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Misuse of Bail Provisions in India

PRERNA SHARMA¹

ABSTRACT

In a criminal trial, the rationale behind the incarceration and imprisonment of an alleged suspect individual is substantially to gain the participation in on-going proceedings or for demanding his appearances as and when required, and if he is found guilty, he must appear in court to serve his penalty. It would be inherently unfair to divest the suspect of his basic and the most fundamental right of personal living and liberty conferred by the constitution of India under Article 21 if his availability could be justly guaranteed without his arrest.

The fundamental rule of evidence Act u/s 101 is grounded on a renowned Latin maxim “Ei Incumbit Probatio, Qui Dicit, Non-Qui Net” which interprets that the burden of proof lies on party who asserts, not on him who denies which leads to the presumption of innocence. Defendant is entitled to a fair trial beyond a possible suspicion by the prosecution. It would be unjust to hold the accused in jail for an unreasonable amount of time, as this would subject him to psychological, social, and physical abuse. Similarly, in serious offences where the accused is likely to flee or cross the bail in order to escape a trial, or when the accused is likely to tamper with evidence or interfere with the prosecution, it would be hazardous to grant him bail. The law of bail “has to dovetail two conflicting demands, namely, on the one hand the requirements of the society for being shielded from the hazards of being exposed to the misadventures of a person alleged to have committed a crime; and on the other, the fundamental canon of criminal jurisprudence viz. the presumption of innocence of an accused till he is found guilty.”

This paper focuses on how Bail provision are misused and what are the ways to curb the misuse of these provisions.

Keywords: *Bail, Presumption of Innocence, Misuse of Bail Provisions, Overcoming the misuse.*

I. INTRODUCTION

The concept of bail is very complex subject as the jurisdiction of the same concept is so wide that it is difficult to sum it up under one code. The rationale and legislative intent behind the concept of bail is very simple. The legislative intends to make a balance/equilibrium between the interest of accused with a step towards ensuring fair trial following the principles of natural justice. The misuse of bail is not just limited to the accused, its negative rays have also tempted

¹ Author is a LL.M. Student at Amity University, Noida, Uttar Pradesh, India.

the criminal justice systems including the police officials and courts also. The highlighted grounds for misuse are as follows:

- Where the accused seeks bail for the purpose of taking revenge
- Where the accused tampers the evidence
- Where accused bribes or threatens the victim/witnesses
- Political mutualisation is a big misuse
- Exploitation by police officials
- Subordinate courts misusing their discretion

The three organs of the government need to work with each other so that the system of justice may be improved in order to ensure fairness and credibility. Maintaining a system of check and balance over the officials and subordinate court would be a very helpful in the same cases where the abused is observed.

(A) Research methodology

The precise process or methods used to locate, choose out and analyse the data are known as research methodology. The current study is doctrinal, non-empirical, narrative, and critical, and it is based on many published works, including those that describe legislative legislation and numerous principles that have been created or declared by honourable courts, as well as renowned research papers and journals.

(B) Need for the study

Bail occupies a very crucial part in criminal justice system. Since it is a universally accepted concept, it can be ignored while analyzing any criminal aspect of Law of crimes. When a person violates the Indian Penal Code or any Act created under a special statute, he or she will be arrested and interrogated while incarcerated. He will be taken to court, where the criminal event of the lawsuit will begin. All of this legal procedure takes a long time. Meanwhile, the accused will be detained by police unjustly before his innocence or guilt is pronounced, and will be imprisoned for a period of time, robbing him of his freedom.

But whatever case may be, every person should be aware of the bail options established by our law. Alternatively, a defendant will be detained or imprisoned for a period of time until his case is resolved despite the fact that he is innocent. No accused shall be given punishment if that person is innocent which is basic principle of natural justice and criminal jurisprudence.

II. DEFINITION AND MEANING OF BAIL

“Bail is a rule, jail is an exception”

- Justice V. Krishna Aiyer²

The term "bail" does not appear in the 1973 Code of Criminal Procedure. Bail, simply put, refers to being released on his bond, whether in the presence of or sometimes without the presence of sureties. Every accused person is presumed innocent until proven guilty. When bail is approved, the accused is released from jail and committed to his own bonds and personal guarantees, who are under the obligation to produce him at a particular place and time as required by the court. Bail is a sort of security secured from a person who has been imprisoned for a crime in order to ensure his participation and attendance in court.

• According to **Black Law’s dictionary**³ “Bail” means:

“Procuring the release of a person from legal custody, by undertaking that he/she shall appear at the time and place designated and submit him/herself to the jurisdiction and judgment of the court.”

• According to **Wharton Lexicon**⁴ “Bail” means:

“The setting free of the defendant by releasing him from the custody of law and entrusting him to the custody of his sureties who are liable to produce him to appear for his trial at a specific date and time.”

Bail is a term often used to refer to an individual's interim or transitional freedom after being charged with a crime but before the court plans. In other words, "bail" involves the release of an accused person from jail in exchange for a security deposit that ensures his appearance in court or before any other legal authority as and when required. Bail comes from the French word "bailera," which meaning "to deliver" or "to provide."

III. CONCEPT OF BAIL

“Deprivation of Liberty even for a single day is a one day to many”

- **Justice D.Y. Chandrachudh**

The notion of bail is such an essential topic in Law of crimes, and it is an unquestioned and accepted standard all over the world. The right to personal life and liberty is set in stone by

² State of Rajasthan V. Balchand AIR 1977 2447.

³ Black's Law Dictionary 177 (4th ed.).

⁴ Law lexicon by Ramanth Iyer, (3rd ed).

Article 21 of the constitution. It protects every citizen's personal liberty and gives every person a right to live with human dignity. All accused are innocent, until proven guilty.

The objective behind arresting and detaining a person who is accused for an offence is to ensure that he appears in court during the trial and as needed by the court. It assists the courts in keeping tabs on the accused and ensuring that no activity by the accused could jeopardise or sabotage the processes while the trial is ongoing. The bail system is complicated since it is impossible to know whether a person is innocent or guilty in the middle of a trial, and it has been observed that many innocent persons linger in jail because they are not granted bail.

Bail is simply a guarantee that a defendant will appear in court and face the charges that have been made upon them. The more severe the allegation, the better the prosecution's case, and the greater the anticipated sentence, the more likely the defendant will not be able to represent himself in court to answer the charges. The less grave the accusation, the weaker the proof against the accused, the smaller the potential sentence, and the greater the ties to the jurisdiction, the more likely the accused will appear in court to face the charge.

IV. OBJECT OF BAIL

“The object of bail is neither punitive nor penetrative but to secure the appearance of the accused presence at his trial.”

- Hon'ble Justice Sandeep Sharma⁵

The objective of bail is two-fold. The legislature and judiciary while introducing and interpreting the provision of bail must balance between the protection of human dignity of accused and the safeguarding the fair trial. Hence, the object of Bail is two-fold:

- The primary goal of bail is to set the seal that the accused shows up for his trial and does not flee from justice.
- Simultaneously, an alleged offender should not be detained and retained in jail throughout his case in expectation of his verdict except if the national benefit requires it or there is proof that he would use his liberty to pervert the course of justice or meddle with the evidence.

V. BAILABLE AND NON-BAILABLE OFFENCES

- The administration of bail for bailable offences is dealt with in Section 436 of the Code of Criminal Procedure whereas, Section 437 of the code outlines the requirements for

⁵ Rakesh Kumar Kaushal v. State of Himachal Pradesh, 2018 SCC Online HP 486.

an accused to be released on bail.

- Section 436 of the law mandates that if a person has done something illegal that is bailable in character, that individual be released from custody, Section 437 of criminal code deals with the law pertaining to offence of non-bailable cases.
- Bails under bailable offence cannot be denied because sureties are not available.
- In case of bailable offences, if an individual released on bail fails to adhere with the bail bond's regulations concerning appearance location and time, the judge may refuse to free him on bail when he attends in trial or is taken into jail on a future occasion in the very similar content and in the same circumstances, he is present before the jury or is put forward for remand.
- In case on non-Bailable offences, Bail under section 437 is available in all courts save the superior court and the session court.
- However, such a person will not be freed if:

1. There are substantial reasons to suspect that accused has committed an act of criminal nature which is penalized by death or life imprisonment.

2. The violation is a prima facie cognizable offence, and he had already been sentenced of a felony punishable by penalty of death, incarceration for life, or an incarceration of 7 years or more, or he had earlier been condemned of a non-bailable and cognizable offence on two or more instances.

VI. MISUSE OF BAIL PROVISIONS

“The greater the power, the more dangerous the abuse.”

-Edmund Burke⁶

The legislative intent of the report of Law commission for the introduction of the provision of “Anticipatory Bail” can be easily illuminated in the light of 41st Law Commission report⁷ which seeks protection of people from false cases, protection from political rivalry and to protect individuals from powerful individuals who attempt to incriminate others in fake cases in order to disgrace them and imprison them for their own internal benefit. But now, if we juxtaposed the intent of the legislation with the practical applicability of the same provision, one could not turn a blind eye to lacunas and loopholes.

⁶ <https://www.azquotes.com/quote/41738?ref=abuse-of-power>.

⁷ <https://lawcommissionofindia.nic.in/reports/Report268.pdf>.

Since the legislation constructed the same provision to prevent a misuse of power, but now the people who are granted anticipatory bail or any other bail are misusing them. Accused who is released on anticipatory bail hampers the investigation, accused threatens the witnesses, tamper the evidences.

The Court's jurisdiction over whether bail is granted is widely recognised. Such a conclusion, therefore, must be "judicial," that is, it must be based on rational legal grounds. "Rather than being enjoyable, it should be governed by rules; it should not be arbitrary, ambiguous, or frivolous, but rather legitimate and consistent." Because the grounds and seriousness of the matter may not be entirely grasped by the judiciary at that point, such thorough thought is even more crucial when deciding on a prayer/request for interim bail. Because such power is commonly exercised during the interim period and on the rationale of little evidence and events diverted towards the Court's attention, unethical litigants/accused routinely abuse it. There have been various instances of such misappropriation, ranging from noncompliance and disrespect for bail conditions to outright elopement from the legal system.

(A) How the Bail is misused by the Accused

In *A. K. Murumu v. Prasenjit Choudury*⁸ The court stated "*that an order granting bail can be revoked if new or aggravating circumstances arise after the release on bail, such as harassment of individual liberty by destroying evidence, malicious attacks on eyewitness accounts, or the commission of the same or comparable crime, but that the existence of any expressly or impliedly situation following the grant of anticipatory bail or bail is not the only criterion for bail cancellation.*"

1. **Tampering of prosecution evidences:** A court must assess if, as a result of an accused person's bail being granted, prosecution witnesses are likely to be terrified and have a challenging time walking into the witness stand during the trial. It is commonly understood that granting bail for a non-bailable offence is a benefit, not a matter of right. A court places a certain amount of confidence and faith in the applicant. The immunity is presumed not to be exploited in any way by the court.⁹

An accused individual who has been released on bail should avoid contacting potential witnesses in order to prevent the proof against him from being destroyed or minimized. As soon as somebody abuses the liberty that has been granted to him, he loses his right to that advantage. The prosecution's main argument against a bail application is that a person accused of a heinous

⁸ 1999 Cr.LJ 3460 (3468).

⁹ State Vs. Pritam Dass AIR 1956 Bom 559.

crime, no matter how strong, cannot resist the temptation of deleting evidence against themselves.

Major Judgement: In the case of **Bishambhar Nath Vs. Emperor**¹⁰, “*The learned counsel for the crown, Mr. Gupta expressed apprehension in the course of his arguments as to these accused tampering with the prosecution evidence. The apprehension, however, will not be sufficient ground for me to refuse bail if I otherwise think that it should be granted. So far these apprehensions are merely chimerical. But if they turn out to be real at any stage of the trial, it will be open to the learned counsel who I understand is in charge of the case for prosecution to move the trial court to cancel bail*”

In the case of **Madhukar Purshottam Mondkar and Another Vs. Talab Haji Husain**¹¹ and others, the Bombay High Court “*has revoked bail in aailable case after concluding that the accused manipulated or attempted to meddle with prosecution information. The Supreme Court agreed with this viewpoint.*”

2. **Misuse of bail by accused for threatening the victim:** According to Chittarikkal police¹², an accused in a child abuse case who was out on bond attempted to assault the same victim again. Anto Chacko Chan, 23 years old, the accused, remains on the run, and locals have organized an action committee to protest the delay in his capture.

A year ago, Chacko Chan is accused of sexually abusing a juvenile girl in his neighborhood. The incident was discovered after her parents saw signs of distress in their daughter. She told a counsellor about her ordeal, and she was afterwards contacted by a Childline volunteer.

Accused was booked under POCSO ACT, but after 6 months he was released on bail and again tried to assault the victim.

3. **Accused may abscond:** While discussing the object and concept of bail, it is quite understandable that presence of accused during the trial is of utmost importance, specifically in non-bailable offences. The court also to balance an equilibrium of protecting the individual interest and interest of society. Keeping in view, In **Ramchandra Vs. State**, Justice Kaul C.¹³ observed that the major goal of imprisonment and detainment is to ensure that the accused not only attends the trial but also does not obstruct it by missing it on occasion. The court would not typically grant bail if there is

¹⁰ 25 CrLJ 1132.

¹¹ AIR 1958 SC 376.

¹² <https://www.newindianexpress.com/states/kerala/2021/jul/19/out-on-bail-pocso-accused-tries-to-assault-survivor-again-2332104.html>.

¹³ 1953 CrLJ 17

no such worry in its view. When the prosecution's evidence is overwhelming, the court should assume that the accused will fail to appear for the trial.

4. **Accused likely to repeat the offence-** When a court has grounds to suspect that an accused individual will repeat a similar or other crime if released on bail, it will deny bail, regardless of any other factors in the accused's favor.

In *Emperor Vs. Narainji*¹⁴, the Bombay high court held that “*Very great weight must be attached to the fact that according to the allegations before the Magistrate, the complainant was under police prosecution and hardly left in a taxi, when he was surrounded by several persons and struck with knives and sticks. This is a crime of a very determined nature and any of his assailants might, if released on bail, renew the attack, and try to kill this man, so that his evidence may not be availed of against them*”

(B) The misuse of bail provisions is not only limited to the accused, even police and judges are also misusing the bail provisions.

The Malimath committee's¹⁵ reports have provided police a wide range of bail-granting authorities. The widespread perception is that police officers are ignorant of the law and simply know how to wield authority. This combo isn't a good one. The offender's interests may not be safeguarded while exerting such unlimited power. This is the bone of contention that needs the attention of nation immediately in order to prevent the police from abusing their authority in issuing bail. Apprehending an individual who is suspect of an offence appears to be a common practice in the context of criminal law. After that, the individual is brought to the police station. After being captured, he is either granted the bail or imprisoned at the police station waiting for his appearance in court. At this point, the police come into the picture and can exercise their power to voluntary grant or refuse bail. The issue of bail in bailable offences is addressed and pursued as a constitutional right for the detained individual. It is given to such people by an officer at the police station in trivial cases. However, the technique has certain ineffective and corrupt aspects, in that discretion is exercised to get quick results at the request and pressure of powerful individuals, or by a settlement of monetary gains conducted between the parties' agents. The misuse is even more prevalent in the such cases where the act of offence was non-bailable offence, where officer in charge does not register formal case, doesn't take the accused to magistrate within 24 hours of arrest, where the police make a fool of the accused persons who are unaware and financially unstable.

¹⁴ 1928 SCC OnLine Bom 110

¹⁵ https://shodhganga.inflibnet.ac.in/bitstream/10603/269393/13/13_chapter%207.pdf

Courts have been given the authority to approve or deny bail as per the facts and circumstances of the cases presented before them. The use of this power is usually predicated on precedents. However, courts' unrestricted powers are frequently abused and are frequently criticized. Bails given by subordinate courts have been found to be cancelled by higher courts.

- In *Balchand V. State of M.P*¹⁶, the court observed that When the magistrate's order to release the accused on bail demonstrates that he did not apply his judicious mind to the provisions of Rule 184, the order is clearly illegal and liable to be quashed and set aside provision mentioned 482 of criminal code to prevent of abusing the powers of court's process and to secure the ends of justice.
- In *Rukmani Mahato case*¹⁷, where the honourable apex Court while observing the misuse of bail and criticised the practice of subordinate courts and held that, “even if the superior court is to dismiss the plea of anticipatory bail upon fuller consideration of the matter, the regular bail granted by the subordinate court would continue to hold the field, rendering the ultimate rejection of the pre-arrest bail by the superior court meaningless.”
- **Political mutualization:** Many times, it happens that the ruling party helps the alliance party to provide the liberty to facilitate the bail of criminal family members of alliance party for the purpose of mutual interest. Sometimes, influential criminals (Political leader/religious leaders) help the political parties in gaining vote shares of their (criminal) followers and the beneficiary parties helps the in getting bail before the scheduled election.
- In addition, Deceitful suspects intending to misappropriate/abuse the in-born empowerment of the superior courts by utilizing the provision of 482 CrPC to obtain interim bail/protection are not rare. In this regard, the Honorable Apex court has repeatedly emphasized that the High Court is conferred power under provision of 482 CrPC cannot be exercised unless there are statutory recourse or a suitable alternative for resolving the aggrieved party's dispute. The Hon'ble Court has specifically criticized the practice of converting Section 482 CrPC applications to Sections 438 and 439 CrPC applications. In reality, the Supreme Court has repeatedly stated that when it comes to criminal prosecutions, arrests, investigations, and other things under the criminal code provision mentioned in segment 482, the High Courts should exercise caution.¹⁸

¹⁶ AIR 1976 SC 57.

¹⁷ (2017) 15 SCC 574.

¹⁸ <https://www.mondaq.com>.

VII. RECOMMENDATIONS

“Injustice anywhere is a threat to justice everywhere”

-Martin Luther King¹⁹

- **Cross-check on grounds accused proposed on behalf of accused:** A special power/provision must be vested to the prosecution (including Public prosecutor/Special Public prosecutor) to cross-check the grounds proposed by lawyers on behalf of accused for granting of bail.
- **Enactment of special statute:** Since Bail is such a wide concept which is not limited to only code of criminal procedure, but its jurisdiction extends to various other enactments like NDPS Act, POCSO Act, UAPA etc. So, enactment of special code will help to define the concept of bail precisely. Detailed integrated concerning the functionality, appropriateness, effectively giving, refusing of bail, system of governance on police and court powers, alternatives for court misuse of power. Such establishment will help to explain the comprehensive provisions to minimise the misappropriations of bail besides protecting the human rights of the alleged accused.

The code shall include:

- Definition of bail
- Concept and scope of bail
- Checks and Balance over the power of judges
- Checks and balance over the power of Police officials
- Detailed provisions for granting and accepting the bails
- What would amount to misuse/abuse of bail by accused
- Remedies after the accused has abused his liberty
- Exhaustive list of the ground on which bail be cancelled

Every aspect regarding the bail shall be considered in drafting the code.

- **Special check on police personnel:** A special authority/body/official needs to be constituted/deputed to monitor the just arrested accused, and their timely representation before the competent authority/magistrate for bail to eliminate the unregistered detention with malice intention at Police station level. Such practices will also help to

¹⁹Available at: <https://www.azquotes.com/quotes/topics/equal-justice.html>

discourage the fake encounters of the alleged accused.

Awareness programmes shall be conducted for the police so that they can understand the law on bail more elaborately.

- **Reformation of current law on bail for the time being (till the enactment of special statute):** The existing laws relating to bail must be amended to minimise the misuse of bail.
- **Fixing of amount for bail bond:** At present there is no fixed limit which is to be paid by accused for his bail. The amount of bail bond is decided by the court at its own discretion. Hence, a specific provision regarding the same must be made so that the poor category should not suffer due to heavy bail bonds amount and lack of sureties.
- **Scarcity of judges:** There is shortage of judges but high pendency of cases in the courts, such imbalance tends to cause the over-loading of work on available strength of judges which causes delay. Appointment of more judges can be helpful for timely disposal of bail cases.
- **Check over exercise of judicial discretion:** Hold judicial personnel accountable for issuing bail to the accused without justification. The discretionary powers of court authorities in granting bail should be closely controlled. There should be clear procedures for determining the conditions for giving accused persons anticipatory bail.
- **Clarity and genuineness of the grounds proposed by the accused:** After the completion of investigation by the police genuineness of the grounds must be ensured before granting the bail as accused person tries his best to get of the jail. In order for grant of bail, accused gives false grounds.
- **Guidelines by Supreme court:** Guidelines must be issued by the Hon'ble Supreme court regarding what would amount to misuse and abuse of liberty granted to the alleged accused and if the accused had misused the liberty granted to him, what are the remedies available with the victim or witnesses.
- **Check on political misuse:** The persons especially political leaders who has been sentenced to imprisonment once by the lower courts shall not be given bail before and after the certain time period of elections as they misappropriate the bail for their political agendas.
- **Penalties must be imposed on the accused and the Lawyer representing him:** Where accused in consensus with his lawyer represent false grounds before the court, and the

result after investigation is such that there is no such event on which the accused has requested the bail, or where the accused tries to obtain the bail fraudulently, the court shall impose penalties on both the accused person and the lawyer representing him in the court.

- As discussed in the above chapter the issue of political mutualisation shall also be considered. There are numerous cases where these political/religious leaders get bail to gain the vote share.

VIII. CONCLUSION

Provisions 436 to 450, XXXIIIth Chapter of the Code of Criminal Procedure, 1973, apply to bail. The same covers bails, different sorts of bail, the competence of courts to grant bails, the law governing sureties, anticipatory bail, and different types of offences. It also outlines the requirements for granting bail, the grounds for cancelling the bail granted, and the distinction between rejection and cancellation bail. It includes a variety of bail requirements. The two sides of the same coin are the use and misuse of law. Although the concept of bail is important and one of the most fundamental aspects of criminal law, it does have significant limitations. When an accused abuses his liberty by tampering with evidence, engaging in criminal conduct, threatening or influencing witnesses or complainants, or in any other way, the court has the authority to revoke the suspect's bail. The extent of abuse has grown so large that it has engulfed the criminal justice system.

The ambiguities and the limitations need to be resolved. The reforms are amendments are requirement, a new code can be enforced. It's high time activities of criminal justice systems shall also be looked upon. Remedied to these misuses shall be made available to the sufferers.

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