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# BAIL DECISION-MAKING IN INDIA: UNVEILING JUDICIAL DISCRETION

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## ABSTRACT

The right to a speedy trial has been declared as a fundamental right under Articles 19 and 21 of the Indian constitution time and again through various judicial precedents. However, the right to a speedy trial also includes the right of a case to be disposed in a speedy manner. This includes the right of the accused to be granted or refused bail in a manner that is free, fair, and fast. Pondering upon such rights the first half of this research paper shall discuss the very jurisprudence of bail and the power of the courts in matters relating to granting a bail. The second half of the paper shall implore the quintessential question of judicial discretion of courts and the recommendations by the various reports published by the Law Commission of India on this topic. Moreover, this paper will draw a comparison between the old criminal procedure code (Crpc) and the new act (BNSS) while providing conclusive suggestions.

**Keywords:** Kalyan Chandra Sarkar v. Rajesh Ranjan, Anticipatory Bail, Bailable and Non- bailable offence, Right to Bail

## INTRODUCTION

After an accused is arrested, the system leaves the person with two choices either bail or jail. Refusing to grant bail may result in severe psychological and bodily distress since it effectively exposes an individual to the harsh conditions of incarceration before a conviction. In India, the idea of bail has developed because of legislative and judicial interpretations, giving rise to a

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comprehensive body of legal precedent governing the use of bail and the discretionary powers granted to judges

Bail in the Indian context can be categorised based on the offense i.e., bailable, or non-bailable offense. The type of offence may be considered, but the accused person—rather than the accusation made against him—is the primary focus of the court's discretion when deciding whether to grant release. This is called the judicial discretion of the court which shall be further discussed upon the course of the paper. This topic of bail plays a major role in the contemporary scenario after much debate and discussion surrounding the responsibility of the lower courts in granting the bails and the new changes suggested in the BNSS.

## **RESEARCH QUESTION**

1. What are the rules governing bail in India?
2. What role does the judiciary's discretionary power play in bail decisions?
3. What are the guidelines and standards that courts follow when deciding whether to grant bail?

## **RESEARCH OBJECTIVE**

1. To examine the legal and constitutional framework controlling bail provisions and thereby understand the functioning of the bail procedure
2. To shed light on the court's discretionary power when issuing bail

## **RESEARCH METHODOLOGY**

For the research article, the researcher adopted a doctrinal research approach, often known as secondary research. The actions listed below were done to present a thorough overview of the subject:

- research conducted through books, periodicals, libraries, and case laws
- research using primary sources such as laws, ordinances, bylaws, and acts
- research through secondary sources including rulings issued by the Supreme Court of India and other Indian High Courts.

# CRITICAL ANALYSIS

## THE JURISPRUDENCE OF BAIL

Bail laws in India preserve the fundamental idea that everyone is innocent unless and until proven guilty. By allowing the accused to await trial without being unnecessarily detained, bail strengthens the presumption of innocence until guilt is proven beyond a reasonable doubt. Judges have complete discretion in determining bail under the Code of 1973. When determining bail, the court should take the larger community interest into account rather than ruling against restricting the accused's freedom. The Indian Constitution recognises the right to a prompt trial in **Article 21**. The aim of the 1973 Code is a speedy trial. The Constitution's guarantees of a fair, just, and reasonable process as well as the fundamental right to a prompt trial are violated by the trial's prolonged duration. The authority to grant bail has been granted to the police and the court in certain cases. On the other hand, it is legal to ask for bail in the event of an offence for which one is eligible.

The Hon'ble Supreme Court in the landmark judgement of *Sanjay Chandra v. CBI, 2011*<sup>3</sup> ruled that all the facts and matters of the case must be taken into consideration to grant bail. A bail cannot be and should be denied based on pressure and expectation from the public

## AUTHORITY OF THE COURTS AS PER THE PROVISION

The granting of bail under **Section 437**<sup>4</sup> is greatly dependent on certain principles which lay the very foundation of the bail jurisprudence at large. The principles are as follows:

- 1) A Bail should typically be granted unless the alleged offence is extremely serious and carries a severe punishment.
- 2) A Bail may be denied if there is a concern that the applicant might tamper with prosecution witnesses or undermine the legal process.
- 3) A Bail should be declined if releasing the individual would hinder the progress of justice.

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<sup>3</sup> Sanjay Chandra v. CBI, (2012) 1 SCC 40

<sup>4</sup> THE CODE OF CRIMINAL PROCEDURE, 1973 § 437, ACT NO. 2 OF 1974

- 4) A Bail ideally must be withheld if the person's past criminal record suggests that the crime or a similar crime will be committed again.
- 5) A Bail may/may not be refused if the court has reasonable grounds to believe that granting bail will not ensure the defendant's appearance at trial.

Moreover, based on the gravity of the offence and the harshness of the punishment, this classification is made. A bailable offence is typically regarded as less serious and grave than an unbailable offence. **S.2 of the Cr. P.C**<sup>5</sup>. defines three offences as follows:

*2(a) ““Bailable Offence” means an offence which is shown as bailable in the First Schedule, or which is made bailable by any other law for the time being in force; and “non-bailable offence “means any other offence;”*

The Cr. P.C. distinguishes between offences that are eligible for bail and those that are not. According to Section 437 of the Cr. P.C. [1973], the decision to grant bail to an accused person for a non-bailable offence is discretionary. The person who receives bail may be arrested again at the High Court's or Session Court's discretion. This section permits the High Court or the Court of Session to release anyone on bond and then, by further order, to re-arrest them. An individual facing a bailable offence is given distinct treatment.<sup>6</sup>

He has the right to be released on bond at any point while being held without a warrant and throughout the court proceedings in which he is being brought.

It is clear **how Sections 436<sup>7</sup> and 437** of the Cr. P.C. differ from one another. **Section 436** gives the magistrate no discretion because, if he is willing to do so, he must grant bail to the accused person of a bailable offence; however, **Section 437** gives the magistrate the authority to refuse to release the accused person on bail if specific circumstances are brought to his attention.

## JUDICIAL DISCRETION OF THE COURTS

When delving deeper into the bail process, it becomes evident that courts exercise a delicate balance between safeguarding individual liberties and upholding societal interests. The distinction between bailable and non-bailable offences sets the framework for bail considerations, with bail being a matter of right for the former and subject to the judge's discretion for the latter.

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<sup>5</sup> THE CODE OF CRIMINAL PROCEDURE, 1973 § 2, ACT NO. 2 OF 1974

<sup>6</sup> Kanubhai Chhagnlal Brahmhatv. State of Gujarat, 1973 Cri LJ 533 at p. 536 (Guj).

<sup>7</sup> THE CODE OF CRIMINAL PROCEDURE, 1973 §436, ACT NO. 2 OF 1974

Section 436 of the Code permits release on bond for offences that qualify for bail. Section 437 of the Code permits release on bond for offences not entitled to bail. The judge has the power to grant or deny bail in these situations.

The Court must make sure that no restriction is placed on the accused that would go against the presumption of innocence in his favour when granting bail. When determining bail for non-bailable offences, the court must strike a balance between personal liberty and public interest. Bail must be granted or denied by the court according to predetermined standards. Even if the prosecution need not object to bail and the trial judge is free to make its own decisions, this discretion must be exercised carefully.

In *Gudikanti Narasimhulu v. Public Prosecutor*<sup>8</sup>, it was decided that the bench hearing the argument would decide whether to grant bail. The granting of bail has primarily been left to the discretion of judges because our penal statute lacks discretion and does not outline all the conditions that must be met.

Judges are therefore required to consider the nature of the evidence, the seriousness of the charges, and the possibility of evidence tampering or the accused fleeing in the interests of justice. This was reiterated by the Supreme Court itself in the 1958 case of *Harinarain Singh vs The state*<sup>9</sup>

Furthermore, it was decided that this discretion would be used in a judicial manner, bearing in mind the previously mentioned considerations and the limitations outlined in Section 437 of the CrPC.

In *Amaramani Tripathi* case<sup>10</sup>, the Honourable Supreme Court ruled that when determining whether to issue bail, a court must consider the defendant's behaviour, means, status, and position. A thoughtless bond order can be permitted the bailee the chance to take advantage of the situation and commit more crimes against the people of the community. Therefore, bail discretion dependent on evidence about a defendant's criminal history is not futile.<sup>11</sup>

In the latest instance of *Mr. Y vs State of Rajasthan*<sup>12</sup>, the Supreme Court observed that high courts have been known to grant bail inexplicably and without citing a justification. The accused

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<sup>8</sup> Gudikanti Narasimhulu v. Public Prosecutor, 1978 AIR 429

<sup>9</sup> Harnairain Singh V. The State AIR 1958 P H 273

<sup>10</sup> State Through C.B.I v. Amaramani Tripathi, (2005) 8 SCC 21

<sup>11</sup> GudikantiNarasimhulu v Public Prosecutor, High Court of Andhra Pradesh. Air 1978 Sc 429

<sup>12</sup> MR. Y V. STATE OF RAJASTHAN 2022 SC 384

in this instance is well-known within his family and a repeat offender. Therefore, the fact that these courts lack rationale when awarding or refusing bail serves as an example of their arbitrary character. While a thorough review of the evidence and extensive documentation of the case's merits are not necessary when granting bail, it is crucial to include in these orders the justification for the first decision to grant release, particularly in cases where the defendant is facing criminal charges.

The Hon'ble Supreme Judge decided in *Kalyan Chandra Sarkar v. Rajesh Ranjan & Pappu Yadav*<sup>13</sup> that "the court should exercise the bail granting power cautiously not arbitrarily." The courts pursued the same aim in *Brijmani Devi v. Pappu Kumar*<sup>14</sup> wherein it was noted that the court's discretion must be exercised judiciously and in adherence with established legal principles, considering the nature of the crime the accused is alleged of committing as well as the integrity of the trial when evaluating a bail application. Moreover, the cancellation of bail, even in bailable offences, highlights the judiciary's commitment to preserving the integrity of the legal process.

The Bombay High Court revoked bail in a case where bail had been permitted when it discovered that the accused had interfered or attempted to tamper with the prosecution's evidence in *Madhukar Purshottam Mondkar v. Tabak Haji Husain*.<sup>15</sup>

**The law is clear:** restrictions that are unrelated to the goal of bail and more likely to be perceived as a nuisance or even a violation of a person's legal and constitutional rights cannot be included in the scope of a legitimate "judicial discretion" exercise. Refusing to release someone on bond before they are found guilty is not appropriate.

The Indian Constitution's Article 136 grants the Supreme Court the authority to grant bail orders by granting special authorization to review decisions made by lower courts. However, since it is a discretionary remedy, it must be applied only in "rare circumstances" involving grave legal disputes between conflicting cases law or in instances of "atrocious miscarriage of justice". Even the Supreme Court concurs that the "High Court should normally be the ultimate arbitrator" in cases involving the granting or refusal of bail and that it should not become involved in every factual or

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<sup>13</sup> Kalyan Chandra Sarkar v. Rajesh Ranjan @ Pappu Yadav, AIR 2005 SUPREME COURT 972

<sup>14</sup> Brijmani Devi v. Pappu Kumar [MANU/SCOR/55223/2021]

<sup>15</sup> Madhukar Purshottam Mondkar v. Tabak Haji Husain AIR 2006 SC 3248

legal error that is in dispute. When evaluating a bail application, a court must exercise judicial discretion considering the established standards and guidelines mentioned above.

Every bail request must be backed up by strong evidence that considers the particulars of the case.

## **THE VIEW OF THE LAW COMMISSION REPORT**

**The Law Commission's recommendation on bail aims to strike a balance between ensuring compliance with bail conditions and upholding the right to a fair trial.**

The 41st Law Commission<sup>16</sup> examined India's current bail system with an emphasis on the penalties for breaking bail terms. A person who breaks their bail bond by evading arrest or by neglecting to appear in court loses their absolute right to bail upon recapture, as per the present structure (Section 496<sup>17</sup> of the Code).

The 268th report<sup>18</sup> by the Law Commission of India identifies important issues with the country bail system. The analysis reveals a significant disparity in the way bail is granted based on the financial status of the applicant. Powerful and affluent people frequently get bail easily, while those with little money suffer in jail until their cases are heard. The Law Commission expresses the inconsistency of bail orders made by various court levels, shedding light on the scope of judicial discretion used while granting bail.

The report claims that trial courts are more likely than High Courts and the Supreme Court to deny bail. Many are compelled by this disparity to request bail in higher courts, which adds needless delays and strains the legal system. The report also notes that significant improvements need to be made to bridge the divide between the strict reality that many people encounter and the legal concept of bail. India will not be able to adequately maintain the ideals of a just and equal legal system till then.

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<sup>16</sup> LAW COMMISSION OF INDIA, REPORT NO. 41: "The Code of Criminal Procedure, 1898" (1969)

<sup>18</sup> LAW COMMISSION OF INDIA, REPORT NO. 268: "Amendment to Criminal Procedure Code-1973 – Provisions relating to Bail" Pg no.22 (2017).

## BNSS V/S CRPC ON PROVISIONS RELATING TO BAIL

### DEFINITION OF NEW TERMS

The CrPc has undergone significant modification in the form of BNSS. One of which is the addition of definitions for the terms "bail," "bail bond," and "bond." There was ambiguity because these terms were not defined in the CrPc.

In Section 2, the BNSS clarifies the following terms:

- **Bail:** Defined as the “*release of a person accused of or suspected of the commission of an offence from the custody of law upon certain conditions imposed by an officer or Court on execution by such person of a bond or a bail bond.*”
- **Bail Bond:** Defined as “*an undertaking for release with surety.*”
- **Bond:** Defined as “*a personal bond or an undertaking for release without surety.*”

### MODIFICATIONS FOR PRISONERS UNDER TRIAL

Significant changes about undertrial prisoners have been implemented by the BNSS. Among these modifications are:

- **Early Release of First-Time Offenders:** Under the new law, first-time offenders who have served up to one-third of their sentence as undertrial prisoners may be released from prison early.
- **Bail for Multiple Pending Cases:** Under the new law, an individual who is the subject of an investigation, inquiry, or trial in more than one offence or case is not eligible for bail.

Section 483<sup>19</sup>, a new provision, has been added to the BNSS in the chapter that governs bail grants. This means that the accused will have to sign a bond to appear in court the following day, either before the trial or after the appeal is over. This is advantageous as the accused will not be detained

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<sup>19</sup> BHARTIYA NAGARIK SURAKSHA SANHITA (BNSS), 2023 § 483, Acts of Parliament, 2023(India).

right away to appear in court.

Additionally, BNSS has changed the provisions relating to anticipatory bail. Certain clauses that might have been interpreted as impeding the successful issuance of anticipatory bail have been eliminated. In particular, the revised Section 484 of BNSS<sup>20</sup> is the new section, and the new act does not mention the proviso to Section 438(1), Sections 438(1A) and 438(1B) of the CrPC.

## CONCLUSION AND SUGGESTIONS

The Code's bail provisions might not be enough on their own to ensure that the bail system serves a purpose. A sincere attempt at obtaining public support and involvement in the criminal justice system, along with the essential legislative, executive, and judicial powers to carry out their duties, are most warranted. Merely making such an effort can contribute to meeting the prerequisites needed for the bail system to function smoothly.

The present bail system frequently neglects individuals' socio-economic backgrounds, disproportionately affecting impoverished individuals who struggle to meet surety requirements. This disparity undermines the principle of legal equality. Judicial discretion in bail cases should adhere to principles of rationality and fairness, rather than subjective judgment. Ambiguity regarding bail arises from a lack of precise definition within current statutes, emphasising the necessity for reform to safeguard fairness and prevent the abuse of discretion. Misuse of judicial discretion undermines the integrity of the legal system and presents substantial obstacles in rectifying unjust decisions.

## REFERENCES

### BOOKS

- Takwani, C.K. & Thakker M.C., *Criminal Procedure*, Lexis Nexis Butterorhts Wadhwa, Nagpur (2011)

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<sup>20</sup> BHARTIYA NAGARIK SURAKSHA SANHITA (BNSS), 2023 § 484, Acts of Parliament, 2023(India).

## LAW COMMISSION REPORTS

- LAW COMMISSION OF INDIA, REPORT NO. 41: "The Code of Criminal Procedure, 1898" (1969)
- LAW COMMISSION OF INDIA, REPORT NO. 268: "Amendment to Criminal Procedure Code-1973 – Provisions relating to Bail" Pg no.22 (2017).

## ARTICLES

- *Manupatra, Articles*. Available at: <https://articles.manupatra.com/article-details/THE-ANOMALY-OF-JUDICIAL-DISCRETION-IN-GRANT-OF-BAIL-A-CRITICAL-ANALYSIS> (Accessed: 16 April 2024).
- Dembi, Divyanshu, Rethinking Presumption of Innocence Doctrine in India through a Minimum Interference Standard, 15th April, 2021, Available at SSRN: <https://ssrn.com/abstract=3953364> or <http://dx.doi.org/10.2139/ssrn.3953364> (Last visited on 16<sup>th</sup> April, 2024)
- rishnadas Rajagopal, Right to seek bail implicit in Constitution: Supreme Court, 1st October, 2021, Available at: <https://www.thehindu.com/news/national/right-to-seek-bail-implicit-in-constitution-supreme-court/article36767032.ece> (Last visited 16<sup>th</sup> April, 2024)
- Sekhri, A. (no date) *The Law Commission of India Report on bail - some concerns, The Law Commission of India Report on Bail - Some Concerns*. Available at: <https://theproofforguilt.blogspot.com/2017/05/the-law-commission-of-india-report-on.html> (Accessed: 16<sup>th</sup> April 2024).
- Sagar, S., Kumar, V., Pathak, D. N., & Singh, M. (2022). Bail: a matter of right or discretion in the criminal justice system in India. *International Journal of Health Sciences*, 6(S1), 13656. <https://doi.org/10.53730/ijhs.v6nS1.8429>
- Atigre, Ameyprasad. (2020). "Critical analysis on bail and judicial discretion" ITJ, available at: <http://lawtimesjournal.in/critical-analysis-on-the-concept-of-bail-and-judicial-discretion/>.
- Mustafa, Faizan. (2020). "discretion in bail can't be used arbitrarily", *The Tribune*, available at: <https://www.tribuneindia.com/news/comment/discretion-in-granting-bail-cant-be-used-arbitrarily-125345>.