

BAIL AND REMAND

Every citizen of India has a fundamental right of freedom under Article 21 of the Indian Constitution . Since we are governed by the rule of law , freedom of every individual within the territory of India is subject to the rule of law. In other words, if any individual violates the rule of the land, he is bound to face consequences under the law and in such a case, his freedom can be restricted.

Whenever any person, arrested by police approaches the court to release him on bail , it is the solemn and bounded duty of court to decide his bail application at the earliest by a reasoned order.

The Hon'ble Bombay High Court has even circulated **circular no. A.1211/2009**, where it states that the Hon'ble High Court in Cr. Writ Petition no. 18/09 has observed that **judges of subordinate courts do not decide bail application within reasonable period of time**. By virtue of above circular all judicial officers are directed to dispose off bail applications **as expeditiously as possible** and to comply with that direction.

In view of above constitutional provision and the circular referred to above, it is duty of every judicial officer not to be responsible for delay in disposing off bail application.

Above circular is circulated in the year 2009 in the South Goa District, vide letter bearing no. 20-10-2009.

There are two types of offences, bailable and non bailable governed by sections 436 and 437 of the Criminal Procedure Code, 1973. (for short Said Code).

The aspect of bail in bailable offence came under scanner of the Hon'ble Supreme Court in case of **Rasiklal v/s Kishore, s/o Khanchand Wadhvani[(2009) 4 SCC 446]** where the Hon'ble Supreme Court in clear words held that incase of bailable offences, right to claim bail is an **absolute and indefeasible right** and if the accused is prepared, court/ police officer is bound to release him on bail and **only choice available is in demanding security** in surety and if the accused is wiling to abide by reasonable conditions which may be imposed on him.

Order of granting bail is judicial act and not ministerial act and thus reasons must form the basis for any order on bail application.

The Hon'ble Bombay High Court in **Cr. Bail Application no. 152/2011** has issued directions which are circulated to all subordinate judicial officers and has held that if trial of non bailable offence is not concluded within period of 60 days from first day of taking evidence , the accused should not be forgotten or given a go by and that all should bear in mind that this is very important right conferred on accused in jail, so that accused should not be required to remain in custody indefinitely in cases triable by Magistrate. Therefore, such cases should be taken up promptly and disposed off, preferably within period specified in law. In this case section 437(6) of the Said Code was considered which reads that ' if , in any case triable by a Magistrate, the trial of a person accused of any non bailable offence is not concluded within a period of 60 days from the first date fixed for taking evidence n 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'.

SAY OF THE COMPLAINANT OVER BAIL ORDER:

In the case of **Shri. Ganesh Banu Borase v/s state of Maharashtra & Ors.** (**Cr. Application no. 585/2009**) decided on 9.4.2009 considered decision of the the Hon'ble , Supreme Court in case of **Brij Nanandan Jaiswal v/s Munna alias**

Munna Jaiswal & Anr [(2009) 1 SC 678] when it was held that complainant can always question the order of granting bail if the said order is not validly passed.

LEGALITY OF DIRECTION TO POLICE TO GIVE ADVANCE NOTICE BEFORE REGISTERING OFFENCE IN ANTICIPATORY BAIL APPLICATION :

In yet another circulated decision in a bunch of petitions nos. 58/2012, 59/2012, 60/2012 and 61/2012 the Hon'ble Bombay High Court at Panaji was considering an order passed in an anticipatory bail application whereby police were directed to give notice for 48 hours incase crime is registered so as to enable the applicant to move the court. The Hon'ble, Bombay High Court finally set aside the direction and directed the order passed in the said bunch of petitions to be forwarded to the subordinate courts.

The Hon'ble Supreme Court in case of **Guruchand Singh v/s State (Delhi Administration) (AIR 1978 SC 179)** has laid down factors to be taken into consideration while granting bail and they are as follows:

The nature and gravity of circumstances in which the offence is committed, the position and status of accused with reference to the victim and the witnesses, the likelihood of the accused fleeing from justice of repeating the offence of jeopardizing his own life being faced with a grim prospect of possible conviction in the case of tempering with witnesses, the history of the case as well

as of its investigation and other relevant grounds which in view of so many variable factors cannot be exhaustively set out.

REMAND

The following points are required to be noted while granting remand.

- 1) Efforts must be made by the Investigating Officer to complete the investigation within 24 hours as fixed by section 57 of the Said Code.
- 2) If such completion is not possible and there are grounds for believing that the accusation/information is well founded the officer must forthwith forward the accused to the nearest Judicial Magistrate with a copy of the relevant entries.
- 3) The Magistrate, who receives such information, may authorize the detention of the accused for a maximum period of 15 days whether or not he has jurisdiction to try the case.
- 4) Such detention during the initial period of 15 days may be either in judicial custody or in police custody is the discretion of the Magistrate. Magistrate having no jurisdiction must forward the accused to the .
- 5) Beyond the period of 15 days, there cannot be any remand to police custody.
- 6) Thereafter, if the Magistrate having jurisdiction is satisfied that adequate grounds exist for doing so, the Magistrate may authorize the detention of the accused otherwise than in police custody for a period of 15 days at a time. Such detention cannot exceed the total period of 90 days or 60 days as the case may be.
- 7) If within the said period of 90 days or 60 days the final report is not filed, the accused has an indefeasible right to be released from custody.
- 8) Thereafter he can be remanded to custody by the Magistrate only if he is not in a position to offer bail.

- 9) When the accused is so released under the proviso to Sec. 167(2) of the Said Code, it shall be deemed that such release is under Chapter 33 of the Code.
- 10) Such bail is also liable to be cancelled under Sec. 437(5) or Sec. 439(2) of the Said Code as the case may be.
- 11) If the final report was filed after 60 or 90 days as the case may and the accused has not availed such indefeasible right to be released on bail before the final report is filed, he cannot claim such right to be released on bail.
- 12) It is duty of Magistrate to inform accused his right of bail by default even in serious cases. i.e. when charge sheet is not filed within prescribed period.
- 13) The period of detention if ordered by the Executive Magistrate is to be counted.
- 14) The word custody includes surveillance, restriction and not necessarily in hand.
- 15) The object of remand is to avoid possible abuse by police and to facilitate investigation and not to coerce the accused.
- 16) The Magistrate must ensure that the arrest is justified.
- 17) It has been normal allegations of accused that he is made to visit police station and police make him wait and register his arrest thereafter. Therefore, magistrate must be careful and keep check and balance.
- 18) In normal circumstances Magistrate must assist the production of accused.
- 19) The object of remand is to enable the Magistrate to see if remand is necessary and to enable the accused to make representation and Magistrate has to pass a judicial order.
- 20) If during the course of custody, commission of different crime is brought to light, accused can be detained for different offence.
- 21) Remand means sending the accused back.

- 22) Magistrate should check the time of arrest as required under article 22 (2) of the Constitution of India to ensure that accused is produced within 24 hours.
- 23) If accused makes an allegation of torture inquiry has to be conducted. Here the role of the Hon'ble Sessions Judge come into play.
- 24) In case Magistrate lacks jurisdiction over the matter, Magistrate has to forward the record to appropriate forum.
- 25) Total period of 60 days or 90 days has to be calculated from the date of remand and not arrest.
- 26) Magistrate must see its powers under special statute before granting remand.
- 27) It is duty of Magistrate to provide legal aid to accused even when accused is produced for first time before the Magistrate as per direction of the Hon'ble supreme court in **Criminal Appeal Nos 1899-1900 of 2011 in case of Mohammed Ajamal Mohammed Amir Kasab alias Abu Mujahid v/s State of Maharashtra** and also circular dt: 8.11.2012 of the Hon'ble Bombay High Court.

(Cr Law Journal 1994 160)

AIR 1980 SC 785

1984 CRLJ 160