



THE STUDY OF THE INSTITUTION OF BAIL AND PROTECTION TO THE LIBERTY OF THE ACCUSED

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It has been seen that a person may be arrested with or without warrant. The main purpose behind arrest of the accused person is to secure his presence at the time of his enquiry or trial and to ensure that he is available when sentence has been passed on conviction. The apparently conflicting claims, Firstly freedom of individual and Secondly, the interest of the justice would be ideal blend by the achievement of the above said purpose without forcing detention of the accused during enquiry or trial. The aim provisions relating to bail are blending of the conflicting claims, liberty of the accused person who is arrested without jeopardizing the objectives of arrest will be restoring by the enactment of the provisions of bail.

The release of the accused on bail is crucial to him as the consequences are grave in respect of pretrial detention. If the accused is denied to be release on bail it would mean that he would be subjected to the physical and psychological deprivation of the life of jail even though innocence of the accused is presumed till his guilty is proved beyond reasonable doubts. The accused who is confined into jail not only losses his job but also prevented from effectively contributing in the preparation, is that the burden is heavily falls on the innocent family members of the accused after his detention¹. An attempt has been made by enacting the law of bails to devise and to operate such a system in such a manner so as to enable it to release maximum number of persons accused in various offences on bail without the objectives behind arrest and trial has been seriously endanger.

Circumstances in which release on bail is mandatory: There are the following circumstances in which release on bail is mandatory:-

1. Where a person is not arrested in non bailable offence or detained without warrant and he is ready to furnish bail the police officer who having custody of arrested person or the court is required to release him on bail. The police officer or court, instead of taking bail from such person, may even release him on executing a bond without sureties². The above rule covers all cases of persons accused of bailable offence, cases of persons though not accused of any offence but against whom security proceeding have been initiated under chapter VIII of the code, and all other cases of arrest and detention which are not in respect of any non bailable offence.

Where a person [released under the above rule contained in section 436(1)] has failed to comply with the conditions of the bail 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 or is brought in custody before the court. [Section 436(2)]

A person should seek fresh bail from the court after he has been released by the police on bail³. The right to be released on bail under the above rule, i.e. sec. 436(1) cannot be nullified indirectly by fixing too high the amount of bond or bail bond to be furnished by the person seeking release⁴.

Inability of the accused to seek bail with surety for a week could be ground to presume that he is an indigent. This explanation was inserted by Act 25 of 2005 would help the court to release the accused without surety⁵. Section 440(1) specifically provides that the amount of every such bond shall be fixed with due regard to the circumstances of the case and shall not be excessive.

Further, section 440(2) empowers the High Court and the Sessions Court to direct that the bail required by the police officer or magistrate be reduced. Though there are no specific provisions for appeal against refusal to

¹ Motiram vs State of MP (1978) 4 SCC 47: 1978 SCC (Cri) 485 CriLJ 1703

² See, Section-436 (1) Cr.P.C.

³ Haji Mohammad Wasim vs State of Rajasthan, (1991) 1 CriLJ 806(Raj.)

⁴ Mohd. Tariq vs Union of India 1990 CriLJ 774 (All). Afsar Khan vs. State 1992 CriLJ 1676 (Karnataka)

⁵ See, Sec. 35 of Act-25 of 2005 (wef 23.06.2006)



grant bail under section 436(1), the High Court or Sessions Court can be moved for bail under section 439. Moreover, refusal to grant bail in contravention of section 436 will make the detention illegal and the police officer causing such detention may be held guilty of wrongful confinement under section 342 IPC⁶.

A new section has been enacted as section 436(a) by Act 25 of 2005 stipulating that a person not accused of an offence carrying death penalty, who has undergone detention for a period extending up to one half of the period of the imprisonment prescribed for that offence could be released on his personal bond with or without surety. The public prosecutor has been given audience. The court can order extending the imprisonment or release him on bail. Indeed, if the delay was caused by the accused he will not get the benefit of this provision⁷.

2. The police officer may detain such person for a longer period than 24 hours⁸. For the purpose of investigation after obtaining magistrate order under section 167.

According to section 167(2) (a), the total period of detention of the accused with a magistrate can authorize shall not exceed:-

- (i) Ninety days, where the investigation relates to an offence punishable with death, imprisonment for life or imprisonment for a term not less than 10 years or
- (ii) Sixty days, in a case where the investigation relates to other offence.

On the expiry of said period of 90 or 60 days, as the case may be, the accused person shall be released on bail if he is prepared to and does furnish bail, and every person so released on bail shall be deemed to be so released under chapter XXXIII of the code (i.e. relating to bail) for the purposes of that chapter. This however does not mean that detention of the accused beyond the period of sixty or ninety days as the case may be, is illegal and therefore a ground for bail⁹.

The magistrate can authorize detention beyond the above mentioned maxima, but if the accused during this period furnishes bail he has to be released on bail¹⁰. There is, however, no scope for the inference that the accused shall be deemed to have been released on bail on the expiry of the above maxima making further detention automatically illegal¹¹. The claim of bail, however, has to be made before the submission of charge sheet¹². This claim does not revive because a further investigation remains pending¹³. If no bail was granted under section 167(2) prior of the submission of charge sheet, the accused could seek bail only under section 437.¹⁴ This provision is applicable irrespective of the fact that the offence with which the detained person is accused is non bailable or the case is such that the bail cannot be granted according to the provisions of chapter XXXIII of the Code dealing with bail and bond. The object of this provision is to put pressure on the investigating agency so that the investigations are completed expeditiously within reasonable time.

The question whether on submission of charge sheet after the ninety days, the bail granted could be cancelled To be answered differently. While the Orissa High Court held that on submission of charge sheet the court can cancel bail.¹⁵ The Andhra Pradesh High Court opined that the court cannot cancel such bail.¹⁶

This question came to be examined by the Supreme Court. It has been held that:-

The accused person cannot contend for exercising his indefeasible right to be release on bail at any time notwithstanding the fact that in the meantime charge sheet is filled if he earlier fails to exercise the same right due to the failure on the part of prosecution to file the charge sheet with in maximum time provided by law. But

⁶ Dharmu Naik vs Ravindranath Acharya, 1978 CriLJ 864 (Orissa)

⁷ See, Sec. 36 of Act-25 of 2005 (wef 23.06.2006)

⁸ See, Sec. 57 CrPC

⁹ Mithun Hagjer vs State of Assam, 2009 CriLJ 4370 (Gauhati)

¹⁰ Mahesh Chand vs State of Rajasthan, 1985 CriLJ 301 (Raj.)

¹¹ Shankar vs State of Tamilnadu, 1991 CriLJ 1745 (Madras)

¹² Babau Rao Raghupatil vs State of Maharashtra, 1994 CriLJ 192 (Bombay)

¹³ Dinesh Dalmia vs CBI (2007) 8 SCC 770

¹⁴ Shrawan Waman Yade vs State of Maharashtra, 1994 CriLJ 780 (Bombay)

¹⁵ Sanatan Sahu vs State of Orissa 1992 CriLJ 392 (Orissa)

¹⁶ Madaba Ramaiah vs State of Andhra Pradesh 1992 CriLJ 676 (AP)



on the other hand if he exercise the right within the time allowed by law is released on bail under such circumstances, he cannot be rearrested on the mere filing of the charge sheet.¹⁷

It may be noted that once the bail is granted under the above provision [sec. 167 (2)], the provision of chapter XXXIII of the Code have been made applicable for subsequent dealing with bail matters.

For instance, the court may cancel the bail under section 437(5) as if the bail was originally granted under section 437(1).¹⁸

While computing the period prescribed by section 167(2) above, it has been held that the period of detention under section 57 of the Code has to be excluded.¹⁹ Where the magistrate grants remand under section 167, since the custody thereafter is under the orders of the magistrate, it has been ruled that the day on which the custody is granted by the magistrate cannot be excluded.²⁰ The Supreme Court has one of the days either side day of remand or the day of submission of charge sheet has to be excluded.²¹ The period of bail granted under section 439 cannot be considered in the computation of ninety days.²²

3. Where any person accused of or suspected of the commission of any non bailable offence is arrested or detained without warrant by an officer in charge of a police station or appears or is brought before a court and if it appears to such officer or court at any stage of the investigation, enquiry or trial as the case may be there are not reasonable grounds for believing that the accused has committed a non bailable offence, but there are sufficient grounds for further enquiry into his guilt then according to section 437(2), the accused shall, pending such enquiry, be released on bail, or, at the discretion of such officer or court, on the execution by him of a bond without sureties for his appearance. An officer or a court releasing any person on bail under this provision is required to record reasons for so doing. [sec. 437 (4)]

4. if in any case trial by a magistrate, the trial of a person accused of any non-bailable offence is not concluded within a period of sixty days from the first date fixed for taking evidence in the case, such person shall, if he is in custody during the whole of the said period, be released on bail to the contentment of the magistrate, unless the magistrate otherwise direct by specifying the reasons to be recorded in writing. [Section. 437(6)] it may be noted that this provision does not apply in cases trial by a Sessions Court.

5. If, at any time 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, if he is in custody, on the execution by him of a bond without sureties for his appearance to hear judgment delivered. [section 437(7)]

¹⁷ Vipin Shanti Lal Panchal vs State of Gujrat (1996) 1 SCC 718: 1996 SCC (Cri)200

¹⁸ Kapoor Singh Nidham Singh vs State of Haryana, 1975 CriLJ 1007(P & H)

¹⁹ Tarsem Kumar vs State, 1975 CriLJ 1303 (Delhi)

²⁰ L.R. Chawla vs Murari 1976 CriLJ 212,203(Del)

²¹ State of M.P. vs Rustam 1995 Supp(3) SCC 221

²² Devendra Kumar vs State of M.P. 1992 CriLJ 1730 (M.P.)