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**WORKSHOP PAPER**

for the Workshop of Judicial Officers of Ahmednagar District  
Workshop Dated 18/01/2015

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**WORK SHOP SUBJECT [B GROUP]**

A) **Law Relating to Bail**

B) **Probation of Offenders Act, Sect.360  
and 361 of Cr.P.Code.**

**(A) LAW RELATING TO BAIL**

The right to liberty is one of the fundamental rights guaranteed by our Constitution. Article 21 which reads as follows :

**"No person shall be deprived of his life or personal liberty except according to the procedure established by Law".** The object of the Article is to prevent the executive from encroaching upon the personal liberty of a person except otherwise, in accordance with Law. The right to life includes the right to give importance to human dignity and decency even in rescue homes and prisons. The provisions in respect of Bail are in connection with above provisions of Article 21.

**MEANING** : The term Bail is not defined in the Code of Criminal Procedure. The term signifies judicial release from custody i.e prevention of unnecessary deprivation of personal liberty. It signifies a

security for appearance of a prisoner for his release. **The Black's Law Dictionary 7th Edn.P.135** defines "**Bail**" as a security, such as cash or a bond, especially security required by the court for the release of a prisoner who must appear at a further time.

**PROVISIONS UNDER THE CODE OF CRIMINAL**

**PROCEDURE** : Chapter XXXIII of the Code of Criminal Procedure is captioned as "**Provision as to bail and bonds**" the provisions of sections 436 to 439 deal with provisions relating to release of a person on bail. The power to grant bail given by section 436 and 437 of Cr.P.C vests in the court before whom an accused appear or is brought. The provisions as regards bail can be broadly classed into two categories :

- (1) Bailable cases (2) Non bailable cases.

In bailable cases accused can pray for Bail as of right under Section 436 of the Cr.P.C.

**Provision of Section 436 of Cr.P.Code is as follows :**

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 and

shall, if such person is indigent and is unable to furnish surety, instead of taking bail) from such person, discharge him on his executing a bond without sureties for his appearance as hereinafter provided.

(Explanation- Where a person is unable to give bail within a week of the date of his arrest, it shall be a sufficient ground for the officer of the Court to presume that he is an indigent person for the purpose of proviso)

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 subsequent occasion in the same case he appears before the court or is brought in custody of any such refusal shall be without prejudice to the powers, of the court to call upon any person bound by such bond to pay the penalty thereof under Section 446.

**Section 436-A Maximum period for such an under trial prisoner can be detained :** Where a person has during the period of investigation, inquiry or trial under this Code of an offence under any law (not being an offence) for which the punishment of death has been specified as one of the punishments under that law) undergone detention for a period of extending upto one half of the maximum period of imprisonment

specified for that offence under that law, he shall be released by the Court on his personal bond with or without sureties:

Provided that, the court may after hearing the public prosecutor and for reasons to be recorded by it, in writing order the continued detention of such person for a period longer than one half of the said period or release him on bail instead of the personal bond with or without sureties:

Provided further that no such person shall in any case be detained during the period of investigation, inquiry or trial for more than the maximum period of imprisonment provided for the said offence under that law.

In Bailable cases accused can pray for bail as of right. It may be given either by police officer in charge of police station having custody of accused or by the court. In case of bailable offence there is no question of discretion in granting bail" Section 436 of Cr.P.Code provides for releasing person accused of bailable offences on bail. Such person is entitled for bail as of right and it is mandatory on the Court to release him, if he is prepared to give bail. The court can not impose any conditions on th accused on bailable offences. If same person is indigent and is unable to furnish surety, court shall instead of taking bail discharge him on his executing bond without surety for his appearance.

As per Code of Criminal Procedure (Amendment Act, 2005)

which came into effect on 23/6/2006 provides that, where a person is unable to give bail within the week of the date of his arrest, it shall be sufficient ground for the Court to presume that, he is an indigent person.

**Section 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 the court other than the High Court or Court of Sessions, 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 cognizable offence punishable with imprisonment for three years or more but not less than seven years)

Provided that the court may direct that a person referred 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 had complied with such directions as may be given by the Court)

Provided also that no person shall if the offence alleged to have been committed by him is punishable with death, imprisonment for life, or imprisonment for seven years or more be released on bail by the Court under this sub-section without giving an opportunity of hearing to the public prosecutor)

(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 no reasonable grounds for believing that, 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 XV 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 shall impose the conditions :

a) 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) and may also impose, in the interest of justice, such other conditions as it considers necessary"

(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 trial by a 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 the opinion that there are reasonable grounds for believing that the accused 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 the judgment delivered.

Section 437 of Cr.P.C provides for releasing a person accused of non bailable offence when he is arrested or detained without warrant by officer in charge of police station or appears or is brought before the court other than high court or court of sessions. Such person shall not be so released, if there appears reasonable grounds for believing that he has been guilty of an offence (1) punishable with death or imprisonment for life. (2) such person shall not be so released if such offence is cognizable offence and if he had been previously convicted for an offence punishable for death or imprisonment for life, or imprisonment for seven years, or he had been previously convicted for two or more occasions for cognizable offences punishable with imprisonment for three years or not less than seven years.

**First proviso clause gives discretion to court to release such person on bail if he is under 16 years or is woman or is sick or infirm.**

Second proviso clause gives discretion to court, to release him on bail if it is satisfied that it is just and proper so to do for any other special reason.

As per fourth proviso it is necessary to give notice to public prosecutor while considering bail application.

Power of admitting to bail is the matter of judicial discretion which needs to be exercised judiciously. There are no hard and fast rules regarding grant or refusal of bail, each case has to be considered on its own merits. The matter always calls for judicious exercise of discretion by the Court"

Refusal of an application for bail does not necessarily preclude another application on later occasion giving more details, further development and different consideration. The principles of *res judicata* and such analogues principles although are not applicable in a criminal proceeding still the courts are bound by the doctrine of judicial discipline having regard to the hierarchical system prevailing in our country. The findings of a higher Court or a co-ordinate bench must receive serious consideration at the hands of the Court entertaining a bail application at a later stage when the same had been rejected earlier.

**Following factors are required to be considered/  
Guiding Principles while dealing with bail application :**

1 Whether there is any prima facie or reasonable ground to believe that the accused had committed an offence, nature and gravity of the charge,

- 2 Severity of the punishment in the event of conviction,
- 3 Danger of the accused absconding or fleeing if released on bail
- 4 Character, behaviour, means, position, position and standing of the accused.
- 5 Likelihood of the offence being repeated
- 6 Reasonable apprehension of the witness being tampered with and

However, it is to be remembered that while considering bail petition detailed examination of evidence and merits of the case must be avoided. While considering the bail petition what is to be kept in mind, is that, in any case there should not be any impediment in the progress of the fair trial. The fair trial must be fair not only to the accused but also to the prosecution.

**The grounds for cancellation of bail are as under :**

- \* When the person on bail is found tampering with the evidence either during investigation or during the trial.
- \* When the person on bail commits similar offence or any heinous offence during the period of bail.
- \* When the person on bail has absconded and trial of the case gets delayed on that account.
- \* When there is likelihood of the accused fleeing away to another country.
- \* When it is alleged that the person on bail is terrorizing the witnesses and committing acts of violence against the police.
- \* When the person on bail creates serious law and order problems in society and he had become a hazard on the peaceful living of the people.
- \* When it is found that the subsequent events make out a non bailable

offence or a graver offence.

- \* When the Hon. High Court found that there was a wrong exercise of judicial discretion to grant accused the bail.
- \* When circumstances were proved that the accused has misused the liberty granted to him, it is sufficient ground to cancel a bail.
- \* If the life of accused person on bail is in danger.

### **Cancellation of Bail :**

Except Magistrate, High Court and Sessions Court have power to cancel bail U/s.437(5) and Section 439 (2) of Cr.P.Code.

In an interesting case in which son of a Prime Minister tried to intimidate the witness and tamper with evidence. Rejection of Bail and cancellation of bail already granted, are two different things. Cancellation of bail necessarily involves the **review** of a decision already made and can by and large be permitted only if by reason supervening circumstances. It would be no longer conducive to a fair trial to allow the accused to retain his freedom during the trial. Cancellation of bail should not be in mechanical manner. Rejection of bail in nonailable case at the initial stage and cancellation of the bail so granted have to be considered and dealt with on different basis. Very cogent and overwhelming circumstances are necessary for an order directing cancellation of bail, already granted. Interference or attempt to interfere with due course of administration of justice, or abuse of concession granted to the accused in any manner are some of the grounds which must be weighed in the mind while canceling the bail already granted

to an accused person. The possibility of the accused absconding is yet another reason justifying the cancellation of bail.

V) **Default bail**:- According to Sec.167 (2) of Cr.P.Code if charge sheet is not filed within 90 days or 60 days accused is entitled for default bail. Right to be released on bail for failure to complete the investigation within the prescribed time is not automatic and even if infeasible it has to be availed by the accused at an appropriate stage and that the infeasible right to the accused in such situation if does not survive or remain enforceable on the challan being filed. After filing charge sheet, plea of bail will be considered on merit of case.

When on failure of the submission of charge sheet within prescribed time limit, the accused is released on bail it is an order on default. Such bail is not granted on merit. Rather it is a command of the legislature to release accused on bail under provision (a) to sub section (2) of S. 167 of Cr. P. Code. But if after the investigation and filing of charge sheet it is revealed that, the accused has committed serious offence, the accused as a matter of right can not claim to remain on bail granted under above provision. Once accused filed application U/s.167(2) and it is found that no challan is filed, accused be treated to have availed of his right. Filing of challan at later stage will no take away such right of accused U/s.167(2) of Cr.P.Code. There shall not be stringent condition that surety shall be from district of accused and heavy amount of bail.

**Bail during appellate stage on suspension of sentence can be granted under Section 389 of Cr.P.Code.**

In case of suspending pre-conviction cases Sec.439 Cr.P.Code is applicable. Whereas in post conviction cases Sec. 389 of Cr.P.Code is applicable. In case of punishment of life imprisonment or imprisonment for not less than 10 years notice is required to be given to public prosecutor before suspending sentence.

**437-A Bail to require accused to appear before next**

**Appellate Court --** (1) Before conclusion of the trial and before disposal of the appeal the court trying the offence of the appellate court as the case may be shall require the accused to execute bail bonds with sureties, to appear before the Higher Court as and such such court issues notice in respect of any appeal or petition filed against the judgment of the respective court and such bail bonds shall be in force for six months.

(2) If such accused fails to appear, the bond stand forfeited and procedure under Section 446 shall apply.

**ANTICIPATORY BAIL :**

**438. Direction for grant of bail to person apprehending**

**arrest** :- (1) Where any person has reason to believe that he may be arrested on accusation of having committed a non bailable offence, he may apply to the High Court or the Court of Sessions for a direction under this section that **in the event of such arrest**, he shall be released on bail; and that Court may after taking into consideration , inter alia, the following

factors; namely :-

- i) the nature and gravity of the accusation
- ii) the antecedents of the applicant including the fact as to whether he has previously undergone imprisonment on conviction by a Court in respect of any cognizable offence;
- iii) the possibility of the applicant to flee from justice; and
- iv) where the accusation has been made with the object of injuring or humiliating the applicant by having him so arrested,

either reject the application forthwith or issue an interim order for the grant of anticipatory bail :

Provided that, where the High Court or as the case may be the court of sessions has not passed any interim order under this sub section or has rejected the application for grant of anticipatory bail, it shall be open to an officer in charge of a police station to arrest without warrant the applicant on the basis of the accusation apprehended in such application.

(1-A) Where the court grants an interim order under sub section (1) it shall forthwith cause a notice being not less than seven days notice, together with a copy of such order to be served on Public Prosecutor and the Superintendent of Police with a view to give the Public Prosecutor a reasonable opportunity of being heard when the application shall be finally heard on by the Court.

(B) The presence of the applicant seeking anticipatory bail

shall be obligatory at the time of final hearing of the application and passing of final order by the Court, if on an application made to it by the public prosecutor the court considers such presence necessary in the interest of justice.

(2) When the High Court or the Court of Sessions makes a direction under sub section (1) it may include such conditions in such directions in the light of the facts of the particular case as it may think fit including :-

a) a condition that the person shall make himself available for interrogation by a Police officer as and when required.

b) a condition that 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 conditions as may be imposed under sub section (3) of Section 437, as if the bail were granted under that section.

3) If such person is thereafter arrested without warrant by an officer in charge of a police station on such accusation, 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 if a Magistrate taking

cognizance of such offence, decides that a warrant should issue in the first instance against that person, he shall issue a bailable warrant in conformity with the direction of the Court under sub-section (1).

The main purpose of anticipatory bail is to protect the person who under the garb of criminal prosecution is harassed and that, his status in society is lowered. Duration of anticipatory bail can not be limited.

(i) The distinction between an ordinary bail and anticipatory bail in that former being after the arrest means release from custody of Police, the later being in anticipation of arrest is effective at the very moment of arrest.

(ii) High court and Sessions court have judicial discretion to grant pre arrest bail.

(iii) The court must decide question of bail without leaving it to Magistrate.

(iv) There shall not be blanket order.

(v) Notice shall be given to public Prosecutor.

(vi) The operation of the order should not be limited to the period of time.

(vii) If the proposed accusation appears stern from some ulterior motive to injure and humiliate to the applicant the order for anticipatory bail would generally be made. If it appears likely that he will flee from justice, order would not be made.

(viii) Filing of an FIR is not condition precedent.

### **CLOG ON GRANTING ANTICIPATORY BAIL:**

Scheduled Caste and Scheduled Tribes (Protection of Atrocities Act)

1989, Section.18 :- If there is prima facie case, pre-arrest bail can not be granted.

Pre-arrest bail shall be granted in exceptional circumstances and where it appears that the person may be falsely implicated or where there are reasonable grounds for holding that a person accused of an offence is not likely to otherwise misuse liberty then power is to be exercised under sec.438.

**Section 439 :- Special powers of High Court or Court of Sessions regarding bail**:- (1) A High Court or Court of Sessions 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 Sessions shall, before granting bail to a person who is accused of an offence which is triable exclusively by the Court of Sessions 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.

### **CANCELLATION OF BAIL :**

Section 437(5) of the Cr.P.C empowers the Magistrate or the court which releases the accused of any non bailable offence to cancel the bail, whereas, section 439 (2) of Cr.P.Code empowers the High Court or Court of Sessions to cancel the bail of any person who has been released on bail.

### **BAIL UNDER OTHER ACTS**

#### **BAIL UNDER M. C. O. C. ACT :-**

The power to grant bail by the High Court or the Court of Session is not only subject to the limitations imposed by section 439 of the Code of Criminal Procedure, 1973, but is also subject to the limitation placed by section 21(4) of MCOCA. Apart from the grant of opportunity to the Public Prosecutor the other two conditions are :

- 1.The satisfaction of the court that there are reasonable grounds for believing that the accused is not guilty for the alleged offence and
- 2.He is not likely to commit any offence while on bail. The conditions are cumulative and not alternative.

#### **BAIL UNDER N. D. P. S. ACT ;**

According to Section 37 of the NDPS if the accused is arrested for

allegedly committing offence punishable U/s.19,24,27-A and offences for commercial quantity, he cannot be released on bail, unless an opportunity to oppose the bail application is given to Public Prosecutor. The NDPS Act, 1985 was enacted and the menace of drugs trafficking which it intends to curtail is evident from its scheme. A perusal of section 37 of the NDPS Act, 1985 leaves no doubt in the mind of the court that a person accused of an offence punishable for a term of imprisonment of five years or more, shall generally be not released on bail. Negation of bail is the rule and its grant an exception under sub-clause (ii) of clause (b) of section 37(1).

**BAIL UNDER P. O. T. A.** :- If the intention of legislature is that an application for bail can not be made prior to expiry of one year after detention of offences under POTA, it would have been clearly spelt out in that manner in section 49(b) itself. Section 49(6) and 49(7) of POTA have to be read together and the combined reading of these two sections is to the effect that public prosecutor has to be given an opportunity of being heard before releasing the accused, that there are grounds for believing that he is not guilty of having committed such offence. It is by way of exception to section 49(7) that proviso is added which means that after the expiry of one year after the detention of the accused for the offence under POTA, the accused can be released on bail after hearing the public prosecutor under ordinary law without applying the rigour of section 49(7) of POTA.

**Scheduled Caste and Scheduled Tribes (Prevention of Atrocities)**

**Act :** Merely because offence under S.C and S.T.(Prevention of Atrocities) Act is exclusively triable by Special Court, it can not be said that Magistrate will have no power to grant bail.

**Other Acts :-** As regards Copy Rights Act, Essential Commodities Act, Indian Forest Act, Bombay Prohibition Act, Information Technology Act, Bombay Prevention of Gambling Act, Prevention of Immoral Trafficking Act, Wild Life Protection Act, Environment (Protection) Act etc., the bail of the accused persons involved in the offence under any of these Acts will lie with the concerned Judicial Magistrate First Class.

**TRANSIT BAIL :-**

A court can grant bail even when crime is registered outside jurisdiction of the Court. It is called as Transit bail. Like regular bail and anticipatory bail, transit bail can be classified in two types i.e regular transit bail and anticipatory transit bail. As per **section 81 of Criminal Procedure Code**, if the person arrested is brought before Magistrate having no jurisdiction, he can be released on bail i.e if the offence is bailable and arrested person is ready and willing to give bail to the satisfaction of the magistrate, or a direction has been endorsed under **Sec.71 of the Cr.P.Code** on the warrant and such person is ready and willing to give the security required by such direction. The magistrate can take such bail and security, as the case may be, and forward the bond, to the court which issued warrant. Further if the offence is non bailable, it is lawful for the Chief

Judicial Magistrate or a Sessions Court to consider the provisions of section 437 of Cr. P. Code and also to consider information and the documents forwarded along with warrant as per section 78 (2) of Cr. P. Code. After going through section 437 and information and documents referred in section 78 (2), Chief Judicial Magistrate and Sessions Court can release Cancellationsuch person on bail and forward the bond to the court which issued the warrant. The anticipatory transit bail is covered by section 438 of Cr.P.Code. When any person is apprehending his arrest in a case registered beyond jurisdiction of the Court, he may apply to the Court or Court of Sessions for direction that in the event of his arrest he be released.

## **PROBATION OF OFFENDERS ACT :**

### (A) **Aim and object** :-

Manu said,

धिग्दण्डस्त्वथ वाग्दण्डी धनदण्डी वधस्तथा  
योज्या व्यस्ताः समस्ताबाह्यपराधवशादिमे

वाग्दण्डं प्रथमं कुर्याधिदग्दण्डं तदनन्तरम्  
तृतीयं धनदण्डं तु वधदण्डमतः परम्

which means - reprimand should be first employed, reproof afterwards, thirdly fine and lastly corporal punishment. Mahatma Gandhi also said "**Hate the crime not the criminal**" This means that, we need to eliminate crime and eliminating criminals is not the way to do it. It is true that punishment gives a sense of satisfaction to the victim and to the society in general. It has been observed that, in most of the cases, punishment specially imprisonment does not actually reform the criminals. In most cases, once a person comes out of prison, he gets back to his own ways of being in conflict with the law. Young criminals can be influenced in the wrong way due to their contacts with hardened criminals in Jail. Therefore, it is necessary to provide opportunities and guidance to young and first time offenders instead of committing them to Jails. Opportunity needs to be given for reformation. This is the aim behind Probation of Offenders Act, 1958.

Under the provisions of this Act, instead of committing offenders to Jail, court can release him under supervision and guidance of Probation

Officer. This Act is based on the reformatory approach which is adopted in many countries of the world. Probation of offenders Act is milestone in the progress of the modern liberal trend of reform in the field of penology. This act distinguishes offender below 21 years of age and those above that age; and offenders who are guilty of having committed an offence punishable with death imprisonment for life and those who are guilty of a lesser offence.

**The Probation of Offenders Act** consists only 19 Sections. Sections 3 to 12 of the Act deal with the 'Role of Court'. These provisions are about the procedure to release offenders either on admonition or on probation of good conduct. There are five important aspects :

- 1) Admonitions, (Section 3)
- 2) Probation of Good conduct (Section 4)
- 3) Compensation and costs.(Section 5)
- 4) Offenders under 21 years of age (Section 6).
- 5) Report of Probation Officers. (Section 6 (2))

**1) Admonitions (Section 3) :** Admonishing means to warn or reprimend. In this mode of release Court, scolds the person and in a way tried to appeal to the good conscious of person and release him. The court has power to release offenders after admonition after satisfying following conditions :

a) the offence must be punishable with imprisonment for **less than two years or with only fine or with both. or offence is punishable under any of the sections 379, 380, 481 and 420 of IPC.**

b) the offender does not have any prior conviction.

2) **Probation of good conduct :(Section 4)**

Following important points are to be considered to apply this provision:

a) Section 4 of this Act is not applicable if offender is found guilty for offence punishable with death or imprisonment for life.

b) The Court has to consider the circumstances of the case, nature of the offence and character of the offender.

c) Under this provision without sentencing the offender to any punishment the court may release the offender on condition of good conduct. Court may give direction to the offender to execute bond, with or without sureties, to receive sentence when called upon during such period which should not exceed period of three years. The court may direct the offender to maintain peace and be of good behaviour.

d) Report of Probation officer is not mandatory to apply this provision but if report is available on record, the court **shall** take in to consideration the report of probation officer, before making order of probation of good conduct.

In addition to passing the order of release the offender on probation of

good conduct, the court may pass supervision order. The period of supervision should not be less than one year. In such a case, Probation officer will supervise the offender during that period. The name of Probation officer should be mentioned in supervision order. The court may put appropriate conditions in supervision order and the court making supervision order under sub-section 3 shall explain to the offender the terms and conditions of the order. Such supervision order should forthwith be furnished to the offender.

3) **Compensation and Costs (Section 5)** If the offender is released under Section 3 or 4 of the said Act, the court may direct the offender to pay compensation and cost to the victim for loss or injury to him.

4) **Offenders under 21 years of Age : (Section 6)** Under this provision offenders, who are under 21 years of age should not be sent to prison if offence is not serious. The relevant date for determining whether probation of offenders Act is applicable or not, is the date on which accused is held guilty i.e the date of Judgment and not the date of commission of offence.

In all cases, where accused is below 21 years of age, the court shall call for the report of Probation Officer. After considering the report of Probation officer, Court would decide whether benefit of section 3 or 4 can be given. On receiving report, court will decide whether offender can be released on admonition or probation of good conduct or not.

5) **Report of Probation Officers (Section 6 (2))**

Character, physical and mental condition of offender are essential factors for consideration. For that purpose, report of Probation officer is very important. Section 4 says before making any order under sub-section (1) the court shall take into consideration report, if any, of the probation officer concerned, in relation to the case. The word '**if any**' means no report of Probation Officer is mandatory to release offender on probation bond of good conduct. However if such report is available on record the court shall not ignore it and the court shall take report in to consideration. Under Section 6 report of Probation Officer is necessary, if offender is under 21 years of age.

**Offences in which benefit of probation can be granted :**

The general intention of legislature is to give benefit of probation as much as possible. While extending benefit of probation the court should take into consideration some other aspects such as possibility of losing the job, the convicts belonging to middle class family, without any criminal record.

Normally provisions of Probation of Offenders Act are not applied in ACB Cases, Section 304 part II of IPC, NDPS Cases, Section 304-A, 325, 409, 467, 471 of IPC Cases, Kidnapping and abduction and Habitual Offenders, S.C & S.T (Prevention of Atrocity) Act, 1989, Goa Children Act and protection of Children from Sexual Offences Act.

**Section 9 : Breach of condition of Probation by Offender :**

If the court has reason to believe on report of Probation officer

or otherwise that, offender has failed to observe conditions of the bond entered into by him, it may issue warrant for his arrest or may if it thinks fit issue summons to him and to his surety, requiring him or them to attend the court.

The court thereafter, may remand him to custody until the case is concluded or it may grant him bail to appear on the date fixed for hearing. If the court after hearing the case is satisfied that, offender has failed to observe any of the conditions of the bond entered into by him, it may forthwith sentence him for original offence or where the failure is for the first time, then without prejudice to the continuance in course of the bond, impose upon him penalty not exceeding ₹ 50/-. If a penalty imposed is not paid within such period as court may direct, the court may sentence the offender for the original offence.

Thus if the conditions of the probation are violated, the court may sentence the offender for the original offence without conducting a fresh trial.

**Section 360 of Cr. P. Code :-** Order to release on Probation of Good conduct or after admonition:

(1) When any person not under twenty one years of age is convicted of an offence punishable with fine only or with imprisonment for a term of seven years or less, or when any person under twenty one years of age or any woman is convicted of an offence not punishable with death or imprisonment for life, and no previous conviction is proved against the

offender, if it appears to the Court before which he is convicted, regard being had to the age, character or antecedents of the offender and to the circumstances in which the offence was committed, that it is expedient that the offender should be released on probation of good conduct, the court may instead of sentencing him at once to any punishment direct that he be released on his entering into a bond, with or without sureties to appear and receive sentence when called upon during such period (not exceeding three years) as the court may direct that in the meantime to keep the peace and be of good behaviour.

Provided that where any first offender is convicted by a magistrate of the second class not specially empowered by the Court and the magistrate is of opinion that the powers conferred by this section should be exercised, he shall record his opinion to that effect and submit the proceeding to a magistrate of the first class, forwarding the accused to, or taking bail for his appearance before such Magistrate who shall dispose of the case in the manner provided by sub-clause.

(2) Where proceedings are submitted to a Magistrate of the first class as provided by sub-section (1) such magistrate may thereupon pass such sentence or make such order as he might have passed or made if the case had originally been heard by him, and, if he thinks further inquiry or additional evidence on any point to be necessary, he may make such inquiry or take such evidence himself or direct such inquiry or evidence to be made

or taken.

(3) In any case in which a person is convicted of theft, theft in a building, dishonest misappropriation, cheating or any offence under the Indian Penal Code (45 of 1960) punishable with not more than two years imprisonment or any offence punishable with fine only and on previous conviction is proved against him, the Court before which he is so convicted, if it thinks fit, having regard to the age, character, antecedents or physical or mental condition of the offender and to the trivial nature of the offence or any extenuating circumstances under which the offence was committed, instead of sentencing him to any punishment, release him after due admonition.

(4) An order under this section may be made by any Appellate Court or by the Court of sessions when exercising its powers of the revision.

(5) When an order has been made under this section in respect of any offender the High Court or Court of Sessions may on appeal when there is a right of appeal to such Court or when exercising its powers by revision set aside such order and in lieu thereof pass sentence on such offender according to Law :

Provided that the High Court or the Court of Session shall not under this sub-section inflict a greater punishment than might have been inflicted by the Court by which the offender was convicted.

(6) the provisions of Sections 121, 124 and 373 shall, so far

as may be, apply in the case of sureties offered in pursuance of the provisions of this section.

(7) The court before directing the release of an offender under sub section (1) shall be satisfied that an offender of his surety (if any) has a fixed place of abode or regular occupation in the place for which the Court Acts or in which the offender is likely to live during the period named for the observance of the conditions.

(8) If the court which convicted the offender or a court which could have dealt with the offender in respect of his original offence is satisfied that the offender has failed to observe any of the conditions of his recognizance it may issue a warrant for his apprehension.

(9) An offender, when apprehended on any such warrant, shall be brought forthwith before the Court issuing the warrant and such Court may either remand in custody until the case is heard or admit him to bail with a sufficient surety conditioned on his appearing for sentence and such Court may after hearing the case, pass sentence.

(10) Nothing in this section shall affect the provisions of the Probation of Offenders Act, 1958 (20 of 1958) or the Children Act, 1960 (60 of 1960) or any other law for the time being in force for the treatment, training or rehabilitation of youthful offenders.

**Section 361 Special reasons to be recorded in certain**

**cases** :--- Where in any case the Court could have dealt with -

a) an accused person under Section 360 or under the provisions of the Probation of Offenders Act, 1958 (20 of 1958), or

b) a youthful offender under the Children Act, 1960 (60 of 1960), or any other law for the time being in force of the treatment training or rehabilitation of youthful offenders.

but has not done so, it shall record in its judgment the special reasons for not having done so.

Section 360 of Cr. P. C enables court, under certain circumstance to release convicted accused on probation of good conduct. It applies only to first offender. The object of this section is to avoid sending the first offender to prison, for offence which is not of serious nature.

First offenders are two categories;

- (1) Above age of 21 years and convicted for an offence punishable with fine only or imprisonment for a term of seven year or less
- (2) Below age of 21 years or woman and convicted for offence not punishable with death or imprisonment for life.

The Court cannot pass an Order under this section where offence charged is punishable with imprisonment for more than 7 years and the person accused is above 21 years.

Even where condition set out in section 360(1) are fulfilled, the person convicted cannot as of right claim the benefit of the provisions of this section.

As per Section 361 reason is to be given in the judgment for not

applying the provisions of those special laws whenever they were applicable.

The provisions of Sec. 360 of Cr. P. C is wholly inapplicable in areas where Probation of Offenders Act is made applicable.

To conclude, it can be said that object of Probation of Offender Act and above provisions can be achieved only if judiciary and administration works together. That will help to reduce number of prisoners in jail, which is utmost necessary at present.

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**CASE LAWS REFERRED**

- [A] CASE LAWS ON LAW OF BAILS
1. **Sunil Batra Vs. Delhi Administration AIR 1978 SC 1675** : The right to life includes right to give importance to human dignity and decency even in rescue homes and prisons.
  2. **Rasiklal Vs. Kishore Khanchand Wadhvani, reported in AIR 2009 SC 1341**, it was observed that, "In case of bailable offence there is no question of discretion in granting bail"
  3. **State of Maharashtra Vs. Anant Dighe AIR 1990 SC 625** it is observed that : "There are no hard and fast rules regarding grant of refusal of bail, each case has to be considered on its own merits. The matter always calls for judicious exercise of discretion by the Court"
  4. **Babusing Vs.State of Uttar Pradesh AIR 1979 SC 527** it is observed that, "Refusal of an application for bail does not necessarily preclude another application on later occasion giving more details, further development and different consideration the findings of a higher Court or a co-ordinate bench must receive serious consideration at the hands of the Court entertaining a bail application at a later stage when the same had been rejected earlier.
  5. **Kalyan Chandra Sarkar Vs. Rajesh Ranjan alias Pappu Yadav and another reported in AIR 2005 SC 921** that--"The principles of res judicata and such analogous principles although are not applicable in a criminal proceeding still the courts are bound by the doctrine of judicial discipline having regard to the hierarchical system prevailing in our country. The findings of a higher Court or a co-ordinate bench must receive serious consideration at the hands of the Court entertaining a bail application at a later stage when the same had been rejected earlier.
  6. **(Sanjay Gandhi Vs.Delhi Administration AIR 1978, SC 961)** In that matter bail already granted to Sanjay Gandhi was canceled when it was found that he tried to intimidate witnesses and tamper with evidence.
  7. **(Doulat Ram Vs. State of Haryana (1995) 1 SCC 349)** cancellation of Bail should not be in mechanical manner. There should be very cognate and overwhelming circumstances for cancellation of Bail.
  8. **Sanjay Datt Vs. State through CBI Bombay (1994) 5 SCC 410**, right to release on bail U/Sec. 167(2) is not an automatic right. Accused has to avail this right at appropriate stage. After filing chargesheet plea of bail will be considered on merits.

9. **Rajinkant Jivanlal Patel Vs. Intelligence Officer Narcotic Central Bureau AIR 1990 SC 71**, if after investigation and filing of charge sheet, serious offence is disclosed, the accused cannot claim to remain on bail granted to him.
10. **(Motiram Vs. State of MP AIR 1978, SC 1594)** stringent condition about surety and amount of bail may not be imposed.
11. **Siddharam Satlingappa Mehetre Vs. State of Maharashtra and others AIR 2011 SC 312** : Duration of anticipatory bail can not be limited.
12. **Gurbaksh Singh Siba Vs .State of Punjab AIR 1980,SC 1632** : Important guidelines – for granting pre-arrest bail.
13. **Vilas Pandurang Pawar Vs. State of Maharashtra 2012 (4) Bom CR (Cri) 408** - Scheduled Caste and Scheduled Tribes (Protection of Atrocities Act) 1989, Section.18 :- If there is prima facie case, pre arrest bail can not be granted
14. **Chenna Byanna Krishna Yadav Vs. State of Maharashtra reported in 2007 Cr.L.J. 782** - Bail Under MCOCA under Section 21(4) and Sec. 439 of Cr. P. C. Additional two conditions required.
15. **State of Madhya Pradesh Vs. Kajad** reported in **AIR 2001 SC 3317** - Negation of bail is the rule and its grant an exception under sub-clause (ii) of clause (b) of section 37(1) of NDPS Act.
16. **Union of Civil Liberties Vs. Union of India** reported in **AIR 2004 SC 456** – BAIL UNDER POTA – Section 49(7) of the POTA needs to be considered.
17. **Union of India through CBI Vs. Murla Yadav alias Rajaram Yadav alias Deepak Yadav (2014 ALL SCR 3451)** – Sec 167(2) of Cr. P. C filing of Challan after presenting application by accused will not take away right of accused U/sec. 167(2) of Cr. P. C.

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[B] CASE LAWS ON PROBATION OF OFFENDERS ACT & SEC. 360, 361 OF CR. P. C

18. **Chaanni Vs. State of U. P AIR 2006 SC 3051** It is held by Hon'ble Apex Court that, the provisions of Sec. 360 of Cr. P. C is wholly inapplicable in areas where Probation of Offenders Act is made applicable.
19. In the case of **Batanlal Vs. State of Punjab reported in AIR 1965 SC 444** Hon'ble Justice Subba Rao, J. (as he then was) speaking for the majority observed that, “the Probation of Offenders Act, is a milestone in the progress of the

modern liberal trend of reform in the field of penology. It is the result of the recognition of the doctrine that the object of Criminal Law is more to reform the individual offender than to punish him.”

20. ***Keshav Sitaram Sali v. State of Maharashtra***, reported in AIR 1983 SC 291 observed that, in a case of petty theft the High Court should have extended the benefit of either section 360 of the Code of Criminal Procedure or sections 3 and 4 of the Probation of Offenders Act to the appellant instead of imposing a sentence of fine on him.
21. ***Dalbir Singh Vs. State of Haryana***, reported in AIR 2000 SC 1677 that, if the court forms the opinion that it is expedient to release the offender on probation for his good conduct regard being had to the circumstances of the case. One of the circumstances which cannot be sidelined in forming the said opinion is “the nature of the offence”.
22. ***State of Gujarat Vs. A. Chauhan***, reported in AIR 1983 SC 359 that, the benefit of Probation of Offenders Act cannot be given to an accused convicted of an offence punishable with imprisonment for life.
23. ***State of Maharashtra Vs. Natverlal*** reported in AIR 1980 SC 593 In case of gold smuggling, the Supreme Court has declined to accord to the accused found guilty, the benefit of Probation of Offenders Act because smuggling of gold not only affects public revenue and public economy, but often escapes detection.
24. ***Phul Singh Vs. State of Haryana*** reported in AIR 1980 SC 249 that, the provision of this section should not be mistaken as undue leniency not should it be applied leniently in undeserving cases where the offender in his early twenties, committed a reprehensible offence of rape on his neighbour’s wife, the court refused to release him on probation and convicted him in view of the heinous nature of the crime.
25. ***Ram Prakash Vs. State of Himachal Pradesh*** reported in AIR 1973 SC 780 that, the benefit of section 3 or section 4 of the Probation of Offenders Act is subject to the limitation laid down in these provisions. The word ‘may’ in section 4 does not mean ‘must’.
26. ***Daulat Ram Vs. State of Haryana*** reported in AIR 1972 SC 2434 that, the object of section 6 is to ensure that juvenile offenders are not sent to jail for offences which are not so serious as to warrant imprisonment for life, with a view to prevent them from contamination due to contact with hardened criminals of the jail.