

# ROLE OF JUDICIARY IN DEALING WITH BAIL AND ANALYSIS OF RESEARCH PROBLEMS

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## Abstract

In a criminal case where a trial is ongoing and the court has not yet rendered a decision, the accused is temporarily released from custody and is referred to as being on bail. The French verb *bailer*, which meaning "to give or deliver," is where the term "bail" originates. The accused individual is in possession of the information on the break-out or continuation of illegal activities. In this paper the researcher shall cover the role of judiciary in India in dealing with grant of bail and denial of bail. This will help the researcher in analysing the research problems.

**Keywords:** Criminal, bail, illegal activities

## Introduction

As far as the philosophy of granting of bail is concerned, the judiciary in India has played a very important role thereby stating that – "*Law of Bail like any other Branch of Law has its own philosophy and occupies an important place in the administration of justice*". In the case of *Vaman Narain Ghiya v. State of Rajasthan*, the Hon'ble Supreme Court had observed that – "*Bail is a rule to the exception that is Jail*", which is another fundamental principle which is generally many a times neglected, which in fact is primary to the criminal justice system.

## Role of Judiciary vis-à-vis Bail Applications

The Courts in the case of *Shri Gurbaksh Singh Sibbia and Ors. V. Punjab State* and also in the case of *Nikesh Tarachand Shah v. Union of India and Ors.* have indeed worked steadfastly on the very basic theory related to bail. The Courts have held that the grant of bail is in fact a law and the denial of the same is no doubt an exception. The Courts have held that the "importance of temporary bail cannot be sufficiently emphasized and the Courts in India have also consistently recognized that interim bail acts as a means of protecting the reputation of a person until the adjudication on the main bail application, which is susceptible to being dented by the mere event of such person's arrest and the associated stigma".

The Hon'ble Apex Court in the case of *Lal Kamendra Pratap Singh v. the State of U.P.* laid emphasis upon the extent of a temporary bail and held that "in appropriate cases, interim bail should be granted until the final bail application is disposed of, since the arrest and detention of a person may cause irreparable loss to the reputation of a person".

In the case of *Parminder Singh and Ors. v. The State* the Delhi High Court had held in the matter related to anticipatory bail demand that "where there is no possibility of the accused escaping from justice or manipulating facts, or where there is no reasonable cause for custodial questioning and the appeal for the grant of anticipatory bail cannot be considered at an early date, temporary protection would usually be given to these accused persons".

In the case of *Haji Mohammed Wasim v. State of U.P.* according to the Honorable Allahabad High Court, "a person freed on bail by the police should obtain a fresh bail, from the Court since it is a requirement of the trial's process. A person must submit an application under Section 436 of the Criminal Process Code, 1973, outlining the circumstances of the case and providing assurances that he will not evade the law and would follow the court's orders, in order to be granted bail for bailable offences. Upon application submission, the accused may post bail using a personal bond or sureties.

In the case of *L. T. Col. Prasad Shrikant Purohit v. State of Maharashtra* the court ruled that an accused individual has the right to submit additional bail applications, and that any subsequent bail applications must take

into account the reasons and grounds for the earlier bail application's denial. Additionally, if bail is granted, the court must note the factors that led it to change its mind from the position it had previously taken.

It is an established law that the grant of a bail or refusal of a based is basically based upon the discretion of the Court.

*Kalyan Chandra Sarkar v. Rajesh Ranjanthe* Hon'ble Supreme Court held that if the facts and circumstances of the case have significantly changed, that justifies filing a new application for the granting of bail. So, there shouldn't be any hesitation in considering a second application. The court further stated that there was no prohibition against submitting a new bail application following the filing of the charge-sheet, given that the previous bail applications had been rejected based on other evidence, such as the First Information Report. So, the bail application made after the charge sheet was filed should be regarded as a change of a substantial nature.

One of the legal fallacies is that if a non-bailable offence is committed, bail cannot be obtained. The recent *Aryan Khan case* sparked the spread of this misconception. To be clear, bail can be acquired as a matter of right for offences that are subject to bail; nevertheless, bail can be obtained for offences that are not subject to bail at the Court's discretion.

Section 436 of the Code of Criminal Procedure, 1973 governs the granting of bail in the former scenario, whereas Section 437 governs the resolution of the latter case. The First Schedule of the Code of 1973 contains the classification of offences. According to this definition, a "bailable offence" is one that is "an offence shown as bailable in the First Schedule, or which is made bailable by any other legislation for the time being in force," while a "non-bailable offence implies any other offence," according to Section 2(a) of the Code. Let's look at the legal guidelines on the issuance of bail in both circumstances and consider how they might apply to Aryan Khan's case.

The Narcotics Control Bureau detained Aryan Khan and two other people during a raid on a cruise ship off the coast of Mumbai. Due to the fact that only the Court of Session has the authority to try cases under the Narcotics, Drugs, and Psychotropic Substances Act, 1985, also referred to as the NDPS Act, an Additional Metropolitan Magistrate declined to consider the bail application. Two reasons were given by the Special Court when it rejected bail in the case.

Aryan Khan voluntarily admitted to NCB officials that he was in possession of the narcotic for his own delight and self-consumption. It establishes conscious possession, according to NCB. However, this was criticised because NCB officials are police officers, and Section 25 of the Indian Evidence Act of 1872 forbids any statements to them. The second evidence was Aryan Khan's WhatsApp conversation with the foreigners and other people who were thought to be involved in a narcotics ring. This was also rejected since the chat was electronic evidence, and according to Section 65B of the Evidence Act of 1872, such evidence must be accompanied by a certificate.

The High Court was then notified of the bail application issue. Bail applications were approved, and the Court also placed limitations on them, failing which NCB may request that their bail be cancelled. Let's also consider how bail is granted for offences that are not punishable by bail as well as the conditions that may be imposed.

In the case of *Guruchanran Singh v. State* one such action is placing restrictions. In this case, the Apex Court made the observation that, when granting or refusing bail for a non-bailable offence, considerations other than the nature of the offence should be made, including the risk that the accused will elude justice and tamper with prosecution evidence.

In the case of *Sanjay Chandra v. CBI* although the defendants committed economic crimes that had an impact on the nation's economy, the Hon'ble Supreme Court found that their presence was not necessary for further investigation and that bail should be granted with strict conditions. According to the Supreme Court, before granting bail, the type of charges, the severity of the sentence in the event of a conviction, the type of evidence, and the court's finding of guilt beyond a reasonable doubt must all be taken into account.

In the case of *Rasiklal v. Kishore Khanchand Wadhvani*, it was held that the right to request bail under Section 436 for a bailable offence was declared to be unassailable and absolute. Therefore, it is evident from the foregoing that bail in cases of bailable offenses—as opposed to non-bailable offences, where bail is at the discretion of the court—is unquestionably a right through which an accused can ask the police and the court for bail, and once granted, it cannot be denied for any reason.

In the case of *Ratilal Bhanji v. Asstt. Customs Collector*, it was held that the Criminal Procedure Code (1973) Section 436 addresses bail in situations when there is a possibility of it. It says that anyone who is detained or arrested by a police officer in charge of the station for an offence that is subject to bail without a warrant, and who is then brought before a court of law or personally appears there, shall be released on bail when he is prepared to post bail while in custody or at any point during the proceeding. *Ratilal Bhanji v. Asst. Customs Collector* (1967) made the same observation, stating that “a person accused of a bailable offence has on arrest a right under Section 436 to be released on bail”.

As stated in the case of *Dharmu Naik v. Rabindranath Acharya*, “refusal to grant bail in contravention of Section 436 will make the detention illegal and the police officer causing such detention may be held guilty of wrongful confinement under Section 342 IPC”. In addition, refusing bail by a police officer in the case of a bailable offence will attract penal consequences.

In the case of *Kanumuri Raghrama Krishnan Raju v. State of Andhra Pradesh*, the Supreme Court addressed the issue of whether a high court can consider a bail application under Section 439 of the Code if the accused comes to the court directly rather than going through the trial court in this case. The Supreme Court responded in the positive, stating that Section 439's provisions are concurrent and that the fact that the accused went directly to the high court rather than the trial court did not preclude the high court from hearing his application.

In the case of *Sudha Singh v. The State of U.P.* the Supreme Court addressed the issue of whether a high court can consider a bail application under Section 439 of the Code if the accused comes to the court directly rather than going through the trial court in this case. The Supreme Court responded in the positive, stating that Section 439's provisions are concurrent and that the fact that the accused went directly to the high court rather than the trial court did not preclude the high court from hearing his application.

Bail has a long history in the Indian criminal justice system. After being arrested, a person may be freed from jail on bail. The core tenet of the Indian criminal justice system is that no penalty should be given until after a conviction, making it clear that everyone has the right to freedom unless the law takes it away. The Apex Court ruled in *Maneka Gandhi v. Union of India* that one cannot be denied their freedom without due process, and that if such an offence is committed, it is illegal and punishable by law.

Recently on 21<sup>st</sup> March 2023, the Hon'ble Supreme Court had warned Magistrates to follow the judgments on Bail, otherwise they shall be taken of judicial work and will be sent to training. The Apex Court also laid emphasis on the orders related to bail passed by the trial courts and stated that in case of the breach of the guidelines stated in the bail, the law cannot be countenanced and under such circumstances, the concerned Magistrates may be not allowed to continue with their judicial work and would be sent to “academies for their skill upgrade”. Some breach of the orders on bail were placed before the Bench headed by Justice S. K. Kaul, Justice A. Amanullah and Justice Aravind Kumar of Hon'ble Supreme Court as a sample to show the Apex Court the number of aberrations at ground level were taking place. The Hon'ble Supreme Court, “observing that it is not as if the top Court's order has not been brought to the notice of the trial courts, the Apex Court said that yet orders are being passed which have a dual ramification – sending people to custody where they are not required to be sent and creating further litigation”. The Apex Court further held that “this is something which cannot be countenanced and, in our view, it is the duty of the High Courts to ensure that the Subordinate Judiciary under their supervision follows the Law of the Land”.

The Hon'ble Supreme Court stated that if such kind of orders are being passed by the trial Courts or some magistrates, then it may require that the judicial work be withdrawn and such magistrates be sent to the judicial

academies so as to enhance or upgrade their skills. The majority of the orders placed before the Hon'ble Supreme Court were from the State of Uttar Pradesh. The Apex Court even asked the Counsel who had appeared for the State of Uttar Pradesh to bring to the notice of the Chief Justice of the Allahabad High Court the said issues so that necessary directions can be issued in such a case. The Bench of the Hon'ble Supreme Court further observed that it is also necessary that the Public Prosecutors should bring the correct and just legal proposition before the Courts as it is their duty towards the Court. The Bench further stated that "illustrations have been given before it where submissions of the prosecutors are contrary to the order passed by the Apex Court".

The Hon'ble Court further noted that it was very fairly stated by the Additional Solicitor General S. V. Raju who had appeared for the Central Bureau of Investigation (CBI). It was stated that "In fact, we are of the view that all Prosecuting Agencies/State Governments should issue such directions to the prosecutors so that neither in pleadings nor in arguments the stand taken is contrary to the legal position enunciated by this Court".

The director of prosecution in each state shall be notified, according to the supreme court, and training sessions should be held to keep prosecutors informed in this regard. It noted that, based on the facts shown to it, many convicts awaiting trial are incarcerated because they are unable to adhere to the bail requirements set down for them. According to the recommendations, the offences have been divided into categories, and rules are sought to be established for the granting of bail without restricting the judgement of the relevant courts and bearing in mind the statutory provisions. The Apex Court held that they are inclined to adopt the rules and incorporate them into the court's order.

In the case of *Virsa Singh v. State*, the accused was alleged to be of desperate character. He was wanted in almost 19 cases and the President of India, in public interest, ordered that the accused should not be removed from Central Jail. The accused had been in jail for more than six years and no progress was made even for commencement of the trial. It was also not known as to when the order of the President would be withdrawn and when the trial would start. It was held that merely because the petitioner is still in the custody in some cases in which bail order has not been passed, may not be a cogent ground to decline bail especially keeping in view the period for which the accused was in custody without any progress in the trial and also because the respondent has not referred to the reasons on account of which there was an apprehension that the petitioner would tamper with the evidence. The accused was ordered to be released on bail.

In the case of *Moti Ram v. State of M. P.*, the Hon'ble Supreme Court got the opportunity to examine the working of the bail law. The Supreme Court made a survey of the provisions of the various sections of the Criminal Procedure Code that deal with the provisions of the bail. The Court examined Sections 436, 437, 441, 445, 389 of the Code of Criminal Procedure Code and also O. 21, Rule 27 of the Supreme Court Rules and the Hon'ble Supreme Court concluded by saying that, "*bearing in mind the need for liberal interpretation in areas of social justice, individual freedom and indigent's rights we hold that bail covers both release on one's own bond, with or without sureties. When sureties should be demanded and what sum should be insisted on are dependent on variables*".

Another question which the Hon'ble Supreme Court had to dispose of in this case was whether the surety can be rejected on the ground that he or his estate is situated in a different district? Instead of expressing clear cut opinion it indicated its approval of the practice followed by magistrates in insisting on having sureties residing in or having property situated in the district in which the Magistrate's Court is situated.

In fact, the view expressed by the Hon'ble Supreme Court in *Moti Ram's* case has been criticised by Mr. R. V. Kelkar on two grounds:

- It would make the first proviso to Section 436(1) otiose.
- It might possibly lead to some unforeseen results in releasing persons on bail under Section 167(2).

The Code makes no express provision for the cancellation of a bail granted under this Section. Nevertheless if at any subsequent stage of the proceeding it is found that any person accused of a bailable offence is intimidating, bringing or tampering with the prosecution witness or is attempting to abscond, the High Court has inherent power

to cause him to be arrested and to commit him to custody. But the inherent power can be invoked in exceptional cases only when the High Court is satisfied that the ends of justice will be defeated unless the accused is committed to custody. This was also held in the case of *Talab Haji Hussain v. Madhukar P. Mondker*.

In the case of *Devendra Singh Negi v. State of U.P.*, the Allahabad Court depreciated the practice of subordinate Courts not to permit accused to surrender when they make such request stating that he is wanted in a crime. In such a case simply asking the Public Prosecutor to report and postpone the surrender is not proper.

In the case of *Issma v. State of U. P.*, the Allahabad High Court held that when a Court has jurisdiction to grant a relief, such jurisdiction also includes the power of granting incidental, ancillary or limited relief short of the ultimate and final relief. Therefore, the Courts of Magistrates and the Courts of Sessions have jurisdiction to grant limited relief by way of releasing an accused on personal bond for short period. It was further held that when an accused surrenders in the Court and applies for bail, the subordinate Courts should be liberal in releasing him on personal bond but the facts and circumstances of each case should be considered. In cases of women and children Courts should prefer to release them on personal bonds pending the disposal of their bail applications as there is always a fear of sex abuse and child abuse in jail as well as in police custody and no one likes to report such outrages to the authorities out of shame or other reasons. The bail applications should be decided as expeditiously as possible and should not be allowed to remain pending for long.

In the case of *Vaman Narain Ghiya v. State of Rajasthan*, the Hon'ble Court had held that in the case of a bailable offence, there is no question of discretion for granting bail. The Court has discretion to grant or refuse bail only in non-bailable offences.

In the case of *Gajanand Agarwal v. State of Orissa*, the accused was charged of having committed serious offences of cruelty and dowry death. It was held that while considering a bail application under Section 437 of the Criminal Procedure Code, though detailed examination of the evidence and elaborate documentation of the merits of the case is to be avoided by the Court while passing orders on bail application, yet a Court dealing with the bail application should be satisfied as to whether there is a *prima facie* case, and exhaustive exploration of the merits of the case is not necessary. The Court dealing with the application for bail is required to exercise its discretion in a judicious manner and not as a matter of course. There is a need to indicate in order, reasons for *prima facie* concluding why bail were being granted particularly where an accused was charged of having committed a serious offence. It is necessary for the Courts dealing with the application for bail to consider amount other circumstances, the following factors also before granting bail:

- The nature of accusation and the severity of punishment in case of conviction and the nature of supporting evidence
- Reasonable apprehension of tampering of the witness or apprehension of threat to the complainant
- *Prima facie* satisfaction of the Court in support of the charge. Any *de hors* of such reasons suffers from non-application of mind.

In the case of *Venkataramanappa v. State of Karnataka*, that merely because the offence alleged against the petitioner is punishable with death or imprisonment for life or that there is a *prima facie* case it will not be sufficient ground for denying the bail. The Court will have to see whether there is any possibility to tampering with the prosecution witnesses and also possibility of their absconding from law. Where in case of murder in a public place the facts of the case sufficiently indicated commission of such an offence, the Sessions Judge would not have jurisdiction to grant bail to the accused for medical check-up on the ground that he was suffering from hypertension and depression.

In the case of *Chandraswami v. Central Bureau of Investigation*, a complaint was received from one, Shri Lakhu Bhai Pathak of U.K. in August 1987 whereupon a case under Section 120-B, read with Section 420, I.P. Code was registered against the appellants. It was alleged that in 1983 the appellants came in contact with the complainant, Lakhu Bhai Pathak and led him to believe that they wielded sufficient influence in India to secure for him lucrative contracts in India. The appellants induced the complainant in December, 1983 to pay one lakh

U.S. Dollars for procuring a contract which amount was paid to them by two cheques which were handed over to Chandraswami. The case dragged on for more than 15 years and during these years the bail has been granted. But later on, a Public Interest Litigation a writ petition was also filed. Thereafter on 12-04-1996 a chargesheet under Section 120-B, read with Section 420, was filed in the Court of Chief Metropolitan Magistrate, Delhi and a non-bailable warrant was issued on 02-05-1996 against both the appellants. Bail was refused from the Courts below and ultimately special leave petition was filed before the Supreme Court. It was held that the complaint related to an offence having been committed about 16 years ago and not much progress has taken place in the conduct of the proceedings. Only examination-in-chief and a part of the cross-examination of the complaint, the main witness, has been completed. The main witness is the complainant himself, who has been zealously pursuing this case since 1987. It is his perseverance throughout these long years that has made it possible for the case to reach in the present stage. His commitment to see the prosecution reach its logical end is strong and he is not likely to be influenced by the accused. There is no likelihood of any evidence being tampered or influenced by the accused persons. The present case is not covered by Clauses (i) and (ii) of Section 437, Cr. P.C. Code. Therefore, ordinarily, a person who is suspected of having committed an offence under Section 120-B, read with Section 420, I.P. Code, would be entitled to bail. Of course the paramount consideration would always be to ensure that the enlargement of such persons on bail will not jeopardise the prosecution-case. There is no such likelihood in the present case. The accused persons are, therefore, entitled to be released on bail subject to certain conditions.

According to Sub-section (3) certain conditions may be imposed upon an accused person who is released on bail or bond under sub-section (1) of this section. The conditions which may be imposed must be necessary:

- In order to ensure that such person shall attend in accordance with the conditions of the bond executed under the said 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 interest of justice

These conditions may be imposed upon any person who is 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 as stated in clause above.

If accused is released on bail, there is no need to require him to appear before the Court until charge-sheet is filed and process is issued by the Court. The practice in many Magistrate's Courts in Bihar requiring accused to appear before Court every fourteen days even though he is on bail is disapproved. This was held in the case of *Free Legal Aid Committee Jamsedpur v. State of Bihar*.

An order of bail may be an ordinary order of bail or an order of anticipatory bail. The distinction between the two was pointed out by the Hon'ble Supreme Court in the case of *Gurubaksh Singh v. State of Punjab*. According to the Hon'ble Supreme Court the distinction between the two lies in the fact that an ordinary order of bail is granted after arrest and, is, therefore, effective at the very moment of arrest.

Where an offence is bailable, bail has to be granted under Section 436, but if the offence is non-bailable the granting of bail shall depend upon the discretion of the Officer-In charge of the police station or the Court. But the discretion must be exercised judicially and not capriciously. In granting bail in a non-bailable offence certain considerations arise before the Court. This was held in the case of *State v. Captain Jagjit Singh* those following considerations arose before the Court:

- Nature and seriousness of the offence.
- The character of the evidence.
- Circumstances which are peculiar to the accused.
- A reasonable possibility of the presence of the accused in not being secured at the trial.
- Reasonable apprehension of witnesses being tampered with.

- The large interests of the public or the State.

The above considerations have been reiterated by the Supreme Court in the case of *State v. Jaspal Singh Gill*. These considerations are merely illustrative. Sections 436, 437, 439 and 440 of this Code are not exhaustive of powers of the Court in regard to terms and conditions of bail or bond. These terms and conditions do not fetter the inherent powers of the High Court under Section 482 while granting bail under such power. This was held in the case of *Hijarilal v. Rameshwar Prasad*.

## Analysis of Research Problem

1. *Whether Article 21 of the Constitution of India is misused by the accused while seeking "Bail" from the Court?*

Bail is a type of limitation on an accused person's unrestricted enjoyment of their personal freedom. People cannot be detained on charges of non-bailable offences due to Article 21 of the Indian Constitution and the fundamental rule of criminal law that everyone is deemed innocent until proven guilty; nonetheless, constraints on total liberty must be put in place for the good of society.

The charge of surety is given control over the accused's freedom. If the accused is willing to post bail for a crime that is subject to it, bail must be granted automatically. But it must be done carefully to maintain the balance between the rights of the accused and the interests of society, the Court must exercise its discretionary power when granting bail for a non-bailable offence. It is important to remember that jail is an exception to the rule of bail. Each case's merits must be taken into account before the judge uses his or her discretion.

Article 21 is misused by high-profile, white collar accused i.e., the creamy layer of the society. Whereas, there are still many under-trials who are still languishing in the prisons. As such, economically weaker section, uneducated etc. of the society is not having access to the justice system. Even Justice Bhagwati also emphasized on the issue that the under-trials are languishing in the jails not because they are guilty but because they are financially poor.

Many a times, "Bail" applications are filed successively or repeatedly without there being any change of circumstances would indeed set a bad precedent if the bail applications are filed successively or repeatedly by the accused without there being any change in circumstances. In the case of *State of Tamil Nadu v. S. A. Raja*, it was observed by the Hon'ble Supreme Court that if repeatedly an accused files bail application without any change in the circumstances, then it would set a bad precedent as the principles of *res judicata* are not applicable to bail applications. It is true that subsequent bail applications are acceptable given the altered situation. Yet, absent a change in the circumstances, the second application would be interpreted as an attempt to have the prior verdict reviewed, which is against the law.

## Conclusion

Bail legislation has been a slow-moving process in the legislature. Only in 2017 did India's Law Commission issue a study emphasizing the need to change the legislative system around bail. Under-trial inmates make up 67 percent of the total jail population, according to the commission. It claimed in its study that a bail provision must not unreasonably infringe on constitutional rights. It was further proposed that under trial inmates serving up to seven years in prison be released after completing one-third of their sentence, and those serving longer sentences be released after completing half of their sentence. While the study highlighted the need for bail improvements, it was heavily criticized in many areas. The report found a number of issues with the bail system, but only modest changes were proposed in the end. The theory of 'innocent unless found guilty' governs bail. When proposing bail reforms, keep in mind that the victim is still facing charges and has not been charged. The seriousness of the crime does not sway the courts; instead, they should value the facts and apply their minds in a rational manner. A standardized checklist should be used to direct the courts in issuing bail. The test should compel courts to refuse bail only where there is a flight risk, a lack of compliance on the part of the convicted, or the likelihood of evidence tampering. The terms of bail should include the person's socio-economic status and shall not be unreasonable. Bail for the vulnerable has been inaccessible due to 'surety' in the form of monetary consideration. For the presence of

the convicted at the trial, alternative types of requirements may be enforced. Conditions that are entirely incidental to the subject of the bail or that enforce a high level of 'surety' inadvertently harm the socially disadvantaged parts of society. The new bail rules are completely disconnected from the country's social realities. Though bail is considered a right and is a formally equitable statute, the provision of discretion leads to misuse of authority and a shift away from the rule of law.<sup>11</sup> The rule of law shall direct judicial discretion in all bail-related cases, and it should be exercised by reasoned decisions. The order shall explicitly state the relationship between the terms and the issuance of bail. When considering a bail appeal, the court must strike a balance between the individual's right to liberty and the societal/public interest at large.

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