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Importance of Bail vis-a-vis Discretionary Power of the Court in India: An Analysis

Dr. Meena Ketan Sahu

Reader, P.G. Department of Law, Sambalpur University

ODISHA; E-mail: meenaketan1@gmail.com

ABSTRACT

As far as criminal justice administration system in India is concerned, bail or jail is the question before every intellectual to be answered while the Court is exercising discretionary power in granting or refusing the bail because every citizen is presumed to be law abiding and innocent. The cardinal principles of criminal law is that burden of proof always lies on prosecution except few exceptions and everybody is presumed to be innocent unless and until he is proved as guilty. This is based on the principle that every citizen is entitled to live in liberty till he commits an offence; and nobody, including the state, should take away his liberty without establishing before a court of law that he had committed the offence and thus rendered himself disqualified for enjoying the liberties of a free citizen. The law of bail occupies an important place in the administration of justice and the concept of bail emerges from the conflict between the police power to restrict liberty of a man who is alleged to have committed a crime, and presumption of innocence in favour of the alleged criminal. An accused is not detained in custody with the object of punishing him on the assumption of his guilt. The objective of the paper is to analyse the importance of bail in the criminal justice administration system in India. In the present paper the author has made an attempt to examine the statutory provisions pertaining to bail in the light of the decided cases. The researcher has also focus on the discretionary power of the court in granting or refusing the bail including anticipatory bail. The author has also specifically points out some of the drawbacks in the bail provisions and suggested some remedial measures to strengthen criminal justice administration system in India.

Key Words: Criminal Justice, Bail, Liberty, Presumption, Punishment etc.

INTRODUCTION

Personal liberty is fundamental right guaranteed by law. Although liberty of a citizen is undoubtedly important but balance must be maintained with the security of the community. A balance is required to be maintained between the personal liberty of the accused and the investigational right of the police. It must result in minimum interference with the personal liberty of the accused and the right of the police to investigate the case. It has to dovetail two conflicting demands, namely, on the one hand the requirements of the society for being shielded from the hazards of being exposed to the misadventures of a person alleged to have committed a crime; and on the other, the fundamental canon of criminal jurisprudence viz. the presumption of innocence of an accused till he is found guilty. Liberty exists in proportion to wholesome restraint, the more restraint on others to keep off from us, the more liberty we have.¹

The concept of personal liberty, though an essential feature of our constitutional scheme, is neither absolute nor isolated and if found necessary, personal liberty may be curtailed under a procedure established by law.² For an ideal social set up a fine balance has to be struck between liberty of an

1. A.K. Gopalan v. State of Madras, AIR 1950 SC 27

2. Article 21 of the Constitution of India.

individual and interest of the society because both are complimentary to each other. In this respect, it has aptly been remarked by their Lordships of the Supreme Court in the famous case of *Indira Nehru Gandhi v. Raj Narain*,³ that "the major problem of society is to combine that degree of liberty without which liberty becomes license". The discretionary jurisdiction of Courts, regarding grant or refusal of bail to persons arrested in connection with commission of various offences, ultimately aims at attaining this very objective.

The Apex Court in *State of Rajasthan v. Balchand*,⁴ proclaimed that the basic rule might tersely be put as bail not jail. Taking this principle, a step ahead and putting its seal of approval to the philosophy of balancing interests of individual and society, the Apex Court in *Ram Govind Upadhyaya v. Sudarshan Singh & Others*,⁵ observed that while liberty of an individual is precious and there should always be an all round effort on the part of Law Courts to protect such liberties of individuals, but this protection can be made available to the deserving ones only since the term protection cannot by itself be termed to be absolute in any and every situation but stands qualified depending upon the exigencies of the situation. It is on this perspective that in the event of there being committal of a heinous crime it is the society that needs protection from these elements since the later are having the capability of spreading a reign of terror so as to disrupt the life and tranquillity of the people in the society. In *Mansab Ali v. Irsan and another*,⁶ the Apex Court again stressed that the discretionary jurisdiction of bail should be exercised by balancing valuable right of liberty of an individual and the interest of society in general.⁷

CONCEPTUAL ANALYSIS

The word "Bail" means the security of a prisoner's appearance for trial. The effect of granting bail is, accordingly not to get the prisoner free from jail or custody, but to release him from the custody of Law and to entrust him to the custody of his sureties who are bond to produce him at his trial at a specified time and place. Grant of bail is a rule and refusal is an exception. A person accused of a bailable offence has the right to be released on bail. Bail in case of bailable offences is compulsory. In the matter of admission to bail the Code of Criminal Procedure makes a distinction between bailable & non-bailable offences. The grant of bail to a person accused of non-bailable offence is discretionary. But a person accused of bailable offence at any time while under detention without a warrant at any stage of the proceedings has the right to be released on bail in view of section 436 Cr. P.C. 1973.⁸ When the offence is bailable and accused is prepared to furnish bail, police officer has no discretion to refuse bail.⁹ Even when a person suspected of committing a bailable offence is produced before a magistrate and he is prepared to give bail, Magistrate has no option but to release him on appropriate bail.¹⁰ Magistrate cannot refuse to accept surrender and to bail out an accused against whom a petition or complaint of bailable offence has been filed.¹¹ The offence when is bailable, bail has to be granted. If the offence is non-bailable further considerations arise.¹² While adjudicating a bail application detailed examination of evidence and elaborate documentation of the merits of the case is however to be avoided.¹³

3. AIR 1975 SC 68.

4. AIR 1977 SC 2447.

5. AIR 2002 SC 1475.

6. (2003) 1 SCC 632.

7. Ved Prakash, "Legal Issues-An Anthology" First Edn. 2009, Suvidha Law House Pvt. Ltd, p. 30

8. Ratilal Bhanji Mithani v. Asstt. Collector of Customs, AIR 1967 SC 1939.

9. Dharmu Naik v. Rabindranath Acharya 1978 CrLJ 864 : Kanu Bhai v. State of Gujarat 1972 (B) Guj LR 748.

10. Kanubhai v. State of Gujarat (1972)(B) Guj LJ 864 : Union of India v. S. Bhagwandas 1969 Mad. LW (Cri) 88.

11. K.K. Rao v. State 1982 Mad LJ (Cr). 330 : (1981)2 Andh LT 461.

12. State of Punjab v. Jagjit Singh, AIR 1962 SC 253 : (1962)3 SCR 622 : (1962)1 Cr. LJ 215.

13. Niranjana Singh v. Prabhakar (1980)2 SCC 559 : 1980 SCC (Cri) 508 : AIR 1980 SC 785.

PURPOSE AND SIGNIFICANCE OF BAIL

The primary purposes of bail in a criminal case are to relieve the accused of imprisonment, to relieve the State of the burden of keeping him, pending the trial, and at the same time, to keep the accused constructively in the custody of the Court, whether before or after conviction, to assure that he will submit to the jurisdiction of the Court and be in attendance thereon whenever his presence is required. This Court in *Gurcharan Singh and Ors. Vs. State*¹⁴ observed that two paramount considerations, while considering petition for grant of bail in non-bailable offence, apart from the seriousness of the offence, are the likelihood of the accused fleeing from justice and his tampering with the prosecution witnesses. Both of them relate to ensure of the fair trial of the case. Though, this aspect is dealt by the High Court in its impugned order, in our view, the same is not convincing.

The principles, which the Court must consider while granting or declining bail, have been culled out by Court in the case of *Prahlad Singh Bhati v. NCT, Delhi*,¹⁵ thus:

The jurisdiction to grant bail has to be exercised on the basis of well-settled principles having regard to the circumstances of each case and not in an arbitrary manner. While granting the bail, the court has to keep in mind the nature of accusations, the nature of the evidence in support thereof, the severity of the punishment which conviction will entail, the character, behaviour, means and standing of the accused, circumstances which are peculiar to the accused, reasonable possibility of securing the presence of the accused at the trial, reasonable apprehension of the witnesses being tampered with, the larger interests of the public or State and similar other considerations. It has also to be kept in mind that for the purposes of granting the bail the legislature has used the words reasonable grounds for believing instead of the evidence which means the court dealing with the grant of bail can only satisfy it (sic itself) as to whether there is a genuine case against the accused and that the prosecution will be able to produce prima facie evidence in support of the charge. It is not expected, at this stage, to have the evidence establishing the guilt of the accused beyond reasonable doubt

STATUTORY PROVISIONS

Section 436 to Section 439 which find place in Chapter XXXIII of the Code of Criminal Procedure, 1973 provide in respect of regulation of bail in different types of cases. Section 436 enacts the invariable rule for grant of bail in bailable cases, subject to the sole exception contained in sub-section (2) of Section 436, under which a Court may refuse to release a person on bail, even in a bailable case, where such person has failed to comply with the conditions of the bail bond. Section 437 which deals with the power of the Court other than the High Court or Court of Sessions, clothes the Courts with a discretion to release a person accused of a non-bailable offence on bail, subject to following two main limitations as provided in sub-section (1) thereof:—

- (i) Such person shall not be released if there appear 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 for an offence punishable with death, imprisonment for life or imprisonment for seven years or more, or he had been previously convicted on two or more occasions for a non-bailable and cognizable offence.

Section 438 deals with what is conventionally referred to as anticipatory bail and provides that subject to the conditions and limitations provided therein a person apprehending arrest for an accusation on a non-bailable offence may on being arrested be directed to be released on bail by the

14. AIR 1978 SC 179

15. (2001) 4 SCC 280

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High Court or the Court of Sessions. Section 439 confers special powers upon High Court and Court of Sessions to grant bail to any person in custody and accused of an offence.

The Apex Court in *Gurcharan Singh and others v. State (Delhi Administration)*¹⁶ examined the scope of Sections 437 and 439. The Court held that Section 437 Cr. P.C is concerned only with the Court of Magistrate and it expressly excludes the High Court and the Court of Session. As regards Section 439, the Court observed that this Section confers special powers on the High Court or the Court of Session in respect of bail. Unlike under Section 437 (1) there is no ban imposed under Section 439(1) Cr. P.C against granting of bail to persons accused of an offence punishable with death or imprisonment for life. The Court further observed that, however, it is not possible to hold that the Sessions Judge or the High Court certainly enjoying wide powers, will be oblivious of the considerations of the likelihood of the accused being guilty of an offence punishable with death or imprisonment for life.¹⁷

THE DISCRETION- EXERCISE OF

The benedictory jurisdiction of bail lies exclusively within the discretion of the Court usually referred to as judicial discretion. It means sound discretion guided by law, and governed by rule, not humor. It must not be arbitrary, vague and fanciful, but legal and regular. The basic concept of judicial discretion may be put a capsulated form in the following classical exposition made by Benjamin Cardozo, J.-

“The Judge even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system and subordinated to the primordial necessity of order in the social life. Wide enough in all conscience is the field of discretion that remains.”

The Apex Court from time to time in its various pronouncements has outlined and explained the various considerations which should be kept in mind while exercising the judicial discretion regarding grant or refusal of bail. In *State of Maharashtra v. Anand Chintaman Dighe*,¹⁸ it has been observed that there are no hard and fast rules regarding grant or refusal of bail, each case has to be considered on its own merits. The matter always calls for judicious exercise of discretion by the Court. Where the offence is of serious nature, the Court has to decide the question of grant of bail in the light of such considerations as the nature and seriousness of offence, character of the evidence, circumstances which are peculiar to the accused a reasonable possibility of presence of the accused not being secured at the trial, the reasonable apprehension of witness being tampered with and the larger interest of the public and such similar other considerations.

In *Ram Govind Upadhyaya*, the Apex Court ordained that while placement of the accused in the society though may be considered but that by itself cannot be a guiding factor in the matter of bail and the same should and ought to always be coupled with other circumstances warranting the grant of bail. The nature of the offence is one of the basic consideration for the grant of bail, more heinous is a crime, the greater is the chance of rejection of the bail though, however dependent on the factual matrix of the matter. The Court laid down following considerations which should be kept in mind while dealing with the matter of bail, which are, as the Court clarified, only illustrative:-

- (a) While granting bail, the Court has to keep in mind not only the nature of the accusations, but also the severity of the punishment, if the accusation entails in a conviction and the nature of evidence in support of the accusations.
- (b) Reasonable apprehensions of the witnesses being tampered with or the apprehension of there being a threat for the complainant.
- (c) While it is not expected to have the entire evidence establishing the guilt of the accused beyond reasonable doubt but there ought always to be a prima facie satisfaction of the Court in support of the charge.
- (d) Frivolity in prosecution should always be considered and it is only the element of genuineness that has to be considered in the matter of grant of bail and in the event of there being some doubt as to the genuineness of the prosecution, in the normal course of event, the accused is entitled to an order of bail.

Past criminal background of the person seeking bail also has close bearing in the matter of bail. It is explained by the Apex Court in *Ram Pratap Yadav v. Mitra Sen Yadav & another*¹⁹ that-

“it cannot be denied that previous conviction of an accused for a heinous offence punishable with imprisonment for life, his involvement in other crimes and the quantum of punishment for the offences in which the applicant is seeking bail are all relevant factors to which the court should consciously advert to while taking a decision in the matter of enlargement on bail.”

Plea for grant of bail that due to detention the applicant is unable to conduct his defense was held to be logically untenable²⁰ Again as held in *Chenna Boyanna Krishna Yadav v. State of Maharashtra and another*²¹, when the gravity of the offence alleged is severe, mere period of incarceration or the fact that the trial is not likely to be concluded in the near future either by itself or conjointly may not entitle the accused to be enlarged on bail though these factors may also be taken into consideration while deciding the question of grant of bail.

BAIL ORDER, SCOPE OF

Sub-section (4) of Section 437 of the Code of Criminal Procedure mandates that a Court releasing a person on bail under sub-section (1) or sub-section (2) is required to record reasons. Under Section 438, the Court “if it thinks fit” may grant anticipatory bail. The use of phrase “if it thinks fit” in Section 438(1) gives an indication that the order granting anticipatory bail must show, though briefly, why the Court thinks it fit to do so, which means and implies that the order must be reasoned one. Though, the condition of giving reasons for granting bail, as found in Section 437(4) or the use of phrase “if it thinks fit” as used in Section 438 is not there in Section 439 of the Code, however, as laid down by the Apex Court in *Mansab Ali v. Irsan and another*, in granting or refusing bail, the Courts are required to indicate, may be very briefly, the reasons for grant or refusal of bail and the jurisdiction is not to be exercised in a casual and cavalier fashion. Though, recording of reasons for being satisfied about a prima facie case is desirable but detailed examination of evidence and elaborate documentation of the merits should be avoided because no party should have the impression that his case has been prejudged.²² Elaborating this principle, the Apex Court in a case,²³ observed that the Courts exercising bail jurisdiction normally do and should refrain from indulging in elaborate reasoning in their orders in justification of grant or non-grant of bail. For, in that manner, the principle

19. (2003) 1 SCC 15

20. *Rajesh Ranjan Yadav v. C.B.I.*, AIR, 2007 SC 451

21. 2007 Cr.L.J 782.

22. *Niranjan Singh and another v. Prabhakar Raja RAM Kharote and others*, AIR 1980 sc 785

23. *Kashi Nath Roy v. State of Bihar*, AIR 1996 SC 3240.

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of "presumption of innocence of an accused" gets jeopardized; and the structural principle of "not guilty till proved guilty" gets destroyed, even though all same elements have always understood that such views are tentative and not final, so as to affect the merit of the matter".

ARREST-CUSTODY-SURRENDER

The concept of bail as incorporated under Section 437 pre-supposes that there is a person in custody of the Court desirous of being set at liberty. The custody may be either due to the arrest of a person in a non-bailable offence by a police officer without warrant of arrest or arrest in compliance of a warrant of arrest issued by a Court or surrender of a person accused or suspected of being involved in a non-bailable offence before the Court of competent jurisdiction. This is particularly, apparent from the language of Section 437, which says about a person accused or detained or person appearing or brought before the Court. However, Section 439 of the Code provides in respect of a person accused of an offence and in custody. Apparently, there appears to be wide difference between these two provisions but as explained in *Niranjan Singh*, term "custody" as used in Section 439 is of elastic semantics but its core meaning is that the law has taken control of the person and therefore, the physical control or at least physical presence of an accused in Court coupled with submission to the jurisdiction and orders of the court amounts to custody of such person. A person can be said to be in judicial custody when he surrenders before the Court and submits to its directions.

Referring to the observations made in *Niranjan Singh (Supra)*, the Apex Court explained in *Nirmal Jeet Kaur v. State of M.P and another*,²⁴ that there cannot be any doubt that unless a person is in custody, in application for bail under Section 439 of the Code would not be maintainable. Probing into the question as to when is a person can be said to be in custody, within the meaning of Section 439 of the Code, the Apex Court held as under:

"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 of the Court's jurisdiction and submitted to its orders by physical presence. No lexical dexterity nor presidential profusion is needed to come to the realistic conclusion that 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. The word is of elastic semantics but its core meaning is that the law has taken control of the person."

Dealing with the issue in *Rajul Rajendranath Dubey v. State of M.P.*,²⁵ in the light of various judicial pronouncements, the legal position in respect of extent of umbrella available under the order of anticipatory bail while considering application under Section 437/439 has been summarised as under:

- (a) If a person has been enlarged on anticipatory bail for a limited period with this condition that if he so desires, may file an application for regular bail before the Competent Court and the Competent Court is the Court of Magistrate, the bail application under Section 437 of the Code would lie and it is not necessary at all that such person must remain present before the Court or he must be in jail for the maintainability of that application because he is on anticipatory bail and the umbrella has already been provided to him for a limited period or till the rejection of that application, whichever is earlier.
- (b) Where the Court of Session is Competent Court and if an application for regular bail has been filed under Section 439 of the Code, it would certainly be maintainable even if the applicant is not present in Court or he is not in jail because he is on anticipatory bail and the umbrella has already been provided to him for a limited period or till the rejection of

that application, whichever is less. If this application is rejected then only the person can be taken into custody, if present.

- (c) Where an application under Section 437 of the Code is rejected by the Magistrate and the applicant has not been taken into custody because of any reason or he moves out of the custody of the Court, then the application under Section 439 of the Code would not be maintainable in the Court of Sessions. Similarly, if an application under Section 439 of the Code is filed before the Sessions Court because the Sessions Court is the Competent Court and after rejection of that application, if the applicant is not taken into custody for any reason or he moves out of the custody of the Court, the application under Section 439 of the Code would not be maintainable in the High Court. For maintainability of the application for regular bail in both the cases, the actual custody of such person would be the condition precedent.

MISCELLANEOUS ASPECTS

Very often a question is posed whether a Magistrate in exercise of its jurisdiction under Section 437 of the Code may release a person on bail who has been arrested in connection with an offence exclusively triable by the Court of Sessions. A clear cut answer to this question is found in *Prahalad Singh Bhati v. N.C.T of Delhi and another*²⁶, wherein the Apex Court has held that even though, there is no legal bar for a Magistrate to consider an application for grant of bail to a person who has been arrested for an offence exclusively triable by a Court of Sessions, yet it would be proper and appropriate that in such a case, the Magistrate directs the accused person to approach the Court of Sessions for the purpose of getting the relief of bail.

In the aforesaid case, the Apex Court also pointed out that with the change of the nature of the offence, the accused becomes disentitled to the liberty granted to him in relation to a minor offence if the offence is altered for an aggrieved crime. Though, the aforesaid proposition was made in the background of the fact that initially the accused was granted anticipatory bail for lesser offence which was subsequently converted in to a graver offence, but then the aforesaid principle may well be applied where regular bail initially was granted for a lesser offence and subsequently, the offence has been altered to an aggrieved one.

Again a question which very often crops up before Trial Courts is that in a situation where bail has been granted by the superior Court and the accused person fails to comply with the conditions of bail regarding regular appearance before the Court during trial and remains absent, whether on his subsequent appearance of such accused person, as of right, can claim to be released on bail under initial bail order given by the superior Court. In such a situation, it is argued that the Trial Court has to abide by the bail order of the superior Court and cannot refuse bail. The issue was considered in detail by High Court in *Veer Singh v. State of M.P.*²⁷ after referring to Sections 436 (2), 437 (5), 439 (2), 445 and 446-A of the Code, as well as the relevant case law including the case of *Johny Wilson v. State of Rajasthan*,²⁸ rejected the plea that the Trial Magistrate is bound to enlarge such an accused on bail because there has been no cancellation of bail by the superior Court.

From the aforesaid pronouncements, following principles can well be deduced:-

- (a) Once the accused does not appear in a Court and is produced in custody pursuant to a warrant of arrest having been issued by competent Court, or surrenders voluntarily being aware of issue of such warrant, all other provisions of the Chapter XXXIII will come into

26. JT 2001 (4) SC 116.

27. 2008 (1) MPHT 334.

28. 1986 Cr. L.J 1235.

- play and the Magistrate can refuse to release the accused and he would have no right in law to contend that he is entitled to be enlarged on bail, as the order by which he was enlarged has not been cancelled.
- (b) Even if there is no condition at the time of grant of bail, as a consequence of non-appearance of the accused before the Trial judge or trial Magistrate., the said Court would have complete liberty to deal with him in accordance with law
 - (c) If the Trial Court is satisfied that there are cogent and sufficient reasons for non-appearance of the accused he may exonerate and release him on fresh bail bonds with the same conditions or more onerous conditions with regard to the surety and the sum. He is also at liberty, depending upon the facts and circumstances of the case, to refuse him to enlarge on bail.

In some Courts, the prevalent practice is that after enlargement on bail at investigation stage, accused is required to attend the Court till s charge sheet is submitted against him. This practice has been disapproved by the Apex Court in *Free Legal Aid Committee, Jamshedpur v. State of Bihar*,²⁹ and it has been held that after release on bail, the accused is not required to appear before the Court until charge sheet is filed and process is issued against such person by the Court.³⁰

SUCCESSIVE BAIL PETITIONS

Successive bail petitions by a person in custody have become the order of the day. Such applications are no doubt maintainable; however, the application must contain details of previous applications and their result. The person providing such details should also be named in the application.³¹ Again subsequent application should be decided by the same judge who rejected the previous ones except when the case has been transferred by Sessions Judge to Assistant Sessions Judge in which situation the Assistant Sessions Judge shall have jurisdiction to decide such application. The object of placing subsequent application before the same judge is that the process of the Court is not abused and such an impression is not created that the litigant has either successfully avoided one Judge or selected another to secure a favourable order and unless there is substantial change in the fact situation and circumstances of the case, the subsequent application should not be allowed.³²

ANTICIPATORY BAIL: BASIC ISSUES

The jurisdiction in respect of anticipatory bail is altogether different than that of regular bail. Considerations, which should weigh with the request for anticipatory bail, are also different. In *State v. Anil Kumar*,³³ the Apex Court found merit in the plea that custodial interrogation is qualitatively more elicitation oriented than questioning a suspect who is well protected with a favourable order under Section 438 of the Code. In serious cases, effective interrogation of suspected person is of tremendous advantage and success in such interrogation would elude if the suspected person knows that he is well insulated by a pre-arrest bail order.

The scope of Section 438 was scanned and outlined by a five Judges bench of the Apex Court in *Gurubaksh Singh v. State of Punjab*,³⁴ wherein it was laid down that an anticipatory bail is neither a passport to the Commission of Crimes nor a shield against any and all kind of accusations, rather

29. AIR 1982 SC 163.

30. Ved Prakash, "Legal Issues-An Anthology" First Edn. 2009, Suvidha Law House Pvt. Ltd, p. 41

31. *State of M.P v. R.P.Gupta*, 2000 (10 MPJR 185 (HC)

32. *State of Maharashtra v. Captain Buddhi Kota Subba Rao*, AIR 1985 SC 2292

33. JT 1997 (7) SC 651.

34. AIR 1980 SC 1632

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it is a device to secure individual liberty. The person seeking anticipatory bail should have reason to believe that he may be arrested for non-bailable offence. Mere 'fear' is not 'belief'. Therefore, jurisdiction under Section 438 cannot be invoked on the basis of vague and general allegations, as to arm oneself in perpetuity against a possible arrest. The Apex Court made it clear that the power conferred by Section 438 is of extraordinary character in the sense that it is not ordinarily resorted to like the power conferred by Sections 437 and 439, and should be exercised with due care and circumspection only in exceptional cases where it appears that the person may be falsely implicated or where there reasonable grounds for holding that a person accused of an offence is not likely to otherwise misuse his liberty.³⁵ If the proposed accusation appears to stem not from motive of furthering the ends of justice but from ulterior motive to injure and humiliate the person by arresting him then direction to release such person on anticipatory bail may be made.

DURATION OF THE ORDER

The view of the Supreme Court as expressed in Gurubaksh Singh (supra) was that the normal rule should be not to limit the operation of the order of anticipatory bail in relation to a period of time, but for reasons the Court may limit its operation to a short period. However, with the pronouncement of the Apex Court in *Salauddin v. The State of Maharashtra*,³⁶ it is now well settled that anticipatory bail orders should be of a limited duration only and ordinarily on the expiry of that duration or extended duration, the Court granting anticipatory bail should leave it to the regular Court to deal with the matter on an appreciation of evidence placed before it after the investigation has made progress or the charge sheet is submitted. It is essential that the duration of such order should be limited and ordinarily the Court granting anticipatory bail should not substitute itself for the original Court, which is expected to deal with the offence. It is that Court which has then to consider whether, having regard to the material placed before it, the accused person is entitled to bail.

CANCELLATION OF BAIL

The Apex Court in *Asian Babalal Desai v. State of Maharashtra*,³⁷ considered the various aspects regarding cancellation of bail and observed that considerations for rejection of bail and cancellation of bail are different. It is easier to reject a bail application than to cancel a bail granted by the Court because it involves review of all the circumstances of the case. The Court enumerated following situations where bail may be cancelled:-

- (i) The accused misuses the liberty by indulging in similar criminal activity;
- (ii) Interferes with the course of investigation;
- (iii) Attempts to tamper with evidence of witnesses;
- (iv) Threatens witnesses or indulges in similar activities which would hamper smooth investigation;
- (v) There is likelihood of his fleeing to another country;
- (vi) Attempts to make himself scarce by going underground or becoming unavailable to the investigating agency;
- (vii) Attempts to place himself beyond the reach of his surety.

BAIL ORDER-WHETHER REVISABLE

The view of M.P High Court on this point is settled one because it has been laid down in the State of *M.P v. Nansingh Rakasingh Bhilala*,³⁸ that granting of bail is an interlocutory order and a revision

35. *Adri Dharan Das v. State of W.B.*, (2005) 4 SCC 303.

36. AIR 1996 SC 1042.

37. 1992 Cr. L.J 3712

38. 1980 MPLJ 603

SUGGESTIONS AND CONCLUSION

As far as the above discussion is concerned, the following suggestions may be adopted by the Court while exercising discretionary power in granting bail to an accused person:

1. Courts should be empowered to impose reasonable conditions. But the conditions must have a bearing to the object and purpose of bail viz. ensuring the presence of the accused on the appointed day and that he/she does not obstruct the administration of justice. The Court should also give priority on circumstances which are relevant to assess risks involved in releasing arrested person on bail. These factors together with other necessary ones may be taken into consideration by the Court while exercising their discretion.
2. The prevailing law on sureties seems to be unsatisfactory. The financial capacity of the person to stand as surety need not be given a place of primacy. However, a surety should be under a duty to ensure attendance of the accused at the appointed time and place. On breach of a condition already agreed to by a surety, the accountability should be in terms of imposing a monetary fine on him.
3. The judges have been given discretionary power to grant or not to grant bail. The exercise of this power is generally based upon the precedents. But, unfettered powers given to the judges are generally misused and subject to great criticism. It has been seen that bails granted by the lower courts are cancelled by the higher courts. There must be definite criteria in this regard.
4. There is no statutory limit fixed on the amount of bond or number of sureties. The entire matter has been left to the discretionary of the courts. Many persons have to languish in jail for want of furnishing bail bonds. The statutory provisions may be made for each category of cases in fixing the amount of bond and number of sureties.
5. There is a need to provide by an amendment of the penal law that if an accused wilfully fails to appear in compliance with the promise contained in his personal bond, he shall be liable to penal action.

To conclude, it is pertinent to mention here that granting of bail is the discretionary power of the Court. The common trend in criminal jurisprudence in India is that after arrest of the offender in non-bailable offence, he will apply for bail before the Sessions Court and if the bail is rejected he will be sent to custody, but when the court is granting or rejecting bail, it is the court to go through the grounds of the same. It must be further noted that a person accused of a bailable offence is arrested or detained without warrant he has a right to be released on bail. But if the offence is non-bailable, that does not mean that the person accused of such offence shall not be released on bail but here in such case bail is not a matter of right, but only a privilege to be granted at the discretion of the court. However, the courts can impose the conditions while granting bail. But the conditions should be reasonable. Courts have also power to cancel bail. But power to cancel bail in non-bailable offences must be used judiciously.

In addition to the above, the law of bail must continue to allow for sufficient discretion in all cases to prevent a miscarriage of justice and to give way to the humanization of criminal justice system and to sensitize the same to the needs of those who must otherwise be condemned to languish in prisons for no more fault other than their inability to pay for legal counsel to advise them on bail matters or to furnish the bail amount itself.