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Bail: a matter of right or discretion in the criminal justice system in India

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Abstract--In criminal law, bail is also known as the right to liberty. It refers to everyone's right to liberty, which is also a basic right under Articles 19 and 21 of the Indian Constitution. The right to bail allows individuals to continue about their everyday lives by enabling a person accused of a crime to be freed from jail. Despite the fact that there are various requirements for obtaining bail, under criminal law, a person is deemed innocent until proved guilty, and the courts and the constitution have adopted a liberal approach to this privilege. A sort of bail that permits a person to post bail before being arrested if they are charged with a certain offence is known as advance bail provision. The classification of charges as bailable or non-bailable expands this right. In cases of bailable offenses, bail can be requested as a matter of law and is almost never denied; however, in cases of non-bailable offenses, a request for bail can be made in good faith, and the courts' tendency to grant bail in most cases emphasizes the importance of this right in the individual context. The goal of this article is to see whether bail is a legal privilege or a matter of judicial discretion.

Keywords--Arrest, Bail, Judicial Discretion, Right, Accused.

Introduction

The two options that are available in the criminal justice system for a person accused of an offence are either bail or Jail. These possibilities are accessible in both bailable and non-bailable offenses. The functional categorization of offenses into two categories has no influence on the actual functioning of the bail system, since bail is granted on the assumption that the accused will come before the Court for trial on the specified day. The nature of the offense may be a consideration, but the exercise of judicial discretion in regard to release is mainly concerned with the individual charged and not the allegation leveled against him. Bail-jail options are available in all cases, and the judicial authority is the last arbiter in the question of granting or denying bail, which may be considered before it at various stages of the criminal proceedings. Bail assumes the detention of an accused in the hands of state authorities for an alleged violation of a law. If the accusation is for a bailable offense, he may be allowed to bail if he is willing to provide the requisite guarantee. An accused may even be released if he signs a bond with or without sureties. In each of the above scenarios, he would be required to appear before the Court on the given day.

The following ingredients are taken into account while deciding a bail pleading: -
Prima Facie there is any reason to believe that the person accused of an offence has committed the offence.

- The Nature and seriousness of the offence
- The risk of accused fleeing after granting of bail
- Whether the accused can influence the witness
- The grant of bail will result into miscarriage of justice (RAO, 2019)

Meaning Of Bail

Bail is simply the procedure of releasing a person, which may be on his own bond or on another kind of security. Bail is the process that occurs after an arrest and before a trial. Bail is not stated anywhere in the criminal process legislation, although categorization of crimes into bailable and non-bailable offences is made explicitly or may be determined after considering the seriousness of the offenses. Grave offenses should be deemed nonbailable, with bail not being provided as a right but being granted based on an examination of specific conditions by courts exercising judicial discretion on certain fair and human grounds. (Kode)

Bail is a legal term that refers to ensuring a defendant's attendance in return for their release awaiting trial or inquiry. According to the author, "release of person by the court on furnishing of security bond and agreement that the accused will appear on every date of hearing or trial (Garner & Henry Campbell Black, 2019). The Indian Criminal Justice System has classified the Offences in two categories i.e., Bailable Offence and Non Bailable Offence, it is mentioned under Section 2(a).

As per the Code, 1973, bailable offences are those offences which are mentioned in Schedule I of the Code and Non-Bailable offences are those which are not mentioned in the Schedule I of the Code. The processes for posting bail and bonds in criminal cases are described in Sections 436 -450. The amount of security

bond required to be furnished for getting bail is not mentioned in the Code, the judge has the authority and discretion to decide the bail bond amount.

Fundamentals Governing Bail

While granting Bail under section 437 of the Code, 197, the following fundamentals must be taken into consideration by the court.

- Bail should not be rejected unless the offense accused is of the most serious kind and the penalty imposed by the law is severe;
- Bail should be denied when the court has a reasonable belief no amount of security will make the accused appear before the court for hearing.
- If the person seeking bail is hindering the legal process, bail should be denied.
- In case the accused has the capacity that he can influence the witness or hamper the administration of justice, he should not be granted bail.
- if the applicant has previous criminal record, they should be rejected or denied due to reason he may again commit offences while being released on bail.

Bail as Matter of Right

As per the Code, 1973, the Judges has an absolute power to decide on bail. When the court is deciding on bail, instead of not deciding in the favor of not curtailing of accused liberty, the greater community interest must be considered. Article 21 of Indian Constitution acknowledges every citizen's right to a timely trial. The Speedy trial is the ultimate goal of the Code, 1973. The delay in completing the trial breaches the Constitutional provision of a fair, just, and reasonable process, as well as a basic right to a timely trial. The Court and as well the police in some offences has been granted the power to grant bail. However, in the case of bailable offenses, bail may be requested as a matter of right.

In this aspect, neither the police nor the magistrate has any discretion. However, since the public is unaware of the legislative restrictions, the police utilize their discretion in issuing bail. There is an essential need to raise awareness in this area so that police do not abuse their authority for illegitimate purposes.

The police officer has no jurisdiction to reject release under Section 436, implying that bail does not have to be granted only by the Court. It is upon the officer to determine whether the bail should be granted with or without a bond. The Police Officer has no right to deny bail in bailable offences under Section 436 as long as the accused is willing to give surety. The Investigating Officer is compelled to release the accused on bail as long as the accused is furnishing the bail bond. If the defendant is arrested for a crime for which bail is set, the police officer will post bail, and if he fails to do so for any reason, the court will.

In the case of (*Dharmu Naik v. Rabindranath Acharya*, 1978), "the appellant and his brother were arrested by the respondent police officer despite having previously been granted bail by the court. Despite the fact that the appellant and his brother had previously been freed on bail and the bail order had been brought before him, the hon'ble High Court found that the respondent police officer

unjustly apprehended and detained them. It was unthinkable that the appellant and his brother, who had acquired a release order after appearing in court in fear of arrest, would keep quiet, fail to show the bail order, and submit to police imprisonment. Even if no bail order had been presented to the respondent police officer, evidence showed that surety had been offered at the time of the appellant's arrest, and thus the respondent was required to release him on bail. In a bailable offense, the police officer does not have any kind of discretion to refuse to bail to the accused if he is willing to furnish bail bonds. As a result, the respondent police officer was found guilty of breaching IPC (The Indian Penal Code, 1860) Section 342 as a result of the investigation."

The Hon'ble Supreme Court in the landmark judgement of 2011 ruled that "decision to grant or deny bail is at wisdom of the judge of the presiding court. The Facts and the circumstances of the case should be taken in to consideration while deciding the bail plea. The Bail should not be denied due to public emotions and pressure. The Primary purpose of the bail after or before the conviction is to free the accused from the restriction put upon him by barring him beyond the walls of the prison and also to relieve the burden of the state which the state is spending on him for keeping him, maintaining him constructively while he is in the prison and in the custody of the court and the purpose of Bail bond is to ensure the presence of the accused on the date of hearings. (*Sanjay Chandra v. CBI*, 2011).

The right to a speedy and fair trial

The Accused of an offence has a fundamental right of speedy trial under article 21 of the constitution of India, this fundamental right is an extension of the provided under article 21 and 22 of the constitution which is right against illegal detention. This is a universal privilege that the accused does not have to seek or use. An accused individual has the right to appear in court as quickly as feasible so that the court may decide whether the detained person should be freed on bail and his detention was needed or not (*Bare Acts Live*, n.d.)

The ICCPR, OUNHCHR, 2013 and ECHR, 1950, provide that an accused's release on reasonable bail constitutes a remedy for a delay in deciding the charges. Furthermore, according to article 9 (3) of the ICCPR, the person who has been detained by the authorities should be brought before the court as soon as possible (The International Covenant on Civil and Political Rights, 1966). The right of speedy trial has also been upheld by the United States Supreme Court, any intentional delay in the trial can result in dismissal of charge as well as the case.. In one the landmark case, the Hon'ble Supreme Court ordered "the release of those prisoners whose time in jail has been more than the punishment for the offences, irrespective of trial being completed or not, the judge went on to say that these people are lying in jail because of the delay in the judiciary and there are oppressed having not much means to fight the system or avail the provisions avail in the system. (*Hussainara Khatoon v. Home Secretary, State of Bihar*, 1979)

The Hon'ble Supreme Court set nationwide norms for quick trials for all courts in the case of (*Abdul Rehman Antulay v. R.S. Nayak*, 1991):

- "The right to a speedy trial is guaranteed under Article 21 of the

Constitution of India, which guarantees the accused a fair, equitable, and reasonable trial.

- In the circumstances, it is in everyone's best interest to ascertain the accused's guilt or innocence as quickly as possible.
- The right to a speedy trial, guaranteed by Article 21, applies to all phases of the legal process, including investigation, inquiry, trial, appeal, review, and retrial.
- Prior to their conviction, the accused shall not be subjected to excessive or needless incarceration.
- In terms of concern, anxiety, money, and interruption to his work and peace of mind, a too long investigation, inquiry, or trial should be avoided. (*Bare Acts Live*, n.d.)
- Unnecessary delay may undermine the defendant's capacity to defend himself, whether because the witness has died, vanished, or is unavailable, or for other reasons; and
- It should be remembered, however, that the accused is generally the one who asks a delay of the proceedings.
- The use of delay is a typical defensive strategy. Because the prosecution has the burden of demonstrating the defendant's guilt, the delay is detrimental to the prosecution. Furthermore, the prosecution's interests are injured by the absence of witnesses and the loss of evidence owing to the passage of time".

Thus, in relation to bail, the guarantee of a speedy trial serves several purposes: it protects against oppressive pre-trial detention; it relieves a person charged with a crime of the public anxiety and suspicion that comes with unresolved criminal charges; it protects against evidence loss; and it allows the accused to defend himself. (*Bare Acts Live*, n.d.)

A bond hearing is a court process that must be handled in a fair, judicial, and lawful manner. Due to a lack of cash or resources, the right to justice guaranteed by articles 21, 19, and 14 of the Constitution, as well as the Directive Principles of State Policy, cannot be denied. The major aims of the bail institution, as stated in Article 39A, are to assure the presence of the individual accused with a crime at trial while protecting personal liberty in accordance with the Constitution's principles. (*Bare Acts Live*, n.d.)

Bail to be non-arbitrary

Bail or incarceration in the criminal justice system's pre-trial or post-conviction phases is essentially governed by the court's decision, which is known as judicial discretion. Personal liberty, which is taken away when bail is refused, is much too important a value in our constitutional system to be overlooked; it is a substantial trust that can only be handled responsibly and with a thorough knowledge of the implications for the individual and society. Personal liberty restrictions, whether temporary or permanent, must be founded on the most severe considerations pertinent to the Constitution's welfare aims. (*Bare Acts Live*, n.d.)

Bail is used to force a defendant to show up for his trial or any other time when his presence is legally necessary, as well as to comply with the court's authority

and punishments. Bail is never refused to someone who has been charged with a crime as a form of punishment. Bail's main goal is to get a defendant out of pre-trial detention without the constraints and criminal consequences that come with it. Bail should not be rejected just because the defendant wants to be freed and has a strong probability of doing so. Bail may be rejected if there is a danger that the defendant would engage in activity that jeopardizes the administration of justice if released on bail.

Bail and judicial discretion

A case may be separated into two categories to determine whether it is bailable or not: bailable and non-bailable. In reviewing a bail application in light of the principles and criteria, a court must use judicial discretion. Any bail request must be backed by compelling evidence based on the facts and circumstances of the case. The accused may be released on bond under the Code of Criminal Procedure, 1973. In the event of offences entitled to bail, Section 436 of the Code allows for release on bond. (The Code of Criminal Procedure, 1973)

Bail is a matter of law, according to Section 436 (1) of the Code, which implies that the official in charge of a police station or any court has no authority to provide bail for offences entitled to bail. (The Code of Criminal Procedure, 1973) In the event of offences not subject to bail, Section 437 of the Code allows for release on bond. In such instances, security deposits are not accessible on a first-come, first-served basis. The judge has the authority to grant or deny bail. The conditions that have no link to the intent and purpose of the bond and are more likely to constitute harassment or a violation of the individual's constitutional and legal rights cannot be included within the scope of the allowed exercise of 'judicial discretion'. When granting bail, the Court must ensure that no condition is imposed on the accused that contradicts the presumption of innocent in his favor. The court must find a balance between personal liberty and the public interest while deciding on bail for non-bailable offenses. When granting bail for non-bailable offenses, the likelihood of recommission, the risk of frightening witnesses, the risk of tampering with evidence, the defendant's seniority, the likely punishment that the defendant will receive if convicted, the strength of the evidence against the defendant, and the reasonable possibility of ensuring the presence of a witness must all be considered.

In the case of (*Kalyan Chandra Sarkar v. Rajesh Ranjan @ Pappu Yadav*, 2005), the Hon'ble Supreme Judge ruled that "the court should exercise the bail granting power cautiously not arbitrarily. While a full examination of the evidence and lengthy documenting of the case's merits are not required when giving bail, it is vital to state in such orders the basis for the *prima facie* determination that bail was granted, especially when the defendant is charged with a crime. Every organization would lack mental application if such explanations were not offered". The Hon'ble Supreme Court ruled in the case of Amarmani Tripathi case that courts must consider the defendant's "character, behavior, means, status, and position" while granting bail. While the presumption of innocence ensures that a defendant is innocent until proved guilty, a conditional order instructing the defendant to deposit a specified amount of money allegedly misappropriated by the defendant jeopardizes the trial court's independence instance, because it is

evident that the trial court would make an unfair presumption against the defendant's innocence after examining such a bail order. (*State Through C.B.I v. Amaramani Tripathi*, 2005)

It's also worth noting that in order to grant bail, the Legislature replaced the words "reasonable grounds to believe" with "the evidence," implying that the Court can only decide whether there is a genuine case against the defendant and that the prosecution must be able to present *prima facie* evidence in support of the accusation. At this point, there is no way to know whether the defendant is guilty beyond a reasonable doubt.

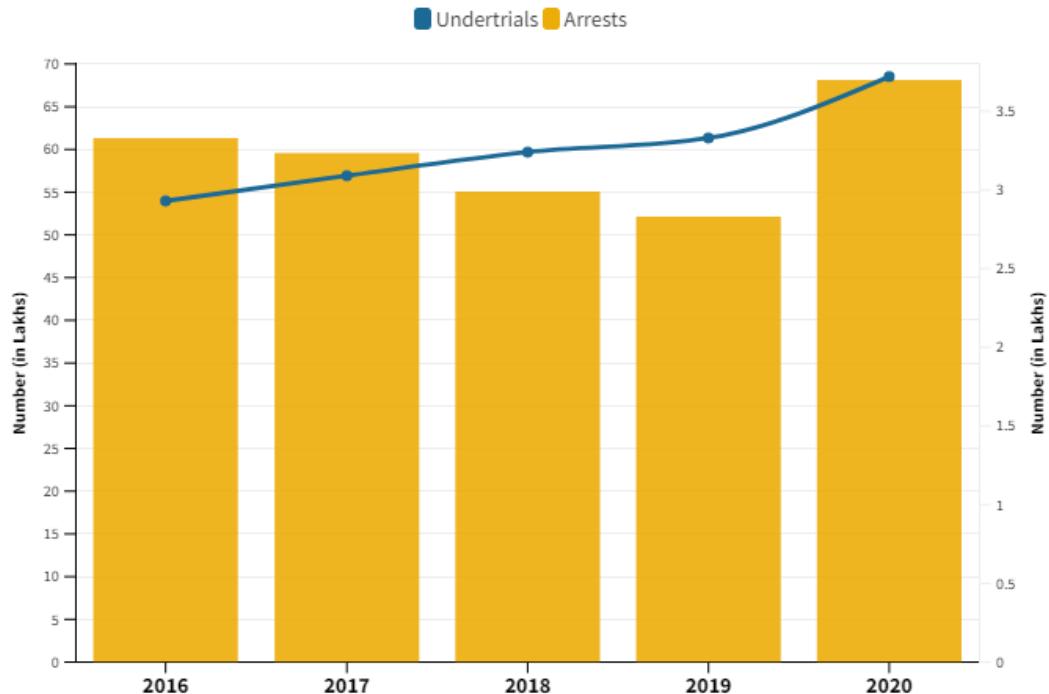
Bail denial should not be used as a form of punishment prior to a conviction. Let us not forget that under criminal law, the presumption of innocent exists until guilt is proven. The defendant's guilt must be established beyond a reasonable doubt. The defendant's right to a fair trial is further harmed by the rejection of bail, since he has very limited contact with his counsel, especially in such a restricted setting.

The Supreme Court has the jurisdiction to issue bail orders under Article 136 of the Indian Constitution (Mahabir Prashad Jain et al., 2019), which gives it the authority to overturn lower court sentences. This, however, is a discretionary remedy that should be employed only in "rare circumstances" requiring difficult legal challenges with contradictory precedents or cases of "egregious miscarriage of justice." Even the Supreme Court agrees that in matters involving the granting or rejection of bail, the "High Court should normally be the ultimate arbitrator," and that it should not intervene for every mistake of fact or law in dispute. According to Krishna Iyer J., bail is a murky area of the criminal justice system that depends greatly on the court's intuition, sometimes known as judicial discretion.

"As the Code is vague on this issue, the court chooses to keep quiet, regardless of whether the order is custodial or not. Instead, the problem is one of liberty, justice, public safety, and financial hardship, all of which need well-developed bail jurisprudence as part of a socially aware legal process." (*Gudikanti Narasimhulu v. Public Prosecutor*, High Court of Andhra Pradesh, 1977) In light of the established principles and criteria outlined above, a court must use judicial discretion while assessing an application for bail. Every bail plea must be supported by compelling evidence based on the facts and circumstances of the case.

Statistics

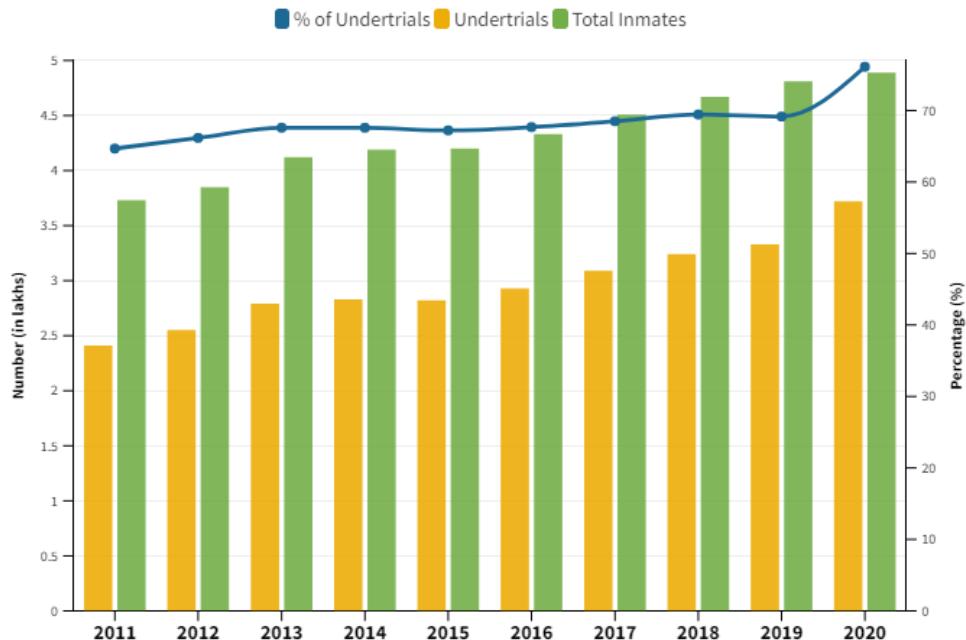
No.of Persons Arrested vs. Inmates under trial 2016-2020



According to the NCRB's Crime in India report, the number of arrests made in 2020 increased significantly. There were 68.15 lakh arrests in 2020 (under the combined IPC and SLL charges), up from 52.13 lakh in 2019, a 31% rise. As we previously reported, the number of prosecuted inmates is likely to rise by 38% by the end of 2020. The rise in preliminary trials in recent years, however, cannot be attributable exclusively to arrests. According to the NCRB CII data, the number of arrests made before 2020 has decreased year over year. Although there were 61.3 lakh arrests in 2016, the number has significantly fallen, reaching 52.13 lakh in 2019. (Records Bureau, 2021)

Trends in Prison inmates Under trial in India

Total inmates vs Undertrials (2011 - 2020)



As can be seen, the number of prisoners in jail awaiting trial is steadily rising. As demonstrated, the proportion of detainees convicted on trial was about 65% in 2011. Year after year, with the exception of 2014 and 2015, the proportion of inmates held under preventative custody has risen. Prior to 2020, however, the rate of rise was slower.

The overall number of convicts in Indian jails grew by around 29% between 2011 and 2019, from 3.73 lakhs to 4.81 lakhs. The number of prisoners on trial climbed by 38% within the same time period, from 2.41 lakhs to 3.72 lakhs. The larger expansion in the number of prisoners on trial in comparison to the overall number of inmates explains the rise in the percentage of inmates.

The prisoners lodged in jail as per the report released by NCRB were 4,81,000 in 2019 which went up in 2020 to 4,89,000 due to higher number of arrest made. The trial prisoners were 3,33,000 in the year 2019 but in 2020 it went up to 3,72,000 in the year 2020, which is good number of increase, bringing the percentage of inmates prosecuted from 69% at the start of the year to 76% at the conclusion. (Records Bureau, 2021)

Recent development regarding Bail orders

The Current Chief Justice of India NV Ramana launched a software for faster and safer transfer of bail orders passed by the Supreme court or any other court to Jails Officials, the software was named 'Fast and Secured Transmission of Electronic Records'. (CJI N V Ramana Launches Software to Transmit Court Orders Swiftly, 2022)

This software was launched after the supreme court took *Suo Moto* cognizance of the matter of the newspaper report where the person granted bail by the Hon'ble Supreme court was not released even after 3 days from the date of order of bail. Earlier also in the month of July, 2021, the Chief justice of India had expressed concerned about the delay in communication of the bail orders, he stated "even in the era of internet and Information Technology boom, it seemed jail authorities are relying on ancient mode of communication through pigeons". (Dwivedi, 2022)

Conclusion

"The law of tyrants is said to be a judge's discretion; it is constantly unknown; it differs from man to man; it is haphazard and relies on constitution, temper, and emotion. It's frequently caprice at its best; at its worst, it's every vice, stupidity, and passion to which human nature is prone" - Lord Camden (*Rajendra Prasad v. State of Uttar Pradesh*, 1979)

Even after doing their best and considering the law and specific parameters to follow for its execution, the Indian criminal justice system remains defective from a bigger viewpoint, while functioning with such discretionary authority. There is also a need for a revolution in the current bail system, which should take into account the socioeconomic status of the bulk of our people. The courts should always take into account the accused's socioeconomic situation, take a sympathetic attitude, and conduct background checks to prevent him from escaping the legal system, resulting in the citizens' basic and other rights being restored.

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