

Bail Pending Petition for Bail

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(1) Chapter 33, the Code of Criminal Procedure, 1973 (CrPC) deals with procedure and powers of the court to grant bail. Sections 436 and 437 CrPC pertain to bail in cases involving bailable and non-bailable offences. Section 170(1) CrPC enables the station house officer / investigating officer to admit an accused person, under arrest for committing a bailable offence, to bail, if he's able to give security for his appearance before the Magistrate. If the police produce him or he appears before the Magistrate, he may seek bail as a matter of right u/s 436. The Magistrate may release the accused with or without surety. In case the accused fails to appear as per the terms of the bail bond, the Magistrate may refuse him bail when he appears subsequently. Ref: Section 436(2). Thus Section 436 CrPC is the Magistrate's domain of bail power.

(2) Section 437 CrPC is about the Magistrate's power to issue bail in cases of non-bailable offence. Which power doesn't extend to releasing the accused, if the offence involved is punishable with death or imprisonment for life. However, the Magistrate may free the accused on bail, even in such cases, provided, at any stage of the investigation inquiry or trial, he feels no reasonable grounds exist to believe that the person accused committed a non-bailable offence. Ref: Section 437(2). In the context, Prahalad /vs/ NCT, 2001 (Cri LJ) 1730 (SC) is relevant. In para (11), pages (1733) & (1734) the Supreme Court declares the law:

“We would reiterate that in cases where the offence is punishable with death or imprisonment for life which is triable

exclusively by a court of Sessions, the Magistrate may, in his wisdom, refrain to exercise the powers of granting the bail and refer the accused to approach the higher courts **unless he is fully satisfied that there is no reasonable ground for believing that the accused has been guilty of an offence punishable with death or imprisonment for life”**.

(Emphasis Supplied)

Thus, Section 437CrPC is also the sphere of magisterial powers to grant or refuse bail.

(3) Section 438 CrPC relates to the High Court's and the Sessions Court's power to grant anticipatory bail. That's bail preceding to or in anticipation of arrest; and it becomes effective from the moment of arrest. Pending the application for anticipatory bail, the court may issue an interim order of bail as dealt with in Section 438(1) substituted by Act 25/2005. Final orders shall be passed after notice to the Public Prosecutor and the superintendent of police and on hearing them. If the court rejects the accused's plea for interim bail or his application for anticipatory bail, the police are free to arrest him without warrant. In *Siddharam /vs/ State*, (2011) 1 SCC 694, the Supreme Court has cleared the law as to anticipatory bail of all confusion holding certain of its previous rulings, limiting the period of such bail as well as forcing the accused to seek regular bail at the expiry of the period, as per incurium.

(4) Section 439 CrPC is on the High Court's and the Sessions Court's power to release the accused on bail in custody. Evident as it is that Sections 436, 437 and 439 are repository of powers of the court to release the accused in custody on bail. That's post-arrest. As seen above, the newly substituted Section 438 expressly provides for interim bail pending disposal of the plea for anticipatory

- bail. It's a welcome provision as the accused faces the threat of arrest before his application for the bail is decided. Also, it's consistent with the concept of fundamental right to life and liberty under Article 21 of the Constitution of India. Interim bail may be granted when the court is satisfied that the object of the accusation against accused is to injure his reputation and humiliate him. It's an effective check against unscrupulous exercise of the arrest power by the police.
- (5) An important situation lies post-arrest. That's the time gap between the police taking the accused into custody, producing him before the Magistrate and the Magistrate granting remand. May be for a simple non-bailable offence or for an offence punishable with death or imprisonment for life. A specific example: the police officer adds the charge of attempt to murder punishable u/s 307 IPC to a simple case of voluntarily causing hurt u/s 323 or 324 IPC. In such a case, the Magistrate may be reluctant to look into the records and apply Section 437(2) for the reason the offence is triable exclusively by a Court of Session. Leaving alone Section 307 IPC, if the police adds 506(2) IPC (Criminal intimidation), usually the Magistrate remands the accused to custody, posting his application for bail for consideration to a later date to hear the prosecution. In the situation, the accused is forced to remain in detention/judicial custody. It's a grey area in the sense that generally courts keep off their hands when the investigation is at the threshold. The object is to ensure independent / impartial process of investigation. Taking advantage of this, the police whimsically add penal provisions joining hands with vengeful complainants / private parties to humiliate the accused by sending him to jail. Instances in this regard are quite common.
- (6) No express provision for interim bail in Sections 437 or 439 CrPC. Of course Section 437(2) hints at such a power, but not in explicit terms. Even to exercise the power thereunder, the Magistrate may order notice to the prosecution in

which case the accused under arrest can't avoid detention in jail. Thus, the interim bail regime becomes relevant even in post-arrest matters, leaving alone the interim bail provision in Section 438 CrPC. Life bereft of liberty is without honour and dignity. It loses all significance. And the life itself will not be worth living. That's the reason why liberty is held the very quintessence of a civilized existence. Without the right to life with liberty, no other right can be enjoyed. Ref: Siddaram's case (Supra). In Sukhwant Singh /vs/ State, (2009) 7 SCC 559: 2009 (3) SCC (Cri) 487, the Supreme Court filled the gap in Sections 437 and 439 holding that in the power to grant bail is inherent the power to order interim bail, Which means the court hearing a plea for regular bail has inherent power to order interim bail, pending final disposal of the bail application. For this, the Supreme Court relied on one of its earlier rulings. That's Lal Kamendra /vs/ State, (2009) 4 SCC 437 : (2009) 2 SCC (Cri) 330.

(7) Here's a quote from Para (2) and (3) of Sukwant's case referred to just above.

“...following the decision of this Court in Kamendra Pratap Singh /vs/ State of U.P.¹ we reiterate that a court hearing a regular bail application has got inherent power to grant interim bail pending final disposal of the bail application. In our opinion, this is the proper view in view of Article 21 of the Constitution of India which protects the life and liberty of every person..... ..
When a person applies for regular bail then the court concerned ordinarily lists that application after a few days so that it can look into the case diary which has to be obtained

(1) (2009) 4 SCC 437 : (2009) 2 SCC (Cri) 330

from the police authorities and in the meantime the applicant has to go to jail. Even if the applicant is released on bail thereafter, his reputation may be tarnished irreparably in society. The reputation of a person is his valuable asset, and is a facet of his right under Article 21 of the Constitution vide *Deepak Bajaj /vs/ State of Maharashtra*.² Hence, we are of the opinion that in the power to grant bail there is inherent power in the court concerned to grant interim bail to a person pending final disposal of the bail application.”

- (8) Section 167 CrPC mandates the investigating officer to transmit the accused under arrest to the nearest Judicial Magistrate, if two conditions are satisfied. One, he can't complete the investigation within 24 hours. Two, “there are grounds for believing that the accusation or information is well-founded”. With the accused, he has to submit a copy of the entries in his diary to the Magistrate. Needless to pinpoint that before issuing an order of remand to custody, the Magistrate is not to be swayed by the penal provisions under which the investigating officer booked the accused. The Magistrate must look into the records and satisfy himself, *prima facie*, with the nature of the accusation. The Magistrate is repository of the rights of the citizens. The vital power to remand an accused citizen to custody is entrusted to him, not even to a judge of the Supreme Court or High Court. If the power is exercised disregarding the mandate of law, the right to life and liberty will be in danger of extinction. And in the process, the Magistrate who's the protector of the rights of the citizens will become the predator of the rights.

(2) (2008) 16 SCC 14 : JT (2008) 11 SC 609

(9) Overall, wherever it's expedient, the Magistrate/court shouldn't hesitate to exercise the power to issue interim bail. Such exercise of the power will effectively deter abuse of the process of criminal law for objects extraneous to its cause.
