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## **Bail, a Privilege for the Rich?**

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**Law without justice is a wound without cure- William Scott Downey**

### **Abstract**

Bail in Criminal Justice System means the release of an accused by making a bond with the court either by himself or by his sureties in order to assure the court of his presence as and when required. This however, does not mean that the accused is already facing the punishment while he is in custody amid the investigation.<sup>2</sup> Bail can only be procured when the investigation or trial is still going on and the accused has not been held guilty. A country like India follows the accusatorial system, where the accused is held to be innocent until proven guilty beyond reasonable doubt. If Bail be granted to the accused who is still not proven guilty, may help him defend his case in a better way. Moreover, it will also ensure his liberty that is granted by the Constitution. But, as seen above bail requires a person to formulate a bond which the accused makes with the court where in the court requires him to pay an amount or attach the documents of the assets which he owns upto the amount of bail bond, this acts as a security to ensure the appearance of the accused person by which he is released on bail pending the investigation or trial. The author, through case laws and law reports, tries to throw some light on the financial predicament of the poor who become unable to buy their liberty by formulating the bail bond, thereby resulting in the overcrowding of prisons and how the rich become the privileged in the country that guarantees equality in all ways.

**Keywords:** Bail Bond, Surety, Criminal Justice System, Right To Liberty, Over Crowding Of Prisons.

### **Introduction.**

India being a democracy upholds the personal liberty and freedom of its citizens. Every person who holds the citizenship of India is guaranteed the right to life and personal liberty under Article 21 of the Indian constitution which specifically states that no person shall be deprived of his life, or personal liberty except according to the procedure established by law.

The words 'except according to the procedure established by law' confer the power on the state to prosecute and punish any person who commits a crime according to the procedure established by law. The criminal jurisprudence in India depends upon the deterrent theory of

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<sup>2</sup> Babua Tazmul Hossain V. State of Orissa Appeal (crl.) 593 of 2002

punishment which believes in punishing the wrong doer in order to restrain him from committing the same offence in future.

However, the same criminal justice system holds the accused as innocent until proven guilty and so the Criminal Procedure Code, 1973, provides for the provisions of bail in order to respect the liberty of the accused until he is proven guilty by the competent court trying the case.

The prime objective of every criminal justice system is to deliver justice. Justice should not be a privilege for some but a right for all. It should remain fundamental to all irrespective of the socio-economic class one belongs to.

The concept of Bail is an integral part of the criminal jurisprudence which is made with an object to uphold the liberty of an accused. But the same suffers from various drawbacks which discriminate between the wealthy and the poor depending upon the conditions one needs to fulfill to buy his liberty from the police officer or the court.

The article strictly confines its scope to the socio-economic differences the law related to bail holds and the impact on people of a country which is a home for 60% of people below poverty line.

### **Definition of Bail**

As such the criminal procedure code does not define bail, the terms bailable and non bailable offences find their place in the definitions under the code. Law lexicon defines bail as security for the appearance of the accused person on which he is released pending the trial of an investigation. What is contemplated by the law related to bail is “to procure the release of a person from the legal custody, by undertaking that he shall appear at the time and place designated and submit himself to the jurisdiction and judgement of the court”<sup>3</sup>. However the apex court in various cases has held that the bail covers both, release of a person on his own bond or with **sureties**<sup>4</sup>.

Two terms evident in the above definitions, ‘bond’ and ‘surety’ hold vital role when it comes to bail. Let us know what they mean in terms of taking bail.

### **Bond and Surety**

Law related to bail is dealt under sections 436 to 450 of CrPC which makes it mandatory for executing a bond in order to get a bail, be it bailable or non bailable offences.

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<sup>3</sup> <https://lawtimesjournal.in/bail-under-crpc/>

<sup>4</sup> <https://districts.ecourts.gov.in/sites/default/files/6-Bail%20Anticipatory%20Bails%20-%20Sri%20M%20Sreenu.pdf>

Section 441 of the Code of Criminal Procedure, 1973 talks about bond and surety. **Bail bond** is basically a bond which the accused makes with the court where in the court requires him to pay an amount or attach the documents of the assets which he owns upto the amount of bail bond, this acts as a security to ensure the appearance of the accused person by which he is released on bail pending the investigation or trial<sup>5</sup>. If the concerned accused jumps his bail and does not appear in the court on the due date, the court may forfeit the property or the amount against which the bail was granted or the bond was executed.

In cases where the court requires one or more **sureties** to ensure the presence of the accused in a court as and when required, the court may ask the surety to furnish the bond. Wherein, if the accused does not turn up when required by the court or the police, the court may hold the surety liable.

### **Refusal of Bail and Overcrowding of Prisons**

India being a developing country is still struggling to curb the issues of poverty. A country whose 60% population comes under the Below Poverty Line will for obvious reasons have a high number of crime rate, crimes arising out of poverty. In most of the cases, the crimes are petty ones where the person has committed theft or other crimes in order to get a living for the family. Taking into consideration the backlog in the judiciary and the need for speedy trial, an under trial is usually left languishing in jail, in most of the cases, more than the period required for the offence which the person has committed. In cases of the same sort, one can generally be let out on bail and be released from jail. But as seen above, the provisions related to bail under the code require an accused to give a security to the court or the police officer in the form of bond which has a monetary value that may be forfeited if the accused does not abide by the conditions of the bail.

Now, where the person in order to get a living for his family is committing a crime, how is that person going to pay for his liberty? The only way left for such accused persons is to stay back in jail till the trial gets over which may result in his conviction or acquittal. In the former case he may complete his sentence and then be released and in the latter, it all depends on his fate. As seen in the Rudal shah case, He was released from prison after 14 years, i.e. on 16 October 1982, despite being acquitted of all charges by the competent penal court on 3rd June 1968. Such is the situation of the criminal justice system in India.

The 78th report of the Law Commission as on April 1, 1977, stated the total prison population as 1,84,169, out of which as many as 1,01,083 (roughly 55%) were under-trials. For specific jails, some other reports show: Secunderabad Central Jail- 80 per cent under-trials; Surat-78 per cent under-trials; Assam, Tripura and Meghalaya-66 per cent under-trials. Most of these undertrials keep longing for their case to be disposed of, either they get convicted or acquitted. But, given the fact of the overburden our judiciary suffers from and

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<sup>5</sup> <https://www.legalserviceindia.com/legal/article-5231-bail-bond.html>

the ignorance of our executive, India keeps witnessing more and more Rudal Shahs. The judgment of the Supreme Court in the case of Rudal Shah v. State of Bihar is an eye-opening incident of the worst example of state executive inaction regarding the status of poor people. There are various cases like *Rudal shah*<sup>6</sup>, where an accused has lost his precious years of life in the prison due to the inaction of the executive and lack of literacy and resources on the part of the accused. *Mohammad Ali Bhat case*<sup>7</sup>, *Mohammad Maqbool shah case*<sup>8</sup>, Bala singh. Illiteracy arising out of poverty causes a man to waive off his Right to Liberty to the highly ignorant State. The above cited cases are just a few examples to indicate how poverty hit people who are low on resources lose their right to liberty.

### **268th Law Commission Report**

The Law Commission explicitly highlighted in its 268th report the trend of Rich procuring the bail and the Poor languishing in jail. The Commission headed by Supreme Court judge B.S. Chauhan grimly observes that, “the existing system of bail in India is inadequate and inefficient to accomplish its purpose.” One of the first duties of those administering criminal justice must be that bail practices are “fair and evidence-based”. “Decisions about custody or release should not be influenced to the detriment of the person accused of an offence by factors such as gender, race, ethnicity, financial conditions or social status.”<sup>9</sup>

The Law Commission recommends that those detained for an offence that would attract up to seven years’ imprisonment be released on completing one-third of that period, and those charged with offences attracting a longer jail term, after they complete half of that period. For those who had spent the whole period as undertrials, the period undergone may be considered for remission. In general terms, the Commission cautions the police against needless arrests and magistrates against mechanical remand orders.<sup>10</sup>

### **Right To Bail And Article 21**

Article 21 of the Indian constitution embodies the most vital human rights in the criminal jurisprudence. India follows the accusatorial system, which follows the principle of ‘innocent until proven guilty’ and so the accused gets his liberty as a right in certain cases, preferably in Bailable offences and In other offences, the bail, if possible is granted by the court after due inspection. In cases of Non bailable offences, the Police through the prosecutor tries its best to oppose the bail of the accused which combined with the delay in trial makes the prolonged incarceration of the accused in the prison inevitable.

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<sup>6</sup>Rudul Sah v. State of Bihar (1983) 4 SCC 141

<sup>7</sup> Mohd. Ali Bhatt @ Kille vs The State on 22 November, 2012

<sup>8</sup> Mohammad Maqbool Shah vs Through on 1 November, 2019

<sup>9</sup> <https://lawcommissionofindia.nic.in/reports/Report268.pdf>

<sup>10</sup> <https://www.thehindu.com/opinion/editorial/bail-or-jail/article18578574.ece>

The apex court in various cases has thrown light on the plight of the economically backward people who due to the scarcity of money could not afford to procure their liberty by furnishing the bail amount, in a country where personal liberty is a fundamental right and can only be taken away by due process of law which is fair, just and reasonable. For instance, Justice Bhagwati in the case of *Hussainara Khatoon v. State of Bihar*<sup>11</sup> found these economically backward people to be languishing in jails not because they were guilty but just because they were so poor that they could not afford a bail.

Again in the case of *Mantoo Majumdar v. State Of Bihar*<sup>12</sup> the apex court upheld the right of personal liberty by deploring the delay in police investigation and the mechanical operation of the magistrates insensitivity towards the personal liberty of the undertrials and released them on their own bond without any sureties as all of them had already spent 6 years in the prison awaiting their trial.

Until the *Maneka Gandhi case*<sup>13</sup> the Supreme Court took the view that Article 21 was nothing but a facet of the Diceyan concept which talks about rule of law and that no one can be deprived of his life and liberty by any executive action which is unsupported by the law. This view paved a way for a law which, if provided for some procedure, could deprive a person of his life and liberty.

### **Recommendations**

In view of the author, following changes could play a major role in our (work) towards ensuring liberty to all.

1. Enlarging the number ofailable offences.
2. Conditional release and leniency in conditions.
3. Magistrates may refrain from acting mechanically.

#### **1. Enlarging the number ofailable offences.**

Bringing more offences that are listed under IPC and other substantive laws intoailable offences will be a benefit for the authorities. This may help in reducing the issue of **overcrowding in prisons** as more offences would come under theailable offences list and the persons after completing due formalities would be eligible for a **bail as a right**. The article nowhere tries to convey that the state should be lenient towards the persons who are alleged to have committed a crime. There are judicial pronouncements where the Apex Court has strictly prohibited the police from arresting in certain cases and directed them to first hold preliminary investigations into the offences and if there seems to be any substantive evidence or weightage in the allegations, only then proceed with arrest and custody of the accused<sup>14</sup>.

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<sup>11</sup> 1979 AIR 1369, 1979 SCR (3) 532

<sup>12</sup> 1980 AIR 847, 1980 SCR (2)1105

<sup>13</sup> Maneka Gandhi vs Union Of India, 1978 AIR 597, 1978 SCR (2) 621

<sup>14</sup> Rajesh Sharma & Others v. State of U.P. & Another

**2. Conditional release and leniency in conditions.**

We have seen above, how the monetary system of bail has hampered the liberty of accused and forced them to languish in jail for years. If the legislature formulates new provisions of bail by relaxing the bail conditions that is allowing the accused to procure bail without complying to any monetary policy and procuring it on his own recognisance. The legislature may come up with other conditions and restrictions that may assure the presence of an accused as and when required and also he doesn't jump his bail. This may surely go a long way in protecting the liberty of the people.

**3. Magistrates may refrain from acting mechanically.**

Magistrates have been ordered quite a number of times by the superior courts to refrain from acting mechanically, that is getting a sense of understanding of the matter if not taking cognizance at such a stage, before remanding the accused as in the case of Raj Pal Singh v. State of U.P. Robotically remanding every accused that is brought by the police, who may not have availed the services of a lawyer will thereby in all ways deprive him of his fundamental rights guaranteed by the Constitution.

**Conclusion**

It is quite evident from the article that the suffering is twofold, the accused is denied his liberty and the state suffers overcrowding. However, the former suffers more. Both of these issues can be dealt with, if the legislature decides on a better mid-way by formulating bail provisions which may make the procurement of the same feasible.