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BEHIND BARS BEFORE JUSTICE: THE URGENT NEED FOR BAIL REFORM IN INDIA

An accused is either acquitted or convicted after the conclusion of the trial and then placed behind bars if convicted. Ironically, Indian prisons are crowded with undertrial prisoners more than actual convicts. According to the Prison Statistics India 2022, more than 75% of prisoners in Indian jails are undertrials.¹ Undertrial prisoners are those accused of either bailable or non-bailable offenses and are kept in prison during the trial of their case in a competent court. These undertrial prisoners languish in overcrowded prisons with poor facilities, affecting their psychological and physical health while awaiting release on bail or the conclusion of the trial. Bail is a right of the accused that upholds the constitutional right to personal liberty under Article 21 of the Indian Constitution.² Bail jurisprudence in India is primarily focused on this foundational principle, prioritizing the rights of the accused. The right to grant bail is vested with the courts under Sections 436 and 437 of the Code of Criminal Procedure for bailable and non-bailable offenses. The discretion bestowed upon the courts in cases of bail application under the Code of Criminal Procedure and other legislative provisions

¹ Nileena Suresh, Indian Prisons Saw A Surge In Undertrial Prisoners Over A Decade, INDIASPEND (Jan. 2, 2024, 10:28 AM), <https://www.indiaspend.com/police-judicial-reforms/indian-prisons-saw-a-surge-in-undertrial-prisoners-over-a-decade-887939#:~:text=Mumbai%3A%20Over%20the%20past%20decade,the%20National%20Crime%20Records%20Bureau.>

² INDIA CONST. art. 21.

makes the law on bail unclear and arbitrary. Such discretion vested with law enforcement agencies and the courts has proven to be one of the leading causes of the high number of undertrial prisoners languishing in prisons. This raises the question of whether courts in India follow the established principles of bail jurisprudence concerning undertrial prisoners in India. This paper will present two arguments on the major causes of the large number of undertrial prisoners. Firstly, discrepancies in default bail under Section 167(2) of the Code of Criminal Procedure, along with unnecessary arrests by the police and a lack of uniformity and clarity in bail law, have contributed to the vast number of undertrials locked up in prisons. Secondly, the exercise of judicial discretion pertaining to the right to grant bail has proven to be deficient in serving the purpose of established principles and objectives of bail jurisprudence in India. The prevalence of the destitute state of undertrial prisoners in Indian jails calls for an assessment of its causes and an examination of its compliance with bail jurisprudence. This paper further aims to shed light on critical reforms necessary to address the systematic challenges that perpetuate the state of undertrial prisoners in the country.

BAIL JURISPRUDENCE IN INDIA

Present-day bail jurisprudence in India is largely shaped by various supreme court precedents unlike legislative acts as compared to the U.S. The concept of Bail in the Indian context is heavily relied upon the rights of the jailed accused. Its primary purpose is to uphold the fundamental right to life and personal liberty under article 21 of the Indian constitution on condition that he/she would assure his/her presence when called upon by the court. Indian criminal justice system, relies on the principle of presumption of innocence until guilty following the 'due process' model of criminal justice system. This principle highlights the fact that bail cannot be a tool for punitive or preventive purposes, as an accused is innocent until proven guilty and an innocent person cannot be restricted of his right to personal liberty and

punished of a crime he hasn't done.³ This is the very nature of bail. In simple terms, bail is a conditional release of a jailed accused, on the condition of appearing before the court at a future date by depositing a security as defined in the case of *Satender Kumar Antil v. C.B.I.*⁴ Under the Code of Criminal Procedure, Chapter XXXIII deals with bail provisions and bonds that include sections 436 to 450. Section 436 provides for the grant of bail in bailable offenses, where an accused arrested without warrant by the police, appeared or yet to appear before the court either during custody or any stage of proceedings, such person shall be released on bail. While section 437 provides for the grant of bail in non-bailable offenses. Section 437 in contrast to section 436, is not an absolute right and is left to the discretion of courts. In addition, section 167(2) of Cr.P.C provides for default bail in case a person accused of bailable offences is held in custody for a period of 60 days or for a period of 90 days if accused under non-bailable offences, he/she is entitled to bail on application.⁵ Apart from these provisions, the bail law in India is majorly shaped by judicial precedents. In the case of *State of Rajasthan v. Balchand*, the court held that “*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*”, emphasizing the jurisprudence of bail.⁶ The case of *State of Maharashtra v. Sitaram Popat Vetal* laid down factors for granting bail, including considering the severity of the accusation and potential punishment, the strength of supporting evidence, the risk of witness tampering or threats to the complainant, and the court's prima facie satisfaction with the charge.⁷ Despite several guidelines issued by the Supreme Court in cases including *Arnesh Kumar v. State of Bihar*,⁸ and *Satender Kumar Antil*

³ Satwinder Singh & Palakdeep Kaur, *The Status of Bail Jurisprudence in India: Need Comprehensive Revamp*, 6 IJLMH 1386, 1390 (2023).

⁴ *Satender Kumar Antil v. CBI & Anr.*, AIR 2022 SC 3386.

⁵ The Code of Criminal Procedure, 1973, § 167(2), No. 2, Acts of Parliament, 1973 (India).

⁶ *State of Rajasthan v. Balchand*, AIR 1977 SC 2447.

⁷ *State of Maharashtra v. Sitaram Popat Vetal*, AIR 2004 SC 4258.

⁸ *Arnesh Kumar v. State of Bihar*, (2014) 8 SCC 273.

v. *C.B.I.*,⁹ Indian courts are reluctant in granting bail due to the scope of judicial discretion extending beyond the guidelines issued by the Supreme Court. Although guidelines are crucial, particularly in cases of non-bailable offenses. The present condition of undertrial prisoners raises concerns regarding the effectiveness of bail jurisprudence in achieving its intended objectives.

DEFAULT BAIL UNDER SECTION 167(2) OF CR.P.C, 1973

The majority of undertrial prisoners belong to the illiterate and impoverished segments of society, lacking easy access to legal assistance. Under section 167(2) of the Cr.P.C, if an investigation cannot be completed in twenty-four hours, the police may produce the accused before the magistrate for an extended period of police custody which should not extend beyond fifteen days. If the magistrate is convinced for an extended investigation for the filing of the charge sheet, the magistrate may grant judicial custody not exceeding 60 days in case of bailable offences and 90 days in case of non bailable offenses. The accused after the said period is released on bail if he is prepared to and does furnish bail.¹⁰ The right to default bail under section 167(2) Cr.P.C is an absolute right. It was held in the case of *Abhishek v. State of NCT of Delhi* that, “*The right to seek default bail under Section 167(2) Cr.P.C. is a fundamental right and not merely a statutory right, which flows from Article 21 of the Constitution of India*”.¹¹ The soul of default bail is to protect the accused from extended period of detention that may violate his fundamental rights. But the pre-requisite of the need to furnish bail discriminates illiterate and poor undertrial prisoners as legal aid and financial aid is out of reach for them. A bail requires a security to confirm your presence before the court in the future. Most undertrial prisoners lack such security they can deposit and of all knowledge of the procedural

⁹ Satender Kumar Antil v. CBI & Anr., AIR 2022 SC 3386.

¹⁰ The Code of Criminal Procedure, 1973, § 167(2), No. 2, Acts of Parliament, 1973 (India).

¹¹ *Abhishek v. State of NCT of Delhi*, 2023 LiveLaw (SC) 731.

law. Around 70 percent of undertrial prisoners in India are illiterate and semi-literate, raising the concern over the enforcement of their absolute right to default bail under section 167(2).¹² Also, a majority of the undertrial prisoners are from marginalized sections of the society such as scheduled caste and scheduled tribes.¹³ It would be unrealistic to expect an illiterate and impoverished person to have knowledge of his right to default bail. Although legal aid is provided by the district legal services authorities, the legal practitioners assigned are uninterested in rendering their service owing to low honorarium paid to them.¹⁴ Despite section 167(2) being an absolute right, the enforcement of the same is highly unlikely for socially and economically backward sections owing to its procedural and financial aspect. It is also highly unrealistic to expect an impoverished person who is probably a daily wage worker to furnish security to secure bail. One such case which underlines the status of poor people *Rudul Shah v. State of Bihar*, where the accused was imprisoned for 14 years in jail despite being acquitted in 1968.¹⁵ This is the state of an acquitted person owing to the ignorance of backward community of the society. This raises concerns over the social inequality concerning the economically backward undertrial prisoners who can't afford a bail bond. The financial aspect of bail has been highly criticized by various authors and an alternate form of surety depending on the social life of the accused has been stressed by the supreme court. Justice Bhagwati in the report of Legal Aid Committee of 1971 stated that "*there are several considerations which deter an accused from running away from justice. Risk of financial loss is only one of them and that too is not a major one. Even without monetary bail, it is possible to secure the person of*

¹² Mukesh Rawat, *Poor, young and illiterate: Why most Indian prisoners fight long lonely battles for justice*, INDIA TODAY (Apr. 5, 2022, 3:59 PM), <https://www.indiatoday.in/india/story/undertrial-prisoners-indian-jails-ncrb-report-prison-statistics-supreme-court-1618588-2019-11-15> .

¹³ Shreehari Paliath, *India's Jail Stats: 7 In 10 Undertrials, 1 In 3 Dalit/Adivasi*, INDIASPEND (Sep. 7, 2020, 6:00 AM), <https://www.indiaspend.com/indias-jail-stats-7-in-10-undertrials-1-in-3-dalit-adivasi/> .

¹⁴ Vijay Raghavan, *Undertrial Prisoners in India: Long Wait for Justice*, 51 ECONOMIC AND POLITICAL WEEKLY 17, 17 (2016).

¹⁵ *Rudul Shah v. State of Bihar*, (1983) 4 SCC 141.

the accused at the trial in quite a large number of cases".¹⁶ The Manhattan Bail Project launched by the Vera Foundation in the United States in 1961, showed that pre-trial interviews effectively identified individuals suitable for release before trial. With 3,505 persons released over three years, recommended cases had a 60% likelihood of being released on recognizance by the court. The emphasis on community ties over financial bail has proved to be a better test of the likelihood of re-appearance than the ability to meet financial requirements of the bail.¹⁷ Such an approach would help balance the individual rights of the accused and public safety providing an equitable approach that upholds justice and combats discrimination. Lack of such an approach has proved to be detrimental to the rights of the undertrial prisoners belonging to the marginalized sections of the society and is contributing to the distressed state of undertrial prisoners.

JUDICIAL DISCRETION UNDER SECTION 437 OF CR.P.C , 1973

One major cause contributing to the state of undertrial prisoners accused of non-bailable offenses in the Indian jails is the judicial discretion granted to the courts in determining bail of the accused under section 437 of the Code of Criminal Procedure. Section 437 of Cr.P.C provides for judicial discretion unlike section 436. Section 436 of Cr.P.C provides for an absolute right and indefensible right to an accused of bailable offenses on executing a bond without sureties for his appearance before the court when called upon. The only pre-requisite here is the execution of a bond.¹⁸ But section 437 provides for grant of bail in cases of non-bailable offenses only when the competent court is satisfied on reasonable grounds that the person accused is not guilty of an offence punishable with death or imprisonment for life, or such person is previously convicted for an offense punishable with death, imprisonment for life

¹⁶ S. D. Balsara, *BAIL NOT JAIL – EMPTY THE PRISONS*, 22 JOURNAL OF THE INDIAN LAW INSTITUTE 341, 346 (1980).

¹⁷ *Id.* at 345.

¹⁸ The Code of Criminal Procedure, 1973, § 436, No. 2, Acts of Parliament, 1973 (India).

or imprisonment for seven years or more. The only exception to grant bail is if the person is under the age of sixteen years or is a woman or is sick or infirm.¹⁹ The term reasonable grounds in this section confers the court with judicial discretion unlike in cases of bailable offenses under section 436 of Cr.P.C. The encumbrance in securing a bail through section 436 are similar to section 167(2) of Cr.P.C while under section 437, it is the judicial discretion. The most concerning part of judicial discretion in granting bail is the disparity between different courts of hierarchy. As held in the case of *Sanjay Chandra v. CBI*, the grant or refusal to grant bail lies within the discretion of court but the primary purposes of bail is to relieve the accused of imprisonment, to relieving the state of the burden of keeping him and at the same time to keep the accused in custody of the court.²⁰ Despite the Supreme Court's and High Court's legal approach in serving the purpose of the bail, the trial courts are seen writing the circumstances of the case differently and are bent towards denying bail as a punitive and preventive approach. When these dismissed bail applications are challenged before the High Court, the court tends to grant bail in favour of the accused. This shows the disparity between different courts owing to judicial discretion. Unfortunately, the accused is subject to further imprisonment in judicial custody before the high court pronounces its order. It is further observed that accused is subject to a wait of 90 days to present the charge sheet for hearing the bail plea before the High Court and is forced to await the hearing before the concerned High Court that takes additional one to two months.²¹ Such a process showcases injustice and severe flaws in the criminal justice system. The Supreme Court has laid several guidelines to address this issue but in vain. The Supreme Court of India, in the *Satender Kumar Antil case*, laid specific conditions for granting bail based on offense severity and accused cooperation. Offenses are classified into four Categories. Category A offenses which are punishable with imprisonment of 7 years or less,

¹⁹ The Code of Criminal Procedure, 1973, § 437, No. 2, Acts of Parliament, 1973 (India).

²⁰ *Sanjay Chandra v. CBI*, (2012) 1 SCC 40.

²¹ Hans Kumar, *A CRITICAL STUDY OF BAIL TRENDS IN INDIA*, 17 *PJAE* 10494, 10501 (2020).

are to be dealt with lenient summons procedures. Category B offenses punishable with death, life imprisonment, or more than 7 years, requiring bail applications decided on merits. Category C, Similar guidelines as B, with additional compliance requirements for offenses under special acts like NDPS, PMLA, Companies Act, and UAPA. Category D economic offenses that are not covered by special acts, are to be dealt with bail application decisions made upon the accused's appearance in court.²² But these guidelines are yet vague leaving to the discretion of the courts. In addition, these guidelines remain unimplemented in most cases. In light of judicial discretion in cases concerning the grant of bail to the accused of non-bailable offences, there seems to be a need for immediate reforms to address the state of undertrial prisoners.

WAY FORWARD

To address the issue of judicial discretion in bail matters, the supreme court in the very case of *Satender Kumar Antil v. CBI* recommended a special Bail Act to ensure uniformity and certainty in court decisions concerning granting of bail.²³ The court further refers to the UK's Bail Act as it addresses various factors and simplifies procedure in dealing with bail. As the courts recommends, the state of under trial prisoners in India underlines the dire need of a similar Bail Act that aims to relieve the distressed undertrial prisoners and the problem of overcrowded prisons. The union government is required to pass a special enactment in the nature of a Bail Act. In addition, strict implementation of guidelines issued for unnecessary arrests in the case of *Arnesh Kumar v. State of Bihar* should be followed to avoid unnecessary arrests and prison congestion.²⁴ The guidelines issued for granting of bail in cases of *State of Maharashtra v. Sitaram Popat Vetal*²⁵ and *Satender Kumar Antil v. CBI*²⁶ should be strictly adhered to by

²² Satwinder, *supra* note 3, at 1397.

²³ *Satender Kumar Antil v. CBI & Anr.*, AIR 2022 SC 3386.

²⁴ *Arnesh Kumar v. State of Bihar*, (2014) 8 SCC 273.

²⁵ *State of Maharashtra v. Sitaram Popat Vetal*, AIR 2004 SC 4258.

²⁶ *Satender Kumar Antil v. CBI & Anr.*, AIR 2022 SC 3386.

the trial courts for upholding the very purpose of bail. The trial courts must be frequently reminded of the purpose of bail and not refuse bail as a punitive or preventive measure. The concern surrounding default bail under section 167(2) and section 436 of Cr.P.C can be addressed by replacing the financial aspect of the bail bond with a social aspect that might assure the appearance of the accused similar to Manhattan Bail Project by the Vera Foundation. The union government can appoint a committee for the purpose of finding an alternative to the financial aspect of the bail bond for the poorer section of the undertrial prisoners to uphold justice and equity. Further, this paper suggests the development of a software that keeps track of the number of days an accused is in custody and such software should be used effectively to grant bail to the concerned accused if a charge sheet is not filed even after the maximum period granted for investigation by the magistrate on social security if the accused is from marginalised community of the society. In addition, the undertrial prisoners should be informed of their right to bail and similar such rights by the District Legal Services Authorities effectively as the DLSA's play an active role in protecting rights of an accused. To protect the constitutional rights of the undertrial prisoners, it is important that these recommendations by the court and suggestions are taken into consideration in addressing the issues surrounding sections 167(2), 436 and 437 of Cr.P.C.

CONCLUSION

In conclusion, the distressed state of undertrial prisoners in Indian jails showcases significant flaws within the country's criminal justice system, particularly in the domain of bail jurisprudence. The overwhelming majority of undertrial prisoners, comprising more than 75% of the prison population, highlights procedural failures to uphold fundamental rights and ensure equitable access to justice. The existing framework of bail laws, characterized by judicial discretion and procedural complexities, has perpetuated the imprisonment of countless

individuals. Despite judicial pronouncements and guidelines aimed at addressing these issues, the implementation remains inconsistent, leaving room for discretion and disparity among different courts. The exercise of judicial discretion in bail matters has proven to be a major concern, as it often leads to arbitrary decisions and unequal treatment of individuals awaiting trial. This discretion, coupled with the absence of a uniform approach to bail decisions, exacerbates the situation, leading to prolonged detention and overcrowded prisons. To remedy these systemic challenges, urgent reforms are imperative. The enactment of a specialized Bail Act would provide clarity and uniformity in bail decisions, thereby reducing the scope for judicial discretion. Strict adherence to existing guidelines, along with enhanced legal aid and awareness programs, is essential to safeguard the rights of undertrial prisoners and promote fairness in the criminal justice process. Moreover, innovative initiatives such as the adoption of social-based sureties instead of financial bonds, as demonstrated by the Manhattan Bail Project, could offer a more equitable approach to securing bail for economically disadvantaged individuals. Additionally, using technology to track and monitor the duration of custody would help reduce the burden on undertrial prisoners and prevent prolonged detention without trial. Finally, addressing the state of undertrial prisoners requires an approach that combines legal reforms, awareness campaigns, and technological solutions. By prioritizing the protection of constitutional rights and promoting equality before the law, India can strive towards a more just and humane criminal justice system that upholds the principles of bail jurisprudence and ensures the dignity and rights of all individuals, regardless of their socio-economic status.