



Anticipatory Bail – A Tool against Nefarious intention in 498A

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In legal jargon Bail means to procure the release of a person from legal custody, by undertaking that he/she shall appear at the time and place designated and submit him/herself to the jurisdiction and judgment of the court by the deposit of security to ensure his submission at the required time to legal authority. The monetary value of the security is also known as the bail or more accurately the bail bond. This value is set by the court having jurisdiction over the prisoner. The security may be cash, the papers giving title to property, or the bond of private persons of means or of a professional bondsman or bonding company. The security is forfeited the person released on bail fails to surrender himself at the appointed time. The law lexicon defines the bail as the security for the appearance of the accused person on which he is released pending trial or investigation. Courts have greater discretion to grant or deny bail in the case of persons under criminal arrest, e.g., it is usually refused when the accused is charged with homicide.

The offences committed by an accused fall under either of the two categories i.e. Bailable Offence or Non- Bailable Offence, which are defined as:

Bailable Offences-- Bailable offences are offences mentioned in the Ist schedule of the Indian Penal Code as bailable offences. When any person accused for available offence is arrested or detained without warrant by police officer or is brought before a Court, he must be released on bail, if a request for bail is made. In case of a bailable offence, **bail is a matter of right** .If such officer or Court thinks it fit, such person maybe released on a personal bond without sureties. If for any reason, the police don't give bail, the arrested person must be produced before a Magistrate within 24 hours of arrest.

Non-Bailable Offences -- In case a person is accused of a non-bailable offence it is a matter of discretion of the court to grant or refuse bail and application has to be made in court to grant bail.A person will not be released if there are reasonable grounds for believing that he has been guilty of an offence punishable with death or imprisonment for life; or 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. However a person under the age of sixteen years or a woman or a sick or infirm person may be released on bail. If, at any time after the trial of a person accused of a non-bailable offence and before judgment is delivered, the Court feels that the accused is not guilty of any such offence; it shall release the accused on bail.

Purpose of arresting a person is to secure the presence of the accused at the time of enquiry, trial or other proceedings. However, consequences of pre-trial confinement are grave; therefore, the provision of Bail is provided. Objective is to release on bail maximum number of accused persons without seriously endangering the objective of arrest and trial since there is presumption of innocence of an accused till he is found guilty.

It is considered improper to release a person on bail who- absconds or jumps bail or is likely to destroy evidence or tempers with prosecution witness or is likely to commit more offences.

However it is mandatory to release on bail in the following circumstances:-

1. Arrestee not accused of non-bailable offence and ready to execute / furnish bond and where the bail is not excessive and in illegal detention (contravention of Section 436) (Officer will be guilty of wrongful confinement under section 342 of IPC)
2. Investigation not complete within time prescribed - Maximum detention is 90 days - when punishment from the crime is more than 10 years and 60 days - all other cases so that investigation must be completed expeditiously and within reasonable time.
3. No reasonable ground exists for believing the accused guilty of non-bailable offence
4. Trial before Magistrate not concluded within 60 days
5. No reasonable ground exists for believing the accused guilty after conclusion of trial but before judgment.

Discretion in granting bail in cases of non-bailable offences.

The court is vested with discretionary power to grant bail in cases of non-bailable offences after taking followings into consideration:-

"May" clearly indicates discretion, allowance of bail is the rule and refusal of it is an exception, circumstances for granting bail, severity of punishment, evidence in support, danger of witness being tempered, likelihood of accused fleeing from justice, access to his counsel, health-age and sex of the accused, accused required for identification parade not a ground for refusing bail, conditions for bail, comply with conditions of bail bond (chapter 33), ensuring the accused shall not commit similar offence, in the interest of justice. No bail in case of offence punishable with death or imprisonment for life except- Person under 16 years, Woman, Sick or infirm person. Condition can be imposed in granting bail where Imprisonment is more than seven years, offences of Chapter 16 of IPC (Offences affecting human body), Chapter 17 of IPC (Offences against property), Chapter 6 of IPC (Offences against State) or Abetment, Conspiracy and attempt of abovementioned offences.

Granting of Bail with Conditions.

Section 437 of the Code provides for release on bail in cases of non-bailable offenses. In such cases, bail is not a matter of right. Court has sufficient discretion to deny or to grant bail. First Schedule to the Code provides the list of bailable and non-bailable offenses.

Further cases often arise under S. 437, where though the court regards the case as fit for the grant of bail, it regards imposition of certain conditions as necessary in the circumstances. To meet this need sub-section (3) of S. 437 provides: “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 abatement 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: -In order to ensure that such person shall attend in accordance with the conditions of the bond executed under this Chapter, or 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 otherwise in the interests of Justice. However, it is important to mention here that the power to impose conditions has been given to the court and not to any police officer and the power to impose conditions can only be exercised -

- i) Where the offence is punishable with the imprisonment which may extend to seven years or more or
- ii) Where the offence is one under Chapter VI (Offences against the State), Chapter XVI (offences against the human body), or Chapter XVII (offences against the property) of I.P.C, or
- iii) Where the offence is one of the abetment of or conspiracy to or attempt to commit any such offence as mentioned above in (i) and (ii).

The High Court and the Court of Sessions has power to impose conditions and/or Conditions may be set aside or modified. Before granting bail, in cases of offences triable exclusively by Sessions Court the Court must give notice to the Public Prosecutor. The powers of High Court in granting bail are very wide.

Anticipatory Bail (Section 438 Cr.P.C.).

Section 438 provides for discretion to release a person on bail issued even before the person is arrested and this is called Anticipatory Bail. It may be mentioned that Section 438 applies to both bailable and non-bailable offences and it is not necessary that FIR or police complaint has been registered before granting Anticipatory Bail. This is an extraordinary power - exercised sparingly and in exceptional cases. However, the power not unguided or uncanalised - all limitations of Section 437 to apply. In case where incriminating material is found (under section 27 Evidence Act) the anticipatory bail must not be granted. Anticipatory Bail is also not granted in case of economic offence and dowry death cases. It may further be pointed out that Prosecution must be given notice - opportunity to oppose application and no order for granting anticipatory bail after person is arrested. Bail can be cancelled where accused obstructs the smooth progress of a fair trial or Jumps bail or Absconds or Runs away to foreign country, Conditions of the bail regarding time/ place of attendance and Discretionary & review of decision already made.

Provisions of 438 discussed from the perusal of the provisions of sub-section (2) of section 438, it is evident that when the High Court or the Court of Session makes a direction under sub- section (1) to release an accused alleged to have committed non-bailable offence, the Court may include such conditions in such direction in the light of the facts of the particular case, as it may think fit, including (i) a condition that a person shall make himself available for interrogation by 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 and (iv) such other conditions as may be imposed under sub-section (3) of section 437, as if the bail were granted under that section. Sub-section (3) of Section 437, inter alia, provides that 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 subsection (1), the Court shall impose the following conditions) 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, 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.

It is well settled that while exercising discretion to release an accused under Section 438 of the Code neither the High Court nor the Session Court would be justified in imposing freakish conditions. There is no manner of doubt that the Court having regard to the facts and circumstances of the case can impose necessary, just and efficacious conditions while enlarging an accused on bail under Section 438 of the Code. However, the accused cannot be subjected to any irrelevant condition at all. The conditions which can be imposed by the Court while granting anticipatory bail are enumerated in subsection (2) of Section 438 and sub-section (3) of Section 437 of the Code. Normally, conditions can be (i) to secure the presence of the accused before the investigating officer or before the Court, (ii) to prevent him from fleeing the course of justice, (iii) to prevent him from tampering with the evidence or to prevent him from inducing or intimidating the witnesses so as to dissuade them from disclosing the facts before the police or Court or (iv) restricting the movements of the accused in a particular area or locality or to maintain law and order etc. To subject an accused to any other condition would be beyond jurisdiction of the power conferred on Court under section 438 of the Code. While imposing conditions on an accused who approaches the Court under section 438 of the Code, the Court should be extremely chary in imposing conditions and should not transgress its jurisdiction or power by imposing the conditions which are not called for at all. There is no manner of doubt that the conditions to be imposed under section 438 of the Code cannot be harsh, onerous or excessive so as to frustrate the very object of grant of anticipatory bail under section 438 of the Code. In the instant case, the question before the Court was whether having regard to the averments made by Ms. Renuka in her complaint, the appellant and his parents were entitled to bail under section 438 of the Code. When the High Court had found that a case for grant of bail under section 438 was made out, it was not open to the Court to direct the appellant to pay Rs. 3,00,000/- for past maintenance and a sum of Rs.12,500/- per month as future maintenance to his wife and child. In a proceeding under section 438 of the Code, the Court would not be justified in awarding maintenance to the wife and child. The case of the appellant is that his wife Renuka is employed and receiving a handsome salary and therefore is not entitled to maintenance. Normally, the question of grant of maintenance should be left to be decided by the competent Court in an appropriate proceedings where the parties can adduce evidence in support of their respective case, after which liability of husband to pay maintenance could be determined and appropriate order would be passed directing the husband to pay amount of maintenance to his

wife. The record of the instant case indicates that the wife of the appellant has already approached appropriate Court for grant of maintenance and therefore the High Court should have refrained from granting maintenance to the wife and child of the appellant while exercising powers under section 438 of the Code. The condition imposed by the High court directing the appellant to pay a sum of Rs.12,500/- per month as maintenance to his wife and child is onerous, unwarranted and is liable to be set aside.

Conditional Anticipatory Bail in 498A

Enough laws exist in India to protect women from domestic, matrimonial and sexual violence. They, according to women activists, are good only in paper. On one hand the women continue to suffer under violence with no much hope for the victims to have easy access to justice despite having those laws on our statute book. On the other, some of these provisions are largely being misused by educated and powerful sections of disgruntled women as a sharp weapon, rather than a shield, to harass their innocent husbands and their relatives. Even bed-ridden relatives and those living abroad were put under arrest and detention in a quite number of cases. The Section 498A of Indian Penal Code (IPC) is one such provision, now under limelight for unleashing what is called legal terrorism.

The Section 498A, when inserted into the Code on 25 December 1983, had a laudable purpose to serve - to prevent the husband of a woman or his relatives subjecting the women to *cruelty* on the matter of dowry. Cruelty under this provision means far more than mere harassment, but it includes every kind of willful conduct causing grave mental / physical injury to her health / life, or putting her to harassment for unlawful demand for money / property or driving her to commit suicide. The provision is intended to check outrageous demands by greedy husbands and their relatives driving women to any kind of cruelty.

Precedents In Today's Scenario

Somehow the provision, which has not been serving much useful purpose as per the version of activists, is now in the headlines because of its sheer misuse by a section of over-smart women. They raise exaggerated account of allegations of cruelty with no much substantive evidence, as an easy short cut to bring them to forced settlement of some other family disputes. Therefore considering the continuing harassment of innocent husbands and their family members over the years, the Supreme Court (SC) in *Rajesh Sharma V State of Allahabad* case delivered on 29th July 2017 comes out openly against the misuse of the provision and harassment of such innocent ones based on false complaints. The court issued a slew of provisional directions to deal with the misuse.

The court directed that immediate arrest of the person accused of charge under the section 498A should not be made in a blind manner. It proposes to set up Family Welfare Committees (FWCs) by the District Legal Services Authority (DLSA) consisting of 3 members. The Committee has to look into every complaint under this section and submit a report to the magistrate/ police as the case may be, to aid them in taking a decision on whether to arrest the accused or not. The court incorporated the above said non-governmental committee into the scene as a means to preventing the gross misuse of the provision. Arrest will have to be made only after considering the report by the police or magistrate. If any foul play by husband/relatives is clearly visible in the report, the police will have to arrest the accused without any delay.

The probe into the complaint under this provision is to be done only by a specifically designated investigating officer of the area. The apex court, in addition, proposes for speedy disposal of bail plea in such cases with one days' notice to the public prosecutor / complainant and directs the court below to carefully weigh the facts of the case while disposing it. The SC decries the practice of impounding of passports or issuing Red Corner Notice to those living abroad and bringing all family members to the court in complaints under the section, except in cases involving tangible physical injuries.

Earlier in *Sushil Kumar Sharma v. Union of India* case in 2005, the SC observed that complaints under section 498A were being filed on personal vendetta and a new legal terrorism can be unleashed by misusing the provision. The court also suggested that the legislature should explore how the frivolous complainants can be dealt with. The court in its verdict warned that if cry of "wolf" is made too often as a prank, assistance and protection may not be available when the actual "wolf" appears.

Similarly in 2013 in *Lalita Kumari* case, the SC directed that a preliminary enquiry must be conducted so as to ascertain whether the First Information Statement reached at the police station reveals a cognizable case in matrimonial or family disputes, before filing an FIR. This must be done within a period not exceeding seven days.

Again on 2nd July 2014 in *Arnesh Kumar V State of Bihar & another* case, the SC had issued a checklist for the police to consult before making any arrest under Section 498A. The court, in addition, asked the law ministry to consider amending the law. The verdict instructed all the State Governments not to make immediate arrest when a case under section 498A comes up and arrests must be made only when there is overt and covert action of violence amounting to 'cruelty' as defined under the section.

In the present Rajesh Sharma case, the Court acknowledges the judicial recognition of the misuse of the 498A cases in a slew of verdicts issued earlier and highlights the need to prevent such misuse. The court provides some statistics too in support of its reasoning. It states that in 2012 nearly two lakh people were arrested on account of 498A and a quarter of them were women. The percentage of charge sheet filing for 2012 was 93.6 whereas the conviction was at a low rate of 14.4 percent.

The order reaffirms that arrests were made as part of frivolous complaints and reminds that arrest and judicial remand are not the answers to matrimonial disputes. Since the judiciary has the duty to punish the guilty and protect the innocents, arrest of the innocent husband and his family members cannot be justified if the case is a false one.

Even though the Section 498A gets attracted only when the wife is subjected to grave injury or a situation dangerous to her life, the police and courts do pay little attention to this fact. Many of the complaints filed under their section have been done on the spur of a moment without paying much attention to the later consequences. An uncalled for arrest and an insensitive investigation may perpetually spoil any chance for settlement of the family dispute and may end up in destruction of the matrimonial relation.

In the verdict, the court says it is not the duty of the court to legislate but the court does just the opposite. It sets up the FWC, which in normal case be not well equipped to validate the scope of the word 'cruelty' under the section 498A, as an intermediate layer between the

victim and criminal justice system, to make a report to validate the ingredients of the complaint. The court however suggests that the women's cell of the police should have a well-balanced and well equipped team of officers with the abilities of persuasion, patience and forbearance.

The new verdict has brought nothing substantial compared to the earlier ones it refers to. The key difference it offers is in the procedural part. The role of women's Cell is replaced with FWCs in recommending arrest after due consideration of the facts obtained from the parties of the complaint to be called upon to give details. The possibility of husband harass a women with cruelty and narrates before the committee a vivid believable story resembling a fairly tale that the women filed a false complaint misusing the law still exists. There is possibility for the other way round also. The FWC consisting of para-legal volunteer, retired persons or activists need not be better placed in sifting the truth from the two narratives. No doubt, no husband will *suomoto* accept a dowry harassment charge however true it is.

Conclusion

It is indisputable that an unnecessarily prolonged detention in prison of under trials before being brought to trial is an affront to all civilized norms of human liberty and any meaningful concept of individual liberty which forms the bedrock of a civilized legal system must view with distress patently long periods of imprisonment before persons awaiting trial can receive the attention of the administration of justice. Thus the law of bails must continue to allow for sufficient discretion, in all cases, to prevent a miscarriage of justice and to give way to the humanization of criminal justice system and to sensitize the same to the needs of those who must otherwise be condemned to languish in prisons for no more fault other than their inability to pay for legal counsel to advise them on bail matters or to furnish the bail amount itself.

While concluding, it seems it would be far better if we could do something to sensitise and train the police and judiciary on how to deal with false cases rather than incorporating new committees with possibly ill-equipped non-governmental members in the delicate issue of putting the accused under arrest. Setting up of the FWC cannot be fair substitute for faultless women friendly police investigation which should be evolved in due course by perpetually sensitizing and training the officers. If we cannot make qualitative changes in the police functioning and scrap its unethical and unlawful actions, we are unfit for a regime of rule of law. Improving our policing is the *sine qua non* for preventing *malafide* arrests and reducing crimes in our society.

References

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