



*Journal of Advances and
Scholarly Researches in
Allied Education*

*Vol. IX, Issue No. XVIII,
April-2015, ISSN 2230-7540*

REVIEW ARTICLE

**A CRITICAL ANALYSIS OF JUDICIAL
DISCRETION OF GRANTING BAIL IN INDIA**

AN
INTERNATIONALLY
INDEXED PEER
REVIEWED &
REFEREED JOURNAL

A Critical Analysis of Judicial Discretion of Granting Bail in India

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Abstract – Pre-trial incarceration has exceptionally harsh and merciless repercussions, making an accused person's right to be released on bail critical. If the accessed person's right to bail is refused, he will be exposed to the mental and physical anguish of jail life even though he is deemed innocent until his guilt is proven beyond a reasonable doubt. The Criminal Procedure Code (hence referred to as the code) of 1973 made posting bail a mandatory step. The accused individual holds this as one of his or her most prized rights, claims, or advantages. There are two contradictory demands in the rules of bail, one of which is the need for society to be protected from an accused person's potential mishaps, and the other is the presumption of innocence until the accused is proven guilty. The, Bail provisions combines the goals of justice and individual freedom. According to the 1973 Criminal Procedure Code, there is no definition of bail.

Keywords – Bail, crucial to the accused, Criminal Procedure Code 1973, bail able offences, non-bailable offences, individual freedom, interest of justice

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INTRODUCTION

The act of releasing an individual who has been arrested or imprisoned on the condition that security be provided for his appearance at a specific time and location, which security is known as bail, because the arrested or imprisoned party has been handed over to those who bind themselves or become bail for his due appearance when required, in order to safely protect him from the pris¹

Judicial discretion is never arbitrary, and it always acts through well-defined and predictable channels, even when it appears to be granted in broad terms by a legislation. It is an appeal to the judge's judicial conscience. The discretion must be employed in compliance with well-established legal principles, not in contradiction to them. With this in mind, the purpose of this article is to investigate the many facets of judicial discretion in bail situations, including anticipatory bail. In this context, an attempt has also been made to clarify the 'scope and ambit' of bail rules by providing historical context and diverse court interpretations. It would be beneficial to outline the scope of this study.²

(A) Scope and ambit of bail provisions:

- Meaning of bail'.
- Persons empowered to grant bail.

- Statutory provisions regarding bail and judicial interpretations:

(B) Doctrine of anticipatory bail:

- A historical overview of anticipatory bail laws in general.
- Preliminary bail laws vary widely in terms of breadth and nature.
- Prerequisites for anticipatory bail release
- Whether 'blanket bail' permissible.
- 'Anticipatory bail' vis-a-vis police powers.

CLASSIFICATION OF OFFENCE

This classification is based on the seriousness of the offence as well as the severity of the penalty. In most cases, a bailable offence is considered less serious and grave than a non-bailable offence.³ Offences are defined in the clause (a) of S. 2 of the Cr. P.C. as:

"The terms "bailable offence" and "non-bailable offence" refer to offences that are listed as bailable in the First Schedule or that are rendered bailable by any other legislation in effect at the time; and "non-bailable offence" refers to any other offence.;"

It's worth noting that every offence under the Indian Penal Code has been classified as bailable or non-

bailable in the first portion of the first Schedule to the Cr.P.C. to determine which offences are bailable and which are not. In the absence of such a statement under the parent Act, the basic guidelines set forth in the second part of the first Schedule of the Cr. P.C. must be used to determine whether the crime falls into the appropriate category.⁴

PRINCIPLES GOVERNING BAIL

The following principles emerge for grant or refusal of bail under section 437, CR.P.C.

1. Bail should not be denied unless the offence accused is of the most serious kind and the punishment imposed by the law is severe.
2. Bail shall be denied where the Court has reasonable grounds to believe that no amount of bail will insure the convict's presence at the time of judgement.
3. Bail shall be rejected if the person seeking the Court's benign authority to be freed for the time being will obstruct the process of justice.
4. Bail should be denied if there is a risk that the applicant may interfere with prosecution witnesses or otherwise taint the legal system.
5. Bail should be denied if a man's antecedents reveal a criminal past, particularly one that indicates he is likely to commit significant crimes while on bail.

STATUTORY PROVISIONS REGARDING 'BAIL' AND JUDICIAL INTERPRETATIONS

1. **Code of Criminal Procedure, 1861:** Sections 216 and 258 and sections 156 and 212 of the Code of Criminal Procedure of 1861 were the first to include bail provisions.
2. **Code of Criminal Procedure, 1872:** Sections 128, 194, 204, 388, and 393 and sections 128 and 389 were included in this code.
3. **Code of Criminal Procedure, 1898:** The difference between bailable and non-bailable situations was likewise preserved by this legislation. This code's section 496 dealt with bail in bailable cases, whereas section 497 dealt with bail in non-bailable cases.⁵ In a number of circumstances, the provisions sections 496 and 497 of the 1898 law were interpreted. The following are the principles that determine the granting of bail: Except for those accused with non-bailable offences, anybody can request bail as a matter of right.

The courts had to consider the following factors when exercising their "discretionary power" to admit a person to bail: (/) the seriousness of the charge; (/")

the nature of the evidence; and (in) the severity of the punishment prescribed for the offence; and the character, means, and standing of the accused⁶

EXERCISE OF DISCRETION IN CRIMINAL PROCEEDINGS

In India, most penal laws provide for the highest sentence that a criminal court may impose, with just a few offences allowing for a minimum punishment. In the former cases, the court has broad discretion to impose punishment, but when it comes to sentencing, the court must apply the principle of proportionality in prescribing liability based on the culpability of each type of criminal conduct, as laid down by the Supreme Court in the case of State of M.P. v. Munna Chaubey. This approach gives the Judge considerable leeway in determining a sentence in each instance, presumably to enable for sentences that reflect more complex concerns of responsibility prompted by the facts of each case. In essence, judges declare that the penalty should always be proportional to the offence.⁷

To be clear, Section 354(4) of the Criminal Procedure Code of 1973 says a court must record the reason for awarding an imprisonment sentence less than three months if the conviction is for an offence punishable by imprisonment for one year or more, unless the sentence is for imprisonment until the court rises or under the provisos of the code's summary trial. In circumstances where the offence is punished by a period of one year or more, this sub-section limits the court's discretionary jurisdiction to impose a sentence of at least three months. The reasoning for this is because short-term detention does not always serve a constructive function.⁸

"The court granting bail should utilise its power in a thoughtful way and not as a matter of course," the Supreme Court stated. A thorough review of the evidence and recording of the merits of the case is not required when giving bail, but it is necessary to specify in such orders why bail was granted, especially when the accused is charged with a serious offence. Any order lacking such justifications would suffer from a lack of mental application.⁹

LAW COMMISSION of INDIA 41ST REPORT

The 41st law commission also took up the issue of bail.¹⁰ The report was discussed as follows:

Broad principles regarding bail

1. The broad principles adopted in the code in regard to bail are
2. Bail is a matter of right, if offence is bailable
3. Bail is a matter of discretion if the offence is non bailable

4. The magistrate has the discretion to give bail if the offence is punished by death or life imprisonment; but, if the accused is under the age of 16, a woman, or a sick or infirm person, the Court has the discretion to grant bail.
5. The session court or the High Courts have more authority to grant bail, even for crimes punished by life in prison or death.
6. A person who violates a bail bond will not be released on bail.

In the case of bailable offences, the right to bail is absolute under section 496 (of the 1898 law). It was recommended that if a person freed on bail absconds or fails to appear in court, he will not be eligible for bail when brought before the court at a later date. The commission suggested that this idea be accepted, and that rejection of release in certain circumstances be without prejudice to any action conducted under section 514 for forfeiture of the bail bond.¹¹

As a result, section 496 may be renamed subsection (1), and the following subsection may be added: "notwithstanding anything contained in subsection (1), if a person freed on bail fails to appear before the court or is taken into prison on a future occasion, the court may refuse to release him on bail and he will be incarcerated again." Any such denial shall not affect the Court's ability to require any individual bound by such bond to pay the penalty imposed by section 514."

IMPOSITION OF CONDITIONS

The Court has the authority to impose restrictions on bail under Section 437 of the Code of Criminal Procedure. As stated in *Hazarilal vs. Rameshwar Prasad*, a court may order a person to relinquish his passport when granted bail. Any condition that is neither realistic or fair cannot be imposed on the accused. It is the Court's responsibility to ensure that the condition placed on the accused is reasonable and in accordance with the intent and requirements of the sections. The Court has the authority under Section 437(3) to impose certain restrictions on a person accused or suspected of committing a crime punishable by imprisonment.¹² such as –

- (a) That such person will appear in accordance with the terms of the executed bond.
- (b) That such a person must not commit an offence that is identical to the offence for which he is charged or suspected of committing.
- (c) That such person will not, directly or indirectly, offer any enticement, threat, or promise to any person familiar with the facts of the case in order to prevent him from reporting those facts

to the Court or to any police officer, or from tampering with the evidence.

In the case of *Sumit Mehta vs. State of NCT of Delhi*, the Supreme Court declared that "The phrase 'any condition' in the Article should not be interpreted as giving a court of law full power to impose whatever condition it sees fit. Any condition must be regarded as a reasonable condition that is acceptable in the facts, allowed in the circumstances, and effective in the pragmatic sense, and it must not be interpreted as a condition that defeats the decision granting bail." The High Court of Delhi had ordered the Bail Applicant to deposit Rs. 1,00,00,000/- (One Crore) in a fixed deposit in the name of the complainant in a nationalised bank and to retain the FDR with the Investigating Officer, but the Apex Court has overturned that judgement. *Sheikh Ayub versus. State of M.P.* was decided by the Supreme Court.

PROVISIONS RELATING TO BAIL UNDER CrPC.

i) Section 436. In what cases bail to be taken?

To be released on bail, an individual who is arrested or detained without warrant by a police officer who is in charge of an officer of a police station or who is brought before a court must be prepared to give bail at any time while in the custody of such officer or during the preceding before such court. Specified, however, that such officer or Court may, in his or her discretion, dismiss such person by requiring him to execute a bond without sureties for his attendance as provided below. The court may refuse to release a person on bail if he fails to appear before the court or is taken into custody on a subsequent occasion in the same case, notwithstanding anything contained in sub-section (1), and any such refusal shall be without prejudice to the court's powers to call upon any person bound by such bond to pay the penalty thereof under section.¹³

ii) Section 436 A. Maximum period for which an under trial prisoner can be detained.

Maximum time of detention for a prisoner awaiting trial. In the event that a person has been held in custody for a period of time that exceeds one-half of the maximum term of imprisonment for that offence under that law during the investigation, inquiry, or trial under this Code, he or she shall be released by the Court on his or her own personal bond, with or without sureties.

There are two ways to get out of jail time: either to continue serving it in prison or to be released on bail instead of posting a personal bond with or without sureties after hearing from the Public Prosecutor and documenting its reasons in writing.

iii) Section 437. When bail may be taken in case of non-bailable offence

Non-bailable offences may be released on bail if there are reasonable reasons to think that the defendant has committed a felony punishable by life imprisonment, death, or the death penalty, if they are held or arrested without warrant by a police officer in charge of the police station.

Such a person shall not be released if the offence is a cognizable offence and he has previously been convicted of a crime punishable by death, life imprisonment, or a sentence of seven years or more, or if he has previously been convicted of a crime punishable by death, life imprisonment, or a sentence of seven years or more, or if he has previously been convicted of a crime punishable by death, life imprisonment, or a sentence of seven years or more

JUDICIAL DISCRETION

The court power to grant or deny bail is to be based on well-established criteria. In the 2G case, the prosecution did not object to the issuance of release to five defendants, presumably because there was no fear that they might sway witnesses, tamper with evidence, or flee the country - the three scenarios I described previously. In fact, the prosecution should not have objected to any of those who applied for bail being granted: the distinction it sought to make between five-year and seven-year terms, as well as between those charged in the main chargesheet and those charged in the supplementary chargesheet, is artificial and illogical. While the trial judge is not obligated to give bail just because the prosecution does not oppose it and must apply its mind independently, such discretion must be utilised with caution. In my opinion, the trial judge made a significant error in refusing bail. The trial court's decision to deny bail in the interest of providing a secure atmosphere for the witnesses to testify is unjustified. There should be a genuine fear of witnesses being intimidated. We must remember that imprisoning someone takes away his liberty, and there is no sufficient reward for the time spent in prison if he is eventually exonerated.¹⁴

Bail denial should not be used as a form of punishment prior to conviction. Let us not forget that unless guilt is proven, there remains a presumption of innocent under criminal law. That guilt must be established beyond a reasonable doubt. Denial of bail also affects the right to a fair trial since the accused has very limited contact with his attorneys, and that too in a tightly restricted environment.

As a result, adequate defence planning is hampered. Justice Krishna Iyer put it this way: "...It's reasonable to believe that a guy on bail has a greater opportunity of preparing or presenting his case than one who is detained. Mechanical detention should be reduced if public justice is to be promoted." It appears that Indian

courts have just recently grown more cautious in granting bail in general, and notably in situations of white-collar crime. This is unfortunate, because the legal criteria for granting bail remain unchanged.¹⁵

CONCLUSION

The goal of Article 21 is to prohibit the executive from infringing on personal liberty unless it is done in line with the law and in accordance with its provisions. As a result, it is critical that before a person's life or personal liberty is taken away, the legal procedure must be followed and not deviated from to the person's detriment. In each situation when a person complains of a deprivation of life or personal liberty, the Court evaluates whether there is a law permitting such deprivation and whether the method provided by such legislation is reasonable, fair, just, and not arbitrary, using its constitutional authority of judicial review. On the basis of a liberal reading of the terms 'life' and 'liberty' in Article 21, the said Article has now come to be regarded as a residuary right. As a result, personal liberty may only be taken away in accordance with the legal procedure. Personal liberty is guaranteed by the Constitution. However, Article 21, which protects the above-mentioned right, also allows for the deprivation of personal liberty by legal means.

Unless he is expanded on bond, a person charged of non-bailable offences is retained in jail for the pendency of the trial under our country's criminal laws. Because such imprisonment is legal, it cannot be argued that it is in violation of Article 21. Non-bailable offenders can be granted bail if the court finds that a prima facie case against them has not been established, and the court is satisfied for reasons to be recorded that, despite the existence of a prima facie case, it is necessary to release such persons on bail where facts and circumstances necessitate it. In that procedure, a person whose application for release on bail has previously been denied is not barred from submitting a new application for bail if the facts have changed. While an individual's liberty is valuable, and Law Courts should make every effort to protect that person's right to personal liberty, in the event of a conflict between an accused person's right to personal liberty and the interests of public justice and societal welfare objectives, the former should take precedence.

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