

# Anticipatory bail

---

Under Indian criminal law, there is a provision for anticipatory bail under Section 438(1) of the Criminal Procedure Code. Law Commission of India in its 41st report recommended to incorporate this provision in procedure code.<sup>[1]</sup> This provision allows a person to seek bail in anticipation of an arrest on accusation of having committed a non-bailable offence. <sup>[2]</sup>

On filing anticipatory bail, the opposing party is notified about the bail application and the opposition can then contest the bail application in court (public prosecutor can also be used to do this).

Anticipatory bail is a direction to release a person on bail, issued even before the person is arrested. It is only issued by the Sessions Court and High Court.

## Eligibility

---

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(1) of the code of Criminal Procedure for grant of bail in the event of his arrest for a cognizable or non-cognizable offence, 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.

## Conditions

---

The High Court or the court of session may include such conditions in the light of the facts of the particular case, as it may think fit, including:<sup>[3]</sup>

- a condition that the person shall make himself available for interrogation by the police officer as and when required;
- 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;
- a condition that the person shall not leave India without the previous permission of the court.

If such person is thereafter arrested, and is prepared either at the time of arrest or at any time while in the custody of such officer to give bail, he shall be released on bail and the magistrate taking cognizance of such offence decides that warrant should be issued against that person, he shall issue a bailable warrant in conformity with the direction of the court granting anticipatory bail.<sup>[2]</sup> Supreme Court while dealing the case of Sidhram Mhetre, held certain conditions imposed by High Court to be not required & contrary to provisions of anticipatory bail.<sup>[4]</sup>

## Qualification

---

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.<sup>[2]</sup>

## Cancellation

---

An accused is free on bail as long as the same is not cancelled. The High Court or Court of Session may direct that any person who has been released on bail be arrested and commit him to custody on an application moved by the complainant or the prosecution.

Bail is a set of pre-trial restrictions that are imposed on a suspect to ensure that they will not hamper the judicial process. Bail is the conditional release of a defendant with the promise to appear in court when required.<sup>[1]</sup>

In some countries, especially the United States, bail usually implies a bail bond, a deposit of money or some form of property to the court by the suspect in return for the release from pre-trial detention. If the suspect does not return to court, the bail is forfeited and the suspect may possibly be brought up on charges of the crime of failure to appear. If the suspect returns to make all their required appearances, bail is returned after the trial is concluded.

In other countries, such as the United Kingdom, bail is more likely to consist of a set of restrictions that the suspect will have to abide by for a set period of time. Under this usage, bail can be given both before and after charge.

For minor crimes, a defendant may be summoned to court without the need for bail. For serious crimes, or for suspects who are deemed likely to fail to turn up in court, they may be remanded (detained) while awaiting trial. A suspect is given bail in cases where remand is not justified but there is a need to provide an incentive for the suspect to appear in court. Bail amounts may vary depending on the type and severity of crime the suspect is accused of; practices for determining bail amounts vary.

## India

Indian law stresses the principles of presumption of innocence. The principle embodies freedom from arbitrary detention and serves as a bulwark against punishment before conviction. More importantly, it prevents the State from successfully employing its vast resources to cause greater damage to an un-convicted accused than he/she can inflict on society. While considering bail applications of the accused, courts are required to balance considerations of personal liberty with public interest. Accordingly, the granting of bail should be the rule rather than the exception.<sup>[23]</sup> The Supreme Court has laid down in its judgements, "Personal liberty, deprived when bail is refused, is too precious a value of our constitutional system recognized under Article 21 that the crucial power to negate it is a great trust exercisable, not casually but judicially, with lively concern for the cost to the individual and community. To glamorize impressionistic orders as discretionary may, on occasions, make a litigation gamble decisive of a fundamental right. After all, the personal liberty of an accused or convict is fundamental, suffering lawful eclipse only in terms of procedure established by law." The courts have also held that foreign nationals cannot be deprived of the right to seek bail. The Delhi High Court observed, "Law does not permit any differentiation between Indian Nationals and Foreign citizens in the matter of granting bail. What is permissible is that, considering the facts and circumstances of each case, the court can impose different conditions which are necessary to ensure that the accused will be available for facing the trial. It cannot be said that an accused will not be granted bail because he is a foreign national."<sup>[24]</sup>

The *Code of Criminal Procedure, 1973* does not define bail, although the terms bailable offence and non-bailable offence have been defined in section 2(a) of the Code. A Bailable offence is defined as an offence which is shown as bailable in the First Schedule of the Code or which is made bailable by any other law, and non-bailable offence means any other offence. A person who is arrested for a 'bailable' offence may secure bail at the police station, while those who fail to secure police bail and those arrested for non-bailable offences have to secure bail in court.<sup>[1]</sup>

Sections 436 to 450 set out the provisions for the grant of bail and bonds in criminal cases. The amount of security that is to be paid by the accused to secure his release has not been mentioned in the Code. Thus, it is left to the discretion of the court to put a monetary cap on the bond. The Supreme Court of India has delivered several cases wherein it has reiterated that the basic rule is – bail and not jail. One such instance came in *State Of Rajasthan, Jaipur v. Balchand @ Bailey* which the Supreme Court decided on 20 September 1977, and held that the basic rule is bail, not jail, except where there are circumstances suggestive of fleeing from justice or thwarting the course of justice or creating other troubles in the shape of repeating offences or intimidating witnesses and the like by the petitioner who seeks enlargement on bail from the court. The bench of Krishnaiyer, V.R. had observed that when considering the question of bail, the gravity of the offence involved and the heinousness of the crime which are likely to induce the petitioner to avoid the course of justice must weigh with the court. Taking into consideration the facts of the case the apex court held that the circumstances and the social milieu do not militate against the petitioner being granted bail.<sup>[25]</sup>

When a person accused of a crime is arrested, his statement is recorded and information such as the name, residence address, birthplace, charges filed are noted. The police officer may also check back the criminal record if any in the police station and ask for fingerprints to file a case against the accused. Under the Code of Criminal Procedure 1973 (First Schedule), offences have been classified as "bailable" and "non-bailable" offences. In the case of bailable offences, if the accused produces proper surety, and fulfils other conditions, it is binding upon the Investigating officer to grant bail. However, in case of a non-bailable offence, the police cannot grant bail; it can only be granted by a Judicial Magistrate/Judge. The Investigating Officer must produce the accused before the Judicial Magistrate/Judge concerned within 24 hours of his arrest. At that time, the accused has a right to apply for bail. Depending upon the facts of the case, the judge decides whether bail should be granted. If bail is granted the accused must deposit money with the court. Generally, for lesser crimes, a standard amount is asked to be deposited for awarding the bail.

There are some conditions put under section 437 of the Cr.P.C. wherein bail can be requested even for a non-bailable offence. In non-bailable cases, bail is not the right of the accused, but the discretion of the judge if regards the case as fit for the grant of bail, it regards imposition of certain conditions as necessary in the circumstances. Section 437(3) elaborates the conditions set by the law to get bail in non-bailable offences. The sub-section says that when a person accused or suspected of the commission of an offense punishable with imprisonment which may extend to seven years or more or of an offense 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 offense, is released on bail under sub-section (1). However, for that, the Court has the power to impose any condition which it considers necessary. Some conditions that the court may place while granting bail are to ensure that such person shall attend in accordance with the conditions of the bond executed under this Chapter, or to ensure that such person shall not commit an offence similar to the offence of which they are accused or of the commission of which they are suspected, or otherwise in the interests of justice.<sup>[26]</sup>