

BAIL WITH SPECIAL REFERENCE TO RAPE AND

POCSO ACT

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INTRODUCTION

In today's legal system the concept of bail is an integral part of Indian criminal law and an accepted method in international jurisdiction. Particularly in India, Article 21 of the Indian Constitution guarantees the protection of everyone's life and freedom. It guarantees fundamental rights such as human dignity and personal freedom, which gives us the right to ask permission if we are arrested by a law enforcement agency. The idea of bail was first introduced in England and India was also inspired from the England and introduced the idea. Law commission in its 41st report conduct out the recommendations to the parliament and these recommendations were examined and incorporated by parliament in criminal procedure code, 1973. Section 436–450 governs the provisions relating to bail under Code of Criminal Procedure, 1973.

Bail in cases of Rape and bail in cases of child sexual abuse although it is found rare, but this concept has been recently in hype and exist so in this Article we will go through the concept of bail and specially in cases of rape and child sexual abuse thus this article cover the provisions of Cr.P.C and POSCO Act.

WHAT IS BAIL UNDER INDIAN LEGAL SYSTEM?

The first and foremost aspect to understand the article in fruitful way we have to glimpse what actually bail is. 'Bail' is derived from the aged French verb 'baillier' which cannot 'give or deliver'.¹ The word "bail" is not yet defined in the Code of Criminal Procedure, but the word "bail" is used in the code of Criminal Procedure.

The word 'Bail' has been employed in the Cr.P.C. numerous times and stays one of the crucial concepts of criminal justice system in congruence with the fundamental principles Enshrined in Parts III and IV of the Constitution. Which we can observed that several times Hon'ble Apex court of India define and elaborate the concept of bail.

In **Gurbaksh Singh v. state of Punjab (1980)**,² it was held by supreme court that grant of bail means to set at liberty a person arrested or imprisoned, on security being taken for his appearance.

In another case of **Moti Ram v. State of M.P.**,³ Supreme Court was of the opinion that it is a process to set a person free who is under arrest or detention by taking security for his appearance. The expression 'bail' covers both release on one's own bond, with or without sureties.

Some other definitions of Bail

Wharton's Lexicon And Stroud's Judicial Dictionary, Defines bail as "*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.*"

According to Black's Law Dictionary, what is contemplated by bail is to "*procure 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.*"

In simple it can be said that the literal meaning of the term "bail" is surety.⁴ Bail, thus, pertains to release from Custody, either on personal bond or with sureties.

¹ The Report no. 268 of the Law Commission of India on Bail reforms.

² AIR 1980 AC 1632.

³ AIR 1978 SC 1594.

⁴ Sunil Fulchand Shah v. Union of India, AIR 2000 SC 1023.

Secondly, the concept of bail involves two conflicting concerns: the right to individual liberty and the right to be presumed innocent until proven guilty, which is a social imperative to maintaining law, order and security. Retaining custody of a person until the process is complete can place a great strain on that person, and can include loss of freedom and livelihoods in the meantime.

The object of holding an accused individual in detention preceding to or during the trial is not punishment but,

- 1) To stave off repetition of offence with who is charged
- 2) To seek the Existence of the accused during the trial and
- 3) To preclude devastation of evidence.

PRINCIPLE REGARDING BAIL

The principle behind grant of bail in criminal cases is based on two factors:

- a) The State is duty bound to protect the interest of society at large and save it from criminals.
- b) The person is presumed innocent until proved guilty and he cannot be deprived of his right to liberty unless there are grounds for doing so.

LEGAL PROVISIONS OF BAIL IN CR.P.C

The provisions associating to the grant of bail are enshrined in **Chapter XXXIII, under sections 436-450 of Cr.P.C.** It is known that Offences have been categorized into bailable and non bailable and “cognizable” and “non-cognizable”. Officer-in-charge of police station, Magistrate, Sessions Court and High Court are authorized under Cr.P.C. to oversee with bail, imposing constraints on bail, cancellation of bail or anticipatory bail.

BAIL FOR BAILABLE OFFENCES

Bailable offences Section 436 (1) of the Code lays down that where a someone accused of a bailable offence is arrested or detained without warrant or comes off or is brought before a court and is instructed to grant bail , the police official or the court having custody of very person shall acquit him on bail . The police official or court, rather putting up

with bail from such person, may even release him on executing a bond without sureties. Consequently, in bailable offence accused can be released both by the court and by police officer

Supreme Court in *Rasiklal v. Kishore*,⁵ observed that right to claim bail granted by Section 436 is an absolute and indefeasible right. In bailable offences there is no issue of discretion in granting bail. As soon as it seems that the accused is prepared to provide bail, the police official or the court before whom he requests his bail is bound to release him on such terms as may appear to the officer or the court to be adequate.

Maximum period of detention for an undertrial

A fresh **section 436-A** was inserted in the Code By the **amendment act of 2005** which provide that Where an under trial prisoner other than the offence for which death has been Prescribed as one of the punishments, has been under detention for a period Extending to one half of the maximum period of imprisonment provided for the Alleged offence, he should be released on his personal bond, with or without Sureties. It is also provided that in no case the under trial be detained beyond the maximum period of imprisonment for which he can be convicted for the Alleged offence.

BAIL IN CASE OF NON-BAILABLE OFFENCE

Section 437 and 439 provides for the provisions relating to grant of bail in non – bailable cases.

Section 437 lays down that when any individual accused of, or suspected of, the commission of any non bailable offence is arrested or detained without warrant by an officer in charge of a police station or arises or is brought before the court other than the High Court or Court of Session he may be released on bail.

In the case of *Shakuntala Devi v. State of UP*⁶ court clarified that word “may” has been adopted in Section 437 which should not be read as mandatory rather it confer discretionary power on Court.

Section 437 (1) (i) and 437 (1) (ii) furnishes two instances where the accused shall not be released:

⁵ (2009) 4 SCC 446.

⁶ 1986 CriLJ 365.

- i. If it appears a sufficient footing for believing that the accused has been guilty of an offence punishable with death or imprisonment for life;
- ii. If the offence is a cognizable offence and he had been formerly sentenced of an offence punishable with death, imprisonment for life or imprisonment for seven years or more, or he had been previously convicted on two or more circumstances of a cognizable offence punishable with incarceration for three years or more but less than seven years.

Supreme Court in *Prahlad Singh Bhati v . NCT of Delhi*,⁷ held that if the prescribed punishment is imprisonment for vitality or casualty and the offence is solely triable by the Court of Sessions, then the Magistrate has no jurisdiction to grant bail unless the case is covered by proviso appended to Section 437.

POWERS OF THE HIGH COURT OR COURT OF SESSION IN GRANTING BAIL

Section 439 provides powers of High Court and Sessions Court to unshackle the accused on bail . It also authorizes them to inflict conditions while granting bail if the offence is of the nature stipulated in Section 437(3). It also empowers them to revise or set aside the conditions inflicted by the Magistrate at the time of unshackling the accused on bail. If the case is altogether triable by Court of Session or punishable with imprisonment for life, the High Court or Court of Session before releasing the accused on bail shall grant notice to the Public Prosecutor.

In *Sharad vs. State of Maharashtra (2019)*,⁸ Supreme Court held that an accused after revoking his bail application before the High Court can file a successive bail application before the Sessions Court. Amendment Act of 2018 inserted a proviso to Section 439. It furnishes that High Court or Court of Session shall before awarding the bail to an individual who is accused of an offence under Sections 376(3), 376-AB, 376-DA or 376-DB of Indian Penal Code shall provide a notice to the public prosecutor within an interval of fifteen days from the date of receipt of notice of such application.

Grant of bail in writ jurisdiction

⁷ (2001) 4 SCC 280.

⁸ Criminal Appeal No. 1221 of 2019.

In *Arnab Goswami v. State of Maharashtra (2020)*,⁹ Supreme Court was of this view that High Courts can award bail even in a writ petition under Article 226 in relevant cases. The High Court should not foreclose itself from the practising of power when an inhabitant has been arbitrarily deprived of personal liberty in abundance of state power. Nonetheless, Supreme Court cautioned that High Court must exercise its power with vigilance and circumspection, cognizant of the certainty that this jurisdiction is not an available alternative for recourse to the remedy of bail under Section 439 of the Code.

ANTICIPATORY BAIL

Section 438 deals with the provisions pertaining to anticipatory bail. It empowers High Court and Sessions Court to award anticipatory bail. The terms anticipatory bail is neither found in section 438 nor in its marginal note.

Meaning: The word '*anticipatory bail*' has not been specified in the Code. The bail is granted in anticipation of arrest. In case of *Union of India v. Padam Narain (2018)*,¹⁰ it was held that when anticipatory bail is awarded then in the incident of arrest the person imprisoned is released on bail. Exclusively after arrest the order granting anticipatory bail comes to be functional.

Apart from this, the court in the case of *Siddharam Satlingappa Mhetre v. State of Maharashtra*,¹¹ here Examined the scope and ambit of anticipatory bail and explained that doctrines respecting it has been enacted in the *Sibbia's case* should be obeyed by the court.

- a) Section 438 (1) is to be interpreted in gleam of Article 21 of the Constitution of India.
- b) Filing of FIR is not a condition precedent to exercise of power under Section 438.
- c) Order under Section 438 would not involve the right of police to perform investigation.
- d) Situations cited in Section 437 cannot be read into Section 438.
- e) Although the power to unshackle on anticipatory bail can be interpreted as of an "extraordinary" identity this would "not justify the conclusion that the power must be exercised in exceptional cases only." Powers are optional to be exercised.

Who can grant anticipatory bail and when can it be granted?

⁹ (2020) 14 SCC 12.

¹⁰ (2008) 13 SCC 305.

¹¹ AIR 2011 SC 312.

As per the Section 438 High Court and Court of Session can award anticipatory bail. The individual applying for grant of anticipatory bail must have reason to believe that he may be arrested. Such justification must be founded on adequate ground and it should not be mere 'fear'. Supreme Court in *Naresh Kumar Yadav v. Ravindra Kumar*,¹² observed that the applicant must show that he has 'reason to believe' that he may be arrested in a non-bailable offence. Use of the expression 'reason to believe' shows that it must be founded on some reasonable grounds. It should not be some sort of vague apprehension.

Based on Section 438(1) of Cr.P.C, the Supreme Court has enumerated a meticulous and exhaustive list of considerations while deciding anticipatory bail. They are as follows:-

- Gravity of crime and role of accused must be understood before the arrest.
- Previous record of accused, any imprisonment on conviction in respect of non bailable offence, should be checked.
- Possibility that applicant will flee from justice.
- Chances of repetition of similar or other offences.
- Intention behind accusation is whether to injure or humiliate the applicant by arresting him or her.
- Consider the exact role of the accused.
- Reasonable apprehension of tampering with evidence, witnesses and threatening the complainant.

In a case of *Suresh Vasudeva v. State*,¹³ court held that the Section 438(1) applies only to non-bailable offences

In another case of *Adri Dharamdas v. State of West Bengal*¹⁴ court held the power exercisable under section 438 is extraordinary and is exercisable only in remarkable cases. Where it appears that a Person may be falsely implicated in such cases this power maybe exercised.

BAIL IN POCSO

POCSO (Protection of Children from Sexual Offences) Act, 2012 This is a special law created to protect children from sexual crimes . The law provides for severe penalties for

¹² (2008) 1 SCC 632.

¹³ CriLJ 677 (Del) (1978).

¹⁴ AIR 2005 SC 1057.

crimes against children and provides specific procedures for investigating and prosecuting such cases.

In a POCSO case under sections 5 and 6 of the POCSO Act, which pertain to aggravated penetrative sexual assault, the chances of getting bail are generally low, especially if the investigation is ongoing and there is no evidence to support the suspect. The court considers any factors, including the seriousness of the crime, the age of the victim, the available evidence, the likelihood of the accused being associated with the victim by primary or related evidence, and the likelihood of the suspect leaving if released on bail.

PROVISION OF BAIL UNDER POCSO ACT

Presumption of Guilt under Section 29 of the Act can be seen as Provision of bail under POCSO Act

Section-29 provides that, *“Where a person is prosecuted for committing or abetting or attempting to commit any offence under Sections 3, 5, 7 and Section 9 of this Act, the Special Court shall presume, that such person has committed or abetted or attempted to commit the offence, as the case may be unless the contrary is proved.”*

From the above section two important issues arise:

- When does the presumption actually gets triggered and,
- Its effect on grant of bail.

Thus if unravel these above two issue then only we are able to find that when a person get bail in the POCSO Act.

When does the presumption under section 29 of POCSO get triggered?

There is a line of Supreme Court and various High Courts judgments elucidating the stage at which reverse onus clauses becomes effective. In respect of POCSO Act, Numerous High Courts have accepted that the presumption in section 29 will apply during the trial after the prosecution has concluded the facts. Section 29 uses the term *“prosecuted”* and it is in this context that the courts have demystified the stage of presumption.

In the context of POCSO Act, High Court of Bombay in *Navin Dhaniram Baraiye v. State of Maharashtra*,¹⁵ held that mere allegation does not bring the presumption into play and it is only after the foundational facts are proved that the presumption actually becomes operative which is possible only at the stage of trial and not before.

Bail plea moved before the commencement of trial

All of the above judgments unanimously state that presumptions can only be initiated after the commencement of legal proceedings. However, the court did not assume the influence of this presumption on bail applications.

The High Court of Delhi in *Dharmander Singh v. The State (Govt. of NCT, Delhi)*(2020),¹⁶ clarified in extraordinary detail, the question of invocation of presumption under section 29 at the stage of bail before framing of charges and reached to the opinion that if the presumption was to regulate at pre-trial stage, then it would amount to performing a mini trial, and accused would be inquired to prove his innocence even before he is instructed the precise offence he is charged with.

Bail plea moved after the commencement of trial

Not Only before the commencement of trial, the court also have power to grant the bail of POCSO accused during the trial stage and one can file bail application under section 439 of Cr.P.C before the court.

Renoj R.S v. State of Kerala,¹⁷(2022), In this case the Court observed that if the provisions of the POCSO Act prevail, then the petitioner is entitled to maintain an application for bail under section 439 of CrPC and seek the remedy before the Sessions Court as well as the High Court.

¹⁵ Criminal Appeal no. 406 of 2017.

¹⁶ Bail Application no. 1559 of 2020

¹⁷ Bail Application No. 6688 of 2022

BAIL IN RAPE CASES

One of the scariest terms ‘rape’ is a word that gives both men and women goosebumps. Many laws have been enacted for this horrific crime. Some use these laws as a solution to cases involving innocent parties, but over time others use them as a means of revenge or as an outlet for resentment to damage the reputation of others. There are numerous Bye-Laws and provisions of bail and anticipatory bail under sections 438 and 439 of the Criminal Procedure Code to protect the innocent from those who exploit these laws as a weapon to bring society to shame.

How ‘Rape’ has been defined under Indian law?

To understand the concept of bail in Rape cases it prima facie to understand provision of rape under Indian law in order to find out which offences are considered as rape.

The word ‘Rape’, its categories as well as its punishments all are specified under Section 375 and Section 376 of the Indian Penal Code. The Section 375, IPC, defines the word rape as:¹⁸

“A man is said to commit “rape” who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the six following descriptions:

(First) -Against her Will

(Second) -Without her consent

(Third) -With her consent, when her consent has been obtained by putting her or any person in whom she is interested in fear of death or of hurt

(Fourth) -With her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

(Fifth) -With her consent, when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.

¹⁸ Nishita Makkar, “Bail in Rape Cases-How the Story goes on?”, LAW INSIDER INDIA, <https://www.lawinsider.in/columns/bail-in-rape-cases-how-the-story-goes-on?amp> (Last visited on June 27, 2023)

(Sixth) -With or without her consent, when she is under sixteen years of age. It is explained that penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.”

Further, there was also an anomaly regarding Section which was amended after the case of this ***Independent thought v. Union of India***.¹⁹

Originally, it was implied that non-consensual sex with your wife (not younger than 15 years old) is not rape. However presently, it has been altered with the age of 18 years. This implies that ‘Marital Rape’ is an apparent anomaly to giving consent since marital rape is not a crime under the Indian Pena Code.

In a very recent case of ***Prawin Kumar v. State of Bihar (2023)***,²⁰

In a petition for Special Leave to Criminal Appeal against the judgment and order dated 1-11-2022 passed by Patna High Court rejecting Petitioner’s bail plea against apprehension of arrest in a matter involving offence punishable under Section 366-A/376 of the Penal Code, 1860 (‘IPC’) and Section 4 of Protection of Children from Sexual Offences Act, 2012 (‘POCSO Act’), the Division Bench of A.S. Bopanna and Dipankar Datta, JJ. Extended the protection granted to the petitioner previously, requiring him to cooperate during further investigation.

LANDMARK JUDGMENT

In ***Deepak Khosla v state of NCT of Delhi & Ors***²¹ Delhi High Court held that grant of bail to A person accused of bailable offence is governed by the provisions of section 436 of the Code of criminal procedure, 1973. Bail in such cases is compulsory and a person accused of a Bailable offence if prepared to furnish bail has the right to be released on bail and the Court Has no discretion to deny bail.

Amiya Kumar Sen v. the State of West Bengal²²

The accused questioned the validity of the Sessions Court dismissing the bail wherein he filed another application in the High Court for the same. The issue emerge whether an individual can file the same bail application in the sessions and High Courts?

Judgement: The Apex Court evidently quoted that both the sessions and high Court are empowered to issue anticipatory bail to a person. The judgement stated that if the sessions

¹⁹ AIR 2017 SC 4904.

²⁰ 2023 SCC OnLine SC 471.

²¹ CRL.M.C, 663 of 2017.

²² 1979 CriLJ 288.

Court denies bail, the same petition can't be tried in the high Court. The party can appeal to the high Court but it is at the discretion of the Court whether to entertain the petition or not.

CONCLUSION

So, we can sum up like this that although the Code of Criminal Procedure only outlines bail provisions, most of the work is done by the courts themselves. Rules of law established by courts are subject to change by courts. The meaning and definition of a deposit are not stipulated by law. Therefore, it continues to be understood as the right to freedom from state – imposed restrictions on a person's physical security for the purposes of release. Bail is generally at the discretion of judicial authorities.

Now we are also aware of fact that rape is one of the most heinous crimes of the world. In India, Rape and its punishment is defined under Section 375 and 376 of the Indian Penal code, 1860 which is a non-bailable offence.

Even if the Rape is unbailable offence, in some cases bails has been furnished according to varied conditions. Apart from this bail in relation to the POCSO cases also exist in various situation as we already evident. Furthermore, numerous landmarks cases have led to amendments in many laws made from time to time as per changing society.

Like rape and sexual assault and sexual assault of minor is concern which have been increasing day by day. All this depends on various factors but the main is us, our psychology, our environment and thinking. Hence, we should think about it and this is the area where improvement is still needed.