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Subject: **Law**

Production of Courseware
e-Content for Post Graduate Courses



Paper : **Criminal Justice Administration**

Module : **Bail Jurisprudence**



A Gateway



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Description of Module

Subject	Law
Paper	Criminal Justice Administration
Module Title	Bail Jurisprudence
Module Id	LAW/CJA/X
Pre-requisites	Understanding of the basic concepts of criminal law and procedure
Learning Objectives	<ul style="list-style-type: none">• To understand the meaning of bail• To understand the objectives of bail under criminal justice system• To know about the authorities empowered to grant bail• To know when can bail be granted by both Magistrate and police• To know exclusive jurisdiction of the Magistrate to grant bail• To know power of police to grant bail• To understand the judicial trends on bail
Key Words	Bail, Arrest, Magistrate, Police, right to bail, release, surety, bond



1. Introduction:

Black's Law Dictionary (4th ed.) defines bail as “procure the release of a person from legal custody, by undertaking that he/she shall appear at the time and place designated and submit him/herself to the jurisdiction and judgment of the court.” Webster's Third New International Dictionary defines ‘Bail’ as “the process by which a person is released from custody.” Law lexicon by Ramanath Iyer, (3rd ed.) defines bail as “the security for the appearance of the accused person on which he is released pending trial or investigation.”

The Criminal Procedure Code, 1973, has not defined bail. But the terms bailable offence and non-bailable offence have been defined under the Code as “Bailable offence means an offence which is shown as bailable in the First Schedule or which is made bailable by any other law for the time being enforce, and non-bailable offence means any other offence.”¹ Section 436 to 450 of the Code of Criminal Procedure lays down the provisions for the grant of bail and bonds.

2. Purpose of Bail:

The right to personal liberty is a basic fundamental right of every person as recognised under Article 21, Constitution of India. But this right is not absolute; it can be curtailed to maintain a balance between individual interest and interest of society at large. However to ensure that individual right to liberty of a person is not unreasonably restrained, its curtailment requires procedure established by law to be followed. The procedure provided under Code of Criminal Procedure to curtail the liberty of person ensures that a person is not unreasonably detained if his detention is not required for securing ends of justice. So a person can be released on bail if his release would not defeat the ends of justice.

Justice Krishna Iyer for the first time in **State of Rajasthan v Balchand**² raised the issue of unfair bail system in India and suggested rethinking over the issue. Again in the landmark judgment of **Moti Ram and Other v. State of M.P**³ Justice Iyer laid down that judges should be more inclined towards bail and not towards jail. The Hon'ble Supreme Court again discussed the need of balance between individual liberty and societal order while exercising

¹ Sec. 2(a) CrPC

² 1977 AIR 2447

³ 1978 AIR 1594



power of arrest in the case of **Arnesh Kumar v. State of Bihar**⁴. It was held that all such cases where offence is punishable with imprisonment for a term which may be less than seven years or which may extend to seven years whether with or without fine; police officers shall not arrest the accused unnecessarily and Magistrate shall not authorise detention casually and mechanically. Failure to comply with these directions, shall, apart from rendering police officers concerned liable for departmental action, also make them liable to be punished for contempt of court. Judicial Magistrate authorising detention without recording reasons shall be liable for departmental action by appropriate High Court.

3. People authorised to grant Bail:

Code of Criminal Procedure confers power to grant bail on:

- A) Magistrate
- B) Police

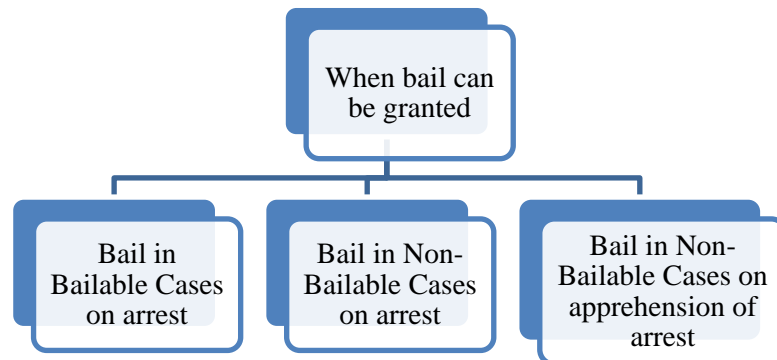


3.1 When Bail can be granted:

As per the provision of Code of Criminal Procedure bail can be granted in following cases:

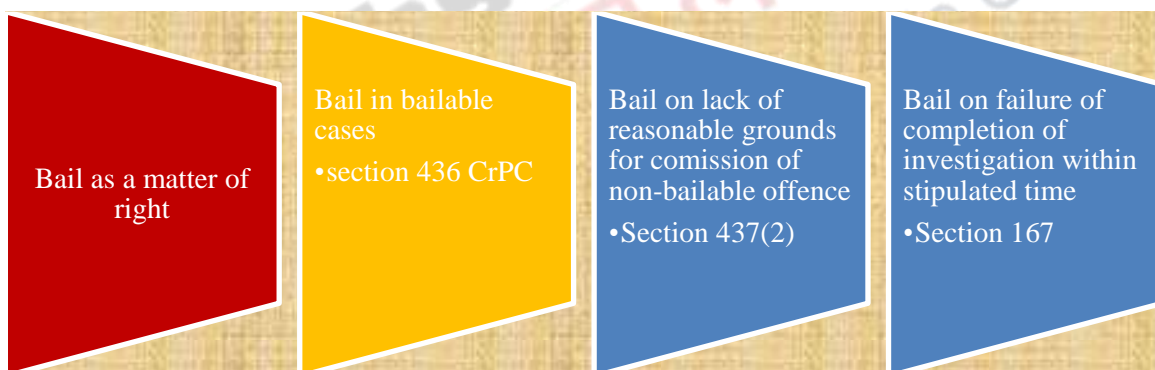
- A) Bail in Bailable Cases on arrest
- B) Bail in non-Bailable Cases on arrest
- C) Bail in non-Bailable Cases on apprehension of arrest

⁴ (2014)8SCC 273



3.1.1 Bail as a matter of Right:

Bail in bailable offences under section 436 and 437(2) of Code of Criminal Procedure Code can be granted by both magistrate and police but under section 167 it can be granted by court only. The Accused person can claim bail in such cases as a matter of right.



Under **section 436** Code of Criminal Procedure Code, 1973 bail can be granted provided following conditions are fulfilled:

- When any person other than a person 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,
- If he is prepared at any time while in the custody of such officer or at any stage of the proceeding before such Court to give bail.
- Then such person shall be released on bail

When a person is arrested on the suspicion of committing non-bailable offence but later on at any stage of investigation, enquiry or trial it is found that there are no reasonable ground for commission of non-bailable offence by him but there are grounds for conducting further



enquiry then such person can be released on bail as per **section 437(2)** by both police officer and magistrate.

Justice Bhagwati and Justice Krishna Iyer highlighted the faulty bail system which needs reconsideration in the famous case of **Maneka Gandhi v. Union of India**⁵. In this case attention was brought to the impact of indigence of an accused on his right of bail. Again in the case of **R.D. Upadhyay v. State of A.P. and Others**⁶, it was brought to the notice of court that there are many undertrials languishing in jail for non-furnishing of surety despite bail order granted in favour of them. It was held by court barriers certain categories of cases, court can consider release of such prisoners on personal bond.

The issue of release of under trail prisoners on personal bond who are languishing in jail due to inability to furnish surety was again discussed in the case of **B. M. Bhalla vs. State**⁷. It was clarified that such prisoners can be released on furnishing of surety other than local surety, if they are not resident of Delhi. Surety from outside Delhi belonging to the permanent place of residence of the prisoner can be considered for release of prisoner only if attested by the district magistrate of the place of residence of the surety.

When officer in charge of police station or the police officer making an investigation fails to complete investigation within 24 hours of arrest of a person then as per **section 167**, he needs to be produced before the nearest magistrate who can extend the police custody upto 15 days. If further detention is required then an accused can be detained only in judicial custody for total period not exceeding—

- ninety days, where the investigation relates to an offence punishable with death, imprisonment for life or imprisonment for a term of not less than ten years;
- sixty days, where the investigation relates to any other offence.

On the expiry of the said period of ninety days, or sixty days, as the case may be, the accused person shall be released on bail⁸.

In the case of **Dinesh Dalmia vs. C.B.I.**⁹, the Hon'ble Supreme Court laid down that investigating agency is required to complete investigation within reasonable time. If the

⁵ 1978 AIR 597

⁶ (1996)3Supreme Court Cases 422

⁷ W.P. (c) 3465/2010

⁸ Sec 167 CrPC



investigation is not completed within stipulated period the same would not be detrimental to right of accused to bail. On expiry of stipulated period he would be entitled for bail, but Right to bail does not revive only because a further investigation remains pending. When a charge sheet is not filed and investigation is kept pending, the accused will have right to bail u/s 167(2). Once, a charge sheet is filed, the said right ceases. Such a right does not revive only because a further investigation remains pending within the meaning of Sub-section (8) of Section 173 of the Code of Criminal procedure.

When an accused person has already undergone more than one half of the maximum punishment provided for the alleged offence, during investigation, inquiry or trial, then as per **section 436 A** such accused shall be released on bail. The alleged offence should not be punishable with death penalty¹⁰. In the case of **Hussainara Khatoon and others v. Home Sec, State of Bihar**¹¹, the hon'ble Supreme directed the release of prisoners who had undergone more than half of the imprisonment which could have been granted if they were convicted. Recently again in the case of **Bhim Singh vs. Union of India**¹², the hon'ble Supreme Court directed the jurisdictional magistrate/ chief judicial magistrate/Session Judge to conduct a setting in jail once in a week for identifying the prisoners entitled for release as per the provision of section 436 A and release such prisoners then and there itself. Such visits were directed to be conducted for two months commencing from 1 October 2014 for effective implementation of Section 436 A.

3.1.2 Discretionary Bail:

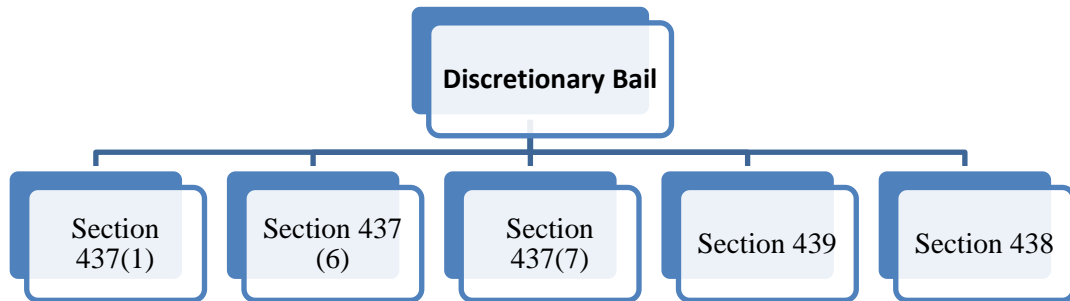
In non-bailable offences bail can be granted by magistrate only and police has no power to grant bail. Bail in non bailable offences can't be claimed as matter of right and it is in the discretion of magistrate. Code of criminal Procedure provides for grant of bail in non bailable cases under following section:

⁹ AIR2008SC78

¹⁰ Sec 436A CrPC

¹¹ 1979 AIR 1369

¹² Writ Petition(Criminal) no 310 of 2005



There are certain exceptional cases where bail is not granted in non-bailable cases which are as follows:

- If there appear reasonable grounds for believing that accused has been guilty of an offence punishable with death or imprisonment for life
- If offence is a cognizable offence
- Accused had been previously convicted of an offence punishable with death, imprisonment for life or imprisonment for seven years or more
- Accused had been previously convicted on two or more occasions of a cognizable offence punishable with imprisonment for three years or more but not less than seven years,

In the above state exceptional cases if accused happens to be a person under the age of sixteen years or a woman or sick or infirm, then his bail application can be considered by the magistrate¹³.

If the trial by the magistrate of a person accused of any non-bailable offence could not be concluded within a period of sixty days from the first date fixed for taking evidence, then accused shall be released on bail if he is in custody during the whole of the said period.¹⁴ The High Court and Court of Session can also release an accused person in custody on bail.¹⁵

If the Court is of opinion time after the conclusion of the trial of a person accused of a non-bailable offence and before judgment is delivered that there are reasonable grounds for believing that the accused is not guilty of any such offence, then accused shall be released on

¹³ Sec 437 CrPC

¹⁴ Sec 437(6) CrPC

¹⁵ Sec 439 CrPC



bail if he is in custody. In such case court also asks him to execute a bond without sureties for his appearance to hear judgment when delivered¹⁶.

In the case of **Dipak Shubhashchandra Mehta vs. C.B.I. and Anr.**¹⁷, the Hon'ble Supreme Court laid down that when the undertrial prisoners are detained in jail custody to an indefinite period then its a violation of Article 21 of the Constitution of India but the court granting bail should exercise its discretion in a judicious manner and not as a matter of course. Though at the stage of granting bail, a detailed examination of evidence and elaborate documentation of the merits of the case need not be undertaken; there is a need to indicate in such orders reasons for prima facie concluding why bail was being granted, particularly, where the accused is charged of having committed a serious offence.

Similarly, in the case of **Sanjay Chandra Vs CBI**¹⁸ the Hon'ble Supreme Court laid down that while considering an application for bail under section 437 and 439 severity of punishment and gravity of alleged offence both needs to be taken into consideration. Court is required to maintain a balance between right to liberty and securing presence of an accused at trial. Bail is not a rule but an exception so bail must be refused only in extra-ordinary circumstances.

The Hon'ble High Court of Delhi in the case of **Lambert Kroger vs Enforcement Directorate**¹⁹ laid down that no person can be denied bail just because of the reason of his being a foreign national. Court cant discriminate on the ground of nationality for granting bail. To secure his presence before the courts as and when required till the completion of trial, he can be released conditionally. Such condition can be impounding of Passport to restrain him from fleeing from trial.

3.1.3 Anticipatory Bail:

When any person apprehends his arrest on an accusation of committing a non-bailable offence, then he can be granted bail by the High Court or the Court of Session with a direction to release him on arrest²⁰. The Hon'ble Supreme Court, in the case of **Shri**

¹⁶ Sec 437(7) CrPC

¹⁷ AIR2012SC949

¹⁸ 2012(1)SCC40

¹⁹ 2000CriLJ2125

²⁰ Sec 438 CrPC



Gurbaksh Singh Sibbia and Ors. Vs. State of Punjab²¹ held that applicant must show that he has 'reasons to believe' that he may be arrested for some non-bailable offence. Provision of anticipatory bail cannot be invoked on basis of vague and general allegations as to arm oneself in perpetuity against possible arrest. Anticipatory bail is a passport neither to commit crime nor shield against any kinds of accusation. Filing of first information report (FIR) is not condition precedent to exercise power under Section 438 (1). Bail under Section 438 (1) can be granted even after FIR so long as arrest is not made. Powers are discretionary to be exercised in light of the circumstances of each case. 'Blanket Order' of anticipatory bail should not be generally passed.

Again in the case of **Siddharam Satlingappa Mhetre v. State of Maharashtra**²² the hon'ble Supreme Court clarified the nature and scope of anticipatory bail. It was laid down that grant of anticipatory bail is in the discretion of court but its scope can't be confined to rare and exceptional cases. On considering record of the case, if court is of opinion that anticipatory bail can be granted then notice should be issued to public prosecutor. After hearing the public prosecutor, court may grant or reject anticipatory bail. In case of grant of anticipatory bail it may impose conditions also. Anticipatory bail can be cancelled on violation of such conditions or discovery of subsequent new fact which disentitles the accused from bail. Grant of anticipatory bail is till the conclusion of trial. Grant of Anticipatory bail for limited period coupled with the requirement of submission to custody and then application for regular bail violates section 438. Anticipatory bail granted for limited period also violates of Article 21 as being violative of principle of reasonableness.

4. Other Instances of Bail:

4.1 Bail on arrest by Magistrate:

A magistrate has power to arrest any person who in his presence and local jurisdiction commits any offence. He can authorise any private person as well for such arrest. This magistrate can be judicial or executive magistrate. After arrest he can also grant him bail as per the provisions of bail under the code²³.

²¹ AIR1980SC1632

²² (2011)1SCC694

²³ Sec. 44 CrPC



4.2 Bail to appear before next appellate court:

The trial court and appellate court before the conclusion of trial and disposal of appeal requires the accused to execute bail bond with surety to appear before the higher court. Such bail bond remains in force for six months²⁴.

4.3 Bail by court not having jurisdiction to take cognizance:

When on a warrant issued by a court of other district, a police officer arrests a person for non-bailable offence, then the Chief Judicial Magistrate (subject to the provisions of section 437), or the Sessions Judge, of the district in which the arrest is made can release a person on bail²⁵.

4.4 Bail on execution of bond for appearance:

When a presiding officer finds any person present in court for whose appearance or arrest, he is empowered to issue a summons or warrant, then such officer may require such person to execute a bond, with or without sureties, for his appearance in such Court, or any other Court to which the case may be transferred for trial. If such person executes a bond then he shall be released otherwise he will be arrested and send to custody²⁶.

4.5 Bail on security for keeping the peace on conviction:

When in the opinion of a Court of Session or Court of a Magistrate of the first class it is necessary to take security from a person for keeping the peace, and then at the time of passing sentence on such person, such court can order him to execute a bond, with or without sureties, for keeping the peace. This bond can't be for more than three years. If such person executes a bond then he is released otherwise he is send to custody²⁷.

4.6 Bail on receiving security for keeping the peace in other cases:

When an Executive Magistrate receives information that any person is likely to commit a breach of the peace or disturb the public tranquillity or to do any wrongful act that may probably occasion a breach of the peace or disturb the public tranquillity which in his opinion sufficient to proceed against such person then he may, require such person to execute a bond

²⁴ Sec 437A CrPC

²⁵ Sec 81 CrPC

²⁶ Sec 88 CrPC

²⁷ Sec 106 CrPC



with or without sureties for keeping the peace. The bond can't be for more than a period of one year. If such person executes a bond then he is released otherwise send to custody²⁸.

4.7 Bail on receiving security for good behaviour from persons disseminating seditious matters:

When an Executive Magistrate receives information that there is a person within his local jurisdiction who inside or outside his jurisdiction disseminating seditious matters, and he is of opinion that there is sufficient ground for proceeding against such person, then magistrate may, require such person to show cause why he should not be ordered to execute a bond, with or without sureties, for his good behaviour for such period, not exceeding one year. If such person executes a bond then he is released otherwise send to custody²⁹.

4.8 Bail on security for good behaviour from suspected persons:

When an Executive Magistrate receives information that there is a person within his local jurisdiction who is taking precautions to conceal his presence and that there is a reason to believe that he is doing so with a view to committing a cognizable offence and then the Magistrate can, require such person to execute a bond, with or without sureties, for his good behaviour for such period, not exceeding one year. If such person executes a bond then he is released otherwise send to custody³⁰.

4.9 Bail on receiving security for good behaviour from habitual offenders:

When an Executive Magistrate receives information that there is a person within his local jurisdiction who is a habitual offender or is so desperate and dangerous as to render his being at large without security hazardous to the community, such Magistrate can, require such person to execute a bond, with sureties, for his good behaviour for such period, not exceeding three years. If such person executes a bond then he shall be send to custody³¹.

4.10 Bail during inquiry as to truth of information:

When magistrate conducts an inquiry as to the truth of information received against a person which requires him to execute a bond for maintaining peace or good behaviour and he considers that immediate measures are necessary for the prevention of a breach of the peace

²⁸ Sec 107 CrPC

²⁹ Sec 108 CrPC

³⁰ Sec 109 CrPC

³¹ Sec 110 CrPC



or disturbance of the public tranquillity or the Commission of any offence or for the public safety then he may direct such person to execute a bond, with or without sureties, for keeping the peace or maintaining good behaviour until the conclusion of the inquiry. Such person can be detained in custody until such bond is executed³².

4.11 Bail on order to give security:

On the conclusion of inquiry against a person for possessing a threat to peace and public tranquillity if it is proved that it is necessary for keeping the peace or maintaining good behaviour to execute a bond, then magistrate can require that the person in respect of whom the inquiry is made should execute a bond, with or without sureties. If he fails to execute a bond then he is sent to jail otherwise released³³.

4.12 Bail of person of unsound mind:

When an accused person is a person of unsound mind then irrespective of his being accused of bailable or non-bailable offence, if it appears to court that he is incapable of making defence because of his insanity then court releases such accused on bail on sufficient security being given for compliance of following conditions:

- He shall be properly taken care of
- He shall be prevented from doing injury to himself or to any other person
- He shall be produced when required before the court as and when required³⁴.

4.13 Bail in cases for contempt of lawful authority of public servant:

When any Court comes to a conclusion of conducting an enquiry for contempt of lawful authority of public servant which appears to have been committed in or in relation to a proceeding in that Court or in respect of a document produced or given in evidence in a proceeding in that Court, then such court release the accused on bail during the pendency of enquiry. On the other hand if court comes to a conclusion that the case should not be disposed of as contempt of court case then such Court can release the accused on bail with a direction to appear before the magistrate having jurisdiction to try such other offence appears to have committed from facts recorded and statement of accused³⁵.

³² Sec 116 CrPC

³³ Sec 117 CrPC

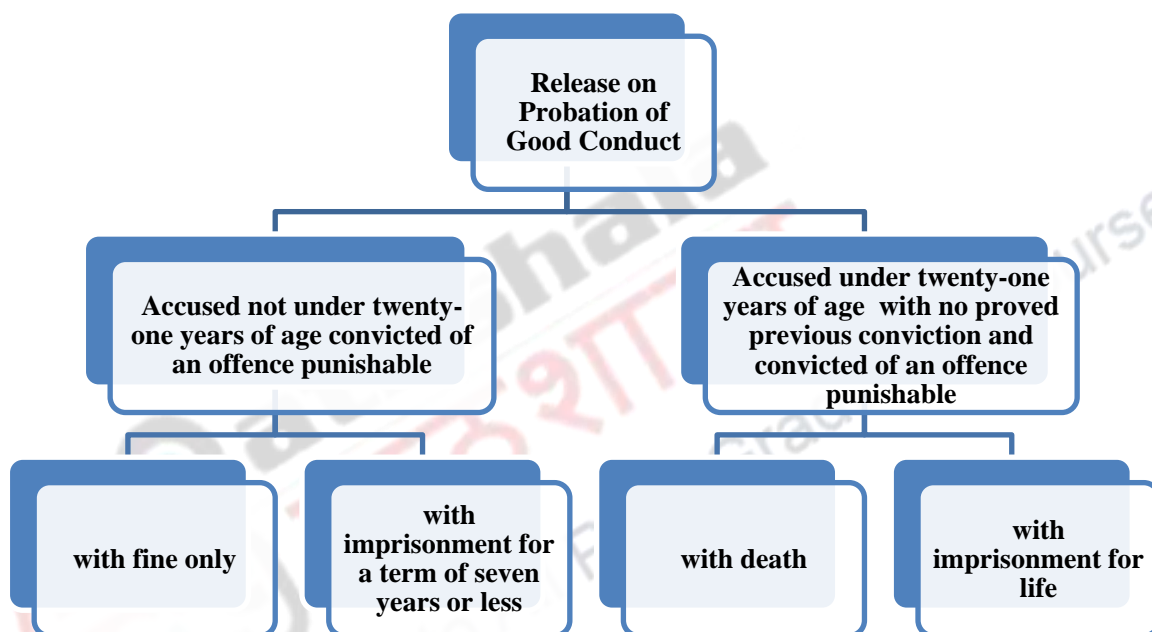
³⁴ Sec 330 CrPC

³⁵ Sec 340&345 CrPC



4.14 Bail on probation of good conduct or after admonition:

When it appears to court that it is necessary to release the offender on probation of good conduct, then it can instead of sentencing him to any punishment, release him on bail and direct him to appear for receiving sentence later. The period of postponement of sentence cannot be more than three years and meanwhile accused is directed to maintain keep and good behaviour. The accused can be released on probation of good conduct only in following type of cases³⁶:



4.15 Bail during calling for record to exercise power of appeal, reference and revision:

The court of appeal can during the pendency of appeal before it can release the accused person on bail and suspend the sentence or order. Similarly when any court refer to the High Court under section 395 then pending the decision of High Court it can released the accused person on bail. On the same line, the High Court or any Sessions Judge while exercising the power of revision, to check the correctness, legality or propriety of any finding of any inferior court within its jurisdiction, can suspend the proceedings and release an accused person on bail³⁷.

³⁶ Sec 360 CrPC

³⁷ Sec 389,395&397



4.16 Bail on non requirement of arrest in cognizable offence:

Police is authorised to arrest a person without warrant of a court in cognizable cases as per section 41 of CrPC but if arrest of a person is not required under the provisions of sub-section (1) of section 41 then he shall issue a notice directing the following person accused of committing a cognizable offence to appear before him or at such other place as may be specified in the notice:

- A person against whom a reasonable complaint has been made
- A person against whom credible information has been received
- A person against whom reasonable suspicion exists³⁸

4.17 Bail on assertion of name and address:

On assertion of name and address of a person accused of committing a non-cognizable offence, the police officer can release him on bail on his executing a bond, with or without sureties, to appear before a Magistrate when required³⁹.

4.18 Bail on assertion of name and address when arrested by private person:

When police does not find sufficient reason to believe that a person arrested by a private person, has committed a non-cognizable offence and he also discloses his true name and address on demand, then he can be released by the police officer in whose custody he is detained⁴⁰.

4.19 When arrest made under warrant bearing endorsement for bail:

When any court issues a warrant bearing an endorsement for bail, then the officer to whom the warrant is directed shall grant bail on executing a bond by such accused person with sufficient sureties for his attendance before the Court⁴¹.

4.20 Bail on deficient evidence:

When it appears to officer in charge of police station after conducting an investigation that there is no sufficient evidence for the production of accused before the court then he shall release him on bail with a condition to appear before the magistrate as and when required⁴².

³⁸ Sec 421A CrPC

³⁹ Sec 42 CrPC

⁴⁰ Sec 43 CrPC

⁴¹ Sec 71 CrPC



4.21 Bail in cases to be sent to magistrate when evidence is sufficient:

When it appears to officer in charge of police station after conducting an investigation that there are sufficient evidence for the production of accused before the court and the alleged offence is a bailable offence then he shall release him on bail with a condition to appear before the magistrate as and when required⁴³.

5. Summary:

There are sufficient provisions in Code of Criminal Procedure to protect an accused person from unreasonable detention in jail but still many accused who are entitled to bail are languishing in jail for years. So not only provisions for protecting the right to liberty of a person are essential but their effective implementation is equally required.

⁴² Sec 169 CrPC

⁴³ Sec 170 CrPC