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PROVISIONS OF BAIL AND BONDS

Explanatory Notes by DLA on bail provisions

What is bail?

- To grant bail is to 'set at liberty a person arrested or imprisoned, on security being taken for his appearance'. Thus, bail is basically a release from restraint, more particularly, release from the custody of the police.
- An order of bail gives back to the accused freedom on condition that he will appear to take his trial. Personal recognisance, suretyship bonds and such other modalities are the means by which an assurance is secured from the accused that though he has been released on bail, he will present himself at the trial of offence of which he is charged and for which he was arrested.

How should the court proceed?

- Whenever an application for bail is made to a court, the first question that it has to decide is whether the offence for which the accused is being prosecuted is bailable or otherwise.
- If the offence is bailable, bail will be granted under Section 436 of the Code of Criminal Procedure without more ado; but if the offence is not bailable, further considerations will arise and the court will decide the question of grant of bail in the light of those further considerations.
- Here are some of the considerations the court should take into account: **nature and seriousness of the offence**, character of the evidence, circumstances which are peculiar to the accused, a reasonable possibility of the presence of the accused not being secured at the trial, reasonable apprehension of witnesses being tampered with the larger interests of the public or the State.



Object of bail

- The object of bail is to secure the attendance of the accused at the trial. The proper test to be applied in the solution of the question whether bail should be granted or refused is whether it is probable that the party will appear to take his trial. It is indisputable that bail is not to be withheld as punishment.

Rationale for grant of bail

- Consequences of pre-trial detention are grave. Defendants presumed innocent are subjected to the psychological and physical deprivations of jail life, usually under more onerous conditions than are imposed on convicted defendants.
- The jailed defendant loses his job if he has one and is prevented from contributing to the preparation of his defence.
- Equally important, the burden of his detention frequently falls heavily on the innocent members of his family.

Question

- **Is surety a necessary requirement of bail?**

Ans.

- Bearing in mind the need for liberal interpretation in areas of social justice, individual freedom and indigents' rights, we hold that bail covers both—release on one's own bond, with or without sureties. When sureties should be demanded and what sum should be insisted on are dependent on variables. [Source: Supreme Court in Moti Ram v. State of MP 1978]



- Poor men - Indians are, in monetary terms, indigents - young persons, infirm individuals and women are weak categories and courts should be liberal in releasing them on their own recognisances - put whatever reasonable conditions you may.

Question

- **Should the surety be from the same district in which the court is situated?**

Ans.

- The magistrate has demanded sureties from his own district! What is a Malayalee, Kannadiga, Tamil or Telugu to do if arrested for alleged misappropriation or theft or criminal trespass in Bastar, Port Blair, Pahalgam or Chandni Chowk?

He cannot have sureties owning properties in these distant places. He may not know any one there and might have come in a batch or to seek a job or in a morcha. Judicial disruption of Indian unity is surest achieved by such provincial allergies.

- What law prescribes surety is from outside or non-regional language applications? What law prescribes the geographical discrimination implicit in asking for sureties from the court district?

Source: **Supreme Court in Moti Ram v. State of MP 1978**



STATUTORY PROVISIONS:

BAIL IN BAILABLE OFFENCES

Section 436

- When a person not 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 to give bail*
 - at any time while in custody of such officer or
 - at any stage of proceeding before such Court
- such person **shall be released on bail**

- If such person is indigent and unable to furnish surety
 - such officer or Court **shall** discharge him
 - on his executing a bond without sureties

Indigent person

- Where a person is unable to give bail
 - within a week of his arrest
- it shall be sufficient ground
 - to presume that he is an indigent person

[Note: **Inserted w.e.f 23.6.2006**]

Section 436A

- Where a person has undergone detention
 - upto half of maximum imprisonment specified for his offence



- during investigation or trial
- he **shall** be released by court on his personal bond
 - with or without sureties
- Court may order continued detention
 - longer than half of maximum imprisonment or
- release him on bail
 - instead of personal bond with or without sureties
- No such person shall be detained
 - during investigation or trial for more than the maximum imprisonment for his offence

What is bail?

- Traditionally bail is some form of property
 - deposited or pledged to a court
- to persuade it to release a suspect from jail
 - on the understanding that
- he will return for trial or forfeit the bail

What is a Surety Bond?

- By a surety bond
 - a third party agrees to be responsible
 - for debt or obligation of defendant



BAIL IN NON-BAILABLE CASES

Section 437

General rule for non-bailable offences:

- When a person accused of, or suspected 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
 - other than High Court or Court of session
- he **may be released on bail**

Two exceptions to the general rule:

(i)

- such person shall not be so released
 - if there are reasonable grounds for believing that
 - he has been guilty of an offence punishable with death or imprisonment for life

(ii)

- such person shall not be so released
 - if such offence is a cognizable offence and
 - he had been previously convicted of an offence
 - punishable with death or imprisonment for seven years or more
 - or
 - he had been previously convicted
 - on two or more occasions
 - of a cognizable offence punishable with imprisonment for 3 years or more
 - but not less than 7 years



Exception to the two exceptions:

- Court may direct that
 - a person in clauses (i) and (ii) be released on bail
 - if such person
 - is under sixteen years
 - is a woman
 - is sick or infirm

Further exception to the second exception:

- Court may also direct that
 - a person under clause (ii) be released on bail
 - if it is just and proper so to do for any other special reason

Imposition of conditions:

Section 437(3)

- When a person accused or suspected of
 - an offence punishable with imprisonment of seven years or more or
 - an offence under Chapters VI, XVI or XVII of IPC
- is released on bail
- Court **shall** impose these conditions:
 - (a)
 - such person shall attend in accordance with conditions of bond
 - (b)
 - such person shall not commit
 - an offence similar to the offence of which he is accused or suspected



(c)

- such person shall not
 - make any inducement, threat or promise
 - to any person acquainted with facts of case
 - so as to dissuade him from disclosing such fact
 - to court or to any police officer or
 - tamper with evidence
- Court **may** also impose
 - other necessary conditions in interest of justice

[Recording of reasons:](#)

Section 437(4)

- An officer or Court releasing any person on bail
 - shall record in writing reasons or special reasons for so doing

[Cancellation of bail by Court](#)

Section 437(5)

- Any Court which has released a person on bail
 - may direct if necessary that such person be arrested
 - and commit him to custody



Explanatory Notes by DLA on section 437

- Section 437 Cr.P.C. provides as to when bail may be taken in case of **non-bailable** offences.
- Section 437 deals with two stages during the initial period of investigation of a non-bailable offence. *Even the officer in-charge of the police station may, by recording his reasons in writing, release a person accused of or suspected of commission of any non-bailable offence provided there are no reasonable grounds for believing that the accused has committed a non-bailable offence punishable with death or imprisonment for life.*

Two categories of offences under section 437(1)

- Sub-section (1) of Section 437, makes a **dichotomy** in dealing with non-bailable offences. *The first category relates to offences punishable with death or imprisonment for life and the rest are all other non-bailable offences.*

The First Category

- With regard to the first category, Section 437(1), imposes a **bar** to grant of bail by the Court or the officer incharge of a police station to a person accused of or suspected of the commission of an offence punishable with death or imprisonment for life, *if there appear reasonable grounds for believing that he has been so guilty.*
- Naturally, therefore, at the stage of investigation unless there are some materials to justify an officer or the Court to believe that there are no reasonable grounds for believing that the person accused of or suspected of the commission of such an offence has been guilty of the same, there is a **ban** imposed under Section 437(1), Cr.P.C. against granting of bail.
- Whenever a person is arrested by the police for such an offence, there should be materials produced before the Court to come to a conclusion as to the



nature of the case he is involved in or he is suspected of. If at that stage from the materials available there appear reasonable grounds for believing that the person has been guilty of an offence punishable with death or imprisonment for life, the Court has no other option than to commit him to custody.

- *At that stage, the Court is concerned with the **existence** of the materials against the accused and not as to whether those materials are credible or not on the merits.*
- It is clear that when an accused is brought before the Court of a Magistrate with the allegation against him of an offence punishable with death or imprisonment for life, he has ordinarily no option in the matter but to refuse bail subject, however, to the first proviso to Section 437(1) and in a case where the Magistrate entertains a reasonable belief on the materials that the accused has not been guilty of such an offence.
- *This will, however, be an extraordinary occasion since there will be **some materials** at the stage of initial arrest for the accusation or for strong suspicion of commission by the person of such an offence.*
- It is difficult to conceive how if a police officer arrests a person on a reasonable suspicion of commission of an offence punishable with death or imprisonment for life (Section 41) and forwards him to a Magistrate [Section 167(1)] the Magistrate at that stage will have reasons to hold that there are no reasonable grounds for believing that he has not been guilty of such an offence. At that stage unless the Magistrate is able to act under the proviso to Section 437(1) bail appears to be out of question.

The Second Category

- In all other non-bailable cases judicial discretion will always be exercised by the Court in favour of granting bail subject to sub-section (3) of Section 437 with regard to imposition of conditions, if necessary.
- *Unless **exceptional** circumstances are brought to the notice of the Court which may defeat proper investigation and a fair trial, the Court will not*



decline to grant bail to a person who is not accused of an offence punishable with death or imprisonment for life.

- Under sub-section (4) an officer or a Court releasing any person on bail under sub-section (1) or sub-section (2) is required to record in writing his or its reasons for so doing. That is to say, law requires that in non-bailable offences punishable with death or imprisonment for life, reasons have to be recorded for releasing a person on bail, clearly disclosing how discretion has been exercised in that behalf.

Role of Courts

- Courts over-see the action of the police and exercise judicial discretion in granting bail, *always bearing in mind that the liberty of an individual is not unnecessarily and unduly abridged and at the same time the cause of justice does not suffer.*
- After the Court releases a person on bail under sub-section (1) or sub-section (2) of Section 437 it may direct him to be arrested again when it considers necessary so to do. This will be also in exercise of its judicial discretion on valid grounds.
- Section 437(6) is intended to speed up trial without unnecessarily detaining a person as an undertrial prisoner, unless for reasons to be recorded in writing, the Magistrate otherwise directs.
- Section 437(7) provides that if at any time after the conclusion of a trial of any person accused of non-bailable offence and before the judgment is delivered, the Court is of opinion that there are reasonable grounds for believing that the accused is not guilty of such an offence, it shall release the accused, if he is in custody, on the execution of him of a bond without sureties for his appearance to hear the judgment.



The principle underlying Section 437

- *The principle underlying Section 437 is therefore, towards granting of bail except in cases where there appear to be reasonable grounds for believing that the accused has been guilty of an offence punishable with death or imprisonment for life and also when there are other valid reasons to justify the refusal of bail.*

Applicability

- Section 437 is concerned only with the Court of Magistrate. It expressly excludes the High Court and the Court of Session.

Requirement of bail bonds even on acquittal ?

Section 437A

- Before conclusion of trial or disposal of appeal:
- court shall require accused
 - to execute *bail bonds with sureties*
 - to appear before higher court
 - when such court issues notice on any appeal filed against judgment
- Such bail bonds shall be in force for 6 months



ANTICIPATORY BAIL

Section 438(1) Bail to person apprehending arrest

- Where any person has **reason** to believe
 - that he may be arrested on accusation of a non-bailable offence
- he may *apply* to High Court or Court of Session
 - for a direction that *in the event of such arrest*
 - he shall be **released on bail**
- After taking into consideration
 - nature and gravity of accusation
 - antecedents of applicant, including whether he has previously undergone
 - imprisonment on conviction for a cognizable offence
 - possibility of applicant to flee from justice
 - whether accusation has been made with object of
 - injuring or humiliating applicant by having him arrested
- High Court or Court of Session may
 - either reject the application forthwith
 - or issue interim order for grant of **anticipatory bail**

Section 438(1A)

- Where Court grants an interim order:
- it shall cause
 - a notice of not less than seven days
- to be served on Public Prosecutor and Superintendent of Police



Section 438(1B) [Inserted by CrPC Amendment Act 2005]

- Presence of applicant seeking anticipatory bail
 - shall be obligatory at the time of final hearing and passing of final order
- if
 - on application made by Public Prosecutor
 - Court considers such presence necessary in interest of justice

Imposition of conditions:

Section 438(2)

- When High Court or Court of Sessions makes such direction
- it may impose conditions including
 - a condition that the person shall make himself available
 - for interrogation by a police officer as and when required
 - a condition that the person shall not cause
 - any inducement, threat or promise to a person acquainted with facts of case
 - so as to dissuade him from disclosing such facts to Court or police officer
 - a condition that the person shall not leave India
 - without previous permission of Court
 - such other conditions as may be imposed u/s 437(3)

Effect of arrest after a favourable order u/s 438:

Section 438(3)

- If such person is thereafter arrested
 - by a police officer without warrant on such accusation



- and is prepared at the time of arrest or while in custody to give bail
- he shall be released on bail

- If a Magistrate taking cognizance of such offence decides
 - that a warrant should be issued against that person
 - he shall issue a *bailable* warrant in conformity with direction of Court

No Anticipatory Bail for certain IPC offences

Section 438(4) [Inserted by the **Criminal Law Amendment Act 2018**]

- This section shall not apply
 - to any case involving the arrest of any person
 - on accusation of having committed an offence u/s 376(3) or 376AB or 376DA or 376DB of IPC

Explanatory Notes by DLA on section 438(4)

- As a result of this new provision inserted by the **Criminal Law Amendment Act 2018**, protection of anticipatory bail would henceforth not be available to persons accused of having committed **rape and gang rape** of women **under sixteen years of age** and **under twelve years of age**.

Whether Anticipatory Bail is available for offences under the SC/ST Act?

Section 18 of SCs and STs(Prevention of Atrocities) Act 1989:

- Nothing in section 438 of Criminal Procedure Code shall apply
 - to a case involving arrest of any person
 - on an accusation of having committed an offence under this Act



SUPREME COURT DIRECTIONS

Cases where the bar against anticipatory bail under the SC/ST Act is not applicable

- If a person is able to show that, prima facie, he has not committed any atrocity against a member of SC and ST and that **the allegation was mala fide and prima facie false** and that prima facie no case was made out, there is no justification for applying Section 18 in such cases.
- Exclusion of Section 438 applies when a prima facie case of commission of offence under the Atrocities Act is made. On the other hand, if it can be shown that **the allegations are prima facie motivated and false**, such exclusion will not apply.

Rationale

- Presumption of innocence is a human right.
- An accused is certainly entitled to show to the Court, if he apprehends arrest, that the case of the complainant was motivated. If it can be so shown, there is no reason that the Court is not able to protect liberty of such a person. There cannot be any mandate under the law for arrest of an innocent.
- Thus, **limiting the exclusion of anticipatory bail in such cases is essential for protection of fundamental right of life and liberty under Article 21 of the Constitution.**

Conclusion

- There is no absolute bar against grant of anticipatory bail in cases under the Atrocities Act if no prima facie case is made out or where on judicial scrutiny the complaint is found to be prima facie mala fide.

Source:

- **Dr. Subhash Kashinath Mahajan v. State of Maharashtra**
[March 2018]



SUBSEQUENT AMENDMENT BY PARLIAMENT

Parliament has since amended the SC & ST [Prevention of Atrocities] Act in **August 2018** to nullify the abovesaid judgment of the Supreme Court.

The following provision has been inserted in that Act:

- "The provisions of section 438 of the Code shall not apply to a case under this Act, notwithstanding any judgment or order or direction of any Court."

The current legal position

- *The current legal position therefore is that anticipatory bail is not available in case of accusations under the SC & ST [Prevention of Atrocities] Act.*

Other Explanatory Notes by DLA on section 438

- Section 438 affords what is generally referred to as '**anticipatory bail**', an expression which was used by the Law Commission in the 41st Report. Any order of bail can, of course, be effective only from the time of arrest.

What is an anticipatory bail?

- The distinction between an ordinary order of bail and an order of anticipatory bail is that whereas the former is granted after arrest and therefore means release from the custody of the police, the latter **is granted in anticipation of arrest** and is therefore **effective at the very moment of arrest**.
- Police custody is an inevitable concomitant of arrest for non-bailable offences. An order of anticipatory bail constitutes, so to say, an insurance against police



custody following upon arrest for offence in respect of which the order is issued.

- In other words, unlike a post-arrest order of bail, *it is a pre-arrest legal process which directs that if the person in whose favour it is issued is thereafter arrested on the accusation in respect of which the direction is issued, he shall be released on bail.*

When is an anticipatory bail sought?

- Anticipatory bail is sought when there is a mere apprehension of arrest on the accusation that the applicant has committed a non-bailable offence. A person who has yet to lose his freedom by being arrested asks for freedom in the event of arrest.
- That is the stage at which it is imperative to protect his freedom, insofar as one may, and to give full play to the presumption that he is innocent.
- In fact, the stage, at which anticipatory bail is sought, brings about its striking dissimilarity with the situation in which a person who is arrested for commission of a non-bailable offence asks for bail.

Are there limitations similar to section 437?

- Section 438 confers on the High Court and the Court of Session the power to grant anticipatory bail. There is no warrant for reading into this provision the conditions subject to which bail can be granted under Section 437(1).
- Section 437(1), while conferring the power to grant bail in cases of non-bailable offences, provides by way of an **exception** that a person accused or suspected of the commission of a non-bailable offence "shall not be so



released" if there appear to be reasonable grounds for believing that he has been guilty of an offence punishable with death or imprisonment for life. If it was intended that the exception contained in Section 437(1) should govern the grant of relief under Section 438(1), nothing would have been easier for the legislature than to introduce into the latter section a similar provision.

Reasons

- In cases falling under Section 437, there is some concrete data on the basis of which it is possible to show that there appear to be reasonable grounds for believing that the applicant has been guilty of an offence punishable with death or imprisonment for life. In cases falling under Section 438 that stage is still to arrive and, in the generality of cases thereunder, it would be premature and indeed difficult to predicate that there are or are not reasonable grounds for so believing.

Can conditions be imposed?

- While granting relief u/s 438(1), appropriate conditions can be imposed u/s 438(2) so as to ensure an uninterrupted investigation. One of such conditions can even be that in the event of the police making out a case of a likely discovery u/s 27 of Evidence Act, the person released on bail shall be liable to be taken in police custody for facilitating the discovery.

But no unnecessary restrictions

- Since denial of bail amounts to deprivation of personal liberty, the court should lean against imposition of unnecessary restrictions on the scope of Section 438, especially when no such restrictions have been imposed by the legislature in the terms of that section.
- Section 438 is a procedural provision which is concerned with personal liberty of the individual, who is entitled to the benefit of the presumption of



innocence since he is not, on the date of his application for anticipatory bail, convicted of the offence in respect of which he seeks bail.

- An over-generous infusion of constraints and conditions which are not to be found in Section 438 can make its provisions constitutionally vulnerable since the right to personal freedom cannot be made to depend on compliance with unreasonable restrictions.

Grant of anticipatory bail

- If the proposed accusation appears to stem not from motives of furthering the ends of justice but from some ulterior motive, the object being to injure and humiliate the applicant by having him arrested, a direction for the release of the applicant on bail in the event of his arrest would generally be made.
- The nature and seriousness of the proposed charges, the context of the events likely to lead to the making of the charges, a reasonable possibility of the applicant's presence not being secured at the trial, a reasonable apprehension that witnesses will be tampered with and "the larger interests of the public or the State" are some of the considerations which the court has to keep in mind while deciding an application for anticipatory bail.

Reason to believe

- Section 438(1) lays down a condition, which has to be satisfied before anticipatory bail can be granted. The applicant must show that he has "reason to believe" that he may be arrested for a non-bailable offence. The use of the expression "reason to believe" shows that the belief that the applicant may be so arrested must be founded on reasonable grounds.



- Mere 'fear' is not 'belief', for which reason it is not enough for the applicant to show that he has some sort of a vague apprehension that someone is going to make an accusation against him, in pursuance of which he may be arrested.
- Grounds on which belief of applicant is based that he may be arrested for a non-bailable offence, must be capable of being examined by the court objectively, as it is then alone that court can determine whether applicant has reason to believe that he may be so arrested.

Is filing of an FIR necessary?

- Filing of a first information report is not a condition precedent to the exercise of the power under Section 438. The imminence of a likely arrest founded on a reasonable belief can be shown to exist even if an FIR is not yet filed.
- Also, anticipatory bail can be granted even after an FIR is filed, so long as the applicant has not been arrested.

No blanket order

- A 'blanket order' of anticipatory bail should not generally be passed. This flows from the very language of the section which requires the applicant to show that he has "reason to believe" that he may be arrested. A belief can be said to be founded on reasonable grounds only if there is something tangible to go by on the basis of which it can be said that the applicant's apprehension that he may be arrested is genuine.



What should the bail application contain?

- Specific events and facts must be disclosed by the applicant in order to enable the court to judge the reasonableness of his belief, the existence of which is the sine qua non of exercise of power conferred by this section.

Paramount consideration

- It is of paramount consideration to remember that freedom of individual is as necessary for the survival of society as it is for the egoistic purpose of the individual.
- *A person seeking anticipatory bail is still a free man entitled to presumption of innocence.* He is willing to submit to restraints on his freedom, by acceptance of condition which the court may think fit to impose, in consideration of the assurance that if arrested he shall be enlarged on bail.

BAIL POWERS OF HIGH COURT AND COURT OF SESSIONS

Section 439

(1)

- High Court or Court of Sessions may direct
 - that any person accused of an offence and **in custody**
 - be released on bail
- If offence is of nature specified in Section 437(3)
 - Court may impose any condition necessary for purposes mentioned there



- High Court or Court of Sessions may direct
 - that any condition imposed by a Magistrate when releasing any person on bail
 - be set aside or modified

Proviso: [Inserted by the **Criminal Law Amendment Act 2018** wef 21 April 2018]

- High Court or Court of Session shall
 - before granting bail to a person accused u/s 376(3) or 376AB or 376DA or 376DB of IPC
- give notice of the application for bail to the Public Prosecutor
 - within fifteen days from the date of such application

Explanatory Notes by DLA on section 439(1)

- Section 439(1) of the new Code confers special powers on High Court or Court of Session regarding bail. That is to say, even if a Magistrate refuses to grant bail to an accused person, the High Court or the Court of Session may order for grant of bail in appropriate cases.
- *Unlike under Section 437(1) there is no ban imposed under Section 439(1) against granting of bail by the High Court or the Court of Session to persons accused of an offence punishable with death or imprisonment for life.* It is, however, legitimate to suppose that the High Court or the Court of Session will be approached by an accused only after he has failed before the Magistrate and after the investigation has progressed throwing light on the evidence and circumstances implicating the accused.
- Even so, the High Court or the Court of Session will have to exercise its judicial discretion in considering the question of granting of bail under Section 439(1). The over-riding considerations in granting bail which are common both in the case of Section 437(1) and Section 439(1) are *the nature*



and gravity of the circumstances in which the offence is committed; the position and the status of the accused with reference to the victim and the witnesses; the likelihood of the accused fleeing from justice; of repeating the offence; of jeopardising his own life being faced with a grim prospect of possible conviction in the case; of tampering with witnesses; the history of the case as well as of its investigation and other relevant grounds.

Considerations before the Sessions Judge or the High Court

- It is difficult to reach a conclusion that the Sessions Judge or the High Court need not even bear in mind the guidelines which the Magistrate has necessarily to follow in considering bail of an accused.
- *It is not possible to hold that the Sessions Judge or the High Court, certainly enjoying wide powers, will be oblivious of considerations of likelihood of the accused being guilty of an offence punishable with death or imprisonment for life.*
- Since the Sessions Judge or the High Court will be approached by an accused only after refusal of bail by the Magistrate, it is not possible to hold that the mandate of the law of bail under Section 437 Cr.P.C for the Magistrate will be ignored by the High Court or Sessions Judge.

What is the scope of the expression "in custody" in section 439(1)?

- *A person is said to be in custody when he is in duress either because he is held by the investigating agency or other police or allied authority or is under the control of the court having been remanded by judicial order, or having offered himself to the court's jurisdiction and submitted to its orders by physical presence.*



- *He who is under the control of the court or is in the physical hold of an officer with coercive power is in custody for the purpose of Section 439. This word is of elastic semantics but its core meaning is that the law has taken control of the person.*
- *Custody, in the context of Section 439, (not for anticipatory bail under Section 438) is physical control or at least physical presence of the accused in court coupled with submission to the jurisdiction and order of the court.*
- *A person can be in custody not merely when the police arrest him, produce him before a Magistrate and gets a remand to judicial or other custody. He can be stated to be in judicial custody when he surrenders before the court and submits to its directions.*
- *Sections 107 and 108 of the Customs Act do not contemplate immediate arrest of a person being summoned in connection with an enquiry, but only contemplates surrendering to the custody of the Customs Officer which could subsequently lead to arrest and detention.*

Pre-condition for applying for bail under section 439(1)

- *The pre-condition to applying the provisions of Section 439 of the Code is that a person who is an accused must be in custody and his movements must have been restricted before he can move for bail. A person can be stated to be in judicial custody when he surrenders before the Court and submits to its directions.*



Presence of informant during hearing of bail applications:

Section 439(1A) [inserted by the **Criminal Law Amendment Act 2018** wef 21 April 2018]:

- **Presence of the informant** or any person authorised by him
 - shall be obligatory at the time of hearing of bail application u/s 376(3) or 376AB or 376DA or 376DB of IPC

CANCELLATION OF BAIL BY HIGH COURT OR COURT OF SESSIONS

Section 439(2)

- High Court or Court of Sessions may direct
 - that any person who has been released on bail
 - be **arrested** and commit him to custody

Explanatory Notes by DLA on section 439(2)

- Section 439(2) of the Code of Criminal Procedure confers jurisdiction on the High Court or Court of Session to direct that any person who has been released on bail under Chapter XXXIII be arrested and committed to custody. The power to take back in custody an accused who has been enlarged on bail has to be exercised with care and circumspection.

Law of cancellation of bail

- Rejection of bail when bail is applied for is one thing; cancellation of bail already granted is quite another.



- *It is easier to reject a bail application in a non-bailable case than to cancel a bail granted in such a case. Cancellation of bail necessarily involves review of a decision already made and can by and large be permitted **only if** by reason of supervening circumstances, it would be no longer conducive to a fair trial to allow the accused to retain his freedom during the trial.*
- *The fact that prosecution witnesses have turned hostile cannot by itself justify the inference that the accused has won them over. A brother, a sister or a parent who has seen the commission of crime may resile in the Court from a statement recorded during the course of investigation. That happens instinctively, out of natural love and affection, not out of persuasion by the accused. The witness has a stake in the innocence of the accused and tries therefore to save him from the guilt.*
- *Likewise, an employee may, out of a sense of gratitude, oblige the employer by uttering an untruth without pressure or persuasion. In other words, the objective fact that witnesses have turned hostile must be shown to bear a causal connection with the subjective involvement therein of the respondent.*
- *Without such proof, a bail once granted cannot be cancelled on the off chance or on the supposition that witnesses have been won over by the accused. Inconsistent testimony can no more be ascribed by itself to the influence of the accused than consistent testimony, by itself, can be ascribed to the pressure of the prosecution.*

NATURE OF BURDEN

Question

What is the nature of burden which rests on the prosecution in an application for cancellation of bail?



Ans.

- The issue of cancellation of bail can only arise in criminal cases, but *that does not mean that every **incidental** matter in a criminal case must be proved beyond a reasonable doubt like the guilt of the accused.*
- The same standard of proof as in a civil case applies to proof of incidental issues involved in a criminal trial *like the cancellation of bail of an accused.*
- The prosecution, therefore, can establish its case in an application for cancellation of bail by showing on a preponderance of probabilities that the accused has attempted to tamper or has tampered with its witnesses.
- *Proving by the test of balance of probabilities that the accused has abused his liberty or that there is a reasonable apprehension that he will interfere with the course of justice is all that is necessary for the prosecution to do in order to succeed in an application for cancellation of bail.*

Question

- Is it necessary for the prosecution to prove by a mathematical certainty or even beyond a reasonable doubt that the witnesses have turned hostile because they are won over by the accused?

Ans.

- No. It is sufficient if it is proved by preponderance of probabilities.

Competency of Courts

- Under Section 439(2) of the Code, a High Court may commit a person released on bail under Chapter XXXIII *by any Court* including the Court of Session to custody, if it thinks appropriate to do so. However, *a Court of*



Session cannot cancel a bail which has already been granted by the High Court unless new circumstances arise during the progress of the trial after an accused person has been admitted to bail by the High Court.

- If a Court of Session had admitted an accused person to bail, the State has *two options*. It may move the Sessions Judge if certain new circumstances have arisen which were not earlier known to the State and necessarily, therefore, to that Court. The State may as well approach the High Court being the superior court under Section 439(2) to commit the accused to custody.
- When the State is aggrieved by the order of the Sessions Judge granting bail and there are no new circumstances that have cropped up except those already existed, it is futile for the State to move the Sessions Judge again and it is competent in law to move the High Court for cancellation of the bail.
- The High Court has undoubtedly jurisdiction to entertain the application under Section 439(2) for cancellation of bail notwithstanding that the Sessions Judge had earlier admitted the appellants to bail.
- But, ordinarily the High Court will not exercise its discretion to interfere with an order of bail granted by the Sessions Judge in favour of an accused.

The two paramount considerations

The two paramount considerations in determining cancellation of bail:

- Likelihood of the accused fleeing from justice
- Likelihood of the accused tampering with prosecution evidence

Both of these relate to ensuring a fair trial of the case in a Court of Justice.

CONCLUSION

The power under section 439(2), though of an extraordinary nature, is meant to be exercised in appropriate cases when, by a preponderance of probabilities, it is clear that the accused is interfering with the course of justice by tampering with witnesses.



CASE LAW ON BAIL PROVISIONS

1. Moti Ram v. State of M.P. [1978 SC]
2. State v. Captain Jagjit Singh [1962 SC]
3. Gurbaksh Singh Sibbia v. State of Punjab [1980 SC]
4. Gurcharan Singh v. State (Delhi Admn.) [1978 SC]
5. State (Delhi Admn) v. Sanjay Gandhi [1978 SC]
