

NEED FOR A NEW BAIL LAW

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Law relating to bails like any other concept of criminal laws has its own reasoning and its own journey of development. For one to understand the concept of bails has to see its various stages of development. In earlier times, people did not understand the concept of bails or did not take it very seriously but with the development of society people have accepted it as a rule. It has with time become an important part of the criminal procedure and is crucial for administration of justice. The concept of bail evolved from the tussle between keeping the accused in custody for committing a crime and restraining his liberty and the rule of presuming a person innocent until he has been found guilty¹. The police have been given the power to arrest a person and approach the courts for keeping the in custody but in doing so there might be chances of injustice when that person has been proved innocent for that crime.

Bail laws are not consistent but they are dynamic and flexible which evolve with time and circumstances. When there is a time of war, the bail laws are made more stringent and it is difficult to get bail but when there is peace in the society, the laws are more in favor of people and getting bail is easier. This right has to be considered keeping in mind the right to liberty of a person along with his other fundamental rights. This concept has to be applied keeping in mind fair play, justice as well as your freedom.

Man has been aware of these rights since 17th century and through the juristic work of various jurists from various schools of thought, including Rousseau, Jefferson and Tom Paine, these rights have been inbuilt in humans since the beginning². Even the UNO has also focused on human rights and has been making treaties and others agreements for their protection. It is believed that there are certain inalienable rights, which a man has, and those rights cannot be infringed or violated by the state³. It is believed to be the state's duty to protect these rights.

Depriving any person of his liberty is an offence and should be punished unless that deprivation is to ensure that law and order will be maintained or that the person will be present in court whenever called upon⁴. The courts follow the concept of 'innocent until that person is proven guilty'. From earlier times only, keeping an accused in custody has been done in exceptional cases and where necessity demands it. It is based on the concept that when it is difficult to secure presence of the accused in court he must be kept in custody of the police. The courts see the principle of necessity, and see whether the accused if given liberty will hamper the proceedings of the court or will try to threaten the witnesses of the case. The courts should not refuse bail on the ground that the person has a previous record of conviction or that he should be refused bail on the ground that he should be given a lesson for his crime by imprisoning him.

The purpose of concept of bail is not punitive or preventive rather it is for the purpose of securing attendance of the accused before the court by paying an amount before the court⁵. It tries to reduce the burden of the state by relieving the from the duty of bringing the accused before the court on every date and also reduces its financial burden which the state bear by keeping any person in prison. Bail is also important when there is a delay in concluding the trial by the court⁶.

The court has also in many cases stated that where there is a delay in giving a judgement in a trial, bail should not be given mechanically in all cases⁷.

Meaning of Bail

The term 'bail' is a French word meaning to deliver or to give. It is also taken from Latin where it means to bear any burden. In English law, bail means, releasing any person or giving liberty to any person by taking surety, in both criminal or civil cases, for ensuring his presence whenever required by the court⁸. Surety is any person who bind himself for

¹ HALSBURY'S, LAW OF ENGLAND 549-56 (Vol. 8, 4th Edn.).

² *Ibid.*

³ Motilal v. Government of State of Uttar Pradesh, AIR 1951 All 257.

⁴ Amar Nath Das v. State of Bihar, 2007 (52) AIC 875 (Pat HC).

⁵ Sanjay Chandra v. Central Bureau of Investigation, AIR 2012 SC 830.

⁶ State of Kerala v. Raneef, AIR 2011 SC 340.

⁷ Vivek Kumar v. State of Uttar Pradesh, (2009) 9 SCC 443.

⁸ Joseph A, Searches Seizures and Immunities, Vol. II, 1961, PP 900-01.

production of the person before the court at the required date. In American Law, bail is given as a right to any accused who is charged with committing in any non-capital offence⁹.

Therefore, bail is giving liberty to any person by giving security for his attendance before the court whenever required. The security is given by offering a surety, who will be bound by bonds, for getting bail for the accused.

Bail under Indian Law

The term 'bail' has not been defined in Indian Law, but Crpc defines the term 'bailable and non bailable offence'. Section 2 subsection (a) defines both terms. It states that bailable offence is one which mentioned as bailable under the Its schedule or under any other law for the time being force. And non bailable offence covers any other offence which is not a bailable one.

There are two types of securities:

1. Securities along with sureties
2. Securities without any surety

The word bail applies more appropriately in the first scenario. The word bail has been given the same meaning under Crpc and is also in the same manner practiced in the practical sense. The Supreme Court in the case of "Sunil Fulchand v. UOI", explained the concept of bail as:

"Bail is well understood in criminal jurisprudence and Chapter XXXIII of Crpc contains elaborate provisions relating to grant of bail. Bail is granted to a person who has been arrested in a non-bailable offence or has been convicted of an offence after trial. The effect of granting bail is to release the accused from internment though the court would still retain constructive contract could still be exercised through the conditions of the bond secured from him. The literal meaning of the word bail is surety"¹⁰.

Bail is different from Parole. Parole is when a person is released for a short period of time or when he is released from jail for his good behavior¹¹. Parole is given to a person after the judgement of the court in which it has been convicted by the court. Whereas bail is given when the person has been kept in custody when the trial is still going on. Parole and bail are having different meanings. Chapter XXXIII of Crpc provides the provisions for bail. In this chapter, bail can be given to a person by an officer who is in charge of the police station or by the court for any offence other than a non-bailable offence. Bail is granted for the purpose of releasing the person from the custody of the state to the custody of his surety, when the trial is pending, to produce him whenever required before the court¹². It releases the burden of the state from the accused and also releases the accused from unnecessary detention in prison. Whereas parole is granted in special circumstances after the conviction of the accused such as, marriage of the accused or his daughter, son, sister, brother, grandchildren; or he may be released on account of his good behavior, when he has served a portion of his punishment, any serious illness of any of his family member or his own health. Parole is granted by the administrative authorities whereas bail is granted by court or by police officer.

Security:

The term security has been mentioned under Section 81 of Crpc. It has been further under many other sections in crpc. Section 71 states that court can direct the police officer by an endorsement on the warrant that he can release the accused by taking security from the accused, the accused shall be released after signing a bond with sureties¹³. The endorsement shall state the amount of security which every surety has to pay, the number of sureties and time for producing the accused before the court. Further section 106 to 124 state about taking security for good behavior and keeping peace, section 108 to 110, deal with taking security from persons exhibiting seditious matter, who are habitual offenders or are suspected persons. There is certain other section also which talk about security. Security is taken by the court to ensure the attendance of the accused whenever required. Security is a part of bail security can be either with surety or without surety.

Factors for considering bail application

The court while considering any bail application looks into certain factors which include whether there are prima facie grounds for believing that the offence might have been committed by the accused, gravity as well as the nature of the accusation, the severity if punishment for the same, chances of the accused to flee or abscond, chances of the accused influencing the witnesses, danger of accused repeating the same offence, or whether the rules of justice permit giving of bail or not.

⁹ *Ibid.*

¹⁰ 1989 AIR 1529.

¹¹ Abdul Aziz v. Emperor, AIR 1946 All 116.

¹² Rajendra V. State, 1986 All Cr Rep 495 (497).

¹³ The Criminal Procedure Code, 1973, s. 71.

The court also sees the body language of the accused in court, his previous records whether he has committed any crime previously or not, whether there is a likelihood that the accused will commit a crime of released by the court. His overall antecedents will be considered by the court while considering bail application.

Arrest of persons

A person can be arrested either by a police officer, by the court, or by any private person also. A police officer can also arrest any person without any order or warrant from the court. Any private person can also arrest any person if that person commits a cognizable and a non-bailable offence in his presence or if he is a proclaimed offender. Any magistrate be it executive or judicial magistrate can also arrest any person if any offence is committed in his jurisdiction in his presence.

1. When a police officer can arrest without warrant:

Section 41: “(1) A police officer is authorized to arrest an individual without a warrant in the following circumstances:

(a) If the person commits a cognizable offense in the presence of the police officer.

(b) If there is a reasonable complaint, credible information, or a reasonable suspicion that the person has committed a cognizable offense punishable by imprisonment for a term up to seven years. The arrest is deemed necessary to prevent further offenses, facilitate proper investigation, prevent the tampering or disappearance of evidence, stop inducement, threats, or promises to withhold information, or ensure the person's presence in court.

(ba) If credible information is received that the person has committed a cognizable offense punishable by imprisonment for more than seven years, and the police officer believes that the information is valid.

(c) If the person has been proclaimed as an offender, either under the Code or by the State Government.

(d) If the person is found in possession of something reasonably suspected to be stolen property and is suspected of having committed an offense related to it.

(e) If the person obstructs a police officer in the execution of duty, attempts to escape from lawful custody, or is reasonably suspected of being a deserter from any Armed Forces of the Union.

(f) If there is reasonable suspicion or credible information that the person has been involved in an act outside India, which would be punishable in India, and extradition laws apply.

(g) If a released convict breaches any rule under Section 356(5).

(h) If there is a requisition from another police officer specifying the person to be arrested and the offense or cause for arrest.

(2) No person involved in a non-cognizable offense or against whom a complaint has been made, credible information received, or reasonable suspicion exists shall be arrested without a warrant, except as provided in Section 42.”¹⁴

Section 41 of the code specifies the conditions when any police officer can arrest without warrant any person. It does not give any arbitrary power to the police officer where he can arbitrarily infringe the right of personal liberty of any person. In one case where the police officer arrested the accused without any specific allegation but incrimination evidence was found by the police against the accused which according to the police made it necessary for the police to arrest the accused. The court in this allowed the bail of the accused.

Section 41 of the Code of Criminal Procedure (CrPC) in India outlines the authority of a police officer to arrest a person without a warrant. Here is a summary of Section 41 CrPC:

Arrest Without Warrant:

A police officer is empowered to arrest a person without a warrant under certain circumstances.

Conditions for Arrest:

The police officer can arrest a person under the following conditions:

If the person commits a cognizable offense in the presence of the officer.

If there is a reasonable complaint, credible information, or a reasonable suspicion that the person has committed a cognizable offense punishable by imprisonment.

¹⁴ *Supra* note 13, s. 41.

Recording of Reasons:

The police officer making the arrest must record the reasons in writing.

Preventive Arrest:

The arrest can be made to prevent the person from committing further offenses, for proper investigation, to prevent the destruction of evidence, to stop inducements or threats, or to ensure the person's presence in court.

Provisions for Requisition:

The police officer can also arrest a person based on a requisition from another police officer, provided it specifies the person to be arrested and the offense or cause.

Release Without Arrest:

The section provides discretion for the police officer to release a person without arrest in certain situations.

Provision for Proclaimed Offenders:

The police officer can arrest a person who has been proclaimed as an offender.

Possession of Stolen Property:

If a person is found in possession of stolen property and is reasonably suspected of committing an offense, the officer can make an arrest.

Arrest for Obstruction:

Arrest is authorized for a person who obstructs a police officer in the execution of duty.

Arrest of Deserter:

A person reasonably suspected of being a deserter from the Armed Forces can be arrested.

Extradition Cases:

Arrest is allowed for a person involved in an act outside India, which would be punishable if committed in India.

Released Convict:

A released convict who breaches rules can be arrested.

Requisites for Requisition Arrest:

Requisition arrests can be made based on a written or oral requisition from another police officer, specifying the person and the offense.

This section provides the police with the authority to make arrests without a warrant under specific circumstances, ensuring law enforcement capabilities while also incorporating safeguards.

2. Arrest by any private person

Section 43: "Any private person may arrest or cause to be arrested any person who in his presence commits a non-bailable and cognizable offence, or any proclaimed offender, and, without unnecessary delay, shall make over or cause to be made over any person so arrested to a police officer, or, in the absence of a police officer, take such person or cause him to be taken in custody to the nearest police station"¹⁵.

Any private person can also arrest a person who has committed a non-bailable as well as cognizable offence in his presence. This concept is also applicable in English law, where a person can arrest someone who has committed any breach of peace or when the offender has escaped after committing any such breach. In India, also if some person escapes after committing an offence the also, the private person has a right to arrest such person. A private person also has a right to re-arrest any offender if he has escaped from his custody.

3. Arrest by Magistrate

Section 44: "(1) If a Magistrate, whether Executive or Judicial, witnesses an offense committed within his local jurisdiction, he has the authority to personally make an arrest or instruct someone else to arrest the offender. Subsequently, following the provisions related to bail, he can detain the offender in custody.

¹⁵ *Supra* note 13, s. 43.

(2) At any time and within his local jurisdiction, a Magistrate, whether Executive or Judicial, can arrest someone himself or direct the arrest of a person who, according to the prevailing circumstances, he is currently authorized to issue a warrant for.”¹⁶.

A magistrate while acting under this section acts under his administrative capacity and he only has the power to arrest only within his jurisdiction.

4. Arrest by warrant of court

Section 71: “A court issuing an arrest warrant has the option, at its discretion, to include an endorsement on the warrant. This endorsement can specify that if the person named in the warrant executes a bond along with adequate sureties, committing to appear before the court at a designated time and subsequently until the court issues a different directive, then the officer to whom the warrant is addressed should accept this security. Upon acceptance of the bond, the officer is then directed to release the individual from custody”.

The endorsement shall state—

1. the number of sureties;
2. the amount in which they and the person for whose arrest the warrant is issued, are to be respectively bound;
3. the time at which he is to attend before the Court.

Whenever security is taken under this section, the officer to whom the warrant is directed shall forward the bond to the Court”.

Under section 72, a court may issue a warrant for arrest of any person and may direct more than police officers for the same. If no police officer is available, the court may also ask any private person to execute the same.

Types of Bail

Section 436: “If a person, who is not accused of a non-bailable offence, is arrested without a warrant by a police station officer or brought before a court and is willing to provide bail at any point while in custody or during court proceedings, they should be granted bail. The officer or court, at their discretion, may release the person on bail. However, if the individual is indigent and unable to provide surety, the officer or court can release them by having them execute a bond without sureties for their appearance. This provision does not affect the conditions mentioned in Sub-Section (3) of section 116 or section 446A.

Despite the above, if a person fails to adhere to the conditions of the bail bond regarding attendance time and place, the court has the authority to refuse bail upon a subsequent appearance in the same case. Such refusal does not impact the court's ability to call upon the person bound by the bond to pay the penalty as stipulated under section 446”¹⁷.

This section is based upon the principle that no person should remain in prison until he is convicted or proven guilty by the court. This section gives a right to freedom to any person who has been charged with a bailable offence. This will allow the accused to defend his trial in a proper manner and will also uphold the principle that no innocent should be kept in prison until he is proven guilty.

The section has given three conditions for granting bail under it. These conditions include:

1. The person has been kept in prison for committing a bailable offence.
2. He has been detained by the police without any warrant and has been brought before the court.
3. He is ready and prepared to give bail for the same at any time while he is in custody and the trial is pending.

The court has to exercise its discretion while granting bail under this section and no straightjacket formula has been mentioned in the code to be followed by the courts for the same.

This provision clearly sets out that the accused has a right to get bail if he has committed a bailable offence and has applied for bail under this section. It is mandatory for the court or the police to give bail under this section and it cannot be denied by the court or the police on any ground of all the conditions of this section are fulfilled by the accused¹⁸. The magistrate while acting under this section has to be judicious while granting bail and should decide objectively without keeping any personal bias in mind.

Bail of the accused cannot be denied merely on the ground that the offence committed by the accused is a serious offence. If the offence committed by the accused is a bailable offence and he is ready and prepared to give bail, then the magistrate cannot deny bail to the accused. The applicability of this section is not limited to just bailable offence¹⁹. It is applicable to any offence committed by an accused person which is not a non-bailable offence. The principle behind this section is to reduce the burden of the state and to secure the presence of the accused whenever need before the court. This section has been incorporated to protect the right to life and personal liberty of the accused and to uphold the principle of the criminal jurisprudence stating that an accused should not be kept in jail unless he has been proven guilty.

‘Any person’ here means any person having been suspected or accused of any offence other than a non-bailable offence.

¹⁶ *Supra* note 13, s. 44.

¹⁷ *Supra* note 13, s. 436.

¹⁸ Hussainara Khatun v. Home Secretary, State of Bihar, AIR 1979 SC 1360.

¹⁹ *Ibid.*

Section 436A: "If an individual, while being investigated, inquired, or tried for an offense under any law (excluding offenses punishable by death), has been in custody for a duration up to half of the maximum imprisonment period specified for that offense, the court is required to release the person on their personal bond, with or without sureties. However, the court has the authority, after hearing the Public Prosecutor and providing written reasons, to extend the detention beyond half of the stipulated period or grant release on bail instead of a personal bond, with or without sureties. It's important to note that, in any case, the individual cannot be held in custody for more than the maximum imprisonment period prescribed for the offense under that law during the investigation, inquiry, or trial".

Section 437: "This section pertains to situations involving individuals accused of or suspected of committing non-bailable offenses. In contrast to bailable offenses, where the right to bail is automatic upon providing security, the decision to grant bail for non-bailable offenses is at the discretion of the court. The court may release such individuals on bail, subject to specific conditions and considerations outlined in the section.

The court may deny bail if there are reasonable grounds to believe the accused has committed an offense punishable by death or life imprisonment. Similarly, bail may be refused if the offense is cognizable, and the accused has a prior conviction for specific offenses.

Exceptions exist, allowing the court to release individuals falling under the aforementioned categories, such as those under sixteen years of age, women, or those who are sick or infirm. Additionally, the court may grant bail based on other just and proper reasons.

The court may not refuse bail solely because the accused is needed for identification by witnesses during the investigation, provided the accused is entitled to bail and agrees to comply with the court's directives.

If, during the investigation, it becomes apparent that there are insufficient grounds to believe the accused committed a non-bailable offense, but further inquiry is necessary, the accused may be released on bail or on a bond without sureties, pending the inquiry as per section 446A.

Conditions imposed upon release on bail include attendance as specified in the bond, refraining from similar offenses, and avoiding inducement, threats, or promises to individuals aware of the case. The court may also impose additional conditions in the interest of justice.

The reasons or special reasons for granting bail must be recorded in writing by the officer or court releasing the person on bail.

The court, after releasing a person on bail, may, if necessary, re-arrest and commit the person to custody.

In cases tried by a Magistrate, if the trial of a person accused of a non-bailable offense extends beyond sixty days without conclusion, the person may be released on bail unless the Magistrate directs otherwise, providing written reasons.

If, after the trial but before delivering judgment, the court believes there are reasonable grounds to believe the accused is not guilty, it shall release the accused on a bond without sureties for appearance during the judgment hearing²⁰.

If the court is of the opinion that the accused on getting released may tamper the evidences or witnesses or might subvert justice, the courts might refuse to grant the bail. The conduct of the person applying for bail after being released is an important factor for the consideration of the courts. The objective of the section is that the accused should not be deprived of his liberty but it should not be at the cost of tampering the justice system.

Section 437 gives power to the magistrate to grant bail to an accused of a non-bailable offence when the accused is first brought before him and there are grounds to believe by the accused that the person if released will secure his attendance before the court whenever needed. But this bail can also be granted when the person is believed to have committed a non-bailable offence which is not punishable with death or imprisonment for life, except in case where the person accused is below the age of 16 years or is woman or any person who is infirm or sick. The person will not also be released on bail if he has committed a cognizable offence which is punishable with more than 7 years or has committed a cognizable offence previously which is punishable with three years or more.

The section also empowers the magistrate to impose certain conditions while granting bail to an accused. And if the accused does not fulfill the conditions the court has the power to suspend or cancel the bail of the accused²¹.

²⁰ *Supra* note 13, s. 437.

²¹ Subhash Kumar Yadav v. State of Bihar, AIR 2010 SC 802.

Before refusing a bail the court also has to give reasonable opportunity to the accused person and should record its reasons for doing so. The court also can direct a person who has been granted bail by the court to be taken into custody if the court thinks it just to do. The court while granting bail examines all the evidences in detail and looks into the merits of the case before granting bail²².

Section 438: "If an individual has a reasonable belief that they may be arrested for a non-bailable offense, they can petition the High Court or the Court of Session for an anticipatory bail directive. The court, considering factors like the gravity of the accusation, the person's background, the likelihood of them fleeing, and whether the accusation aims to harm or humiliate, may either dismiss the application or issue an interim order for anticipatory bail. If no interim order is issued or the application is rejected, the police can arrest the person based on the anticipated accusation.

If an interim order is granted, the court provides notice to the Public Prosecutor and the Superintendent of Police at least seven days before the final hearing, giving the Public Prosecutor an opportunity to present their case. The presence of the applicant is mandatory during the final hearing if the court deems it necessary in the interest of justice based on a Public Prosecutor's application.

When the court issues a directive under subsection (1), it can impose conditions such as making the person available for police interrogation, refraining from influencing witnesses, obtaining court permission before leaving India, and any other conditions allowed under section 437(3), as if bail were granted under that section.

If the person is subsequently arrested without a warrant, and they are willing to furnish bail either at the time of arrest or during custody, they should be released on bail. If a Magistrate decides to issue a warrant, it must be a bailable warrant in accordance with the court's directive under subsection (1).

This section does not apply to cases involving the arrest of a person accused of an offense under specific sections of the Indian Penal Code, namely sub-section (3) of section 376, section 376AB, section 376DA, or section 376DB²³.

Anticipatory bail grants the person bail before he gets bail through the regular process. This bail is granted when a person is anticipation of getting arrested for any non bailable and cognizable offence, he or she can apply for anticipatory bail. This bail is granted before the arrest of the person by the court. This section comes into operation when a person who has taken anticipatory bail from the court is arrested by the police and then he can be released on bail under this section. If the person is not arrested anticipatory bail cannot be granted²⁴. The power to grant anticipatory bail has been given to the High Court and the Sessions Court.

The object of this section is that when a person is arrested, if he has taken anticipatory bail under this section, he would not have to go to prison for even a few days and he can be released immediately by paying the security amount. The object of bringing this section by the legislature was that no one should be deprived of his or her liberty on the basis of frivolous complaints made by unscrupulous people²⁵.

Anticipatory bail is granted when it is shown that there is a mala fide intention in the complaint made. But even if no mala fide intention is shown on the part of the complainant then also the court may grant anticipatory bail. The court can exercise its discretion while giving an order of anticipatory bail after looking at the facts and circumstances of the particular case. The court might consider the following factors along with other factors while deciding an application for anticipatory bail²⁶:

1. The length of time the applicant has been residing in the community;
2. The financial conditions of the applicant;
3. Applicants ties with his family and other relationships;
4. Applicant's monetary condition, his reputation as well as character;
5. Prior criminal record of the applicant including any of his prior bail or release;
6. Other members of the community who would vouch for the applicant;
7. Nature of the offence with which the applicant has been charged and the chances of his conviction;
8. Other factors showing risk or indicating that giving bail to the applicant might cause a risk for the community.

In "Gurucharan Singh v. State (Delhi Administration)"²⁷, the court stated that the court will determine the application of anticipatory bail based on the facts and circumstances of each case. Therefore, there is no straightjacket formula to determine application under section 438 but it depends upon the facts and circumstances of every case. The court has

²² *Ibid.*

²³ *Supra* note 13, s.438.

²⁴ State of Uttar Pradesh v. Kailash, AIR 1955 All 98.

²⁵ *Ibid.*

²⁶ Gurbaksh Singh Sibbia v. State of Punjab, AIR 1980 SC 1632.

²⁷ 1978 AIR 179.

to look into the nature of the offence, the seriousness of the case along with the risk involved in releasing the accused on bail, the chances of him tampering the evidence or the witnesses of the case and whether there is a mala fide in the complaint made against the applicant.

The difference between anticipatory bail and bail is that anticipatory bail is granted before the arrest of the person and is effective as soon as the person is arrested. This bail is granted in anticipation of bail. Whereas a bail under section 436 or 437 is granted after the person is arrested.

Cancellation of bail

Section 439: “(1) A High Court or Court of Session has the authority to:

(a) Release on bail any person who is accused of an offense and currently in custody. If the offense falls under the category specified in subsection (3) of section 437, the court may impose any necessary condition for the purposes outlined in that subsection.

(b) Set aside or modify any condition previously imposed by a Magistrate when granting bail to a person.

However, the High Court or Court of Session must, before granting bail to a person accused of an offense exclusively triable by the Court of Session or an offense punishable with imprisonment for life (even if not exclusively triable), provide notice of the bail application to the Public Prosecutor, unless it deems, with recorded reasons, that giving such notice is impractical.

Additionally, the High Court or Court of Session is empowered to direct the arrest of a person previously released on bail under this Chapter and commit them to custody”²⁸.

Section 439 of the Code of Criminal Procedure (CrPC) in India deals with the provision of bail and the discretion of the High Court and Court of Session in granting bail. Here is a summary of Section 439 CrPC:

Bail Application: Any person accused of or suspected of committing an offense, except those accused of specific offenses under section 376 or other specified sections of the Indian Penal Code, may apply to the High Court or the Court of Session for anticipatory bail if they have reason to believe they may be arrested for a non-bailable offense.

Factors Considered: The court, in deciding whether to grant anticipatory bail, takes into consideration factors such as the nature and gravity of the accusation, the applicant's antecedents, the possibility of the applicant fleeing from justice, and whether the accusation is made to harm or humiliate the applicant.

Interim Order: The court may either reject the anticipatory bail application or issue an interim order for anticipatory bail. If an interim order is granted, a notice is served to the Public Prosecutor and the Superintendent of Police, and the presence of the applicant is mandatory at the final hearing.

Imposition of Conditions: The court, when granting anticipatory bail, may impose conditions such as making the accused available for police interrogation, refraining from influencing witnesses, obtaining court permission before leaving India, and any other conditions deemed fit.

Arrest and Bail Execution: If the person is subsequently arrested without a warrant, and they are willing to furnish bail either at the time of arrest or during custody, they should be released on bail.

Exclusion of Certain Offenses: Section 439 does not apply to cases involving the arrest of a person accused of specific offenses under section 376 or other specified sections of the Indian Penal Code.

In essence, Section 439 grants the High Court and the Court of Session discretionary powers to grant anticipatory bail and provides guidelines on the factors to be considered and conditions that may be imposed.

Need for Reform in Bail System

The laws relating to bail as operating today are in a need to be reformed. The laws as existing today may cause certain hardships as there is no proper timeline when these bail applications have to be dismissed, there is lack of proper facilities for people in prison, the number of accused detained in prison has also been increasing.

The concept of bail deals with the right to liberty of a person, therefore, the courts must exercise their discretion to grant bail or not with utmost care. The judges have been given the power to restrict the liberty of any person on the ground that he has committed an offence and that his presence in the court cannot be ensured unless he is under the custody of the court. But this power to restrict has to be granted keeping in mind that it does not infringe any fundamental right of the person accused.

²⁸ *Supra* note, s. 439.

1. **Overburdening of prisons:** This is one of the major issues that the justice system is facing today. With an increase in population in jails and congesting of such prisons, there is a need to reform the prevailing bail laws. As per the June 2022, 'Commonwealth Human Rights Initiative', India is the second country having the most number of people in pre-trial detentions²⁹. Data has shown that one in every four undertrials has been in detention for one year or more and one in every eight undertrial prisoners has been in detention for two years or more³⁰.
2. **Amount of bail bonds:** The amount of bail bonds that are signed by the accused before they can be granted bail are also unreasonable in certain cases. There is an instance where for petty crimes also or where the crime is not that heinous, then also the bail amount is very much. And in certain cases where the crime is heinous, the court sets a very low bail amount. The discrepancy in bail amount is a matter of concern which must be looked over by the courts as well as the legislative authorities.
3. **Delay in bail applications:** Due to a huge number of bail applications, there is a delay in disposal of such applications by the court. The procedure for disposal of such applications is also needed to be regulated and revised as there is a huge number of applications pending in the courts. A separate law dealing with procedure for disposing of bail applications is the need of the hour as it will help both the public and the justice system. A timely disposal of bail applications will reduce the number of prisoners in the prisons and will reduce the burden of the state. Moreover, it will help the detainees also who have been detained in prisons pending their bail applications for a period which is more than the punishment prescribed for the offence committed by them.
4. **Exercise of discretion:** The judges should also exercise their discretion while deciding bail applications in a judicious manner. As there are many cases where even in petty offences the bail is denied and in case of heinous offences it is allowed by the court. There are also cases of bribery where bail applications are allowed after taking a bribe from the accused. Hence, this has to be rectified by the legislature and stringent laws should be made for deciding bail applications.
5. **Bail trends:** The trend of getting bail has also changed. Nowadays people bring fake surety in exchange of money before the court for getting bail. This has led to many offenders getting released on bail and committing other offences or threatening the witnesses or hindering the court proceedings.
6. **Problem in finding surety:** The other problem which is faced by undertrial prisoners is that there are times when they are not able to find sureties. As sureties have to give some security for the release of the accused on bail and for that they must have some immovable property for keeping it as surety. This leads to a problem as the accused might not be able to find any person having sufficient security. Other problem that is faced is that many a times no person is willing to take the responsibility of the undertrial prisoner and become surety for him or her. This is one of the reasons which leads to people finding fake sureties, people who are not even known to the accused. These people take money from the accused to become surety and put something as a security.
7. **One person one surety:** The other issue regarding surety is that in India people can become surety only for one person at a time. Unlike India, in USA people are allowed to become surety for more than one accused. This makes it difficult for accused to find surety for getting bail.
8. **Notice of bail:** The applicant in a bail application is required to send a notice of his bail application to the prosecution for reply of the same. The time limit for sending such reply is nowhere set in the procedural code, which leads to unreasonable delay in sending the reply. There is a need to regulate the time limit for sending the notice and its reply by the parties so that the bail application can be disposed off in a timely manner.
9. **Proper elaboration;** The provisions given under Crpc only set out the grounds when bail can be given but there is a need to regulate the bail process and elaborate upon the procedure for disposal of bail applications. With new law setting forth detailed provisions regarding bail will help in disposing of bails in a timely manner with less discrepancy in it.

Conclusion and Suggestions

The bail system currently prevalent in the country is unsatisfactory and is in a need of drastic changes. One of the major problems is the improper regulation of the bail provisions. The bail procedure currently given under the code is in a need to be reformed and be more regulated so that their implementation can be done in a proper manner by the courts. These reforms are also required to set a certain set of guidelines for the courts which they can follow while granting bail to an undertrial prisoner. Furthermore, the appearance of the accused before the court cannot be secured into precise terms. The offender can run away or threaten the witnesses even after paying the security amount. Financial loss is not too much of a risk for an accused person to abscond and it has been stated by the Supreme Court also that monetary loss is not something that can stop an accused person from running away. Therefore, there is a need to make reforms in the

²⁹ Shreehari Paliath, *A Separate Bail Law Can Help Decongest India's Jails: Experts*, INDIA SPEED (Dec. 18, 2023, 8:46 AM), *A Separate Bail Law Can Help Decongest India's Jails: Experts* (indiaspend.com)

³⁰ *Ibid.*

laws requiring the appearance of the accused before the court. Mere monetary loss cannot be the only condition that the courts can put to stop the accused from running away.

Other problem with the current bail laws is regarding the sureties required for furnishing bail. In India, one person can become the surety of only one other person which makes it difficult for people to find sureties in case of need. Unlike India, USA follows the policy where one person can be the surety of one or more accused persons. This does not restrict the right of the accused person to get bail. Further, the legislature should regulate the amount of security fixed by the courts as there are cases where hefty amounts of security for very petty offences. The proper set of guidelines for the same can be direct the courts while fixing the bail amounts.

Laws are needed to be made for ensuring that people don't bring up sureties by paying them a certain amount of money. This practiced should be condemned and should be made punishable by the courts. This will stop the practice of bringing fake sureties in the court who might eventually not serve the purpose of giving bail and taking security and bonds as they might run away or abscond or do not appear before the court. The courts must ensure the identity of the surety before granting bail to the accused.

The legislature must regulate the laws for making expediting the procedure for granting bail applications. The delay and pendency of bail applications is one of the major problems that today we are facing. The number of undertrial prisoners in jail is increasing day-by-day and there is an emergent need for regulating this. The legislature must come up with new laws focusing upon the current problems in bail laws. The bail trends need to be given attention and the discretion of the courts also needs to be regularized as there have been times where courts have failed to exercise their power in a proper manner.

The delay in disposing bail applications, lack of proper implementation of bail laws has led to a delay in providing justice to the undertrial accused. This has led to disparities in the justice system. There is a need to make a separate law by the legislature dealing with bail specifically where it has all the laws and rules governing bail and how the courts must exercise their discretion for disposing bail applications. A time limit should be fixed by the legislature within which the bail applications have to be disposed of. Further, the period for giving notice and its reply by the both the parties also needs to be fixed and it has to be made rigid and exemption should only be given in exceptional circumstances. The parties should be informed about this time period within which they should proceed with their bail applications.

The offences for which the bail has to be given compulsorily have to be specified in the law and where the judges can exercise their discretion should also be mentioned in it. The factors which the judges have to keep in mind while considering a bail application should also be specified in the law and the judges should follow such factors or any other factor keeping in mind the factors given in the act. The facts and circumstances of every case have to be seen by the court and they should exercise this discretion in a judicious manner.

The law should specify the requirements that any applicant has to fulfill before applying for bail and the security amount or the number of sureties that they are required to submit before the court while getting bail. This will help in resolving the issue of unreasonable amount of security in certain cases of petty offences. This will also help in getting justice to the undertrial prisoners and moreover it will help in reducing the burden of the state by reducing the number of undertrial prisoners in prisons. With each prisoner there is a burden on the state for providing him food and other basic necessities and moreover prisons should be kept for people who have been convicted by the courts. Therefore, any person should not suffer or should not be treated like a convict until and unless he has been held guilty by the court.

There have been cases where the trial has gone long and the person has undergone the prison period more than what has been given as punishment for his offence under the law. This leads to injustice for innocent people who are not guilty but then also they have to go through this prison period. Prison environment and the people living in prison might negatively affect the undertrial prisoner and there may be chances where even if the person is innocent he might develop a criminal mind while spending his time in jail. Thus, the courts must try to refuse bail to only those accused whom the court thinks that might affect the trial if released or will abscond or might temper the evidence of the case. Therefore, there is an immediate need for legislature reform the bail laws that are prevailing in the current Indian legal system. The laws that are prevailing in US and Europe can also be seen while reforming these laws keeping in mind the Indian scenario. Apart from reforming these laws the legislature should draft a new law dealing specifically with bail which can be applied by the courts in the justice system.