

BAIL AND PERSONAL BOND

Sister Suma Sebastian's discussion for the 3rd National Consultation on prisons - TISS - 19&20th March, 2016

JAIL & BAIL



WHAT ARE THE PROVISIONS ON BAIL AND PERSONAL BOND EXISTING IN INDIAN LAW ?

TO WHAT EXTENT THE LEGAL SYSTEM OF BAIL IS IMPLEMENTED IN INDIA ?

HOW TO IMPROVE THIS IMPLEMENTATION ?

INTRODUCTION

- **Justice V. R. Krishna Iyer:** ‘judges should be more inclined towards bail and not jail’
- **67%** of all the prisoners in jails are under trial prisoners and the number of such prisoners is said to be about 2,78,000
- There are **3470** under-trial prisoners in different jails due to their inability to furnish bail bonds
- Current situation is unacceptable regarding Indian Constitution (i.e. **Article 21**) and International Conventions.

GENERAL DEFINITIONS

- **Bail:** the system that governs the status of individuals charged with committing crimes, from the time of their arrest to the time of their trial, and pending appeal, with the major purpose of ensuring their presence at trial. It is one method used to obtain the release of a defendant awaiting trial upon criminal charges from the custody of law enforcement officials.

No proper definition in Indian Law.

- **Personal Bond:** a bond stating a criminal defendant will appear at all future court dates. The accused doesn't have to post bail, but will forfeit the amount in the bond if the promise to appear is broken. It is also known as a release on recognizance bond. Here, no need to pay any amount for getting the bail.

I- SITUATION IN INDIAN LEGAL SYSTEM

THE LAW

Details about the bail process in the *Criminal Procedure Code, 1973 or Cr.P.C.*

- **Section 2(a) Cr.P.C.:** about schedule which refers to all the offenses under the Indian Penal Code and puts them into bailable and non-bailable categories which have been determined according to the nature of the crime.
Citation: *'In this Code, unless the context otherwise requires, – (a) “bailable offence” means an offence which is shown as bailable in the First Schedule, or which is made bailable by any other law for the time being in force: and “non-bailable offence” means any other offence'*
- *Sections 436 to 450 :* about the provisions for the grant of bail and bonds in criminal cases.
- These provisions give the Judge a lot of discretionary power.

SECTION 436 AND 436(A) OF CR.P.C

436. In what cases bail to be taken.

(1) When any person other than a person accused of a non- bailable offence is arrested or detained without warrant by an officer in charge of a police station, or appears or is brought before a Court, and is prepared at any time while in the custody of such officer or at any stage of the proceeding before such Court to give bail, **such person shall be released on bail:** Provided that such officer or Court, if he or it thinks fit, may, instead of taking bail from such person, discharge him on **his executing a bond without sureties** for his appearance as hereinafter provided: Provided further that nothing in this section shall be deemed to affect the provisions of sub- section (3) of section 116 or section 446A .

(2) Notwithstanding anything contained in sub- section (1), **where a person has failed to comply with the conditions of the bail- bond as regards the time and place of attendance**, the Court may refuse to release him on bail, when on a subsequent occasion in the same case he appears before the Court or is brought in custody and any such refusal shall be without prejudice to the powers of the Court to call upon any person bound by such bond to pay the penalty thereof under section 446.

SECTION 436 AND 436(A) OF CR.P.C

436(A). Maximum period for which an under trial prisoner can be detained.

Where a person has, during the period of investigation, inquiry or trial under this Code of an offence under any law (not being an offence for which the punishment of death has been specified as one of the punishments under that law) undergone detention for a period **extending up to one-half of the maximum period of imprisonment specified for that offence under that law**, he shall be released by the Court on his personal bond with or without sureties:

Provided that the Court may, after hearing the Public Prosecutor and for reasons to be recorded by it in writing, order the continued detention of such person for a period longer than one-half of the said period or release him on bail instead of the personal bond with or without sureties:

Provided further that no such person shall in any case be detained during the period of investigation inquiry or trial for more than the maximum period of imprisonment provided for the said offence under that law.

Explanation – In computing the period of detention under this section for granting bail the period of detention passed due to delay in proceeding caused by the accused shall be excluded.

Different types of bails:

- **Anticipatory bail:** under Indian criminal law, there is a provision for anticipatory bail under Section 438 of the Criminal Procedure Code. This provision allows a person to seek bail in anticipation of an arrest on accusation of having committed a non-bailable offence
- **Cash bail:** in this type of bail, the accused have to pay the entire stipulated amount in cash or by credit card. The amount required for issuing the bail depends upon the seriousness of the case. A large amount will be set to give the bail if the crime is of serious nature. A large amount will be set for bail so that the accused may reappear for hearings without escaping.
- **Surety bond:** this type of bond involves a friend or relative, with the help of a bail agent can get a bail for the accused. If an accused is not able to pay a large amount in cash for the bail, a bail agent from a surety company will promise to pay the entire amount of the bond to get bail for the accused. If the accused not appears in the court, the bail agent has to pay the entire amount promised for the bond. As in this surety bond a friend or relative is involved, the bond agent believe that the accused will appear for the trial without fail.

- **Property bond:** if the accused is not able to pay the bail amount in cash but one can obtain the bail by showing their property in lieu of cash. The accused have to show an equal value of property in exchange to the cash. But if the accused fails to appear before the court on the stipulated date, the property kept as guarantee will be foreclosed by the court.
- **Release on own personal recognition:** a judge may allow an accused to be released on personal recognizance. The crime committed by an accused may not be of serious nature or a minor crime of non violent nature and the accused may be released from the jail on the promise of the accused. In such cases there is no need to pay any amount for getting the bail. Also called '**on Personal Bond**'.
- **Release on citation:** the officer may not arrest and book the offender. Simply the officer sends a citation (cite out) that the offender should appear before the court. If the offender not appear before the court on stipulated time, the offender than will be arrested.

IMPLEMENTATION OF THE BAIL SYSTEM

- *Incomplete and not satisfying*

As per the statistics provided by the National Crime Records Bureau (NCRB) as on 31st December, 2013 the number of undertrial prisoners was **67.6%** of the entire prison population and that the percentage was **unacceptably high**. It suggests that the provisions of the sections on bail are not well-implemented. A major part of the over-population in Indian prisons is due to slow trials and bails not granted, as the high number of under trials underlines.

To remember:

-> As per the statistics prepared by the NCRB as on 31st December, 2008 prisons in India are overcrowded to the extent of **129%**.

-> Prison overcrowding compels prisoners to be kept under conditions that are unacceptable in light of the **United Nations Standard Minimum Rules for Treatment of Offenders** to which India is the signatory.

-> With regard to the cases of undertrial prisoners who were unable to furnish bail bonds it was stated that as many as **3470 such persons were in custody due to their inability to furnish bail bonds**.

THE ROLE OF THE JUDGE AND OF INFLUENTIAL JUDGEMENTS IN THE EVOLUTION OF BAILS' IMPLEMENTATION

- **Krishna Iyer**

Quotations from *Rajeev Dhavan's article in IndiaToday about the basic right to bail:*

'There are good reasons to miss Justice V. R. Krishna Iyer to whom we owe much of our re-thinking about bail as **a fundamental right** and not just an untidy gift from the judge deciding a bail application'

About Iyer's action: 'As Iyer puts it with the full authority of the Supreme Court: "Personal liberty, deprived when bail is refused, is too precious a value of our constitutional system, that the crucial power to negate it is a great trust exercisable not casually but judicially with lively concern for the cost to the individual and the community »'.

KRISHNA IYER

His fight regarding bail: Bail to be considered as a **Fundamental Right**

- State of Rajasthan v Balchand
- Moti Ram and Ors. v State of M.P
- Maneka Gandhi v Union of India



JUDGEMENTS INVOLVING INNOVATIVE DIRECTIVES BY KRISHNA IYER

- State of Rajasthan v Balchand, 1977

On bail: 'The basic rule is **bail, not jail**, except-where there are circumstances suggestive of fleeing from justice or thwarting the course of justice or creating other troubles in the shape of repeating offences or intimidating witnesses and the like by the petitioner who seeks enlargement on bail from the court. When considering the question of bail, **the gravity of the offence involved and the heinousness of the crime which are likely to induce the petitioner to avoid the course of justice must weigh with the court.**'

On personal bond: 'While the system of pecuniary bail has a **tradition** behind it, it may well be that in most cases not monetary suretyship but undertaking **by relations of the petitioner or organisation** to which he belongs may be **better and more socially relevant.**'

- Moti Ram and Ors. v State of M.P, 1978

Context: the accused who was **a poor mason** was convicted. The apex court had passed a sketchy order, referring it to the Chief Judicial Magistrate to enlarge him on bail, without making any specifications as to sureties, bonds etc. The CJM assumed full authority on the matter and fixed **Rs. 10,000** as surety and bond and further **refused to allow his brother to become a surety as his property was in the adjoining village**. MR went on appeal once more to the apex court and Justice Krishna Iyer condemned the act of the CJM, and said that the **judges should be more inclined towards bail and not jail**.

Legal issues in consideration before the Court:

-> Can the Court, under the Code of Criminal Procedure, enlarge, on his own bond without sureties, a person undergoing incarceration for non-bailable offence either as under trial or as convict who has appealed or sought special leave?

-> If the Court decides to grant bail with sureties, what criteria should guide it in quantifying the amount of bail?

-> Is it within the power of the Court to reject a surety because he or his estate is situated in a different district or State?

- *Quotation from the Court:*

‘Even so, poor men-Indians are, in monetary terms, indigent's young persons, infirm individuals and women are weak categories and Courts should be liberal in releasing them **on their own recognizances** put whatever reasonable condition you may.’

- Further the Court also held that the **accused cannot be asked to furnish surety from within the district where the offence is being tried.**

‘What law prescribes sureties from outside or non-regional language application? What law prescribes the geographical discrimination implicit in asking for sureties from the Court district? This tendency takes many forms, sometimes, geographic, sometimes linguistic, sometimes legalistic. Article 14 protects all Indians qua Indians within the territory of India. Article 350 sanctions representation to any authority, including a Court, for redress of grievances in any language used in the Union of India...’

- *Supreme Court Observations*

The Court acknowledged that many poor persons are forced into cellular servitude for little offences because trials never conclude, and bails amounts are fixed beyond their meagre means. **The poor are being priced out of their liberty in the justice market.** Whenever excessive amounts are fixed as surety for bail, the victims invariably happen to be from disadvantaged sections of society; belonging to linguistic or other minorities; or are from far corners of the country.

There is **no sanction in any law to make geographical discriminations** such as not accepting sureties from another part of the country or not accepting an affirmation in a language other than the one spoken in the region. The Supreme Court asserted that provincial or linguistic divergence cannot be allowed to obstruct the course of justice.

Bail provisions contained in the Cr.P.C. must be liberally interpreted in the interest of social justice, individual freedom and indigent persons.

- *Supreme Court Directives*

An accused person should **not be required to produce a surety from the same district** especially when he is a native of some other place

Bails covers **release on one's own bond**, with or without sureties

Bail should be given liberally **to poor people simply on a personal bond**, if reasonable conditions are satisfied

The bail amount should be fixed keeping in mind the **financial condition** of the accused

When dealing with cases of persons belonging to the **weak categories** in monetary terms - indigent young persons, infirm individuals or women - court should be liberal in **releasing them on their personal recognizance**

- Maneka Gandhi v Union of India, 1978

Justice Krishna Iyer once again spoke against the unfair system of bail that was prevailing in India. **No definition of bail** has been given in the code, although the offences are classified asailable and non-ailable.

Justice P.N.Bhagwati also spoke about how **unfair and discriminatory** the bail system is when looked at from the economic criteria of a person this discrimination arises even if the amount of bail fixed by the magistrates isn't high for some, but a large majority of those who are brought before the courts in criminal cases are so poor that they would find it difficult to furnish bail even if it's a small amount.

OTHER LEADING JUDGEMENTS ON BAIL AND PERSONAL BOND

- Hussainara Khatoon and others v. Home Sec, State of Bihar, 1979

Context: in January 1979, the Indian Express listed the names of numerous under-trial prisoners who had been languishing in prison for 5,7 or 9 years without their trial having begun. Majority of such under-trial prisoners were accused of **trivial offences** warranting punishment of only a few years or less. On a petition, the Supreme Court directed that these under-trial prisoners be released forthwith **on personal bonds**, not based on any monetary obligations. A counter affidavit was also filed by the government bringing to light the plight of many innocent women who were in prison on the premise of '**protective custody**' (victims or witnesses, required for the purpose of giving evidence).

-> The Court laid down the ratio that when the man is in jail for a period longer than the sentence he is liable for then he should be **released**.

-> The Apex Court observed that Courts must **abandon the antiquated concept under which pretrial release is ordered only against bail with sureties**.

-> The Court further observed that even **while releasing the accused on personal bond** it is necessary to caution the Court that the **amount of bond which it fixes should not be based merely on the nature of charge**. The decision as regards the amount of the bond should be **an individual decision** depending on the individual financial circumstances of the accused.

On personal bond: “If the Court is satisfied, after taking into account, the basis of information placed before it, that the accused has his roots in the community and is not likely to abscond it can **safely release the accused on the personal bond.**

To determine whether the accused has his **roots in the community** which would deter him from fleeing, the Court should take into account the following factors concerning the accused: the length of his **residence in the community**, his **employment status, history and his financial condition**, his **family ties** and relationships, his **reputation**, character and **monetary condition**, his **prior criminal record** including any record of prior release on recognizance or on bail, the **identity of responsible members of the community** who would vouch for his reliability, the nature of the **offence** and the apparent **probability of conviction** and the **likely sentence** insofar as these factors are relevant to the risk of non-appearance, and any other factors indicating the ties of the accused to the community or bearing on the risk of willful failure to appear.”

- *Supreme Court Observations*

Bail system: criticizing the discriminatory nature of the bail system, the Court observed that **it is a travesty of justice that many poor accused are forced into long cellular servitude for little offences because the bail procedure is beyond their meagre means.** The deprivation of liberty for the reason of financial poverty only was held to be an incongruous element in a society aspiring to fulfill the constitutional promises of social equality and social justice to all citizens.

- *Supreme Court Directives*

More courts and competent judges for the trial of case.

- Hussainara Khatoon and others (II) v. Home Sec, State of Bihar, 1979

In this case, the Court stressed the state's constitutional obligations to assure speedy trial and providing of **free legal aid to the accused**.

- *Supreme Court Observations*

The right to free legal aid is an unalienable element of '**reasonable, fair and just**' **procedure**. Without it, a person suffering from economic or other disabilities would be deprived of the opportunity for securing justice. Also, '**speedy trial**' is an essential ingredient of 'reasonable, fair and just' procedure guaranteed by **Article 21 of the Constitution**.

- *Supreme Court Directions*

- The state government should provide under-trial prisoners a lawyer at its own cost for the purpose of making an **application for bail**.

- The state is under a constitutional mandate to ensure speedy trial.

- The state must take positive action to **enforce the fundamental rights of the accused to speedy trial**.

- In the matter of News Reports published in the Times of India dated 26 June 2006 v State of Bihar & Ors

A bench of the Patna High Court *suo moto* initiated a public interest litigation for the **efficient and effective enforcement and implementation of the amended provision of Section 436A Cr.P.C.**

High Court Observations

Pursuant to the directions issued by the High Court, the government filed an affidavit stating that **247 under-trial prisoners were entitled to bail under Section 436A Cr.P.C.** In its interim order, the Court issued directions for the **constitution of a jail cell for districts and sub-divisions** which would have a free hand in evolving procedure to regularly monitor such cases of under-trial prisoners.

- Court on Its Own Motion in Re: regarding various irregularities at Central Jail, Tihar, 2007

A bench of the High Court of Delhi took notice of the problem of **overcrowding in Central Jail, Tihar**. An inquiry report was called for, which brought out many issues of concern regarding prison conditions.

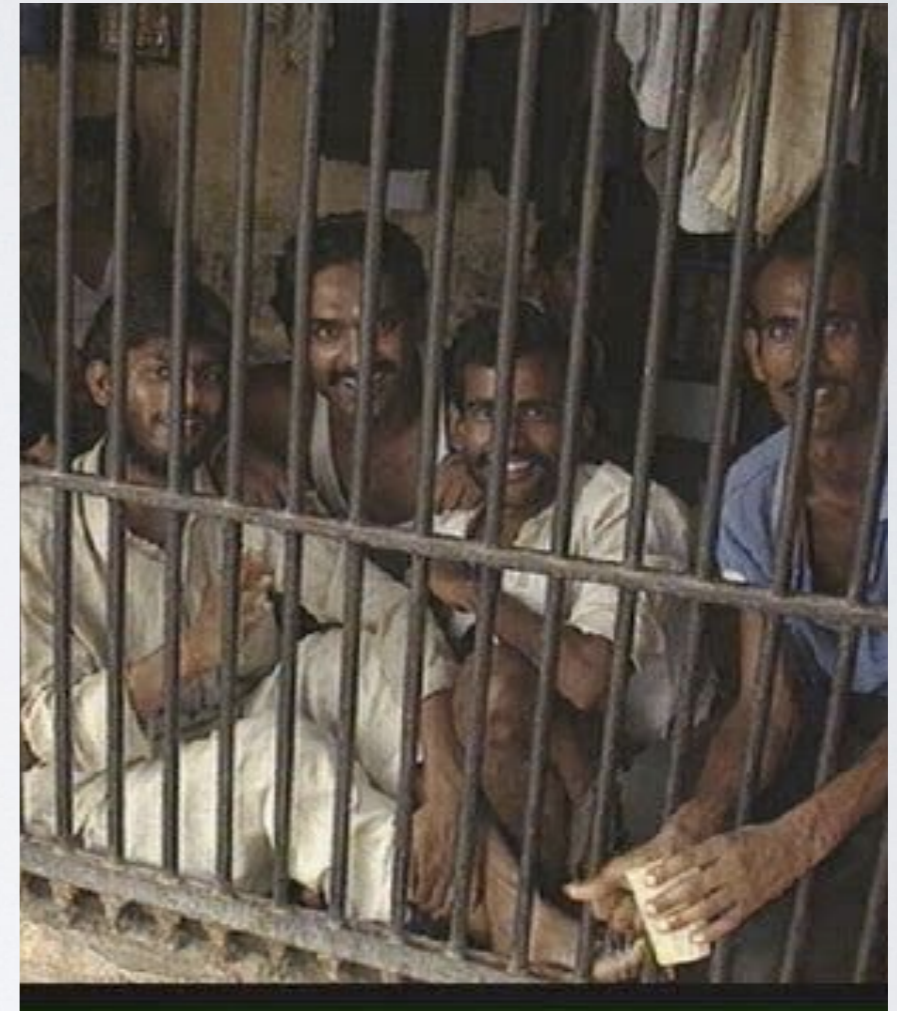
Main High Court Directives (18.6.2007)

With regard to persons incarcerated due to proceedings initiated under Section 107 read with Section 151 Cr.P.C.:
- all inmates lodged under these sections **due to non-furnishing a surety bond would be released on furnishing a personal bond in sum of Rs.2000, under several conditions** (i.e. attendance to police station)

Main High Court Directives (22.8.2007)

With regard to release of under-trial prisoners from Central Jail, Tihar:

- if admitted to bail but unable to furnish sureties for more than 2 months, shall be released **on their personal bond**
- in case of under-trial prisoners who are from other states other than Delhi, **local surety shall not be insisted upon while granting bail.**



LATEST ORDER FROM WRIT PETITION (CIVIL) NO.406/2013

- A prisoner is entitled to be treated with dignity and sympathy, said the **Supreme Court** while directing the Centre and state governments on Friday to provide all basic facilities to jail inmates commensurate with human dignity.
- A bench of Justices **Madan B Lokur** and **R K Agrawal** passed a slew of directions to reduce the number of prisoners in overcrowded jails and directed the prison authorities **to take steps to release those who are languishing in jail for not being able to pay the bail bond.** "A prisoner is required to be treated as a human being entitled to all the basic human rights, human dignity and human sympathy," it said.

- It directed Undertrial Review Committee in districts to meet every quarter and take steps for the release of under-trials and convicts who have undergone their sentence or are entitled to release because of remission granted to them. It said the under-trials who have undergone detention for half of the maximum period of imprisonment specified for his offence shall be released on his personal bond with or without sureties as specified under Section 436A of CrPC.

« The Committee should specifically look into aspects pertaining to effective implementation of Section 436 of the CrPC and Section 436A of the CrPC so that under-trial prisoners are released at the earliest and **those who cannot furnish bail bond due to their poverty are not subjected to incarceration only for that reason.** »

NATIONAL HUMAN RIGHTS COMMISSION GUIDELINES

In 2003, **Dr. Justice A.S. Anand**, the then Chairperson of the Commission wrote a letter to all Chief Justice of High Courts on the plight of under-trial prisoners.

The letter stated that overcrowding was the root cause of the deplorable living conditions in jails across India.

Concerned about the human rights of prisoners, the Commission suggested the following measures regarding bail:

- **Monthly review of the cases of under-trials** in light of the Supreme Court judgements, where clear instructions have been issued for release of under-trials on bail
- **Release of under-trials on personal bonds**, especially in cases where they are first time offenders and punishment is less than 2-3 years
- Cases of under-trials who stay in prisons due to their inability to raise sureties should be reviewed **after 6-8 weeks to consider suitability for release on personal bonds**

CONSEQUENCES OF THE LACK OF IMPLEMENTATION OF THE BAIL SYSTEM

- **Overcrowding in Indian prisons**

Overcrowding affects the health and hygiene of the prisoners, their security, their possibilities to do activities and work inside jail, their rights to free legal aid, their access to medical facilities. It fosters criminalization and dominance of hardened criminals. It makes it difficult for the prison administration to ensure the basic minimum needs of the prisoners.

- **Delegitimization of Indian legal system**

Violation of a Fundamental Right

Explicit violation of **Article 21** of the Constitution of India on the 'Protection of life and personal liberty':
'No person shall be deprived of his life or personal liberty except according to procedure established by law'

Violation of United Nations Standards

CONCLUSION: AN UNCONSTITUTIONAL AND UNFAIR IMPLEMENTATION OF THE BAIL SYSTEM

- The problem is mostly targeting poor people who can't afford to pay the bail
- Eventually the problem is not that bail is not granted but that the under-trial can't provide the monetary sureties asked by the Court
- Most of the prisoners who are granted bail stay in jails because of a lack of monetary resources

LAST BUT NOT LEAST: A HAPPY ENDING STORY

- Ashvin's story (February 2016, Delhi)

2.1.2016: arrested by Delhi Police and held in custody in **Tihar Jail No4**.

Ashvin is accused of having committed a theft: he was enlarged in bail in 2005 but stopped attending the court's hearing because of false information from the co-accused mother.

From a **poor family** living in Uttarakhand, he is 30 year old, have a young wife and a nine year old son.

He and his wife are suffering from **pulmonary tuberculosis** and undergoing treatment.

Since custody, his life is at danger as he is not being provided his treatment in Ward 4. Only **Tihar Jail No3** has appropriate medical facilities.

The sudden discontinuation of his treatment represents a highly serious threat first to his life as by dropping the medicines he became **drug resistant**, and to all the people having daily contacts with him.

Moreover, on the basis that the accused is believed to be falsely implicated in the case, he has **no criminal antecedents**, and there is no chance that he will impede the due process of law, a bail application was filled.



LAST BUT NOT LEAST: A HAPPY ENDING STORY

- Ashvin's story (February 2016, Delhi)

The first application for bail was dismissed by Saket Court on the 1st of February 2016. The application prayers' included the release of the accused as well as his transfer to Central Jail No.3 where DOTS center for T.B. patients are available. Thus, the order given directs Tihar Jail **'to get the accused medically examined and provide him with appropriate medical facility for his treatment' with mention to a possible transfer to Jail No.3 'if he can be provided with better treatment there'.**

Bail was granted on 10.02.2016, **'he is admitted to bail on his furnishing bail bond in the sum of Rs.10,000/- with two sureties on the like amount to the satisfaction of the court concerned'.**

Ashvin could not furnish the bail amount and we applied for release on personal bond. Two of his relatives, his wife and his old father-in-law, made this last minute trip from Uttarakhand to Delhi to appear in front of the court. Thanks to their birth certificates and all their good will, **personal bond was accepted. on 11.02.2016.** The Judge, **Mannish Khurana Kakkar** did not even read the whole document on the previous judgements on bail and on tuberculosis statement, she took this brave and innovative judgment independently.

Ashvin took the bus back to Uttarakhand with his wife and father in law the day he was released on personal bond.

