Chapter 1

THE BAIL SYSTEM

Historical Genesis

THE ETHOS and injunctions of ancient Hindu jurisprudence required *inter alia*, an expedient disposal of disputes by the functionaries responsible for administration of justice. No laxity could be afforded in the matter as it entailed penalities on the functionaries.[1] Thus, a judicial interposition took care to ensure that an accused person was not unnecessarily detained or incarcerated. This indeed devised practical modes both for securing the presence of a wrongdoer, as well as to spare him of undue strains on his personal freedom.

During Moghul rule, the Indian legal system is recorded to have an institution of bail with the system of releasing an arrested person on his furnishing a surety. The use of this system finds reference in the seventeenth century travelogue of Italian traveller Manucci. Manucci himself was restored to his freedom from imprisonment on a false charge of theft. He was granted bail by the then ruler of the Punjab, but the *Kotwal* released him on bail only after Manucci furnished a surety.[2] Under Moghul law, an interim release could possibly be actuated by the consideration that if dispensation of justice got delayed in one's case then compensatory claims could be made on the judge himself for losses sustained by the aggrieved party.[3]

The advent of British rule in India saw gradual adaptation of the principles and practices known to Britishers and were prevalent in the common law. The gradual control of the East India Company's authority over *Nizamat Adalats* and other *fouzdary* courts in the mofussil saw gradual inroads of English criminal law and procedure in the then Indian legal system. At this juncture of history, criminal courts were using two well understood and well defined forms of bail for release of a person held in custody. These were known as *zamanat* and *muchalka*. A release could be effected on a solemn engagement or a declaration in writing. It was known as *muchalka* which was an obligatory or penal bond generally taken from inferiors by an act of compulsion. In essence, it was a simple recognisance of the principal of bail. Another form of judicial release was a security with sureties know as *zamant*, in which the *zamin* (surety) became answerable for the accused on the basis of a written deed deposited by him

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1. See *Kautilya Arthshastra*, IV ch. 9.
2. William Irvine, II *Moghul India* 198 (1907).
Manucci's travel account of the mid seventeenth century was originally published in Italian and was translated later by William Irvine.
3. J.N. Sarkar, *Mughal Administration in India* 108 (1920).

with the trying court. With discretionary powers vested in courts under the doctrine of *tazeer* in Mohammedan criminal law, a decision on the issue of grant or refusal of bail or the mode of release, did not pose much difficulty. However, the form and contents of the British institution of bail were statutorily transposed by the passing of Code of Criminal Procedure in 1861, followed by its re-enactment in 1872 and 1898 respectively.

In the changed context of an independent Republican India, administrators of law and justice are mandated to function in a manner that the constitutional equilibrium between the 'freedom of person' and the 'interests of social order' are maintained effectively. Ushering of democratic social order necessarily required updating and streamlining of the then existing laws. As a necessary corollary to the above, the Law Commission of India directed its attention towards the existing procedural code and provisions governing the system of bail.

Law Commission—41st Report

After having taken stock of the entire position, the Law Commision brought out its recommendations in the *41st Report*. These recommendations were considered and incorporated by Parliament while fabricating the newer Code of Criminal Procedure, 1973, with the purpose of replacing the earlier one. In relation to provisions governing bail, the Law Commission reiterated the need to preserve the basic and broad principles in regard to bail and suggested modifications in the operational aspect of the system.

According to the Law Commission, the broad principles on the subject are: (*i*) bail is a matter of right if the offence is bailable, (*ii*) bail is a matter of discretion if the offence is non-bailable (*iii*) bail is not to be granted if the offence is punishable with death or imprisonment for life but the court has discretion in limited cases to order release of a person. The Law Commission also stated that even in respect of offences punishable with death or imprisonment for life, the sessions court and the High Court ought to have even a wider discretion in the matter of granting bail.[4]

The Matrix of the new Law

With adherence to above basic principles, the Law Commission proceeded to suggest changes which concerns 'interests of public' in the upkeep of law and order. Accordingly, the commission suggested that avenues of freedom by way of release on bail be denied to those who had earlier abused it by not appearing before a court or by absconding themselves. But the commission did not accept the proposal that those who once had been accused of having committed serious offences punishable with death or imprisonment for life, if they are accused again of having committed any other serious offence, the grant of bail may be refused. The rationale for

4. Law Commission of India, *41st Report on the Code of Criminal Procedure*, Vol. I, p. 311 (1969).

this approach lie on the assumption that persons accused of serious offences may again commit serious offences during his release on bail. Since such proposal did put an undue restriction on the power to grant bail, the Law Commission rightly countered it by stating that in cases where liberty was likely to be abused, the answer lay in cancellation of the bail itself.

In order to blunt the effect of deprivation of liberty for alleged commission of serious offences carrying severe penalty upto seven years of imprisonment, the Law Commission innovated the rule that courts be vested with power to grant bail by imposing necessary conditions. The conditions may be such as are necessary to ensure presence of a released person as well as to ensure that the accused does not engage himself in acts which may again involve him in similar accusations. Other conditions warranted in the interests of justice can also be imposed. Reliance on judicial discretion had thus been the keynote of recommendations of the Law Commission. All such difficult situations are to be regulated and governed by judicial discretion on a case to case basis. (Streamlining of the law on bails was set up in the framework of basic principles of personal liberty to see that these are minimally affected, and a flexible mechanism adopted to secure interests of the society through an exercise of judicial discretion.) The approach seems to be consistent with the policy and purpose of the institution of bail. The suggested scheme seeks to accomplish and reinforce the immutable principles of liberty, as well as to meet challenges thrown by deviant elements. In the process of overhauling the criminal procedure, recommendations of the Law Commission were given serious consideration by Parliament. In the newer code the sections 436, 437 and 439 in chapter XXXIII form the core of the institution and the system of bail. These provisions read as under :

"436. *In what cases bail to be taken :* (1) 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, 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, if 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 hereinafter provided :

Provided further that nothing in this section shall be deemed to affect the provisions of sub-section (3) of section 116 or section 446-A.

(2) Notwithstanding anything contained in sub-section (1), where a person has failed to comply with the conditions of the bail-bond as regards the time and place of attendance, 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 any such refusal shall be without prejudice to the powers of the Court to call upon any person found by such

bond to pay the penalty thereof under section 446."

"437. *When bail may be taken in case of non-bailable offence* : (1) When any person accused of, or suspected of, 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—

(*i*) such person shall not be so 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 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 a non-bailable and cognizable offence :

Provided that the Court may direct that a person referrerd 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 other 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.

(2) 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 not 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 446-A 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.

(3) 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 (45 of 1860), or abetment of, or conspiracy or attempt to commit any such offence, is released on bail under sub-section (1), the Court may impose any condition which the Court considers necessary—

(*a*) in order to ensure that such person shall attend in accordance with the conditions of the bond executed under this Chapter, or

(*b*) in order to ensure that such person shall not commit an offence similar to the offence of which he is accused or of the commission of which he is suspected, or

(*c*) otherwise in the interest of justice.

(4) 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.

(5) 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.

(6) If, in any case triable by 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, unless for reasons to be recorded in writing, the Magistrate otherwise directs.

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

"439. *Special powers of High Court or Court of Session regarding bail.*

(1) A High Court or Court of Session may direct—

(*a*) that any person accused of an offence and in custody be released on bail, and if the offence is of the nature specified in sub-section (3) of section 437, may impose any condition which it considers necessary for the purposes mentioned in that sub-section;

(*b*) that any condition imposed by a Magistrate when releasing any person on bail be set aside or modified :

Provided that the High Court or the Court of Session shall, before granting bail to a person, who is accused of an offence which is triable exclusively by the Court of Session or which, though not so triable, is punishable with imprisonment for life, give notice of the application for bail to the Public Prosecutor unless it is, for reasons to be recorded in writing, of opinion that it is not practicable to give such notice.

(2) A High Court or Court of Session may direct that any person who has been released on bail under this Chapter be arrested and commit him to custody."

Policy Considerations underlying Bail

The basic law relating to bail is laid down it sections 436, 437 and 439 of the code. Section 436 prescribes a doctrine thal bail can be had as of right by a person who has been arrested without a warrant. Since arrest without warrant is a serious encroachment upon an individual's personal liberty, the doctrine comes as a protective check against executive action. This right is extended to cover situations where the interests of society are not likely to be damaged by bailing out a person; instead the state's obligation to protect individual liberty gets promoted. The power to grant bail is accompanied by the practice of ascertaining whether the alleged offence, for which the person has been arrested and for whom bail is being sought, has been classified as bailable under the *First Schedule* of the Code of Criminal Procedure, 1973.

A rigid legalistic view is that in case of a bailable offence, bail for the arrested person is a matter of right. It does not therefore leave any option to the court except to release the accused person on bail on his application. Such simplistic view of bail mechanism reduces the functioning of this institution to a slot machine which, on inserting a coin, automatically delivers the article in hand. In such a context the concept of 'right to bail' (in bailable offences) purportedly seeks to bail out the tabulated bailable offences contained in the *First Schedule* of the code along with the persons accused of having committed alleged offences. The legislative support for this approach is sought from the words "shall be released on bail" in section 436(1) of the code which merely mandates the grant of bail in cases of arrest without warrant for commission of an alleged bailable offence. The law of bails does not envisage that by labelling some offences as bailable, it is the offence that is to be bailed out, instead of the person who is accused of having committed an alleged offence.

An unbalanced view in this regard has the potential of yielding illogical results. In practice judicial thoughts and police action do snap implementation of the one sided view as it seeks to ignore the utility of safety and security aspect, which is implicit in the very concept of bail. The usual mode adopted is to sieve any such request through judicially evolved considerations for the grant of bail, which a court uses as a lever to exercise its discretion to allow an accused to get released on bail or not. The right to get released on bail is qualified by interests of the society to seek protection from hazards of wrongdoers. Thus, in operation of the bail system, the values of personal freedom and security of the social order go hand in hand.

By labelling a class of offences as bailable, society merely recognises a policy that certain wrongs need not necessarily demand continued detention and custody of the wrong-doer. Thus, an assumption underlies that where freedom on bail is assured as a matter of right on policy considerations, the society can concede permitting certain overt depredations to occur as part of normal intercourse of human relations, but it

can show indulgence only to an extent that the society can absorb the shock.

The test in favour of bailing out a person to freedom is dependent on determining the degree of danger that may emanate either from the accused himself or from the nature of the offence that he is accused to have committed. Tabulated classification of offences in the code as 'bailable' and 'non-bailable' however, does not mean that such labelling of offences would affect the court's regulatoty power in anyway to decide whether to grant freedom on bail to the accused in any criminal case or not.

In pursuance of this policy, section 437 provides for seeking and getting granted bail in non-bailable cases. However, certain limits have been set out. The society is unwilling to expose itself to such high risks as may affect its security and stability. Accordingly, in non-bailable cases, if circumstances of the case reasonably suggest and events and antecedents speak of a probability of guilt being of such a high order that it may attract a sentence of death or life imprisonment, then the privilege of being bailed out is denied. But risks emanating from a juvenile, a woman, a sick or an infirm person may not be so grave as they may be in other cases. An exception has, therefore, been made to admit such persons to bail for alleged non-bailable felonies also.

A sound state policy would undoubtedly favour a view that risks need not be multiplied but minimised to the extent it is capable of putting up with. Even otherwise the state may choose to take appropriate risks in enlarging on bail an accused person whose alleged conduct, if proved, could attract a long term rigorous imprisonment. The exercise of judicial discretion determines as to when and how a person accused of non-bailable offence can be granted bail.

The discretionary role of the judicial authority in granting or refusing bail merely sifts the risks involved in a case. Thus, 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 chapters VI, XVI or chapter XVII of the Indian Penal Code (45 of 1860) or abetment of, or conspiracy or attempt to commit, any such offence, is released on bail, the court may impose any condition which it considers necessary (*a*) in order to ensure that such person will attend, in accordance with the condition of the bond executed under this chapter, or, (*b*) in order to ensure that such person shall not commit an offence similar to the one of which he is accused or of the commission of which he is suspected, or, (*c*) otherwise in the interests of justice.

A refusal to admit to bail a person, who is accused of a non-bailable offence, even where imposing of such conditions is practicable, impliedly suggests that 'probably proven guilt' of an accused does not permit that any discretion be used to expose the community to possible hazard,

However, at any intermediate stage falling between initial and terminal stages of custody and conviction, if a reasonable belief about the innocence of the accused emerges during the proceedings, the court may grant bail to the accused.[5]

The society and the state cannot be under protective wings in all circumstances, particularly where the cost is in terms of undue deprivation of personal liberty of an accused. Delayed police investigations, as well as, delays in trial are such instances. In many cases the delay may be of an avoidable nature. Accordingly, if trial of a person who is accused of any non-bailable offence is not concluded even after the lapse of two months from the first date fixed for taking evidence, it may be taken as suggesting a lack of evidence of guilt against him.[6] If it were not so, evidence would have been forthcoming during the trial. This is because prosecuting authorities ordinarily collect evidence during the investigations of the case. Only on completion of such evidence collection, a trial begins. In a situation of delay in the trial stages, an exercise of judicial discretion to enable the accused to secure bail is only just and fair.

Under Indian law, bail mechanism is geared to the twin principles of social interests and individual personal liberty. With the exercise of judicial discretion, law provides for opportunities of bail which can be granted at any stage of trial, so as to ensure that an accused person secures his release from custody without prejudice to the interests of the community. Any indiscretion that might have been committed by a court in any such release is taken care of by the power to cancell a bail which has already been granted,[7] otherwise the judicial power is extensive enough to allow an apprehended person to avail his freedom on bail. The court may grant release on bail to an accused whose trial for a non bailable offence remains inconclusive even after the expiry of sixty days from the first date fixed for recording evidence.[8] The court is empowered to use this power even in favour of convicts, who have gone in appeal to an appellate court.[9] In such cases the suspension of sentence is, technically speaking, not an order of bail, yet the use of this power is in keeping with the principle of 'presumption of innocence', which the Indian legal system accepts as an attribute of fair trial.[10]

Anticipatory Bail : Legal Anomaly in Bail Scheme

The use of bail mechanism has been extended further by taking into its fold a comparatively new concept. In common parlance it is known

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5. S. 437(7), Cr. P.C., 1973.
6. S. 437 (6), *ibid.* See also *Talab Haji Hussian* v. *M.P. Mondkar*, 1958 Cr. L.J. 701 (S.C.), *Pratap* v. *State of Rajasthan*, 1966 Cr. L.J. 1052 (Raj).
7. S. 439 (2), Cr. P.C. 1973.
8. *Supra* note 6.
9. S. 389 (1) & (3) Cr. P.C.
10. *State* v. *K.M. Nanavati*, 1960 Cr. L.J. 1558, 1568 (F.B.) (Bom.).

as 'anticipatory bail'. This provision deals with a situation where person having reasonable apprehension that he would be arrested on an accusation of having committed a non-bailable offence. Such a person can move an application in an appropriate court, which may grant him an anticipatory bail.[11]

Under the Code of Criminal Procedure, 1898, there was no provision corresponding to section 438 of the new code providing for bail in anticipation of arrest. Anticipatory bail was, however, granted in certain cases[12] under the High Courts' inherent powers though the preponderant view negatived the existence of any such jurisdiction. The Law Commission in its *41st Report*, introduced a provision in the code enabling the High Court and the Court of Session to grant "anticipatory bail". The Law Commission viewed that "the necessity for granting anticipatory bail arises mainly because sometimes influential persons try to implicate their rivals in false cases for the purpose of disgracing them or for other purposes by getting them detained in jail for some days".[13]

The Joint Select Committee of Parliament had initiated a thought that bail should be made available in anticipation of arrest, may be, in frivolous proceedings, so that liberty of an individual may not be unnecessarily jeopardised. The nobility of thought was, however, tackled in an erratic way and, therefore, the matter was referred back to the Law Commission for the reconsideration about inclusion of the remedy of grant of anticipatory bail in the Code of Criminal Procedure, 1973.

The Law Commission was enthused to take up the suggestion. It formulated a draft provision to provide bail in anticipation of an arrest which ultimately got enacted as section 438 of the code. The principle that was being implemented through the provision of anticipatory bail was, however, alien to the concept and purpose of bail. Enacting such a provision in the chapter of bail has only produced difficulties. In fact, the Law Commission itself found it difficult to lay down in "the statute certain conditions under which alone anticipatory bail could be granted." It said "we found that it may not be practicable to exhaustively enumerate those conditions; and moreover, the laying down of such conditions may be considered as prejudging (partially at any rate) the whole case". What was found difficult by the Law Commission seemed to have been passed on to the courts with the pious hope that the "superior courts will, undoubtedly, exercise their discretion properly", in the wake of such matters as the commission thought are being accentuated on account of political rivalries.[14]

11. S. 438, Cr. P.C. 1973.

12. *Mangilal* v. *State* 1952, Cr. L.J. 1425 (M.B.); *State of Gujarat* v. *Govindlal Monilal Shah*, A.I.R. 1966 Guj. 146; contra. *State* v. *Kailash*, A.I.R. 1953 All. 98: *State* v. *Omprakash*, 1973 Cr. L.J. 824 (H. & P.).

13. *Supra* note 4, para 39.9.

14. *Id.*, para 39.9, pp. 320-21; See also the Law Commission of India, *48th Report*, ara 31 (1972).

Thus, the Law Commission has perhaps based its recommendation on a wrong formulation. It perhaps thought that anticipatory bail could be an answer to situations which correspond to tortious wrongs of malicious prosecution, abuse of legal process, false imprisonment and the like. Indeed, the stunted growth of the law of torts in India having been unable to meet such mischievous situations do call for a remedial action particularly in the wake of accentuated political rivalry which has been "showing signs of steady increase."[15] These type of wrongs are indeed being perpetrated in the society, thereby putting an unnecessary strain on the machinery of criminal justice, besides abusing processes of criminal law. However, the remedy does not appear to lie in the grant of bail : anticipatory or otherwise.

Bail is not a remedial measure. It is an in-built mechanism of the administration of criminal justice. Its basic purpose is to settle a custodial arrangement between the concerned parties viz., the court and the police in one hand and the accused on the other to ensure that the person is available to the agencies of criminal justice as and when his presence is required for purposes of fulfiilling the obligations of criminal law and justice.

A judicial approach to the exercise of discretion has been a cautious one. It does not—and perhaps cannot, exercise the power on the assumption that a frivolous accusation may be at the back of a proposed or initiated criminal proceeding. The nature of accusation is likely to determine attitude of the court in this regard. The discretionary power is to be exercised only after a notice to the public prosecutor is given and necessary reasons are recorded if the court considers granting of bail necessary in the interests of justice.

The Patna High Court ruled that the provision be used in cases where "the court is convinced that the person is of such a status that he would not abscond or otherwise misuse his liberty".[16] The court further said that even before this provision was introduced, there had been a practice in vogue which enables a court to release on bail such persons without a surety or on their having given a personal undertaking that they would appear before the court if required to do so.[17]

The above view is in consonance with the general judicial attitude of taking a restrictive view of the personal liberty aspect of the matter. Personal liberty is to be enjoyed by all and in an equal measure. It has no relation with the status of a person as such, which the society so often measures only in terms of his material wealth and power. The Law Commission's criterion has been that the justification for denying personal liberty to a person ought to lie on the apprehension of his absconding or

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15. *Ibid.*
16. *Narsingh Lal Daga* v. *State*, 1977 Cr.L.J. 1776 (Pat.).
17. *Id.* at 1777.

misusing his liberty but this approach has explicitly been negatived by the Patna High Court when it observed :

> Ordinarily, there should be a presumption in favour of every citizen that he is not likely to abscond or otherwise misuse his liberty while on bail. But such presumptions are generally belied and one cannot be granted bail on that account.[18]

The kind of the foregoing observations of the court thus supersede the view of the Law Commission, which recommended the use of such a mechanism as a measure to promote interests of personal liberty, and also the wisdom of the legislators who formulated, debated and passed the Bill. It is, however, not suggested that denial of this relief to the petitioner involved in the breach of law committed under section 7 of the Essential Commodities Act, 1955, and rule 194 of the Defence of India and Internal Security India Rules, 1971, had been incorrect.[19] The approach has incidentally put a dent in the basic concept of bail, and has led the facility of anticipatory bail being made available to economic offenders.[20] The judicial efforts have thus extended the scope of this facility to a class of persons which were not within the purview of the Law Commission's proposal. The commission sought to restrict the use of anticipatory bail to frivolous cases arising out of political rivalries.

In an application for grant of anticipatory bail before the Punjab and Haryana High Court,[21] two influential parties were pitched against each other, to make the contest "unnecessarily prestigious". The court was required to intervene in the matter by way of granting bail to the members of one party who feared arrest on the basis of a first information report which showed that two shots were fired in the air by some unknown persons in a meeting of a registered society. No person was found hurt as a result of the reported shooting incident and even three weeks of police investigation could also not reveal as to who fired these shots. In such circumstances, the court issued direction for anticipatory bail.

In *Badri Prasad Pathya* v. *State*[22] the Madhya Pradesh High Court has, however, endorsed the view that grant of anticipatory bail is mainly meant to relieve a person from being unnecessarily deprived of liberty; though in the instant case the consideration of high hazards of releasing the persons alleged to be involved in a *prima facie* case of murder weighed with the court in rejecting the application as against their claims for personal liberty.

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18. *Id.* at 1777.
19. *Balchand Jain* v. *State of M.P.*, 1977 Cr. L.J. 225, 227, 229, 232-38 (S.C.).
20. *Joseph* v. *Asstt. Collector of Customs*, 1982 Cr. L.J. 559, 564 (Mad.); *Suresh Vasudeva* v. *State*, 1978 Cr. L.J. 677, 682 (Del.).
21. *Narinder Singh* v. *State*, 1977 Cr. L.J. 596 (P. & H.).
22. 1977 Cr.L.J. (NOC) 130 (M.P.).

The purpose underlying section 438 of the code is to ensure that a person anticipating arrest is not obliged to go to jail till he is able to move the court for being released on bail. But it cannot also be construed that such a direction should be allowed to come in the way of police investigations nor should it seek to circumscribe police powers relating to remand to police custody for purposes of facilitating investigation. Accordingly, in *Somabhai* v. *State of Gujarat*,[23] the court observed that a direction for anticipatory bail would not be allowed to come in the way of a fuller consideration of the question of custody of the person when the investigations are complete. The court further said :

> The order may therefore provide that it will exhaust itself on or will remain operative only till the expiry of ten days from the date of the arrest and the accused will have to obtain a fresh order in usual course.... To avoid complications, instead of unlimited duration the order may provide that it will become inoperative if no arrest is made say within 90 days of the order.[24]

A search for factors guiding the issue of directions for anticipatory bail will continue. Some conditions are already incorporated in clause (2) of section 438 of the Code of Criminal Procedure, 1973.[25] In applying these conditions to specific situations the court may find it convenient to take into consideration factors like, gravity of the offence, nature of the accusation, character and antecedents of the petitioner as well as some such other cliches as are generally found in the judicial store-house and are so often relied upon. It may be said that search for guidelines may oblige the court even to fall back upon considerations indicated under section 437 of the code, which provides for grant of bail in non-bailable cases, although proceedings under section 438 for the direction of anticipatory bail are to be invoked during the pendency of investigation and not after it.

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23. 1977 Cr. L.J. 1524 (Guj.).
24. *Ibid.*
25. S. 438 (2) reads :

When the High Court or the Court of Session makes a direction under sub-section (i) it may include such conditions in such directions in the light of the facts of the particular case, as it may think fit, including—

(*i*) a condition that the person shall make himself available for interrogation by a police officer as and when required;

(*ii*) a condition that the 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;

(*iii*) a condition that the person shall not leave India without the previous permission of the Court;

(*iv*) Such other condition as may be imposed under sub-section (3) of section 437, as if the bail were granted under that section.

In *Balchand* v. *State of M.P.*[26] the Supreme Court found :

> [T]he Legislature in enshrining the salutary provision in Section 438 of the Code, which applies only to non-bailable offences, was to see that the liberty of the subject is not put in jeopardy on frivolous grounds at the instance of unscrupulous or irresponsible persons or officers....[27]

At the same time, the court stressed that "this being an extraordinary power should be exercised sparingly and only in special cases". With a view to giving effect to the above, the court further said "the rule of prudence requires that notice should be given to the other side before passing a final order of anticipatory bail, so that a wrong order of anticipatory bail is not obtained by a party by placing incorrect or misleading facts or suppressing material facts".[28]

In sum, an anticipatory bail cannot be invoked as a matter of right. It cannot be used to thwart investigation or to defeat an exercise of proper police powers needed for purposes of investigation. However, when police actions prejudicially tend to tilt the balance against a party whose personal liberty is likely to be jeopardised without fuller justification under the law, courts can exercise discretion to issue a direction of anticipatory bail. This facility remains confined to persons apprehending arrest during pendency of investigation of non-bailable offences.

The discretionary power under section 438 of the code is, thus, not an exercise of independent jurisdiction. but is dependent on seriousness of the accusation. For grant of anticipatory bail, the court has, therefore, to be guided by a large number of considerations, including those contained in section 437, which deals with the bail in non-bailable cases.[29] The court cannot show laxity in exercise of discretion for grant of bail in anticipation. It cannot be said to be the intention of the legislature that investigation and initiation of criminal proceedings against a person should be hustled and a escape route be provided for persons alleged to have committed grave and heinous crimes by securing an easy bail at a stage not yet been reopened for pre-trial police action under the code.

The inclusion of a provision for anticipatory bail in chapter XXXIII of the code which relates to bail, is thus bound to create confusion in the concept of bail, as well as in the application of principles of bail. It would perhaps be desirable and appropriate to insert such a provision elsewhere. It would even have been dealt with separately to meet the type of situation referred to under that provision, because the provision caters to an entirely

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26. 1977 Cr. L.J. 225 (S.C.).

27. *Id.* at 234 (*per* Fazal Ali, J.).

28. *Ibid.*

29. *G. Muthuswamy* v. *State of Kerala*, 1980 Cr.L.J. 1021, 1022 (Ker.); *Balchand Jain* v. *State of M.P.*, *Supra* note 26, but also see *Gurbaksh* v. *State of Punjab*, 1980 Cr.L.J. 1125 (S.C.).

different class of persons not termed as accused and are not under arrest. The system of bail is improvised to curtail, control and abridge the dominion of authority over an apprehended accused. The mechanism of bail presupposes that the person seeking bail is an *accused* who already has been *apprehended* by police for keeping him in custody to make him appear before the court at the time required. Once the accused is brought before the court, police has to obtain its orders for custody of the arrested person. Custody of the accused person can be given either to the state or to the community. In the first situation, the accused is remanded to police or to judicial custody as the case may be. Alternatively, he may be released on bail at his request upon his executing a bond or may be given in the charge of a third party coming forward as a surety and furnishing a bail bond. In latter situations, the custody of the accused is deemed to have been given to the self of the accused or to the community. Unlike the accused who is seeking bail, a person by moving the court for anticipatory bail may not be present before the court. He can ask for bail even *in absentia*[30] because of a likely apprehension of his arrest. Thus, the constituents of bail are completely absent in the case of 'anticipatory bail'. Hence custody of a person seeking bail cannot be had either with the state or the community which makes the purpose of bail redundant.

As has been noted elsewhere the mechanism of bail has been contrived to meet problems of an apprehended accused, in whose case his interim release is to be secured with an assurance. The assurance has to be that his presence on an appointed day before the court will be available, so that the court may discharge its obligation of accomplishing the task to try the accused which is incumbent upon it as part of the judicial process. Nothing of the above kind exists when proceedings for anticipatory bail are invoked. In fact, the term 'anticipatory bail' is no better then a misnomer.

The use of bail mechanism for purposes intended to be covered by the term 'anticipatory bail' tantamounts to misuse of the machinery of criminal justice. In fact, the misuse of bail mechanism is a contraption to cover entirely different situations, unrelated to those arising out of the law of arrest, investigation and trial in a criminal case. Its misuse is bound to affect the smooth working of the system. Two immediate effects are discernible, firstly, that the time of a criminal court is exhausted to consider matters which are yet to crystallise into mature criminal actions. Secondly, by taking cognizance of such matters and bringing them within the court's criminal jurisdiction the authority of the investigating agency is likely to be hampered, because the probable accused manages to secure a protective shield in anticipation of his arrest. This paves way for interference by the court in the statutory jurisdiction of the police. The police has statutory power to investigate into a cognizable offence without requiring any instruc-

30. See R.L. Anand (ed.), *Aiyer & Mitter—Law of Bails*, 89-81.

tions from a judicial authority. The 'anticipatory bail' has a propensity to interfere with police power and authority. It even threatens to dismantle the utility of the well established rule laid down by the Privy Council.[31] In *King Emperor* v. *Khwaza Nazir Ahmad* it was held that :

> [J]ust as it is essential that every one accused of a crime should have free access to a court of justice so that he may be duly acquitted if found not guilty of the offence with which he is charged, so it is of the utmost importance that the judiciary should not interfere with the police in matters which are within their province and into which the law imposes on them the duty to inquire.[32]

The Privy Council noted that in India there is a statutory right on the part of the police to investigate the circumstances of an alleged cognizable crime without requiring authority from judicial authorities and observed that, it would be

> an unfortunate result if it should be held possible to interfere with those statutory rights by an exercise of the inherent jurisdiction of the court. The functions of the judiciary and the police are complementary...and the combination of individual liberty with a due observance of law and order is only to be obtained by leaving each to exercise its own function.[33]

Since the concept of anticipatory bail is intended to be a fallout of the value of personal liberty, an added consequence would be to push the co-equal value of security and stability, to the sidelines. The provision is thus a legal anomaly in relation to the established legal concept of bail. It is a provision more readily available to the affluent but its definitely prejudicial to the interests of the administration of the bail process in the administration of criminal justice.

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31. L.R. 71 I.A. 203 (1943).
32. *Id.* at 204.
33. *Ibid.*
34. *Ibid.*