becomes operational.<sup>30</sup> The expression of anticipatory bail is a convenient mode of conveying that it is possible to apply for bail in anticipation of arrest.

The legislative history of the provision reveals that the Joint Select Committee of Parliament had initiated a thought that bail should be made available in anticipation of arrest so that liberty of an individual may not be unnecessarily jeopardized. The matter was referred to the Law Commission for consideration about the inclusion of the remedy of grant of anticipatory bail in the Code of Criminal Procedure, 1973. The Law Commission was enthused to take up the suggestion. It formulated a draft provision to provide that bail in anticipation of an arrest which ultimately got enacted as section 438 of the Code.

#### OBJECT OF ANTICIPATORY BAIL

The purpose of anticipatory bail is to spare an individual from needless fear or embarrassment. This provision's prerequisite is that anyone may apply to the High Court or the Court of Session if they have reason to think they could be arrested for an offense for which there is no bond. Predictive bail cannot be denied for the simple reason that a name is mentioned in a formal complaint or petition that is intended to be treated as a formal complaint.<sup>20</sup> On the other hand, the request for anticipatory bail should be denied if there is a possibility that the offense will be committed again (in this case, under Section 364 read with Section 120-B IPC, a growing threat along Rajasthan's eastern border).<sup>31</sup>

The claim in a dowry-death case was that the bride committed suicide as a result of mental torture administered by her mother-in-law, father-in-law, one son, "N," and a young student. Given the girl's young age, she was placed under anticipatory bail.<sup>32</sup> In the dowry-death case, the Rajasthan High Court denied the application of others for anticipatory bail, stating that the apprehending party is not entitled to the benefits of section 438 Cr. P.C. unless he can demonstrate that the arrest was made falsely in order to defame and humiliate him.<sup>33</sup> However, the Punjab and Kashmir High Courts noted that the

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<sup>30</sup>*Balakchand Jain Vs. State of M. P.* 1976 4 SCC 572

<sup>31</sup>*Harji v. State of Rajasthan*, 1983 Cr.L.J.1938: 1982 Raj.LW 6261980 WLN 719.

<sup>32</sup>*Ashok Kumar v. State of Rajasthan*, 1981 Raj.Cr.C.272:1980 Cr.LR (Raj)581;1980 Raj.LW 267.

<sup>33</sup>*Ibid.*

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malfeasances of the investigating agency did not have to be proven in order to grant anticipatory bail, citing *Gurbax Singh V. State of Punjab*.<sup>34</sup>This establishes the five-member Supreme Court bench. It follows that, in most cases, anticipatory bail should be granted if malfeasance is demonstrated. However, it is difficult to understand why, absent evidence of malice, an anticipatory bail must be denied. This is the real risk associated with judicial construction rules.<sup>35</sup>

All of the requirements set forth in section 437 with regard to offenses for which bail is not required are also implicitly included in this section. Apart from meeting the requirements of section 437, the applicant must also successfully invoke the jurisdiction under this section by establishing a special case in order to obtain an exceptional type of anticipatory bail order. He has to demonstrate that the accusations made against him are false and motivated by something else. The applicant must provide prima facie evidence to support his claims that the serious non-bailable offense charge against him was brought against him in bad faith.<sup>30</sup> The same factors that apply to granting anticipatory bail under sections 437 or 439 also apply.

#### DIRECTION FOR GRANT OF BAIL TO PERSON APPREHENDING ARREST (SECTION 438)

If someone has reason to believe that they could be arrested for a crime for which they are not eligible for bail, they may apply to the High Court or the Court of Session for a direction under this section. The Court may, if it deems appropriate, order that the accused be released on bail in the event of an arrest. The Court may take into account, among other things, the following factors:

- i) the nature and seriousness of the accusation;
- ii) the applicant's antecedents, including whether or not he has been convicted of a crime before;
- iii) the applicant's potential to avoid justice; and
- iv) If the allegation is made with the intention of humiliating or harming the applicant by getting him arrested, either reject the application right away or issue an order granting an anticipatory bail bond.

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<sup>34</sup>(1980) 2 SCC 565: 1980 SCC (Cri) 465.

<sup>35</sup>*Gurbax Singh Vs. State of Punjab*, (1980) 2 SCC, 565, 582, 1980 SCC (Cri) 465, 482

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With the caveat that an officer in charge of a police station may arrest the applicant without a warrant if the applicant is accused of something and the High Court or, if applicable, the Court of Session, has not issued any interim orders under this subsection or has denied the application for grant of anticipatory bail.

1-A) In order to provide the Public Prosecutor with a fair chance to be heard when the application is ultimately heard by the Court, the Court shall promptly cause a notice of at least seven days' notice, along with a copy of the interim order, to be served on the Public Prosecutor and the Superintendent of Police.

(1-B) If, upon the Public Prosecutor's application, the Court determines that the applicant's presence is essential for the administration of justice, it will be mandatory for the applicant to be present at the final hearing of the application and the issuance of the final order.

(2) In the event that the High Court or the Court of Session issues a directive pursuant to subsection (1), it may incorporate any conditions it deems appropriate, taking into account the specific facts of the case. These conditions may include:

- i) requiring the subject to make himself available for questioning by law enforcement whenever necessary;
- ii) prohibiting the subject from offering inducements, threats, or promises to any person who is aware of the case's facts in order to discourage them from disclosing such information to the Court or to any police officer;
- iii) a requirement that the person cannot leave India without the court's prior approval; if the person is then detained without a warrant by a police station officer on the basis of such an accusation and is ready to post bail at the time of the arrest or at any point while in the officer's custody, they will be released on bail; and if a magistrate who has jurisdiction over the incident determines that a warrant should be issued in the first instance against the person, he will issue a bailable warrant in accordance with the court's directive under subsection (1).

#### **ANTICIPATORY CANNOT BE GRANTED AS A MATTER OF RIGHT**

It is not appropriate to grant anticipatory bail lightly or as a matter of right. Furthermore, anticipatory bail should not be granted in cases involving serious crimes like murder or

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dowry death, which carry life sentences or even longer prison terms, unless there are demonstrably compelling reasons to do so.<sup>36</sup>

#### APPREHENSION OF ARREST NECESSARY FOR ANTICIPATORY BAIL

It is common knowledge that S. 438 of Cr. P.C. only applies to anticipatory bail in cases where there is a suspicion of arrest. In these cases, the accused is already behind bars after being arrested for a crime, so the issue of releasing them from needless shame and harassment does not come up.<sup>37</sup>

A person who is apprehended for arrest may file an application under Section 438 of the Cr. P.C. if they are accused of committing an offense for which there is no bond. It serves as evidence that a request for anticipatory bail is based on the suspicion of an arrest, which permits the use of Section 438 Cr. P.C.<sup>38</sup> authority.

Any person has reason to believe that he may be arrested on an accusation of having committed a non-bailable offence," are the key words found in S. 438 Cr. P.C. When these words are properly interpreted, they indicate that a person must be truly afraid of being arrested and that the fear must be founded in an accusation of a crime for which there is no possibility of bail.<sup>39</sup> The prerequisite for using S. 438 Cr. P.C. is fear of arrest upon accusation; an accusation may exist prior to the police registering a case. As a result, the suspicion must be founded in fact, and the arrest must be imminent. Examined in this context, it is evident that the location of the arrest is significant.<sup>40</sup>

Merely being afraid of being arrested is insufficient. That needs to be based on a charge of committing an offense for which there is no bail. This implies that the fear must be legitimate and grounded in the available information. A hypothetical accusation or one that may arise in the future is insufficient. There can be no legitimate fear that there is an imminent threat of arrest based on such unproven accusations. A prerequisite for filing an application under S. 438 is that there must be a legitimate fear of arrest based on an ongoing accusation of having previously committed a non-bailable offense at the time the application is filed. The application must specifically state the accusation, and in the event that the accusation is the basis for an arrest, a release order must be requested. Protection under S. 438 could only be

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<sup>36</sup>*Manoj Agarwal v. State of Chhattisgarh*, 2003 Cri LJ 3519 at p. 3522 (Chhattis).

<sup>37</sup>*Narinderjit Singh Sahni v. Union of India*, AIR 2001 SC 3810 at p. 3825 : (2002)2 SCC210.

<sup>38</sup>*Bimaladav. State*, 1997 Cri LJ 1969 at pp. 1970-71 (Cal) : 1997 Cal Cri LR 72.

<sup>39</sup>*Sachindra Mahawarv. State of M.P.*, 2000 Cri LJ 637 at p. 640 (MP)

<sup>40</sup>*Sachindra Mahawarv. State of M.P.*, 2000 Cri LJ 637 at p. 641 (MP).

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asserted against a specific accusation; it could not be used to prevent an arrest in general for unspecified charges that are currently pending or that are anticipated to come up in the future. It is not a broad protection that is being considered. If that were the case, anyone could go to the court and ask to be directed to be released whenever and wherever in relation to any case. Under the protection of such an order, anyone could commit any crime with the knowledge that, should he be arrested, he would be freed. The section does not consider that. Additionally, the Court may only grant relief against arrest in relation to specific accusations that are currently pending. It is true that a case registration or even the filing of an initial information is not required in order to invoke the provision. However, the Court needs to be convinced that there is a plausible possibility of an arrest in relation to a particular charge.<sup>41</sup> In actuality, an application under Section 438 of the Code is made upon the suspicion of arrest. Put differently, S. 438 of the Code only permits the use of force when someone fears being arrested. On such an application, it may be directed that the applicant be released on bail in the event of his arrest.<sup>42</sup> A person requesting the jurisdiction of the Court must have reasonable suspicion that he will be arrested on suspicion of committing an offense for which bail is not available, according to a study of S. 438 Cr. P.C.<sup>43</sup>

#### SUFFICIENCY OF GROUNDS

The Supreme Court ruled in a case that the High Court's anticipatory bail order was illegal because the first respondent, who had approached the court to request an arrest in a murder case, lacked sufficient justification to support such a request. He wasn't named as an accused in the FIR, and the ongoing investigation hasn't made him an accused yet. However, since evidence was being gathered to identify the true murderer, the State was unable to rule out the possibility that the first respondent was involved in the case.

The petitioner cannot apply for an anticipatory bail order under Section 438 of the Code if there are insufficient grounds for him to believe that he will be arrested in the murder case. The Supreme Court noted that the order under Section 438 Cr. P.C. can only be passed if the High Court is satisfied that the petitioner has reason to believe that he may be arrested in a non-bailable offence. The Supreme Court determined that the first respondent's application before the High Court was premature and that the High Court did not need to consider the

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<sup>41</sup>*Thayyanbadi Meethal Kunhiraman v. S.I. of Police, Panoor*, 1985 Cri LJ 1111 at p. 1113 (Ker) : 1985 Mad LJ (Cri) 263.

<sup>42</sup>*T. Madhusoodan v. Supdt. Of Police*, 1992 Cri LJ 3442 at p. 3444 (Ker).

<sup>43</sup>*K. Rajesekhara Reddy v. State of A.P.*, 1999 Cri LJ 1933 at p. 1934 (AP).

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application under Section 438 at this early stage. As a result, the order granting the first respondent anticipatory bail was overturned, and he was granted the freedom to reapply for bail or anticipatory bail in the valid stage. This did not affect the investigating agencies' ability to carry out their legally mandated investigation.<sup>44</sup>

The fear needs to be grounded in reality and reasonable. A hypothetical accusation or one that may arise in the future is insufficient. There can be no legitimate fear that there is an imminent threat of arrest based on such unproven accusations.

#### DISTINCTION BETWEEN ORDINARY BAIL AND ANTICIPATORY BAIL

An order of anticipatory bail differs from an ordinary order of bail in that the former is granted in advance of the police making it effective at the time of the arrest, while the latter is granted following an arrest and signifies release from custody.<sup>45</sup>

It is a pre-arrest legal procedure that, in contrast to a post-arrest order of bail, stipulates that the subject of the direction will be released on bail if he is later arrested on the charge for which it was issued. As specified by S. 46(1) Cr. P.C., a direction under S. 438 Cr. P.C. is meant to grant conditional immunity from the touch or confinement.<sup>46</sup>

Arrest for non-bailable offenses inevitably results in police custody. In essence, an order for anticipatory bail is insurance against being taken into custody by the police after being arrested for the offense or offenses for which the order is made. Put another way, it is a pre-arrest legal procedure that, in contrast to a post-arrest order of bail, stipulates that the subject of the order will be released on bail if he is later arrested on the charge for which it was issued.<sup>47</sup>

The distinction between "anticipatory bail" and "bail" is not very great. The only difference between anticipatory bail and regular bail is that the former is granted in advance of an arrest and thus takes effect immediately upon the arrest, while the latter is granted subsequent to an arrest and thus signifies release from police custody. Because both would pertain to release following arrest, pre-arrest and post-arrest bail are therefore synonymous. It is abundantly evident from the Cr. P. C. collection and schedule as well as Section 438 Cr. P. C. that the legislature meant for anticipatory bail to fall under the purview of bail rather than be treated as a separate entity.<sup>48</sup>

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<sup>44</sup>*Jaswantbhai M. Sheth v. Anand V. Nagarsheth*, (2000)10 SCC 7 at pp. 7-8

<sup>45</sup>*Gurbaksh Singh Sibbiav. State of Punjab*, AIR 1980 SC 1632 at p. 1637

<sup>46</sup>*Pokar Ram v. State of Rajasthan*, AIR 1985 SC 969 at pp. 970-71.

<sup>47</sup>*Gurbaksh Singh Sibbiav. State of Punjab*, AIR 1980 SC 1632 at p. 1637

<sup>48</sup>*Natturasuv. State*, 1998 Cri LJ 1762 at p. 1765 (Mad)

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CONDITIONS FOR GRANT OF ANTICIPATORY BAIL

First of all, it should be noted that, starting on June 23, 2006, the Court must take into account the following factors before issuing any directions under sub-section (1) of S. 439 Cr. P.C. :

- (i) the type and seriousness of the accusation;
- (ii) the applicant's past, including any jail time following a conviction;
- (iii) the applicant's propensity to elude justice; and
- (iv) whether the accusation was made with the goal of embarrassing or harming the applicant by getting him arrested.

In terms of anticipatory bail, a directive for the applicant's release on bail in the event of his arrest would typically be made if the proposed accusation seems to originate from ulterior motives rather than from efforts to further the ends of justice, with the intention of harming and humiliating the applicant by having him arrested. On the other hand, such an order would not be made if it seems likely—given the applicant's past—that he will use the order of anticipatory bail to evade justice. However, the opposite of these statements isn't always true. That is to say, it cannot be established as an inflexible rule that anticipatory bail cannot be granted unless the proposed accusation seems to be motivated by mala fides, or that anticipatory bail cannot be granted if there is no fear that the applicant will abscond.

When determining whether to grant or deny anticipatory bail, the court must consider too many other factors to list here. When considering an application for anticipatory bail, the court must consider a number of factors, such as the seriousness and nature of the proposed charges, the circumstances surrounding the events that are likely to give rise to the charges, the likelihood that the applicant's presence at the trial will not be secured, the likelihood that witnesses will be tampered with, and "the large interests of the public or the State."<sup>49</sup>

The Court will give careful thought to all pertinent factors, including the seriousness of the offense, the nature of the accusation, the possibility of absconding, the possibility of tampering with the evidence, etc., when deciding whether to grant anticipatory bail.<sup>50</sup>

It only needs to verify if the accused lacks societal ties. When granting such bail, the following factors will be taken into consideration: 82

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<sup>49</sup>*Gurbaksh Singh Sibbiav. State of Punjab*, AIR 1980 SC 1632 at p. 1647

<sup>50</sup>*Bharat Chaudhary v. State of Bihar*, (2003)8 SCC 77 at pp. 78-79 : AIR 2003 SC 4662 SCC (Cri) 1953

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- (i) The type and gravity of the incident leading up to the offense;
- (ii) The accused's status and position in relation to the injured person and witnesses;
- (iii) The accused's likelihood of evading justice;
- (iv) The accused's likelihood of replicating the offenses and of tampering with the witnesses;
- (v) The case's history, the investigation into it, and other pertinent grounds, which are too numerous to list in detail.

#### DURATION OF ANTICIPATORY BAIL

The order passed under sub-section (1) should not have a time limit.<sup>51</sup> Anticipatory bail, once granted, must be kept in effect until the end of the trial, unless it is revoked under section 439.132 In the case mentioned below.<sup>52</sup> The Supreme Court has held that an order for anticipatory bail must be limited in duration. Normally, the Court granting anticipatory bail should leave it to the regular Court to handle the matter based on the evaluation of evidence presented to it after the investigation has progressed or the charge sheet has been filed.

Once granted, anticipatory bail is in effect until the end of the trial or until it is revoked.<sup>134</sup> A magistrate is required to recall a non-bailable warrant even if one was issued when the accused had an order for anticipatory bail.<sup>53</sup>

#### CANCELLATION OF ANTICIPATORY BAIL

The High Court alone has the authority to revoke anticipatory bail; neither the Magistrate nor the Session Judge may do so.<sup>54</sup> Generally speaking, the following legal precepts, among others, would be pertinent when examining the issue of the High Court canceling bail granted under section 438 or bail granted under section 439(1) by the Sessions Judge under section 439 (2). Usually, the cancellation of previously granted bail requires very strong and compelling reasons or circumstances.<sup>55</sup>

- (1) A bail order made under section 439 (1) or an anticipatory bail order made under section 438 is subject to appellate provisional scrutiny and may be revoked if the discretionary power was exercised incorrectly or improperly

<sup>51</sup>*Genbaksh Singh Sibia Vs. State of Punjab* AIR 1980 SC 1632 (1980) 2 SCC 565:1980 Cr.L.J. 1125.

<sup>52</sup>*Saluddin Abdul Samad Shaikh Vs. State of Maharashtra* (1996) 1 SCC 667 (668): AIR 1996 SC 1042: (1966) 1 SCC 667.

<sup>53</sup>*Puran Chand Gupta Vs. State of Punjab* 1980 Punj. LR 694, 701

<sup>54</sup>*Bolai Mistry v. State*, 1977 Cr.LJ 492 (Cal-DB).

<sup>55</sup>*Mahant Chand Nath Yogi v. State of Haryana* AIR 2003 SC 18: (2003) 1 SCC 326:2003Cr.LJ 76(82) (SC) *Subi endu Mishra v. Subrat Kumar Misra*, AIR 1999 SC 3026.

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(rather than by a judge), if due diligence was not used or all relevant circumstances were considered, if the decision was based on unrelated factors, if it was vitiated by a fundamental legal error, or if it was otherwise perverse.

- (2) If new facts, such as the abuse of liberty by interfering with the investigation, tampering with witnesses, or committing the same or a similar offense, surface after the release on bail, the bail order may be revoked. Notwithstanding, the mere existence of novel circumstances subsequent to anticipatory bail or bail does not serve as the exclusive basis for the revocation of said order.
- (3) Even though it is an extraordinary and rare discretionary power, the ability to cancel bail is intended to be used in appropriate situations, however rare those situations may be.
- (4) When dealing with economic offenses like those covered by the FEAR, an order granting anticipatory bail or bail cannot be interpreted as interfering with the effective execution of statutory duties.
- (5) The benefits of detention interrogation should be considered when determining whether to grant anticipatory bail or bail.

When an accused was granted a larger bail amount following his arrest for charges under sections 289, 337, and 304-A IPC, but the charges were changed to sections 302 and 307 IPC approximately 33 days later, the accused has not broken any of the terms of the bail, the police have not filed a charge sheet even after a year and a half, and the cancellation of anticipatory bail is not warranted in the absence of compelling and overwhelming circumstances.

If it is discovered that the accused is tampering with prosecution evidence, anticipatory bail may be revoked in accordance with section 439 (2).<sup>56</sup> When an order granting anticipatory bail is made under this section, it is implied that the court has the right to revoke or cancel the order after giving it due consideration. For these purposes, it is not required to locate any additional specific provisions that grant cancellation power.<sup>57</sup> Revocation of previously granted anticipatory bail is only permissible in cases where the defendant has obstructed the

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<sup>56</sup>*Jairam Tiwari Vs. State of Bihar*, 1987 Cr.L.J. 254 (Pat)

<sup>57</sup>*State of Maharashtra v. Vishwas*, 1978 Cr.LJ 1403,1405 (Bom-DB).

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legal process by manipulating evidence or by abusing or misusing their privilege.<sup>58</sup> An order requesting the cancellation of bail must be supported by compelling evidence.<sup>59</sup>

Bail would not be revoked in cases where accused persons charged under sections 406 and 498A of the IPC were released on bond and the articles of stridhan were not returned.<sup>60</sup> The High Court would not revoke a well-reasoned order granting anticipatory bail simply by noting that the bail was obtained through questionable means.<sup>61</sup>

### **SPECIAL POWERS OF HIGH COURT OR COURT OF SESSION REGARDING BAIL (SECTION 439)**

The Criminal Procedure Code has granted the High Court or Court of Session special powers for the granting of bail.

(1) A High Court or Court of Session may order:

- (a) the release on bail of any person accused of an offense and in custody; and
- (b) if the offense falls under one of the categories listed in Section 437, subsection (3), any conditions that the court deems appropriate for the objectives stated in that subclause; that any condition imposed by a magistrate when releasing someone on bail be overturned or changed: Provided that the High Court or the Court of Session must notify the Public Prosecutor of the application for bail before granting it to someone accused of a crime that is only triable by the Court of Session or that, even if it is not, carries a life sentence in prison. This notification must be given unless the prosecution believes—for reasons to be documented in writing—that it is impractical to provide such notice.

(2) Any person who has been released on bail under this Chapter may be arrested and taken into custody at the request of a High Court or Court of Session.

### **SCOPE AND APPLICABILITY**

The J&K Criminal Procedure Code gives the Court the broad authority to decide whether to grant bail to an accused person who appears and surrenders himself to the court, even if his

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<sup>58</sup>*Vishwanath Tiwari Vs. State of Bihar*, 1988 Cr.LJ 333 (Pat)

<sup>59</sup>*Rajan Mahajan Vs. State*, 2002 Cr.LJ 2433 (2434) (Del); *Bhagirath Singh Vs. State of Gujarat*, AIR 1984 SC 372:1984 Supp.SCC 372:1984 Cr.LJ 160

<sup>60</sup>*Rajan Mahajan Vs. State*, 2002 Cr.L.J. 2433 (234) (Del)

<sup>61</sup>*Mahant Chand Nath Yogi V. State of Haryana*, AIR 2003 SC 18 (2003) 1 SCC 326: 2003 Cr.L. J. 76 (81), 82 (SC)

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arrest is not imminent.<sup>62</sup> For the purposes of Sections 53 and 54, an arrested individual freed on bond does not no longer qualify as a "arrested person" or "accused person."<sup>63</sup> The accused may exercise his or her right to bail, even if the court rejects the accused's request.<sup>64</sup> An accused person in judicial custody who has been released on a short-term or personal bond does not have to be incarcerated before the Court considers and considers his application under Section 439 Cr. P. C.<sup>65</sup>

Under this section, the jurisdiction of the High Court and the Court of Session is concurrent with that of a magistrate. A comparison of Sections 437 and 439 reveals that the High Court is endowed with authority under this section, functioning as a superior, appellate, or revisional court with broad authority to order the admission of any individual on bond in any given circumstance.<sup>66</sup>

Clause (1) of the section has both bailable and non-bailable offence accused persons. If under Section 436, the bail amount is too high, the accused may move to High Courts or Court of session for reduction of that amount.

The provisions of sub-section(2) apply to an accused person who is granted bail for a bailable offence by an order passed by the High Court or the Court of Session. In such cases, the High Court or the Court of Session is expressly authorized to revoke the bail that was granted, arrest the accused, and place him in custody. As a result, this section covers both cases involving accused parties of offences that are not subject to bail as well as those involving bailable offences.<sup>67</sup>

This section grants the High Court or Court of Session complete discretion to admit an accused person to bail; however, the discretion may only be used in a judicial manner. The provisions of Section 437 do not limit the authority of a Court of Session or the High Court to grant bail.<sup>9</sup> The Court considers the totality of the circumstances in each case, and there are far too many factors to fully categorize or list. Instead, the Court must consider the

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<sup>62</sup>*Kali Dass Vs. SHO, Police Station Reasi*, 1979 Cr.LJ 345 (J&K)

<sup>63</sup>*Ananth Kumar Vs. State of A.P.* 1977 Cr. LJ 1797 (AP)

<sup>64</sup>*Manloor Khan Vs. State of Bihar*, 1999 Cr.LJ 5006: 1998 SCC (Cri) 1541: (1998) 8 SCC 368

<sup>65</sup>*Gyan Swaroop Gupta Vs. State of U.P.* 1993 Cr.LJ 3895 (All)

<sup>66</sup>*M. Hanumantha Reddy Vs. Government of Mysore*, AIR 1953 Mys. 132 at 133; see also *Vasant Vinayak Bhagwat Vs. State*, AIR 1951 M.B. 104; *Jamini Mullick Vs. Emperor* LLR 36 Cal. 174 at 177; *State (Delhi Administration) Vs. Vipin Kumar* 1975 Cr.LJ 846 at 849 (Del).

<sup>67</sup>*Talab Haji Hussain Vs. Madhukar PushottamMondkar*, AIR 1958 SC 376 at 380;

*JuharmalVs. State* 1954 (Raj) 279

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cumulative effect of all the circumstances taken together.<sup>68</sup>The Court considers the totality of the circumstances in each case, and there are far too many factors to fully categorize or list. Instead, the Court must consider the cumulative effect of all the circumstances taken together. The High Court may consider other factors when deciding whether to grant bail to individuals who are charged with crimes of a grave and serious nature, so it is not necessary for it to limit its consideration to the question of whether the prisoner is likely to abscond.<sup>69</sup> The tenets of Section 437 Cr.P.C. must be remembered.<sup>70</sup>

Denying bail to individuals accused of high corruption is more justified because there is a greater chance that these individuals will use their financial influence to sway the evidence against them.<sup>71</sup> When an offence is not subject to bail, the Court must decide whether to grant bail based on a number of factors, including the seriousness and nature of the offenses, the evidence's quality, the accused's unique circumstances, the likelihood that the accused won't be present at trial, the likelihood that a witness will be tampered with, the greater good of the public or the State, and similar factors.<sup>72</sup>

#### WHEN BAIL MAY BE GRANTED BY HIGH COURT OR COURT OF SESSION

The High Court of the Court of Session is not prohibited from granting bail to individuals who are charged with crimes carrying a life sentence or death penalty. Nevertheless, the Court will need to take into account the various factors listed by the Supreme Court in this particular case. Despite the concurrent authority of the High Court and the Court of Sessions, the latter is typically moved first. Only in rare or unusual situations would the High Court immediately consider an application.<sup>73</sup>

The High Court should not grant bail suo motu<sup>74</sup>. The bail application should state whether a bail petition has been filed in a co-ordinate court.

Various principles have been enunciated in different cases, and some of them may be summarized as below:

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<sup>68</sup>Sagri (1950) 30 Pat 115.

<sup>69</sup>Narendra Lal Khan (1908) 36 Cal 166, 170, Jamini Mulick (1908) 36 Cal 174,177

<sup>70</sup>Gurcharan Singh Vs. State (Delhi Admn) 1978 Cr.LJ 129: AIR 1978 SC 179; (1978) 2

<sup>71</sup>Onkar Chand Vs. Punjab 1978 Cr.LJ 44 (P&H).

<sup>72</sup>State Vs. Captain Jagat Singh, AIR 1962 SC 253: (1962) 1 Cr.LJ 215

<sup>73</sup>MutumChooba Singh Vs. State of Manipur (1985) 1 GLR 286

<sup>74</sup>Dara Gaddi Vs. State of Bihar (1986) 4 SCC 564

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- (i) Until an accused person's guilt is established, the law presumes him to be innocent. Unless the situation calls for him to not be released on bail, he ought to be given the chance to handle his own case.<sup>75</sup>
- (ii) In general, it is customary to grant bail rather than deny it, and bail should not be used as a form of punishment.<sup>76</sup>
- (iii) The seriousness of the offense is insufficient justification for denying bail.<sup>77</sup>
- (iv) The likelihood that the accused will show up for his trial<sup>78</sup>—rather than his presumptive guilt or innocence—will serve as the court's guiding principle.
- (v) One thing to keep in mind is the fact that the charge sheet against the accused has not yet been turned in.
- (vi) The fact that the defendant has prior convictions does not preclude the granting of bail.<sup>79</sup>

The High Court will only rarely use its discretion to grant bail under this section in murder cases. The discretion in granting bail will only be used in very strong and exceptional cases, one of which is when medical evidence establishes that the accused person's life is in danger. That the Public Prosecutor does not object to bail in a murder case does not constitute justification for granting bail.<sup>80</sup>

#### CONCURRENT JURISDICTION OF HIGH COURT AND SESSION COURT

Section 439 grants the Sessions Court and the High Court special concurrent jurisdiction over the granting of regular bail. Since it grants both courts concurrent jurisdiction, it has frequently been asked whether the petitioner must appear before the Sessions Court before submitting a bail application to the High Court. It has occasionally been questioned whether an accused person must reapply for bail to the trial court after the High Court denied it the first time.

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<sup>75</sup>*Sant Ram Vs. State*, AIR 1952 J&K 28. 1952 Cr.LJ 1223; *State Vs. Surinder Singh Kairon* (1966) 68 Ounj. LR (Delhi) 46; 1966 Cr.LJ 86

<sup>76</sup>*Nagendra Nath Vs. King-Emperor*, AIR 1924 Cal 476; *Emperor Vs. Gulam Mohammad*, AIR 1925 Lah. 510; *Ram Chandra Vs. state*, AIR 1952 MB 203; 1953 Cr.LJ 17

<sup>77</sup>*Abraham Bali vs. Emperor*, AIR 1925 Oudh 489; 26 Cr.LJ 1286; *Fazal Nawaz Jung Vs. State of Hyderabad*, AIR 1952 Hyd 30; 1952 Cr.LJ 873; *Warrier Vs. State of Kerala*, 1964 Ker. LT 595.

<sup>78</sup>*Public Prosecutor Vs. M. Sanyasayya Naidu*, AIR 1925 Mad. 1224; *Rao Harnarain Singh Sheoji Singh Vs. State*, AIR 1958 Punj. 123

<sup>79</sup>*Shambhu Singh Vs. State of Rajasthan*, 1989 Cr.L.R. (Raj.) 192

<sup>80</sup>*Bachinar Singh Vs. Jit Singh*, 1975 RLR 491; *Ratikrishna Nanda Vs. State of Orissa*(1982) 54 Cut. L. T. 555.

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In the case of *Balan v. State of Kerala*<sup>81</sup> the Hon'ble Division Bench of the Kerala High Court held that the legislature had granted the High Court and the Court of Sessions the authority to grant bail under Section 439. The two clauses in no way imply that the petition must be submitted to the Sessions Court before going to the High Court. The Session Court has equally granted both Courts the authority to grant bail. It is unmistakably simultaneous. The citizen may file an application with the Court of Session and subsequently the High Court. It allows him another opportunity to request bail.

He cannot be excluded from court simply for not contacting the Sessions Court if he decides to proceed directly to the High Court. Evidently, the petition can be maintained. It cannot be said, however, that he must present an "exceptional" case before his request for bail will be granted. Adopting the perspective established by the Court in *Usman's case*<sup>82</sup> could lead to the constitutionally guaranteed right to liberty being undermined.

#### DEFAULT BAIL (SECTION 167)

The phrase "default bail" has not appeared in any of the Code's provisions. The term "default bail" was coined by judges and attorneys who oversee the bail process as a matter of convenience. Default bail refers to the legally required bail that an accused person under arrest or custody is entitled to in the event that an investigating officer is unable to finish the investigation within the legally mandated time frame. This kind of bail is commonly referred to as "the default bail" since it is granted because the accused failed to file a charge sheet by the deadline. Another name for it is "compulsory bail."

It protects the accused person's interests in the event that incriminating evidence is not gathered sufficiently to convict them of the alleged crime. In the event that evidence is gathered and presented to the magistrate in the form of a charge sheet within the allotted time, the right to be released on default bail is nullified by the proviso to Section 167, and an accused person may only request bail based on merit. Admittedly, the investigating agency has a reasonable amount of time to finish the investigation. Hence, a 24-hour period would be ideal, though this might not always be realistically achievable.

An offender may benefit from the proviso appended to Sub-Section (2) of Section 167 of the Code in the event that no charge sheet is filed and the investigation is left open; once a charge

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<sup>81</sup>*Balan v. State of Kerala*, AIR 1955 ALL 626, 1955 CriLJ 1448

<sup>82</sup>*Mohammad Usman Mohammad Hussain ... v. State of Maharashtra*, 1981 AIR 1062, 1981 SCR (3) 68

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sheet is filed, however, the aforementioned right expires. Such a right does not resurrect merely because, in accordance with Sub-Section (8) of Section 173 of the Code, an additional investigation is still ongoing.

#### MONETARY BAIL (SECTION 440 - 450)

Even with numerous changes to the criminal code, one of the most common criticisms leveled at the bail system is that it still favors the wealthy over the poor. The wealthy and well-established can readily afford to buy their freedom, but the impoverished, who are the victims of the financial bail system, are imprisoned because they are unable to raise the necessary funds. In actuality, the only thing that frequently determines who gets out of jail and who stays behind is their financial situation. This practice's intrinsic unfairness makes one wonder if it is actually pragmatic.

In the *Moti Ram v. State of M.P.*<sup>83</sup> case, the Supreme Court noted that the main way bail conditions are applied, such as the requirement to appear in court, is by subjecting the accused individual to financial obligations and risk, irrespective of their financial situation.

There are many places in the world where this model is used. When more than 21% of the population lives below the poverty line, there is an issue. The population of Indigents is impacted, as is their ability to access justice. If it is decided that an individual is otherwise eligible for bail, the terms for their release are outlined in Sections 440 to 450 of the Criminal Procedure Code. The idea behind these clauses is that the accused party must give a financial guarantee that, if required, he will appear in court and comply with all other bail requirements, or else he will forfeit the guarantee amount.

Therefore, in order to be released from custody, an individual who is granted bail would have to execute a bond guaranteeing to follow the terms of the bail.

This bond is for a certain amount of money that the court has set; if the defendant fails to comply with a bail requirement, the bond will be forfeited and the defendant will be required to pay the fine. If this isn't done, the fine imposed by the court will be applied to recover the penalty. Should the penalty amount not be retrieved, the offender may face a civil imprisonment sentence of up to six months. The accused person may be required by the court to produce one or more sureties as a guarantee that they will adhere to the terms of their bail,

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<sup>83</sup>*Moti Ram v. State of M.P.*, AIR1978 SC 1594

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in addition to being required to execute a bond. The surety amount will be forfeited if the person accused of an offense doesn't comply.

The bail amount shall be set "with due regard to the circumstances of the case and shall not be excessive," according to Section 440 of the Criminal Procedure Code. The amount set by the police or the magistrate may be lowered by the High Court or the Court of Sessions.

The cancellation of bail is an additional crucial component of bail. It is possible to cancel both bailable and non-bailable offenses.

### GROUND FOR CANCELLATION OF BAIL

From various courts the grounds for cancellation of bail are as follows:-

- 1) If accused is tampering with the evidence
- 2) Accused threatens or intimidates the witnesses
- 3) Likely to escape the country
- 4) Committed an offence already committed
- 5) Hampers the investigation
- 6) Discovery of new material
- 7) After grant of bail committed non-bailable offence
- 8) Bail has been granted arbitrarily, improperly, capriciously
- 9) Materials on record not properly examined
- 10) Accused misused his status power and position
- 11) Accused not absent from the trial
- 12) And many other reasons

### INTERIM BAIL WHILE FINAL DISPOSAL OF BAIL APPLICATION

When it comes to granting bail, the court in question has the inherent authority to give someone interim bail while the bail application is being processed. Although the decision to grant interim bail rests with the relevant court, that authority is undoubtedly present. According to the ruling in *Kamlendra Pratap Singh v. State of U.P.*<sup>84</sup>, a court hearing a regular bail application has the inherent authority to grant interim bail while the case is being heard. This interpretation of the law is accurate in light of Article 21 of the Indian Constitution, which guarantees everyone's right to life and liberty.

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<sup>84</sup>*Kamlendra Pratap Singh v. State of U.P.*, Criminal Appeal No. 538 of 2009

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When someone files for regular bail, the court in question usually lists the application after a few days so that it can review the case diary that needs to be obtained from the police. In the interim, the applicant must remain in custody. The applicant's reputation could be permanently damaged in society, even if he is later freed on bond. A person's reputation is a significant asset and a component of their constitutionally guaranteed rights as stated in Article 21. The Supreme Court has repeatedly stated that the authority to set regular bail includes the authority to set interim bail while the regular bail application is being processed. This authority is ingrained in the authority to grant bail, especially in light of Article 21 of the Indian Constitution. A person should not be forced to go to jail in light of Article 21 of the Constitution if they can demonstrate beyond a reasonable doubt that they are innocent under the circumstances of the case.

Therefore, it is always possible for a petitioner to file an application for interim bail in addition to the bail application if he is seeking regular bail before the relevant court. It is feasible to give the relevant court instructions allowing the application for interim bail to be decided the same day it is filed, while the regular bail application is being decided upon in its entirety.

### **CONCLUSION**

The law governing bail should strike a balance between the competing interests of society at large. protecting the public from the misbehaviour of those who are purportedly involved in criminal activity and upholding the accused's presumption of innocence until a guilty verdict is reached.<sup>339</sup> The courts that follow are meant to operate under the guiding principle that "jail is an exception, but bail is the rule." However, this exception is further subject to the stipulation that the bail provisions should not be interpreted solely for the benefit of the accused, but also for the benefit of the prosecution and society as a whole, which may also be impacted directly or indirectly by the commission of an offense against society.<sup>85</sup>

The courts are required to apply certain standards, such as the type and gravity of the prosecution, when evaluating bail applications. The type of evidence used by the prosecution, the seriousness of the punishment that a conviction will bring, the accused's reputation, behaviour and character, and the likelihood that the accused won't be present during the trial.

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<sup>85</sup>K. Muthuramalingam v. State, 1997 Cri LJ 3501

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It is also legal for the courts to consider the prosecution's allegations as primary guidance when deciding whether to grant bail.

It is also legal for the courts to consider the prosecution's allegations as primary guidance when deciding whether to grant bail. Legal proceedings pertaining to defenses raised by the accused should not be initiated by the courts unless they provide insight into the veracity of the prosecution's allegations. The likelihood of the subordinate Courts making a mistake is reduced if the aforementioned legal principles are taken into consideration when deciding on bail requests.<sup>86</sup>

The two crucial factors—the possibility of the accused escaping justice and his tampering with prosecution evidence to ensure a fair trial—would be very important factors in the judicial discretion to grant or refuse bail. It is imperative that these two factors receive the appropriate and necessary attention.

In criminal justice systems based on accusatorial systems, where the prosecution bears the burden of proof and the accused is presumed innocent until proven guilty, the question of what to do with an accused person between his arrest and judgment poses a serious challenge. Pretrial detention means, for the accused, being punished before guilt is established, having his private life, family, and domestic arrangements violently destroyed, having his job effectively threatened, having his social relationships disrupted, and being prevented from getting self-help in order to prepare a defense.

On the other side, the accused may have the chance to commit crimes, run away, or tamper with the legal system by intimidating witnesses, destroying evidence, or obstructing the course of justice if they are released pending trial. The terrible conditions in our jails where pretrial inmates are housed and the possibility of the pretrial period being extended for months or even years due to court congestion exacerbate this innate tension between justice for the accused and lowering risks for the State. The question comes up not just before, but also during and after a criminal trial.

Regarding the standard of court bail hearings, they need to be improved so that comprehensive background information about the accused person is taken into account, in addition to the information provided by the police in their reports. Perfect plans should be created to find and confirm the pertinent data; since pretrial detention is extremely expensive, courts should consider their options carefully and provide justification when denying bail

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<sup>86</sup>Ramesh v/s State of Haryana,1977 Cri. LJ 2848.

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requests. Furthermore, more caution must be used when handling bail-related issues. In actuality, bail ought to be granted as a fundamental human right rather than being automatically denied in the first place. Conditions for bail may be strict and unambiguous if necessary, but it must be rarely refused. Pretrial detention itself cannot be realistically seen as anything other than a form of punishment unless it is justified by an extreme necessity. In general, pretrial detainees may not be punished. In actuality, the insufficiencies of our legal system and the numerous delays that characterize our criminal justice administration system should not be allowed to jeopardize the inalienable human rights of prisoners who are awaiting trial. Generally speaking, evading justice must be prohibited, and it may be deemed a distinct offense, but refusing to post bail shouldn't be used as a preventive measure or a form of punishment.

The intention behind the bail laws and the actual practice that emerges within the system are at odds with each other. It has been observed that the use of judicial discretion has occasionally resulted in judicial ambiguity or aphorism. Although it is well established that judicial orders do not infringe upon any fundamental rights, the reality of the situation occasionally leads one to believe differently. Telegram orders are typically used to deny bail; no justification is provided. The authority of "preventive detention" is sometimes used in lieu of the authority to refuse bail. The right to a prompt trial has not yet gained the prominence it needs to go from being a theoretical right to a real one. Our bail system does discriminate based on financial need. Every prisoner awaiting trial cries, "Either try me quickly or, at least, grant me bail." Any legal process that allows an accused person to be held for a moment longer than is necessary to ensure justice would be unfair and violate Articles 14 and 21 of the constitution.

Inconsistencies and ambiguities taint our nation's bail laws. The laws pertaining to bail that are found in our Code of Criminal Procedure present an unclear and inchoate legislative policy. Although there is a long list of factors to take into account, the discretion granted to courts in bail matters is judicially and practically limitless, making it challenging to justify the use of discretion in a given situation.

It is questionable if the current statutes, when examined in the context of the judicial guidelines established by the Supreme Court and several High Courts to regulate the

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discretion in the "Bail or Jail" decision, amount to "reasonable, fair and just" law as defined by Article 21 of our Constitution.

When determining whether to grant bail, the court must typically take into account the following factors:

- (1) the nature and gravity of the accusation;
- (2) the seriousness of the offenses;
- (3) The type of evidence gathered and the accused's disposition and mannerisms;  
Possibility of the accused running away and not showing up for the trial;
- (4) Potential for such a crime to be committed again;
- (6) and last but not least, the likelihood that the accused will tamper with the evidence and witnesses.
- (7) A broader interest of the State and its citizens.<sup>343</sup>

When evaluating bail requests, the court should primarily take into account the gravity of the offense and the interests of the community as a whole.<sup>34</sup>

### **SUGGESTIONS:-**

Adoption of a Comprehensive Code:

- 1) Adopting a comprehensive code to supersede the current bail legislation would be necessary to implement the current bail laws. The proposed code should incorporate fundamental ideas, the need philosophy, utility, and guidelines for granting or rejecting bail.
- 2) Examine the Criminal Justice System's Administration: - Immediate attention must be given to ensuring that police authority is used properly, developing tools to control it, providing legal aid services during the initial stages, and expediting the accused's trial.
- 3) Must be unambiguous and certain: - The bail law needs to be changed.  
Uncertainty is replaced by clearly defined issues pertaining to jurisdiction, granting bail during subsequent steps, and the scope of the court's authority to grant or refuse bail.
- 4) Statutory Limit of Bail Bond and Sureties Must Be Fixed: - In essence, the amount of bail bond and sureties is determined at the court's discretion and is not subject to a statutory limit. It is necessary to make provisions for various categories.

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- 5) The court's discretionary power to grant bail is justified as follows: judges have been granted discretionary power to grant bail. Usually, the Higher Court revokes bail orders issued by subordinate courts. Bail must be granted or denied based on reasonable standards to prevent judges from abusing their authority.
- 6) The Code of Criminal Procedure only provided the general framework for the bail provision; in addressing the specifics, judges exercised their discretion. These are the principles that should guide the code. A separate code pertaining to bail provisions should be discussed in detail, as should the utility, applicability, granting, refusing, and check and balance on the powers of the police and courts. Other provisions that should be covered include remedies for the court's abuse of power, the amount of bail bond or sureties, and what happens if a party is unable to submit the required paperwork on time. Every bail-related clause should be included if there is a separate code. The following are a few of the provisions that must be included in the code: (i) Bail: its purpose and use. (ii) The ability to judge whether or not to grant bail while maintaining a check and balance to prevent power abuse. (iii) Police authority to set bail. (iv) Extensive guidelines for accepting and rejecting bail requests. (v) Recourse in the event that the authority to grant bail is abused.

#### OTHER SUGGESTIONS:

- 1) The duties of the court officer who releases an accused person from custody without a good reason should be clarified.
- 2) Appropriate checks should be made on the judicial officers' discretionary powers when it comes to granting bail. If an officer is found to be at fault and to have granted bail to the accused without using reasonable discretion, that officer's liability may be established, and the officer in question should face consequences commensurate with the degree of their misconduct.
- 3) Appropriate guidelines ought to be in place for determining the requirements for granting accused parties anticipatory bail.
- 4) When granting bail to the accused, the court officer should take a reforming stance in light of Article 21 of the Indian Constitution.
- 5) Pretrial detention should be kept to a minimum. Holding someone in custody for an extended period of time damages them, adds to the state's needless workload, and may

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have a negative influence on future criminal behavior. It also lessens the likelihood of positive reformative outcomes.



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