
EXPLORING THE BAIL TREND IN INDIA

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ABSTRACT

Bail means release of an accused person pending trial or investigation, in exchange for assurance or a bond that the accused will cooperate with court order and appear in front of the court for hearings whenever is required. It follows on the principle of “Innocent until proven guilty” and that “detaining someone indefinitely simply because they are alleged with a commission crime is unnecessary”. Bail upholds the idea of individual freedom, liberty, dignity and serves societal interests. By allowing a accused out on bail, he gets more time to prepare its defence and present their case compared to one who is detained. Thus, it is very important to ensure public justice progresses fairly and unwarranted detention should be avoided, especially when there is no risk of the defendant fleeing. Arrest and detention are costly processes and they impose a huge financial burden on the exchequer particularly in a developing country like India where the state resources are already limited and staff and infrastructure are already below requirement. Thus, judges must consider fair, humane, and legal factors along with abovementioned before denying bail. If the court has a reasonable belief that there is no risk of the defendant failing to appear for trial or that releasing them does not harm public interest, they should be granted bail. However, if allowing bail is not in the larger public interest then the bail must be rejected. Indian bail law, though went through multiple amendments and transformation is still largely follows the colonial mindset of states control over its subject. It is a need of the hour to bring holistic reform in the Indian bail jurisprudence to bring it more in line with constitutional and humanistic principles.

Introduction

The idea of bail, as other legal jurisprudence has evolved impressively over a period of time. In earlier days such a thought would have been difficult to imagine. Today the cultivated social order, focus on human rights and the evolving concept of liberty has comprehensively changed the bail framework. Keeping in mind this perspective, obviously bail regulation assumes an essential part in the organization of equity, administration of justice and framing a legislation. Bail as we understand today balances two restricting standards of law: it shields people assumed innocent until they are actually found guilty in the trial and additionally saving the trustworthiness of legal procedures. Justice Surva Ghosh of Calcutta high court recently pointed out that “even in the case of interpretation of a penal statute, however stringent it may be, a constitutional court has to lean towards constitutionalism and the rule of law of which liberty is an intrinsic part.”¹ The basic aim of arrest and detention is to secure the presence of the accused in the trial and implement punishment if convicted, collection of evidence, avoid risk of tampering evidences and witnesses. If this aim can be fulfilled without detaining the accused, then just because he is alleged of some offence and a presupposition that he will definitely flee or tamper the evidence is unwarranted particularly if there are various other means to secure this purpose. Detention of person is directly affecting his life and personal liberty which is guaranteed under Art 21 of the Constitution of India. Person under detention is deprived of his various basic natural human rights. He cannot prepare a proper defense to prove his innocence. In a country which is married to principles of Justice and Liberty, unnecessary restriction of personal liberty defeats the principle of ‘innocent until proven guilty’ and the person suffers without actually being tried and convicted. Nevertheless, except in certain situations involving serious offences like terrorism, child related offence, offences related to national security, etc. ‘bail is a rule and jail is an exception’ shall be the only true governing principle.

The main aim of this article is to advocate the pressing demand of reformation in Indian bail system. A two-judge bench comprising J. Sanjay Kishan Kaul and J. M Sundaresh gave specific explanations to an older judgment conveyed in July 2021 on bail reform (*Satender Kumar Antil versus CBI*)², it underlined “*there is a pressing need*” for reform in the law connected with bail and asked the government to think about bringing a special regulation on the lines of the law

¹ (Kunal Gupta v. Enforcement Directorate 2024 LiveLaw (Cal) 270)

² (Satender Kumar Antil v. CBI, (2022) 10 SCC 51)

in the United Kingdom. The court highlighted that the CrPC, in spite of several revisions since independence, to a great extent holds its unique design as drafted by a colonial control over its subjects. The court made this highlight signalling that in spite of its decisions, basically, the Code doesn't represent for arrest and detention as a fundamental liberty issue in itself. It likewise also featured that magistrates do not exercise their discretionary powers uniformly. Court said that "Uniformity and certainty in the choices of the court are the groundworks of legal agreement. People accused with same offense won't ever be dealt with distinctively either by similar court or by the equivalent or various courts. Such an activity however by an activity of discretion regardless of being a legal one would be a grave attack against Articles 14 and 15 of the Constitution of India". The court's answer on this is the outlining of a different regulation in arrangements with the award of bail.³ . Currently the law related to bail is provided under BNSS, 2023⁴, earlier it was dealt under CrPC, 1973⁵. BNSS was enacted on 25th December 2023 and the legislature had a golden opportunity to redraft the bail jurisprudence of India more in line with justice, liberty and equality principles. Though they claim that the purpose of bringing BNSS is to decolonize the old colonial age mentality based criminal procedure code but they actually failed to do so by reincorporating the same CrPC bail provisions in BNSS.

This article is divided in two sections wherein first section deals with the basic understanding of the bail jurisprudence in India and the second section highlights the various flaws present in the Indian bail administration system. Lastly it suggests some reforms to make the bail law more holistic and in line with principles of justice, equity and liberty.

Chapter 1

What is bail?

It's a legal process which allows a person accused of commission of crime to be released from custody or detention under certain conditions, while they await their trial or the next stage of their legal proceedings. Its purpose is to ensure that the accused will return to court for the trial or hearings without being held in jail.⁶ Bail may involve the payment of money or the provision of a bond as a guarantee of the accused's future appearance in court⁷. In addition to financial

³ (<https://indianexpress.com/article/india/supreme-court-directs-centre-bail-act-8021810/>, n.d.)

⁴ (Bharatiya Nagarik Suraksha Sanhita, 2023 (Act 46 of 2023))

⁵ (Criminal Procedure Code, 1973 Act 2 of 1974)

⁶ (<https://www.bailusa.com/education/what-is-bail/>, n.d.)

⁷ (Garner, Bryan A., "Black's Law Dictionary, Tenth Edition" (2014))

conditions, the court may also impose other non-financial conditions, such as surrendering a passport, staying away from certain people or places, or regularly reporting to a police station, etc. If he fails to comply with the conditions, he risks of forfeiting the bail amount or even cancellation of bail and being re-arrested.

Purpose of Bail

The purpose is, as established in *Sanjay Chandra v. CBI*⁸, to ensure that the accused appears at their trial whenever is necessary by requiring him to deposit a reasonable bail amount and imposing such other conditions as necessary to give effect to this purpose. It's not intended to punish or deter the accused. Depriving someone of their liberty should only be considered necessary if it serves as a precaution to guarantee their court appearance. Merely acknowledging the principle that punishment starts only after a conviction, and that the person is presumed innocent until proven guilty, is insufficient. It has long been recognized that being detained in jail while awaiting trial can be extremely challenging. In some cases, it may be necessary to keep innocent people in custody before their trial to ensure their presence at court proceedings. In such situations, the principle of "necessity" is the key factor in deciding whether bail should be denied. But punishing someone who has not been found guilty, or imprisoning them based solely on the suspicion that they might tamper with witnesses, goes against the concept of personal liberty protected by the Constitution. Courts should not deny bail to express disapproval of accused's past behaviour or to teach him a lesson, especially when they have not been convicted. It is important to remember that any imprisonment before a conviction has a serious punitive element, and a denial of bail should only be focused on preventing specific risks, not serving as a form of punishment.

Legal approach in matters of bail in India

Courts have often repeated that bail ought to be the rule, not the exemption, underlining the right to individual freedom. In cases like *Arnesh Kumar v. State of Bihar*⁹, the Supreme Court set down rules to forestall unnecessary arrests and guarantee that bail is conceded as a rule in minor offenses. On account of *Siddharth v. State of Uttar Pradesh*¹⁰, the Supreme Court emphasized that the default position should be to allow bail as opposed to keep the accused in

⁸ (*Sanjay Chandra v. CBI*, (2012) 1 SCC 40)

⁹ (*Arnesh Kumar v. State of Bihar*, (2014) 8 SCC 273)

¹⁰ (*Siddharth Udaiveer v. State of U.P.*, (2020) 17 SCC 90)

detention, especially in the event that the investigation is finished. The judicial way to deal with bail in India is directed by the standards of individual freedom, the assumption of innocence, and the need to guarantee that the accused shows up in court when required. Courts in India practice their tact in bail matters, adjusting the rights of the accused with the interests for equity and public security.

Guiding Principle for Bail Determination

The rule that an accused is assumed innocent as a matter of course is crucial in bail decisions. Bail should not to be opposed exclusively as a method punishment. Article 21 of the Constitution of India ensures the right to life and individual liberty, which courts should maintain while settling on bail matters

Factors considered by the Court

While settling on bail, the court normally thinks about a few elements, which includes the seriousness of the offense, prima facie case, the chance of fleeing, probability of witness and evidence tampering and the previous criminal history. In *Moti Ram v. State of M.P.*¹¹, the Hon'ble Apex Court established a criterion to assess whether the accused has "roots in the community" when deciding on bail. The Court emphasized the following factors to be considered: The accused's place of residence, place of employment, presence and support of the accused's family, relationships and connections with other individuals, criminal record, if any, names of credible individuals in the community who can vouch for his reliability, nature of the alleged offense, the likelihood of conviction, and the possible punishment, any other factor indicating the accused's community ties or affecting the likelihood of intentional absence.

Judicial Precedents Shaping the Approach to Bail

In the case of *Sanjay Chandra v. CBI (2012)*¹² The Supreme Court underscored that the object of bail isn't to punish the accused before conviction yet to guarantee their appearance in court. Except if there are convincing reasons, bail ought to be conceded to prevent pre-trial detainment, which can cause unjustifiable difficulty. In *Arnesh Kumar (Supra)* The Court set

¹¹ (*Moti Ram v. State of M.P.*, (1978) 4 SCC 47)

¹² (*Sanjay Chandra v. CBI*, (2012) 1 SCC 40)

down rules to prevent unnecessary arrests and stressed that arrest ought not to be a mechanical interaction. The Court decided that police and judges should follow these rules while settling on bail, particularly in cases including offenses deserving of under seven years. In *Siddharth* (Supra) the Supreme Court repeated that the default position ought to be to allow bail, not keep the accused in detention, particularly when the Investigation is finished. The decision reaffirmed that bail ought to be allowed except if there is a huge motivation to deny it. In *Satender Kumar Antil* (Supra) the Apex Court presented the rule that "bail is a rule and jail is an exception," supporting that pre-trial confinement should not be the standard. It guided the judicial officers to stay away from routine rejection of bail and instead focus on the individual freedom of the accused.

Chapter 2: Exploration of Indian bail system

Nature and Gravity of the Offense test

In all-over the world barring few offences like terrorism, child or women related offences, you get a bail. The only test which is followed by is presumption of innocence which can only be effectuated by giving you bail but putting some restrictions like a famous triple test i.e.

- You will cooperate.
- You will not flee.
- And you will not interfere with the investigation.

Thus, the test of nature and gravity of offence finds no place in bail jurisprudence. This test should not be given much weightage as accused is presumed innocent until proven guilty. Nevertheless, it could be a guiding principle and not the rule, but to the contrary you will find that every other bail denial is based upon citing the ground that the allegations are of grave nature. One must keep in mind that this are allegations only and anyone can allege anyone of anything and accused should not be kept rotting in a jail on a mere suspicion that he may or may not have committed an offence and because the allegations against him are of grave nature. This can be severely misused for purposely sidelining the political opponents, social activists, etc. The guilt of accused is only established after due trial followed by conviction on strong evidences against him. Some matters like terrorism related offences or offences involving

security of the state etc may require this kind of approach but this should be an exception not a rule.

The Money-based bail system

The money-based bail framework in India has been a subject of huge criticism because of its effect on equity, especially concerning the rights of poor people and marginalized. The money-based bail framework excessively affects poor people, who frequently can't stand to pay bail, prompting delayed pre-trial confinement. This causes wealth, as opposed to the risk of flight or the latter chances of wrongdoing, decides an individual's liberty. For the people who can scarcely manage the cost of bail, paying it can prompt further monetary misery, driving families into more distress. Conversely, more affluent people can without much of a stretch manage the cost of bail, prompting a biased application equity. A large number of the jail populace in India contains undertrials. Large numbers of these people remain imprisoned basically on the grounds that they can't manage the cost of bail. This adds to congestion in prisons, which compounds unfortunate everyday environments, medical problems, and at times even prompts deaths in prison. The Constitution of India ensures the right to life and individual liberty under Article 21. However, the money-based bail framework frequently encroaches with respect to this right by keeping people in detainment simply as a result of their failure to pay bail. The absence of clear rules on how bail sums ought to be set can prompt erratic and in some cases exorbitantly high bail sums, which are past the range of ordinary people. The framework disproportionately affects marginalized, including Dalits, Adivasis, and minorities, who are many times bound to be poor and, accordingly, less inclined to manage the cost of bail. This sustains foundational separation inside the equity framework.

Excessive judicial discretion

Excessive judicial discretion in bail matters also has been a subject of significant criticism, primarily because of its capability to undermine the standards of fairness, equity, and consistency in the administration of justice. The absence of clear rules for giving or denying bail prompts huge varieties in decisions across various courts and judges. This irregularity brings about similar cases getting immensely various outcomes, which can be seen as unjustifiable and arbitrary. Bail decisions frequently rely upon the individual judge's subjective understanding of the law and facts of the case. This can prompt disparities in outcomes, for

certain litigants being allowed bail effectively while others, in comparable conditions, might be denied. Excessive discretion expands the risk of legal decisions being affected by factors other than the merits of the case, like outside tensions, corruption, or bias. This disintegrates public confidence in the judiciary and the fairness of legal system. The wide discretion in bail matters can in some cases be abused, with allegations that bail is conceded or denied in view of the financial status, political associations, or impact of the accused, as opposed to on lawful standards.

In the case of *MR. Y v. State of Rajasthan*¹³, the Apex Court criticized the practice of High courts giving bail in a vague manner without giving satisfactory legitimization. In this specific case, the accused, a routine offender and from influential background, was accused of assaulting his niece. The Court featured that the shortfall of clear reasoning to concede or deny bail embodies their arbitrary nature. Chief Justice Ramana brought up that there is a developing pattern where courts offer general expressions about having looked into "current facts and circumstances" of a case without indicating the specific factors that impacted their decision. Such decisions from lower courts neglect to meet the fundamental prerequisite of accountability, which is profoundly problematic in a democratic framework.

Rigorous bail conditions in special laws

Certain special laws like the Narcotic Drugs and Psychotropic Substances (NDPS) Act, 1985, the Unlawful Activities (Prevention) Act (UAPA), 1967 and the Prevention of Money Laundering Act (PMLA), 2002 have specific provisions related to bail, often imposing stricter conditions for granting bail due to the serious nature of offenses under these statutes. These laws lay down the rigorous conditions against the general rule of bail is rule and jail is an exception. Section 38 of the SC And ST (Prevention of Atrocities) Act, 1989 bars the anticipatory bail, Section 36AC of The Drugs and Cosmetics Act, 1940 and Section 37 of NDPS Act and Section 45 of PMLA lays down the presumption of guilt as against the general rule of presumption of innocence. In the latter case along with the general triple test an additional twin test also needs to be satisfied which states that no bail should be granted to the accused unless:

¹³ (MR. Y V. STATE OF RAJASTHAN(2022)47)

- Public prosecutor has been provided with a reasonable an opportunity to oppose
- Accused proves that he has not committed the offence

Now, the accused whose personal liberty has been taken away, has almost no access to his resources and he barely knows for what charge he is being arrested or what evidences are against him (as ECIR report is not a public document and copy of ECIR is not required to be provided to accused at the time of arrest as held by Supreme Court)¹⁴ will not be in a position to prove that he is not guilty of such offence. Most legal scholars argue that Nikesh Shah¹⁵ was rightly decided the twin condition test unconstitutional. and there is no need for rigorous provisions of bail as Most of the offences under PMLA attracts maximum punishment up to seven years and thus putting them in a same scale of terrorism like offences is unwarranted.

Problem of undertrial prisoners

A significant number of undertrial prisoners remain in prison even after being granted a bail due to difficulties in meeting bail conditions. According to data from the *Fair Trial Programme* (FTP)¹⁶ in Yerwada and Nagpur central prisons, among the 2,313 undertrials legally represented by the Fair Trial Programme, 18.50 percent were migrants, 93.48 percent did not own any assets, 62.22 percent had no contact with their families, and 10 percent have had a history of previous incarceration. Challenges such as the lack of documents like residence and identity proof, family abandonment, and difficulties in understanding a complex court system further hinder undertrials' ability to meet bail conditions. A study found that in nearly 35 percent of these cases, it took over a month for undertrials to comply with bail conditions and secure their release after being granted bail. It was also seen that in certain cases that despite bail is being granted the accused is still not released on bail as recently observed in Aryan Khan¹⁷ case. Further a report released by the 'National Dalit Movement for Justice' titled 'Criminal Justice in the Shadow of Caste' highlights the fact that how Adivasis and Dalits and people from other marginalised class are treated and suffer in the prisons and how they get discriminated in terms of their right to bail, parole, trial, appeal, medical treatment etc. A report

¹⁴ (Vijay Madanlal Choudhary v. Union of India, 2022 SCC OnLine SC 929)

¹⁵ (Nikesh Tarachand Shah v. Union of India, (2018) 11 SCC 1)

¹⁶ (<https://www.project39a.com/writings/2022/8/27/reform-bail-law-but-make-the-right-diagnosis-first>)

¹⁷ (<https://www.thehindu.com/news/national/cruise-drugs-case-bombay-high-court-grants-bail-to-aryan-khan-two-others/article37210334.ece>, n.d.)

by NRCB in 2015 says that Dalit and Adivasi which constitutes around 24 percent of total population of country amounts around 34 percent of total inmate population in Indian jail.

The Issue of Clogged Bail Applications

It's a huge issue inside the Indian legal framework, adding to delays in the conveyance of equity and the congestion of prisons. Several elements add to this issue. The Indian judiciary is overpowered with an enormous overabundance of cases, which incorporates a significant number of bail applications. Courts are frequently immersed with a high volume of cases, prompting delay in hearing and deciding bail applications. There is a lack of judges and court staff, which further fuels the postponements. With restricted resources, courts battle to deal with the sheer volume of bail applications, bringing about delayed confinement for the majority accused people.

Lack of Clear Guidelines and Standardization

The shortfall of standardized guidelines for giving bail brings about conflicting practices across various courts and regions. This inconsistency prompts delays in the handling of bail applications. Consider this, In the 2020, in *P Chidambaram v. Directorate of Enforcement*¹⁸, the Delhi High Court recognized that the accused was not a flight risk, has a health issue, and probability of witness and evidence tampering is almost negligible. Regardless of this, the Court denied bail referring to the economic nature of the allegations including illegal tax avoidance and money laundering and communicating its worry that allowing bail could give a false impression to the general population. In appeal of same case, the Supreme Court allowed bail in light of the very factors that the High Court had perceived yet used to legitimize denial. Albeit the two courts concurred that the blamed was not a flight risk and wouldn't mess with evidences, these reasons were adequate for the Supreme Court to give bail, yet not for the High Court. This contextual analysis features how similar undisputed facts and circumstances can bring about contrasting ends by various courts, especially in bail matters. It additionally shows the intricacy of such cases, where nor court's decisions can be criticized for being inconsistent or for overlooking laid out standards.

Without clear guidelines that standardize the models for allowing or denying bail, judicial

¹⁸ (P. Chidambaram v. Directorate of Enforcement, (2019) 9 SCC 68)

discretion can cause various courts and, surprisingly, various judges inside a similar court to arrive at different decisions on similar cases, prompting an increase in challenges against such orders.

Law commission Reports

The Law Commission of India's 268th Report, titled "Amendments to Criminal Procedure Code, 1973 – Provisions Relating to Bail,"¹⁹ addresses critical issues inside the bail framework in India and proposes changes to make it just, transparent, and effective. Here are the central issues and suggestions from the report. The report highlights the requirement for changes because of the widespread abuse of the bail framework, prompting delayed pre-trial confinement, packed jails, and the infringement of fundamental rights of undertrials. It features that the current bail framework often disproportionately affects poor people and marginalized, who can't meet bail conditions and thusly experience expanded detainment. The report emphasizes the rule that bail ought to be the standard and jail the exemption, in accordance with constitutional protection under Article 21, which ensures the right to life and liberty. It focuses on that the ongoing framework frequently reverse these principles, especially for financially disadvantaged people who can't stand to pay bail. The report brings up the absence of consistency in bail decisions across various courts, frequently prompting arbitrary results. It criticizes the excessive discretion practiced by judges in deciding bail matters, which can result in inconsistencies and potential biases in the decision-making process. The report recognizes that a huge level of the jail populace comprises of undertrials who have been conceded bail however can't meet the conditions, adding to the congestion of prison facilities²⁰.

Conclusion

"Depriving a person of their natural liberty and denying them the basic amenities of life is more damaging than merely starving the body; it starves the soul, which inhabits the body." - *Mahatma Gandhi*.

There have been various endeavours to change the bail framework in India. In 1973, the expert committee on Legal Aid²¹, led by J Krishna Iyer, proposed re-examining the grouping of

¹⁹ (India, Amendments To Criminal Procedure Code, 1973-Provisions Relating to Bail 23rd May 2017)

²⁰ (<https://www.latestlaws.com/library/law-commission-of-india-reports/law-commission-india-report-no-41-code-criminal-procedure1898-vol-1>, n.d.)

²¹ (Report of the Expert Committee on Legal Aid: Processual Justice to the People 347.54017 LJC - E, 1973)

bailable and non-bailable offenses in the Cr.P.C. to work with allowing bail in additional cases and to facilitate pre-trial procedures. In 2003, the Malimath Committee on Criminal Justice System Reforms suggested altering Schedule I of the Cr.P.C.

Introducing specific reforms to standardize the bail decision-making process, especially for serious offenses, could take out its discretionary nature. For instance, bail schedule used in different US states set a particular bail sum for every offense, however they frequently ignore those unfit to bear the cost of bail. Furthermore, the US bail system permits agents to pay the security for those unfit to do as such, charging a non-refundable expense and requiring guarantee. Updating the discretionary power of bail decisions and establishing a new bail protocol would reduce geographical disparities in bail orders issued by lower criminal courts and ensure bail is granted in bailable offenses. Along with procedural changes, the legislature could likewise alter existing bail regulations to prevent unnecessary detainment and excessive bail, in this way safeguarding individual freedom. In any case, this doesn't imply that strict scrutiny ought to be deserted for serious offenses. In cases including special regulations, bail ought to be allowed with thought of applicable legal provisions. Also Revise bail legislations to ensure that it is fair and equitable for everyone, not biased on socio-economic status. Consider amendments that address long standing systemic issues contributing to the high population of undertrial prisoners. The Supreme Court has recommended enacting special bail legislation similar to the UK's Bail Act. This law would establish a general right to bail and set clear criteria for bail decisions, aiming to reduce the dependence on monetary bonds and sureties. For classification of offences, certain provisions related to bail in Australia can be looked wherein offences are divided into three schedules. Schedule one incorporates all the offences under which accused gets a bail as a matter of right; somewhat similar to bailable offences classification in India. Second schedule contain offences wherein presumption of bail is tilted towards accused and the state have to prove compelling circumstances and reasonable grounds as to why the bail should not be granted. Third schedule contains some serious offences which is followed by no presumption at all and both parties have to prove the circumstances in their favour.

It is a need of the hour to reform and reintroduce the bail jurisprudence in India which shall be more in line of concept of equity, justice as well as does not hamper the constitutionally guaranteed right of liberty. Liberty can be taken only by procedure established by law and due

process of law and for that matter both procedural law as well as substantive law related to bail has to be due.

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