

FACULTY OF JURIDICAL SCIENCES

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BAIL

Article 21 of the Constitution of India guarantees the protection of life and personal liberty to all persons. It guarantees the fundamental right to live with human dignity and personal liberty, which in turn gives us the right to ask for bail when arrested by any law enforcement authority.

The provision of anticipatory bail under Section 438 was introduced in the Code of Criminal Procedure in 1973 (hereinafter referred to as CrPC or Criminal Procedure Code). It is based on the recommendation of the Law Commission of India, which in its 41st report, recommended the incorporation of a provision of anticipatory bail. The report stated 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. 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 to first to submit to custody, remain in prison for some days and then apply for bail.”

The ‘Bail’ provision, especially anticipatory bail, is based on the legal principle of “presumption of innocence” i.e. every person accused of any crime is considered innocent until proven guilty. This is a fundamental principle mentioned in the Universal Declaration of Human Rights under Article 11.

Meaning of bail

‘Bail’ connotes the process of procuring the release of an accused charged with certain offences by ensuring his future attendance in the court for trial and compelling him to remain within the jurisdiction of the court.

Definition of bail, as per the Black’s Law Dictionary is that bail is – “the security required by a court for the release of a prisoner who must appear at a future time.” The objective of arrest is to deliver justice by presenting the accused before the Court. However, if the same objective can be

achieved without making any arrest then there is no need to violate his liberty. That's why bail can be granted to the accused person for conditional release.

Legal position of bail

The term 'Bail' has not been defined under the Criminal Procedure Code, 1973. Only the term 'Bailable Offence' and 'Non-Bailable Offence' has been defined under Section 2(a) of Cr. PC. The provisions relating to bail and bail bonds are mentioned under Section 436-450 of the Criminal Procedure Code.

Categories of bail

For the purpose of bail, offences are classified into bailable and non-bailable offences which are discussed below :

Bailable offences

According to Section 2(a) of CrPC bailable offence means an offence that is classified as bailable in the First Schedule of the Code, or which is classified as bailable under any other law. An accused can claim bail as a matter of right if he is accused of committing a bailable offence. The police officer or any other authority has no right to reject the bail if the accused is ready to furnish bail. Under Section 436 of CrPC 1973, a person accused of a bailable offence at any time while under arrest without a warrant and at any stage of the proceedings has the right to be released on bail.

Non-bailable offences

A non-bailable offence is defined as any offence which is not a bailable offence. A person accused of a non-bailable offence cannot claim bail as a right. A person accused of non-bailable offences can be granted bail provided the accused does not qualify the following conditions:

- There are reasonable grounds to believe that he has committed an offence punishable with death penalty or life imprisonment.
- That the accused has committed a cognizable offence and he had been previously convicted of an offence punishable with death, imprisonment for life or imprisonment of seven years or more or if the accused been convicted on two or more instances of a cognizable and non-bailable offence.

- There are exceptional cases in which law gives special consideration in favour of cases where the accused is a minor, a woman, a sick person etc. [Section 437(1) CrPC].

Different types of bail

Regular bail

Via this, the court orders the release of a person who is under arrest, from police custody after paying the amount as bail money. An accused can apply for regular bail under Section 437 and 439 of CrPC.

Interim bail

This is a direct order by the court to provide temporary and short term bail to the accused until his regular or anticipatory bail application is pending before the court. The Supreme Court noticed the misuse of interim bail by the accused in Rukmani Mahato vs. the State of Jharkhand.

Anticipatory bail

This is a direct order of Sessions or High Court to provide pre-arrest bail to an accused of a crime. When the person has an apprehension of being arrested, the person can apply for anticipatory bail. Sometimes, an application for anticipatory bail may go against the person, as it might alert an investigation agency regarding the involvement of that person in a crime.

Important factors to be considered while granting anticipatory bail in India

Based on Section 438(1) of CrPC, the Supreme Court has enumerated a detailed and exhaustive list of considerations while deciding anticipatory bail. They are as follows:-

- Gravity of crime and role of accused must be understood before the arrest.
- Previous record of accused, any imprisonment on conviction in respect of non bailable offence, should be checked.
- Possibility that applicant will flee from justice.
- Chances of repetition of similar or other offences.
- Intention behind accusation is whether to injure or humiliate the applicant by arresting him or her.
- Consider the exact role of the accused.

- Reasonable apprehension of tampering with evidence, witnesses and threatening the complainant.
- Standard conditions while granting anticipatory bail
- Accused should present himself / herself for interrogation by the investigation office as and when asked to appear.
- Accused should not directly or indirectly try to induce, threaten, or promise to any person related to the case who knows the facts of the case, so that he can be dissuaded from disclosing the fact to the court or investigation officer.
- Accused should not leave the country with prior permission of the court.
- Any other condition which the honourable court deems fit.

Cancellation of bail

Under Section 437(5) of CrPC, the court which has granted bail can cancel it, if found necessary under certain conditions. Per Section 439(2), the Sessions Court, High Court, or Supreme Court can, suo moto, cancel the bail granted to the accused and transfer the accused to custody. Per Section 389(2), an appellate court can also cancel the bail of the accused and order the accused to be arrested and sent to custody.

Latest case laws

1. **Re: Digendra Sarkar** – Under Section 438 of the CrPC, the application for anticipatory bail applied even before the First Information Report is registered. So, First Information Report cannot be a condition precedent to applying for anticipatory bail.

2. **Suresh Vasudeva vs. State** – Section 438(1) applies only to non-bailable offences.

3. **Sushila Agarwal vs. State** – Supreme Court held that anticipatory bail should not be for a fixed period, but it is open to the court to limit the tenure of anticipatory bail if any special condition necessitates the same.

4. **Gurbaksha Singh Sibbia and others vs. the State of Punjab** – the Supreme Court opined :

There are no provisions in the CrPC regarding time boundness of granting pre – arrest anticipatory bail.

The concerned court has the discretion to impose conditions for grant of anticipatory bail including a limited period of protection etc., subject to considering any special circumstances required.

Anticipatory bail as a fundamental right

Under the Constitution of India, every person has a fundamental right to life and personal liberty. Article 21 is enshrined in our Constitution. The objective of this article is not to deprive any person of his life or personal liberty except as per the procedure established by law. As a person can not prepare their case for trial from behind the bars, so the provision of bail in law is provided, to give a fair chance to fight their case with all possible measures. Apart from that since an accused is considered innocent until proven guilty, incarceration in any form brings disrepute to the person and restricts him from going about his daily affairs. Hence to avoid such hardships, a person is provided with the remedy to apply for anticipatory bail.

Clause 4 was added to Section 438, through the Criminal Amendment Bill, 2018. The legislature inserted four clauses under Section 438. According to the amendment, anticipatory bail cannot be granted to a person accused of the offence of committing rape on a woman aged under 16years, under 12 years, gang rape on a woman aged under 16 years of age and gang rape of a woman under 12 years of age, punishable under Section 376(3), 376 AB, 376 DA and 376 DB respectively under the Indian Penal Code (Punishment of rape) 1860.

Rape is a heinous crime and there should be strict provisions under law to punish the convict. However, there is a difference between an accused and being proclaimed a convict. There are high chances of an accused being acquitted after a trial and hence denying the right of bail entirely goes against the spirit of justice. Rape is a serious crime but nowadays people go to any level to defame a person to take revenge on them, therefore the instances of filing false cases of rape are also increasing. Hence, this amendment unjustly restricts the right to get anticipatory bail.

Conclusion

The objective behind enacting Section 438 is to safeguard the liberty of a person. The need for anticipatory bail arises mainly when any person has reason to believe that he may be arrested on an accusation of having committed a non-bailable offence. Anticipatory bail is concerned with the liberty of a person and presumes their innocence. It was held in the case of Gurbaksh Singh Sibbia vs. the State of Punjab by a five-judge Supreme Court bench led by then Chief Justice Y V Chandrachud that Section 438 (1) is to be interpreted in the light of Article 21 of the Constitution. While Courts have time and again emphasised the need to uphold the liberty of individuals and protect them from arbitrary arrests, one needs to remember that anticipatory bails are not a matter of right like other types of bail.