

## **LAW ON BAIL & ANTICIPATORY BAIL**

### **INDEX**

<b>Chapter</b>	<b>Particular</b>	<b>Pages</b>
<b>1</b>	<b>BAIL – INTRODUCTION</b>	<b>2-3</b>
<b>2</b>	<b>MEANING/DEFINITION OF BAIL</b>	<b>4-5</b>
<b>3</b>	<b>CONSIDERATION AT TIME OF GRANTING BAIL</b>	<b>6-9</b>
<b>4</b>	<b>IMPOSITION OF CONDITIONS</b>	<b>10-13</b>
<b>5</b>	<b>LAW RELATING TO BAIL</b>	<b>14</b>
<b>6</b>	<b>BAILABLE OFFENCE</b>	<b>15-23</b>
<b>7</b>	<b>NON – BAILABLE OFFENCE</b>	<b>24-30</b>
<b>8</b>	<b>BAIL OF PERSONS UNDER THE AGE OF 16 YEARS, WOMAN OR A SICK PERSON OR INFIRM PERSON</b>	<b>31-36</b>
<b>9</b>	<b>ANTICIPATORY BAIL</b>	<b>37-40</b>
<b>10</b>	<b>PROCEDURE TO APPLY FOR ANTICIPATORY BAIL</b>	<b>41-44</b>
<b>11</b>	<b>CONTROVERSY AROUND ANTICIPATORY BAIL</b>	<b>45-48</b>
<b>12</b>	<b>CONDITIONS IMPOSED BY COURT IN ANTICIPATORY BAIL</b>	<b>49</b>
<b>13</b>	<b>CANCELLATION OF ANTICIPATORY BAIL</b>	<b>50-52</b>
<b>14</b>	<b>DISCLAIMER</b>	<b>53</b>

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## **BAIL - INTRODUCTION**

Every citizen of India has a fundamental right guaranteed under Article 21 of the Indian Constitution, which states, "No person shall be deprived of his life or personal liberty except according to procedure established by law." Any individual, who violates the law of the land, is bound to face consequences as per the law and in certain cases, his freedom may be restricted depending upon the gravity of offence committed.

However, every accused who has been frivolously charged with the allegations of a non-bailable offence is not only entitled to a good defense but also to be released on bail by the Court upon taking into various factors such as (1) nature or seriousness of the offence, (2) the character of the evidence, circumstances which are peculiar to the accused, (3) reasonable apprehension of the witnesses being tampered with, (4) the larger interests of the public or the state and similar other factors. It is the duty of the Court to decide a bail application at the earliest by a reasoned order, based on the bona fides of the applicant in light of prevailing facts and circumstances.

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'Bail' is gotten from the old French verb 'baillier' which means to 'give or convey'. Bail in English Common law is the liberating or setting at freedom a man captured or detained on security or on surety being taken for his appearance on certain day and place named. As such, bail is the conveyance of captured individual to his sureties upon their giving security for his appearance at an assigned place and time, to the purview and judgment of the court. The individual captured or detained is put in the care of the surety. The impact of allowing bail isn't to set the detainee free from prison or guardianship, but to discharge him from the care of law and to endow him to the authority of his sureties who will undoubtedly deliver him to show up in the court at a predefined time and place.

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## **MEANING / DEFINITION OF BAIL**

### **Meaning of bail**

- Bail is the security given for the due appearance of a man captured or detained to get his or her brief discharge from legitimate guardianship or detainment. In precedent-based law, a denounced individual is said to be confessed to bail, when he or she is discharged from the care of the officers of court and is endowed to the care of people known as his or her sureties who will undoubtedly deliver him or her at a predefined time and place to answer the charge against him or her and who in default of so doing are at risk to relinquish such aggregate as is indicated when the bail is allowed. Consequently, the custom and consistent origination of bail in legal manner implies arrival of a man from guardianship or jail and convey under the control of sureties who attempt to create him or her in court upon a selected day. In criminal law, 'bail' intends to set free, free or convey the blamed from capture or out for care, to the keeping of different people, on their endeavor to be in charge of his or her appearance at a specific day and place to reply to the charge against him or her. These people are called his or her sureties.

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## **Definition of bail**

- Bail is the money a defendant pays as a guarantee that he or she will show up in court at a later date. For most serious crimes a judge or magistrate sets bail during an arraignment, or in court at a detention hearing. For minor crimes bail is usually set by a schedule which will show the amount to be paid before any court appearance (arraignment). For more serious crimes, the amount of bail is set by the judge at the suspect's first court appearance.
- Release of an arrested or imprisoned accused when a specific amount of security is deposited to ensure the accused's appearance in court when ordered.

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Page 5 of 53

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## **CONSIDERATIONS AT THE TIME OF GRANTING BAIL**

At the time of deciding the application seeking bail, the Court should look at the prima facie material available and should not go into the merits of the case by appreciation of evidence. At the time of grant or denial of bail in respect of a non-bailable offence, the primary consideration is the nature and gravity of the offence. While adjudicating bail applications, the Courts should only go into the question of prima facie case established for granting bail. The Court cannot go into the question of credibility and reliability of the witnesses put up by the prosecution. The question of credibility and reliability of prosecution witnesses can only be tested during the trial. The Hon'ble Supreme Court in the matter of *State of Maharashtra vs. Sitaram Popat Vital* has stated few factors to be taken into consideration, before granting bail, namely:

- i) The nature of accusation and the severity of punishment in case of conviction and the nature of supporting evidence;
- ii) Reasonable apprehension of tampering of the witness or apprehension of threat to the complainant;

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iii) Prima facie satisfaction of the Court in support of the charge.

At times certain matters require investigation for the Court to effectively decide upon the bail application, like:

- (i) whether there is or is not a reasonable ground for believing that the applicant has committed the offence alleged against him;
- (ii) the nature and gravity of the charge;
- (iii) the severity of the punishment which might fall in the particular circumstances in case of a conviction;
- (iv) the likelihood of the applicant absconding, if released on bail;
- (v) the character, means, standing and status of the applicant;
- (vi) the likelihood of the offence being continued or repeated on the assumption that the accused is guilty of having committed that offence in the past;
- (vii) the likelihood of the witnesses being tampered with;
- (viii) opportunity of the applicant to prepare his defense on merits.

The Hon'ble Supreme Court in the matter of ***Ram Govind Upadhyay vs. Sudarshan Singh and Ors*** while considering various factors for grant of bail has analyzed the scenario where the applicant has already been in custody and the trial is not likely to conclude for some time, which can be characterized as unreasonable, but it is not necessary that bail shall be granted. The factors such as, previous conduct and behaviour of the accused in the Court, the period of detention of the accused and health, age and sex of the accused also may be considered at the time of grant of bail.

The Hon'ble Supreme Court in the matter of ***Prahlad Singh Bhati vs. N.C.T. Delhi and Ors***, has held that, "*the condition of not releasing the person on bail charged with an offence punishable with death or imprisonment for life shall not be applicable if such person is under the age of 16 years or is a woman or is sick or infirm, subject to such conditions as may be imposed.*" Other relevant grounds which play a vital role in deciding the bail application are - the possibility for repetition of crime, the time lag between the date of occurrence and the conclusion of the trial, illegal detention, and undue delay in the trial of the case.



It is essential that the Courts should provide investigating authorities with reasonable time to carry out their investigations. It is equally necessary that the Courts strike a correct balance between this requirement and the equally compelling consideration that a citizen's liberty cannot be curtailed unless the facts and circumstances completely justify it. Upon the literal interpretation of the Section 437 of Code of Criminal Procedure, it is observed that the legislature has used the words "reasonable grounds for believing" instead of "evidence". Thus, the Court has merely to satisfy as to whether the case against the accused is genuine and whether there is prima facie evidence to support the charge.

It is true that Article 21 is of great importance because it enshrines the fundamental right to individual liberty, but at the same time a balance has to be struck between the right to individual liberty and the interest of society. No right can be absolute and reasonable restrictions can be placed on them. The Court, at the time of adjudicating bail applications, after taking such factors into account, is at liberty to impose reasonable conditions to be abided by the applicant.

## **IMPOSITION OF CONDITIONS**

Section 437 of the Code of Criminal Procedure empowers the Court to impose conditions at the time of granting bail. The Court may, while granting bail to a person, ask him to surrender his passport as stated in *Hazarilal vs. Rameshwar Prasad*. The accused cannot be subjected to any condition which is not pragmatic and is unfair. It is the duty of the Court to ensure that the condition imposed on the accused is in consonance with the intendment and provisions of the sections and not onerous.

Under Section 437(3) the Court has got the discretion to impose certain conditions, on the person accused or suspected of the commission of an offence punishable with imprisonment, such as –

- (a) that such person shall attend in accordance with the conditions of the bond executed,
- (b) that such person shall not commit an offence similar to the offence of which he is accused, or suspected, of the commission of which he is suspected, and
- (c) that such person shall not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to

dissuade him from disclosing such facts to the Court or to any police officer or tamper with the evidence.

The Court may also impose, in the interests of justice, such other conditions as it considers necessary. In order to make the provision stringent and to see that the person on bail does not interfere with the investigations or intimidate witnesses, sub-section (3) has been amended to specify certain conditions, which carry mandatory effect. The conditions as such imposed at the time for granting bail have to be reasonable.

The Hon'ble Supreme Court in the matter of **Sumit Mehta vs. State of NCT of Delhi** held, *"The words 'any condition' used in the provision should not be regarded as conferring absolute power on a Court of law to impose any condition that it chooses to impose. Any condition has to be interpreted as a reasonable condition acceptable in the facts permissible in the circumstance and effective in the pragmatic sense and should not defeat the order of grant of bail."* In the said case, the Apex Court set aside the decision of High Court of Delhi wherein the Bail Applicant was directed to deposit an amount of Rs. 1,00,00,000/- (One Crore) in fixed deposit in the

name of the complainant in the nationalized bank and to keep the FDR with the Investigating Officer.

The Hon'ble Supreme Court in the matter of **Sheikh Ayub vs. State of M.P**, while adjudicating upon the reasonability of the imposed bail conditions held, *"By the impugned order, the Appellant was granted bail and directed to deposit Rs.2,50,000/- which is alleged to be the amount appropriated by the Appellant. There was also condition for furnishing surety bond for Rs. 50,000/-. In the circumstances of the case, direction to deposit Rs. 2,50,000/- was not warranted, as part of the conditions for granting bail."* The onus is upon the Court to consider the entire facts and circumstances of the case before imposing the conditions for granting the bail.

The Apex Court in the matter of **Ramathal and others vs. Inspector of Police and Another**, held that the High Court of Punjab and Haryana, had not taken into account the entire facts of the case in proper perspective while adjudicating, since the conditions imposed by the High Court asking the applicant to deposit a sum of Rs. 32,00,000/- (Rupees Thirty Two Lacs

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only) was unreasonable and onerous, and beyond the means and power of the appellants, hence and the matter was remitted back to the High Court.



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Page 13 of 53

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## **THE LAW RELATING TO BAIL**

The code has classified all offences into “bailable” and “non bailable” offences.

Under Section 2(a) “bailable offence” means an offence which is listed as bailable in the First Schedule or which is made bailable by any other law for the time being in force. Non-bailable offence’ means any other offence. The code has not provided any criteria to determine whether any particular offence is bailable or non-bailable in the First Schedule. The gravity of the offences, namely, offences punishable with imprisonment for three years or more have been treated as non-bailable offences. But, this is not a hard and fast rule. There are exceptions to the same. However, in case of “bailable offences” granting of bail is mandatory and in case of “non-bailable offences” granting of bail is discretionary, which are discussed under this chapter II in three sub-heads in relevant to those sections of Criminal Procedure Code, 1973.

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**BAILABLE OFFENCES:**

Section 436 of Criminal Procedure Code, 1973 deals with bailable offences. This section provides that when a person not accused of a non bailable offence is arrested or detained, he can, as of right of claim to be released on bail, and such a right is available to all those arrested under different categories of bailable offences, except in cases of accused against whom security proceedings have been initiated. Section 436 lays down in what cases bail to be taken:-

- a) when any person other than a person accused of a nonbailable 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 at any time while in the custody of such officer or at any stage of the proceeding before such court to give bail, such person shall be released on bail. Provided that such officer or court, of he or it thinks fit, may, instead of taking bail from such person, discharge him on his executing a bond without sureties for his appearance as here in after provided. Provided further that nothing in this section shall be deemed to affect the provisions of sub-section (3) of Section 116 (or section 446A).

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b) Notwithstanding anything contained in sub-section (1) where a person has failed to comply with conditions of the bail bond as regards the time and place of attendants the court may refuse to release him on bail, when on a subsequent occasion in the same case he appears before the court or is brought in custody and such refusal shall be without prejudice to the powers of the court to call upon any person bound by such bond to pay the penalty thereof under section 446.

### **Scope of the Section**

In granting bail in a bailable offence the Magistrate should discharge his functions with judicious objectivity and detachment, scrupulously keeping away from all extra-judicial considerations as an accused person can claim bail in a bailable offence as of right. When an accused person is arrested for a bailable offence and he is prepared to give bail, he shall be released on bail. Mere seriousness of the offence is not sufficient to refuse bail. In a bailable offence the only choice for the court is as between taking a simple recognizance of the principle offender or demanding security with surety.

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Ordinarily the word 'bail' applies to the second kind of security according to the practice and procedure of courts. The criminal court has no discretion in bailable offence while granting bail under section 436 to impose any condition except the demanding of security with sureties. Thus, where a Magistrate while granting bail in respect of a bailable offence, imposes a condition that the accused should appear before the police, such a condition is improper and there is no jurisdiction in the Magistrate to pass such an order. Even the Magistrate has no power, in such a case, to ask the accused to furnish cash bail as there is no provision for such cash bail.

For every bailable offence, bail being a right and not a favour and in demanding bail from accused person, the social status of the accused should be considered taking care that the amount fixed is not excessive. Detention of the accused entitled to be released on bail, tends to prejudice their means of defence and if the accused are respectable and innocent, they are exposed to the indignity of imprisonment for which no subsequent order of discharge or acquittal can alone be sufficient.

Section 436 of Criminal Procedure Code is meant for any person who is arrested or brought before the court except a person accused of a non-

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bailable offence. The section is not limited to persons accused of a bailable offence and is applicable to Chapter VII except to provisions specially excluded. Thus, a Magistrate holding on inquiry under section 110 can under section 436 compel the person proceeded against to execute a bond for his appearance during the inquiry.

The absence of a specific form for the purpose is no ground to hold otherwise in the case of bailable offences, to which section 436 applies. A police officer has no discretion at all to refuse to release the accused on bail, so long as the accused is prepared to furnish surety and the police officer also can't refuse the bail on the ground that the person arrested may be granted bail by a court and the same was held in **Dharma V.Rabindranath.**

The same way refusal of grant of bail in contravention of section 436 will make the detention illegal and the police officer causing such detention may be held guilty of wrongful confinement under section 342 of the Indian Penal Code was held in **Dharma V.Rabindranath.**

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**Principle underlying in Section 436 of Criminal Procedure Code:**

The principle underlying the grant of bail as envisaged in the Section is that an accused person is presumed in law to be innocent unless he is proved to be guilty. So, as a presumably innocent person, he is entitled, to freedom. He must be given all possible opportunities to look after his case. The granting of bail will facilitate him to defend himself properly better than he could if he were kept in custody. Though the stage for raising the presumption of innocence in favour of the accused does not arise till the conclusion of the trial and the appreciation of the entire evidence on the second, yet the matter of granting bail has to be considered in the background of the fact that in the criminal jurisprudence, which guides the courts there is a presumption of innocence in favour of the accused.

**Conditions precedent and considerations for grant of bail under the section:**

- The section lays down three conditions that a person must satisfy before the question of granting bail to him. They are:
  - a. He has been accused of a bailable offence;
  - b. He has been arrested or detained without warrant by an officer in-charge of a Police Station or appears or is brought before a court and;

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- c. He is prepared to give bail at any time while in the custody of such officer or at any stage of the proceedings before such court.

The above three conditions are also laid down as in **State vs Baswanath Rao**.

**Provisions of the Section are mandatory:**

A mere perusal of the Section will make it abundantly clear that when a person accused of a bailable offence is arrested or detained without a warrant by the Officer-in-charge of the Police Station or appears or is brought before the court and he is prepared at any time while in the custody of such officer or at any stage of the proceedings before such court to give bail such person shall be released on bail.

These provisions are mandatory and the Police Officer or court has no discretion in the matter at all. So, when a person other than a person accused of a non-bailable offence is arrested and if he is prepared to give bail, he shall be released on bail as this provision is mandatory.

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The Police Officer has no discretion at all to refuse to release the accused on bail so long as he is prepared to furnish surety. When a person is arrested by the Police for a bailable offence he has to be produced before the Magistrate having jurisdiction on the case subject to the provisions as to bail. But before he is produced before a Magistrate, if the accused is prepared to give bail, the Police Officer concerned has to release him on bail.

Where, however, at the stage while the accused is in police custody he is not prepared to give bail, he has to be produced before the Magistrate within 24 hours as provided in Section 57 of Criminal Procedure Code. When he is produced before the Magistrate and is prepared to give bail, he shall be released on bail. The Magistrate can authorize his detention in the police custody for the purpose of investigation and he is competent in respect of bailable offences to impose a condition that the accused should appear before the police.

A person arrested without a warrant could not be detained by the police for more than 24 hours. If the Police Officer considers it necessary to detain such person for a longer period for the purposes of investigation, he

can do so only after obtaining a special order of Magistrate under section 167.

According to section 167(2), the total period of detention of an accused which a Magistrate can authorize shall not exceed:

- (i) Ninety days, where the investigation relates to an offence punishable with death, imprisonment for life or imprisonment for a term not less than ten years and
- (ii) 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 bail if he is prepared to and does furnish bail. This, however, does not mean that detention of the accused beyond the period of 60 or 90 days as the case may be, is illegal and therefore a ground for bail. The Magistrate can authorize detention beyond the above mentioned maxima: but if the accused during this period furnishes bail he has to be released on bail. There is however no scope for the inference that the accused shall be deemed to have been

released on bail on the expiry of the above maxima making further detention automatically illegal.

**Sec. 167- Procedure where investigation cannot be completed in twenty four hours:**

While Section 436 gives an arrested person a right to bail, Section 50(2) makes it obligatory for a Police Officer arresting such a person without a warrant to inform him of this right to be released on bail. He is bound to be released on bail immediately when he was prepared to give bail.

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**NON-BAIL ABLE OFFENCES:**

**Section 437 of the Code of Criminal Procedure deals with the aspect of Non-Bailable Offences.**

Subject to these cases, granting of bail is essentially discretionary in all cases of non-bailable offences. It is important to mention here that discretion, when applied to a court of justice, means sound discretion guided by law. It must be governed by rule, not by humour; it must not be arbitrary, vague and fanciful. But legal and regular.

The discretion to grant bail in cases of non-bailable offences has to be exercised according to certain rules and principles as laid down by the Code and Judicial decisions. Generally while making a decision regarding grant of bail, the following circumstances are taken into considerations:

- (i) The enormity of charge;
- (ii) The nature of the accusation;
- (iii) The security of the punishment which the conviction will entail;
- (iv) The nature of the evidence in support of the accusation;
- (v) The nature and gravity of the circumstances in which the offence is committed;

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- (vi) The position and status of the accused with reference to the victim and the witnesses;
- (vii) The danger of witness being transferred with;
- (viii) The livelihood of accused fleeing from justice;
- (ix) Probability of the accused committing more offences;
- (x) The protracted nature of the trial;
- (xi) Opportunity to the applicant for preparation of his defence and access to his counsel.
- (xii) The health, age and sex of the accused person etc.;

**Section 437 when bail may be taken in case of non-bailable offence:**

When any person accused of, or suspected, or the commission of any non-bailable offence is arrested or detained without warrant by an officer-in-charge of a Police Station or appears or is brought before a court other than the High Court or Court of Session, he may be released on bail, but –

(a) Such person shall not be so released if there appears reasonable grounds for believing that he has been guilty of an offence punishable within death or imprisonment for life;

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(b) Such persons shall not be so released if such offence is a cognizable offence and he had been previously convicted of 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 of (cognizable offence punishable with imprisonment for three years or more but not less than seven years). Provided that the court may direct that a person referred to in clause (i) or clause (ii) be released on bail if such person is under the age of sixteen years or is a woman or is sick or infirm;

Provided further that the court may also direct that a person referred to in clause (ii) be released on bail if it is satisfied that it is just and proper so to do for any special reason; provided also that the mere fact that an accused person may be required for being identified by witnesses during investigation shall not be sufficient ground for refusing to grant bail if he is otherwise entitled to be released on bail and gives an undertaking that he shall comply with such directions as may be given by the court. Provided also that no person shall, if the offence alleged to have been committed by him is punishable with death, imprisonment for life, or imprisonment for seven years or more be released on bail by the court under this sub-section without giving an opportunity of hearing to the Public Prosecutor.

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If it appears to such officer or court at any stage of the investigation, inquiry or trial as the case may be, that there are no reasonable grounds for believing that the accused has committed a non-bailable offence, but that there are sufficient grounds for further inquiry into his guilt, the accused shall, subject to the provisions of Section 446A and pending such inquiry, be released on bail) or, at the discretion of such officer or court, on the execution by him of a bond without sureties for his appearance as hereinafter provided.

When a person accused or suspected of the commission of an offence punishable with imprisonment which may extend to seven years or more or of an offence under Chapter VI, Chapter XVI, or Chapter XVII of the Indian Penal Code, or abetment of, or conspiracy or attempt to commit, any such offence, is released on bail under sub-section (1), ( the court shall impose the conditions, - (a) that such person shall attend in accordance with the conditions of the bond executed under this chapter, (b)that such person shall not commit an offence similar to the offence of which he is accused, or suspected, of the commission of which he is suspected, and (c) that such person shall not directly or indirectly make any inducement, treat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the court or to any Police

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Officer or tamper with evidence, may also impose, in the interest of justice, such other conditions as it considers necessary)

- An Officer or a court releasing any person on bail under sub section (1)] or sub-section (2), shall record in writing his or its [reasons or special reasons] for so doing.
- Any court which has released a person on bail under sub-section (1) or sub-section (2) may, if it considers it necessary so to do, direct that such person be arrested and commit him to custody.
- If, in any case triable by a Magistrate, the trial of a person accused of any non-bailable offence is not concluded within a period of sixty days from the first date fixed for taking evidence in the case, such person shall, if he is in custody during the whole of the said period be released on bail to the satisfaction of the Magistrate, 32 unless for reasons to be recorded in writing, the Magistrate otherwise effects.
- If, at any time after the conclusion of the trial of a person accused of a non-bailable offence and before judgment is delivered, the court is of opinion that there are reasonable grounds for believing that the accused is not guilty of any such offence, it shall release the accused, if he is in custody, on the

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execution by him of a bond without sureties for his appearance to hear judgment delivered.

The words “appears or is brought before other than High Court or court of Sessions” in Section 437(1) make it clear that this section does not apply to the High Court or to a court of session and the word ‘Appears’ of this clause was interpreted that includes voluntary surrender before court without intervention of any agency.

In Section 437 (1) the word ‘may’ used therein, was of controversy. The word ‘may’ has been interpreted by the Hon’ble Supreme Court as follows: There is no doubt that the word ‘may’ generally does not mean ‘must’ or shall but it is well settled that word ‘may’ is capable of meaning of ‘must’ or ‘shall’ in the light of the context which denotes direction should be construed to mean a command.

According to Section 437(1) the word ‘may’ directed that a person referred to in clause (i) or clause (ii) be released on bail if such person is under the age of sixteen years or is a woman or is sick or infirm. As per

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Section 437 (1) (i) A person who is guilty of an offence punishable with death or imprisonment for life shall not be released on bail if there appears reasonable grounds that, he is involved in such an offence. But, while considering the question of bail in non-bailable offences not punishable with death or imprisonment for life the court should take into account the various considerations.

For example: (i) nature and seriousness of the offence, (ii) the nature of circumstances in which the offence was committed, (iii) the prima-facie character of the evidence, (iv) the circumstances which are peculiar to the accused, (v) position and status of accused with reference to victim and witnesses, (vi) reasonable possibility of presence of accused not being secured at the trial, (vii) history of the case as well as investigation, (viii) reasonable apprehension of witnesses being tampered with on jeopardizing his own life, (ix) larger interest of public or the state of repeating the offences and similar other considerations which arise when a court is approached for bail in non-bailable offence.

**BAIL OF PERSONS UNDER THE AGE OF 16 YEARS , WOMAN OR A  
SICK OR INFIRM PERSON**

When any person accused of a bailable or non-bailable offence, and apparently a juvenile, is arrested or detained or appears or is brought before a Board, such person shall, notwithstanding anything contained in the Code of Criminal Procedure, 1973 or in any other law for the time being in force, be released on with or without surety but he shall not be so released if there appear reasonable grounds for believing that the release is likely to bring him into association with any known criminal or expose him to normal, physical or psychological damages or that his release would defeat the ends of justice.

When such person having been arrested is not released on bail under sub-section (1) by the Officer-in-Charge of the Police Station such officer shall keep him to be only in an observation home in the prescribed manner until he can be brought before a Board.

When such person is not released on bail under sub-section (1) by the Board it shall, instead of committing him to prison, make an order sending him to an

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observation home or a place of safety for such period during the pendency of the inquiry regarding him as may be specified in the order.

In case **Armit Das vs State of Bihar** the Supreme Court held that the determination of the age of the accused will be taken on the date of his appearance or production before the Juvenile Court.

In case **Sheela Barse vs Union of India** the Supreme Court of India observed that if a child is a national assert, it is the duty of every state to look after the child to ensure full development of its personality. That is why, all the statutes dealing with children provide that a child should not be kept in jail. Even apart from the statutory prescription it is elementary that a jail is hardly a place where a child should be kept. There can be no doubt that incarceration in jail would have the effect of drafting the development of the child exposing him to baneful influences, coarsening his conscience and alienating him from society. b. Woman; According to the interpretation of Supreme Court and same of the High Courts especially Rajasthan High Court the word “may” in proviso first of section 437 Criminal Procedure Code has to be read as “must” or “shall”. Thus, this proviso being mandatory, the court is under obligation to release the accused persons including women on bail.

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**State of U.P. vs Joginder Singh, AIR 1963 SC 1618.** Keeping in view the status of women in India, this proviso was inserted under Section 437 to avoid women being kept in custody as far as possible. It is an obligation on the part of court to interpret the law as it is and release the women accused on bail liberally even if there are “reasonable grounds” to believe that she has been guilty of an offence punishable with death or imprisonment for life.

In case **Smt. Sundar vs State of Rajasthan**, the main ground on which bail application is stressed is that the petitioner is a young woman and under Section 437, there is a provision for taking sympathetic view for the release of a woman on bail.

In the case **State vs Harbansal** the expression “reasonable grounds for believing” means such grounds as are based on reason and logic. The grounds should be such as much lead on to believe that the accused is guilty of such an offence. It is not only the probability of the ground being creative of a believe but even the possibility of such a belief which is sufficient to give rise to the interdiction referred to in the sub-section. It is an established and cardinal principle of criminal jurisprudence that in all criminal proceeding, the evidence against the accused

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should be recorded in his/her presence and in open court so that the accused will have an opportunity to challenge the evidence and can defend their case.

But in certain cases, the court may dispense with the personal attendance of the accused and him or her to appear by pleader. Sections 205 and 273 of the Criminal Procedure Code provide for exemption of all accused from personal attendance before the court. Both sections provide for the exemption of the accused from personal attendance, but they refer to different stages of the proceeding.

Thus, section 205(1) deals with the initial appearance of the accused person before the Magistrate who issues summons, while Section 273 deals with the presence of the accused person at the trial and empowers the presiding officer, whether he is a Magistrate, Sessions Judge or Judge of the High Court to dispense with the personal attendance of the accused at the trial.

In 1951, the Calcutta High Court expressed its views that a Purdanashin woman has to be exempted from personal attendance in cases involving no moral turpitude. Other High Courts have also taken similar view in dispensing with the personal appearance of Purdanashin women. They further exempted accused who

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are highly placed public functionaries and persons rendering public service. (**Zain Yar Jung vs Raghotam, Rajyalakshmi vs State**)

The High Court of Gauhati in **M.J. Marjina Begum and others vs. Matakhal Ali** while dealing with the necessity of seeking attendance of the women accused in a criminal trial by the learned Magistrate, held that: *“Women should not be asked to appear in person in court unless there are some strong reasons for insisting upon their personal presence in court. Discretion in their favour ought to be liberally exercised in view of social conditions that exist today”*.

If a woman sentenced to death is found to be pregnant, the High Court shall order the execution of the sentence to be postponed and may, thinks fit, commute the sentence to imprisonment for life. C

In the case of **State vs Sardool Singh** has interpreted the word “Sick”. The sickness contemplated by proviso is a sickness which involves a risk or danger to the life of the accused person.

In the case **State vs Gadadhar Baral** sickness is ground to release the accused in a non-bailable offence on bail as provided in Section 437(1) proviso.

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However, any nature of sickness would not entitle an accused for release on bail. It should be of such nature and that unless the accused is released, he cannot get proper treatment for his cure from the ailment unless, this interpretation's given, the legislative purpose behind a non-bailable offence shall be frustrated.

The proviso is based on humanitarian grounds merely because a person is detained in custody being accused of a non-bailable offence, the same should not be a ground for his physical suffering in our jurisprudence an accused is presumed to be innocent until proved to be guilty.

Therefore, the severing power shall have to make all arrangements for medical treatment of an accused in custody.

In the case **K.N. Bayan vs State of Gujarat** the word “infirm” interpreted as infirm means according to the same as the meaning of concise dictionary that is, ‘physically weak specially through age’.

According to Webster's New Twentieth Century dictionary, Infirm means weak, not though, not firm, or sound, and physically feeble.

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## **ANTICIPATORY BAIL**

Anticipatory bail became part of the CRPC in 1973 after the 41<sup>st</sup> Law Commission Report recommended for the inclusion of such provision. It was included to protect the arbitrary violation of the right to personal liberty of the person.

When any person apprehends that there is a move to get him arrested on false or trumped up charges, or due to enmity with someone, or he fears that a false case is likely to be built up against him, he has the right to move the court of Session or the High Court under section 438 of the code of Criminal Procedure for grant of bail in the event of his arrest, and the court may, if it thinks fit, direct that in the event of such arrest, he shall be released on bail. Anticipatory bail can be granted by Sessions Court and High Court.

The applicant must show by disclosing special facts and events that he or she has reason to believe, that he or she may be arrested for a non-bailable offence so that the court may take care to specify the offence or offences in respect of which alone the order will be effective and it is not a blanket order covering all other offences.

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The Criminal Procedure Code 1930 gives security to people envisioning or dreading capture. The basic contrast between general safeguard and Anticipatory Bail is that while a consistent safeguard is connected for by a man/blamed simply after his capture, Anticipatory Bail is connected for by a man fully expecting his capture and to secure requests from court to keep the real capture. Likewise, nobody should confront disrespect on the off chance that he is ensnared in false cases .In any case, there are sure conditions under which an application for concede of Anticipatory Bail might be considered and it isn't allowed in a normal way and relies upon certainties of the case To show, in instances of financial offenses, the security of Anticipatory Bail doesn't involve right.

The refinement between Bail and a request of Anticipatory Bail is that while the previous is allowed after capture and in this manner implies discharge from the care of the police, the last is conceded fully expecting capture and is along these lines compelling at the exact second of capture. Police care is an inescapable corresponding of capture for non-bailable offenses.

The concede of "**Anticipatory Bail**" to a denounced who will be taken into custody for further judgment includes an inconsistency in wording, in so far as the

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offense or offenses for which he is captured, are concerned. After capture, the blamed must look for his cure under Section 437 or Section 439 of the Code, on the off chance that he needs to be discharged on safeguard in regard of the offense or offenses for which he is captured.

Consistent safeguard is conceded to a man after he is captured by the Indian police for a wrongdoing he is suspected to have conferred. At the point when the police get a dissension and in the event that they have accumulated adequate proof which will bolster their capture, they capture the suspect and he is remanded in police care for facilitate examination and after that presume sent in legal care. On account of a normal safeguard, the individual may approach a trial court, Sessions, High or Supreme Court to be let out of jail until the point that the trial has finished up.

Specific measures of cash or resources are vowed to the court by the blamed and in light of this surety; the Court might possibly give him safeguard. The condition is that the individual must be available for the trial when they initiate and are on-going and won't escape from the nation or unduly impact other individuals related with the trial. 8 If the Court finds that the denounced isn't dependable and may not show up for the trial or may carry out further violations while out of jail

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on safeguard, it has the expert to decline the safeguard. The wholes swore to the court in return for the safeguards are set at various levels for various individuals. The sum is for the most part settled on the seriousness of the wrongdoing, the budgetary status of the charged and different factors.



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Page 40 of 53

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### **Procedure to Apply for Anticipatory Bail**

The Court of Session and the High court are to be approached in order to grant anticipatory bail. If a person is under the apprehension that a complaint is filed against him for any of the underlying offences –

1. Criminal breach of trust (Section 406 IPC),
2. Mischief by destroying or moving, etc., a landmark fixed by a public authority (Section 434 IPC).
3. Husband or relative of husband of a woman subjecting her to cruelty (Section 498A IPC),
4. Any other non-bailable offence.

He/She can apply for an anticipatory bail. In such cases, the needs to approach a criminal lawyer who will help him in getting anticipatory bail.

It is then the lawyer's responsibility to file a vakalatnama and an application for anticipatory bail. Subsequently, after the petition is filed, the hearing is scheduled.

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### **Procedure of Anticipatory Bail When FIR is Filed**

In a situation where an FIR has been filed, a notice of arrest will be sent by an investigating officer. As soon as the notice of arrest is served on the person, he shall file an application for anticipatory bail with the help of criminal lawyer. The lawyer is then required to follow the above procedure.

### **Procedure of Anticipatory Bail When FIR is Not Filed**

In this case, the Public Prosecutor is required to talk to the concerned police officer. Since there is no filing of FIR it will be presumed by the public prosecutor and the court that there are no available grounds for filing anticipatory bail. In the practical working the following steps will follow:

1. The lawyer making an oral prayer for seven days pre-arrest notice in case the police formulates an intention to arrest the accused's family.
2. In all likelihood, the judge will grant the plea.
3. An order will be passed accordingly. This is generally called the 'notice bail'.

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4. If the bail application is rejected in the Sessions Court, one could apply to the High Court.
5. If the High Court also rejects the bail, one can apply to the Supreme Court.

The Supreme Court in *Sushila Aggarwal v. State of NCT of Delhi (2020)* case delivered a significant verdict, ruling that no time limit can be set while granting anticipatory Bail and it can continue even until the end of the trial. The Court made reference of India's freedom movement claiming that arbitrary arrests, indefinite detentions, and lack of institutional safeguards played an important role in rallying the people to raise the demand for Independence

In *Prathvi Raj Chauhan vs Union of India (2020)* case, the Court observed that provisions of anticipatory Bail (Sec. 438) shall not apply to the cases under Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act 2018.

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In *Shri H D Kumaraswamy vs. State of Karnataka*, after hearing both sides, the Court opined granting interim anticipatory bail and also directing the respondent, police to release the petitioner along with surety as enumerated in the conditions of the interim anticipatory bail order granted by the Court.



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Page 44 of 53

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**Controversy around anticipatory bail:**

Time limitation is the arena which raises controversies in the provisions related to anticipatory bail. The courts have been trying to interpret the essence of this section and it is felt by them that the sole reason for existence of anticipatory bail is for providing the accused person some time to enable him to apply to the regular court for grant of regular bail and therefore, an order granting anticipatory bail will operate only till the time the disposition of the regular bail of the said accused person has taken place.

A constitution bench of Supreme Court in **Shri Gurbaksh Singh Sibbia & Ors v. State of Punjab** also referred as Sibbia's case, dealt with this issue at length and put the controversy to rest by explaining the provision categorically and it stated that an order of anticipatory bail is not limited in time and that it will subsist till the end of trial.

The court has explicitly and unequivocally held that in cases where the applicant is seeking anticipatory bail and the FIR is not yet registered, the court 'may' grant an order of anticipatory bail, limited in time though in

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other cases where applicant is seeking anticipatory bail after the registration of FIR, the order of anticipatory bail 'shall' not be restricted in time. The difference in the terms of 'may' and 'shall' should be given due importance and they are essential to the whole concept of time limitation with regard to anticipatory bail, and the same has also been enumerated in the Sibia's case, and therefore can't be overlooked. There is a reason why this difference has been added and the sole reason is to make sure that if in future such controversy arises, then it can be solved then and there accordingly.

The Supreme Court of India in **Sushila Aggarwal and others v/s State(NCT of Delhi) and others in Special Leave Petition(Criminal) Nos. 7281-7282/2017** settled the difference of opinion stemming from its two prior verdicts by ruling that anticipatory bail can't be restricted by a time limit unless a competent court orders such a condition in a specific case. The five-judge constitution bench said the provisions of the Code of Criminal Procedure that govern bail and anticipatory bail differ on the aspect of when such orders can be passed. While a regular bail can be granted after a formal arrest, anticipatory bail can be ordered prior to the arrest.

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**The five-judge constitution bench held that there can't be any time-limit restriction. But it clarified the questions that the competent courts deciding on anticipatory bail must keep in mind:**

- The application of anticipatory bail must include bare essential facts related to the offence for which he (applicant) reasonably fears arrest as well as his side of the story. Registration of a first information report by the police isn't a necessary pre-condition to apply for anticipatory bail.
- Courts dealing with anticipatory bail cases should hear the public prosecutor and obtain facts even before granting a limited interim anticipatory bail.
- The courts must also consider the nature of the offence and the likelihood of that individual's chances of influencing the investigation or tampering with evidence or fleeing the country. The courts can pass restrictive conditions in the anticipatory bail orders on a case-to-case basis.

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- The anticipatory bail orders can continue till the end of the trial and the court should keep in mind the conduct of the accused while passing the orders.
- Anticipatory bail only gives protection from arrest to a person in relation to offence he apprehends arrest in. There cannot be a blanket anticipatory bail that allows an individual to commit other offences.
- The order of anticipatory bail only grants protection from arrest but does not in any other way limit the rights of the police to conduct its investigation
- The police will be free to move courts seeking permission for arrest of an accused who has been granted anticipatory bail by a court.

The constitution bench overruled cases—including *Siddharam Satlingappa Mhetre v. State of Maharashtra & Others*—where the court ruled that absolutely no restrictive conditions can be imposed in an anticipatory bail order. It also overturned cases where time limits were imposed incorrectly.

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**CONDITIONS THAT MAY BE IMPOSED BY COURT**

- Person **shall not leave the country and travel abroad** without the prior permission of the Court.
- If a Court **rejects the anticipatory Bail** a person, he/she can be **arrested** by the police **without a warrant**.
- Person shall make **himself available for interrogation** by a police officer (as and when required).
- Person shall **not** (directly or indirectly) **make any inducement, interference, threat or promise** to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to any police officer.

## **CANCELLATION OF ANTICIPATORY BAIL**

There is no specific provision that allows a court to cancel the order of anticipatory bail. However, in several cases it has held that when Section 438 permits granting anticipatory bail, it is implicit that the court making such order entitle upon appropriate considerations to cancel or recall the order.

**Sec. 437(5) & Sec. 439** of Cr.P.C. deal with the cancellation of anticipatory Bail. They imply that a Court which has the power to grant anticipatory Bail is also **empowered to cancel the Bail or recall the order** related to Bail upon appropriate consideration of facts.

A High Court or Court of Session may direct that any person who has been released on Bail by it- be arrested, and brought under custody after filing of an application by the complainant or the prosecution.

However, a Court does **not have the power** to cancel the **Bail granted by the police officer.**

Over the years, anticipatory Bail has acted as the protection (granted under **Sec. 438** of CrPC) to safeguard a person against whom false accusation or charges have

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been made. It ensures the release of such falsely accused person even before they are arrested.

• **Some grounds on which anticipatory bail stands cancel:**

1. When the person on bail is found tampering with the evidence either during the investigation or during the trial.
2. When the person on bail commits similar offence or any heinous offence during the period of bail.
3. When the person on bail has absconded and trial of the case gets delayed on that account.
4. When its alleged that the person on bail is terrorizing the witness and committing acts of violence against the police.
5. When the person on bail creates serious law and order problems in the society and he had become a hazard on the peaceful living of the people.
6. When it is found that the subsequent events make out a non-bailable offence or a graver offence.
7. When the High Court found that there was a wrong exercise of judicial discretion to grant the accused bail.

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8. When the circumstances were proved that the accused has misused the liberty granted to him, it is sufficient ground to cancel bail.
9. If the life of the accused person on bails itself be in danger.

The anticipatory bail can also be cancelled before the regular bail is actually granted.



**Disclaimer:**

This information is sourced from the following resources:

- (1) <https://www.bloomberquint.com/law-and-policy/anticipatory-bail-cant-have-a-time-limit-rules-supreme-court>
- (2) <https://www.drishtias.com/loksabha-rajyasabha-discussions/in-depth-anticipatory-bail>
- (3) <http://www.legalserviceindia.com/legal/article-41-anticipatory-bail.html>
- (4) <https://www.intolegalworld.com/LegalNotes.aspx?title=provisions-for-bail-under-crpc>
- (5) <http://www.legalserviceindia.com/legal/article-1804-types-of-bail-in-india-and-conditions-for-grant-for-bail.html>

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