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SOHONI'S CODE OF CRIMINAL PROCEDURE

21ST EDITION

Justice M L Singhal
Former Judge, Allahabad & Gauhati High Courts

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as to dissuade him from disclosing such facts to the Court or to any police officer or tamper with the evidence, and may also impose, in the interests of justice, such other conditions as it considers necessary."

This clause seeks to amend s. 437 to provide that if a person commits a cognizable and non-bailable offence, and he has previously been convicted on two or more occasions of a cognizable offence punishable with imprisonment for 3 years or more but not less than 7 years, he shall not be released except in the circumstances specified in the provision.

It is further provided that if an accused appears before the Court while in judicial custody and prays for bail, or a prayer for bail is made on his behalf, the Court shall grant bail only after giving an opportunity of hearing to the prosecution, if the offence alleged to have been committed by the accused is punishable with death, imprisonment for life or imprisonment for not less than 7 years.

Under sub-s. (3) of s. 437 of the Code, the Court has got the discretion to impose certain conditions for the grant of bail. Under s. 441(2), where any condition is imposed for the release of a person on bail, the bond shall contain that condition also. In order to make the provision stringent and to see that the person on bail does not interfere or intimidate witness, sub-s. (3) is being amended to specify certain conditions, which are mandatory. (*Notes on Clauses, Clause 37*)

This amendment in the section has come into force w.e.f. 23-6-2006 vide Notification No. S.O. 923(E), dt. 21-6-2006.

3. Corresponding old law. This section corresponds to and reproduces almost word for word s. 497 of the 1898 Code with some changes and additions.

Sub-section (1) and the first Proviso reproduces sub-s. (1) and its Proviso of the old s. 497 without any change.

The second Proviso to sub-s. (1) is new.

Sub-section (2) reproduces sub-s. (2) of the old section without any change.

Sub-section (3) is new.

Sub-section (4) reproduces sub-s. (3) of the old section.

Sub-section (5) of the present section reproduces sub-s. (5) of the old section word for word without any change.

Sub-sections (6) and (7) of the present section reproduce word for word sub-ss. (3-A) and (4) of the old section.

4. Select Committee Report. In providing the third Proviso to sub-s. (1), the Joint Select Committee observed:

"It was brought to the notice of the Committee that sometimes bail is being refused by courts on the sole ground that the accused may be required by the Investigating Officer for an identification parade which may or may not be imminent. In the Committee's opinion this should not be permitted if otherwise the accused person is entitled to be released on bail. An additional proviso has therefore been incorporated in sub-clause (1)."

5. Scope and applicability. Bail is a matter of right if the offence is bailable. In the case of a non-bailable offence, bail is a matter of judicial discretion. Bail shall not be granted by the Magistrate if the offence is punishable with death or imprisonment for

life if he is of the view that there appear reasonable grounds for believing that the person concerned accused or suspected of the commission of the offence has been guilty of the offence, provided that he may, in his discretion, grant bail to a woman or a minor under the age of sixteen years or a sick or infirm person. In a case involving a non-bailable offence, a Court may impose reasonable conditions besides fixing the bail amount for the attendance of the accused.²² Bail under s. 437 is after arrest; bail under s. 438 is in anticipation of arrest and becomes effective from the moment of arrest.²³ Bail is basically release from restraint, more particularly the custody of Police. The distinction between an ordinary order of bail and an order of anticipatory bail under s. 438 of the Code is that whereas the former is granted after arrest, and therefore means release from custody of the Police, the latter is granted in anticipation of arrest and is therefore effective at the very moment of arrest.²⁴ The power of the Magistrate under this section cannot be treated at par with the powers of the Sessions Court and the High Court under s. 439.²⁵ Right of bail ceases to be statutory, once charge-sheet is filed within ninety days from the date of arrest.²⁶

Power under s. 439(1) is not subject to the conditions or limitations contained in s. 437.²⁷

This section deals with the question of granting bail in non-bailable cases. It provides for the granting of bail not only to person accused of a non-bailable offence but also to a person suspected of the commission of such an offence. It has no application to persons tried and convicted of a non-bailable offence.²⁸ Under this section the power to release on bail may be exercised by an officer-in-charge of a police station if the accused was arrested or detained without warrant, evidently before the case is sent up to the Court after investigation. The power to release on bail may be exercised by the Court when the accused appears or is brought before it whether during investigation or otherwise.²⁹

Principal object of bail is to secure the attendance of the accused at the trial and ensure that he does not flee from justice. At the same time, an accused must not be deprived of his personal liberty and held in custody during trial in anticipation of his conviction unless the interest of the society demand otherwise or there is material to show that he will use his liberty to subvert justice or tamper with the evidence.³⁰

The provisions of Code do not contemplate either granting of a bail on the basis of an assurance of a compromise or cancellation of a bail for violation of the terms of such compromise. Having granted the bail under the said provision of law, it is not open to the Trial Court or the High Court to cancel the same on a ground alien to the grounds mentioned for cancellation of bail in the said provision of law.³¹

22. *State of Orissa v. Mr. Abdul Karim*, (1984) 57 Cut LT 281 at 285 : 1984 Cr LJ 905 (Ori) : (1984) 1 Crimes 833.

23. *Mohan Behera v. State*, (1985) 59 CLT 110.

24. *D.K. Ganesh Babu v. P.T. Manokaran*, 2007 Cr LJ 1827 (1828) (SC) : AIR 2007 SC 1450 : (2007) 4 SCC 434.

25. *Chandra Prakash v. Mohan Lal*, 1984 (2) Crimes 325 (All).

26. *Chandu Mondal v. State of West Bengal*, 2010 Cr LJ 3066 (3073) (Cal) : (2009) 4 Cal LT 597 (HC).

27. *Badri Prasad Puran Badhai v. Bala Prasad*, 1985 MPLJ 258.

28. *Lata Jairam Das v. Emperor*, AIR 1945 PC 94 at 97.

29. *Ahmad v. Crown*, AIR 1950 Lah 195 at 197.

30. *Kewal Krishna Sood v. Central Bureau of Investigation*, 2013 (205) DLT 284 : 2014 (1) AD (Delhi) 500 : 2014 (1) JCC 326 (Delhi).

31. *Biman Chatterjee v. Sanchita Chatterjee*, AIR 2004 SC 1699 : (2004) 3 SCC 388 : 2004 Cr LJ 1451 (1453) (SC).