

**District Court South Baster**  
**Dantewada C.G.**



सत्यमेव जयते

High Court Of Chhattisgarh

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**Bail Provision-**  
**Overview and analysis with special**  
**reference to the judgment of**  
**Arnesh Kumar & Satyendra Kumar**  
**Antil**

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## BAIL

Basic rule of criminal justice system was "**Bail not Jail**". Denial of bail amounts to deprivation of personal liberty.

"**Bail is rule Jail is an exception**" is legal principle that was laid down by the Hon'ble Supreme Court in a landmark judgement of **State Of Rajasthan VS Balchand Alias Baliya** in 1978. The judgement was based upon several rights that have been guaranteed by the constitution of India with article 21 being the most important one. Detention of an individual infringes his right to life and liberty as guaranteed under article 21 of the constitution of India. The main purpose of detention is to ensure easy proceeding by availing the accused for the trials without any inconvenience. Thus if it can be ensured that the accused will be available as when required for the trial, then detaining the person necessary. Therefore it was held that the provisions of the CRPC 1973 regarding the arrest of an individual must be interpreted in a sense that unless indispensable detention of a person must be avoided. Unless there are some cogent reasons for custodial interrogation and sustained detention at a pre trial stage detaining an individual and encroaching his right to liberty is considered to be punitive and against the principles of natural justice.

Further the application of reformatory theory to the principles of punishment calls for a balance between two theories namely deferent theory and punitive theory, i.e., to reform **an accused and to**

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**keep him away from hardened criminals in jail which are deemed to be universities of crime.**

Further more,with a rise in human rights activism,the equilibrium between the liberty of an individual and the interest of society has become the main concern .So unless there are some cogent reasons such as chances of the accused fleeing from justice or the fear of him tampering with the evidence or inducing the witnesses,detention of the accused is against his fundamental right to liberty which is totally uncalled for.Therefore,the court ensure that a person is not detained unless the interest of justice suffers if an arrest is not made.

The most significant case of bail in also **Hussainara Khatoon VS Home Secretary,State Of Bihar 1980(1)SCC** raised the question of delayed bail and the ambit under article 21 of the constitution.

There are usually 4 kinds of bail under Indian Penal code(CR.PC) that an individual may apply based on the stage of the associated criminal case.

- 1 regular bail,**
- 2 interim bail,**
- 3 anticipatory bail,**
- 4 default bail.**

### **Regular bail**

**Regular Bail** can be granted to person who has already been arrested and kept in police custody.A person can file a bail application for regular bail under

**section 437 & 439** of the CR.P.C.

**This type of bail is granted when a person accused of a crime is under police custody.**

Regular bail is divided into two type base on the offense. **Section 436** of the CR.P.C. deals with the bail procedure in case ofailable offences.The accused is entitled to get bail **as a matter of right.**

**Section 437** deals with the powers of the trial court & Magistrate in front of whom the police produce the offender to grant or refuse bail.

**GURUCHARAN SINGH AND ORS.V/S STATE (DELHI ADMINISTRATION)(1978)1 SCC 118-** Under section 439(1) the High Court or the court of Session will have to exercise its judicial discretion in considering the question of granting of bail.The overriding consideration in granting bail which are common both in the case of Section 437(1) and Section 439(1),of the new code are the **nature and gravity of the circumstances in which the offence is committed; the position and the status of the accused with reference to the victim and the witnesses;the likelihood,of the accused fleeing from justice;of repeating the offence;of jeopardising his own life being faced with a grim prospect of possible conviction in the case;of tampering with witnesses;the history of the case as well as of its investigation and other relevant grounds** which,in view of so many variable factors,can not br exhaustively set out.Of these on the two paramount consideration viz.likelihood of the accused fleeing from justice and his tampering with

prosecution evidence relate to ensuring a fair trial of the case in a Court of Justice, due and proper weight should be bestowed.

**BIMLA DEVI(SMT)VS STATE OF BIHAR & ORS.  
(1994)2 SCC 8**

Grant of provisional bail by magistrate despite rejection of two earlier bail applications by the High Court-Held, not only contrary to settled principles of judicial propriety but also contrary to the statutory provisions

**DOLAT RAM AND ORS.V/S STATE OF HARYANA  
(1995)1 SCC 349**

Ss.439(2) & 437 CR.P.C.-Cancellation of bail-Factor to be taken into consideration **-Bail once granted should not be cancelled in a mechanical manner** without considering whether any supervening circumstance have rendered it no longer conducive to a fair trial to allow the accused to retain his freedom by enjoying the concession of bail during the trial.

**IN HEERALAL MAHAWAR V/S STATE OF C.G.MCRC.  
NO.1596/2020** Hon'ble high court of chhattisgarh held, accused is not entitled to be released on bail as accusation are of commercial quantity and the provisions of **Section 37(1)(b)(ii)** of the **NDPS Act** are not satisfied and **on the basis of principle of parity**, following principle of law laid down by the Supreme Court in **SATPAL SINGH(SUPRA)**, it can not

be held that there are reasonable grounds for believing that the applicants in two separate bail applications have not committed the said offence and they are not likely to commit any offence, if released on bail.

### **Anticipatory bail**

Anticipatory bail can be granted by **High court** or a **Session Court** under section 438 of CR.P.C.

The application of this type of bail is made when a person anticipates that he might get arrested for a non bailable offence. Previously there was no provisions of Anticipatory Bail in CR.P.C.. Later on Section 438 inserted in CR.P.C.

The reasons for the incorporation of Anticipatory Bail is multifold:

**The right to liberty guaranteed under Article 21** of the constitution of India is one of **the major reasons** for the incorporation of the provisions of Anticipatory Bail. The court is of the point of view that since it is a fundamental right. It should not be infringed for frivolous reasons.

**A person is innocent until proven guilty beyond reasonable doubt.** This principle of criminal jurisprudence is **another reason** for the incorporation of the provision of Anticipatory Bail, A person has to fulfill certain condition as per section 438(2) of the CR.P.C.

### **GURBAKSH SIGH SIBBIA V/S STATE OF PUNJAB** **(1980)**

In this case the apex court held that Section 438

of the CR.P.C. must be used very sparingly and in exceptional cases only. **However the discretion of the court to grant bail can not be limited just because the offence is punishable with life imprisonment or death penalty.** Additionally the court held that **the bail should not be limited by time**, however the court can impose reasonable restrictions on the basis of the circumstances and the fact of the case.

### **SALAUDDIN ABDULSAMAD SHAIKH**

### **V/S STATE OF MAHARASHTRA (1995)**

This court **overruled** the judgement passed in the case of **Gurubaksh Singh Sibbia** and held that **the grant of anticipatory bail should be limited by time.** The court held that the Anticipatory Bail must be granted for a limited period on the expiration of which the matter must be left to the regular court for decision.

### **SIDDHARAM SATLINGAPPA MHETRE V/S STATE OF MAHARASHTRA & ORS(2010)**

This is the judgement in which apex court widened the scope of personal liberty with respect to arrest and grant of bail to the citizens. The apex court **emphasised upon the importance of maintaining a balance between personal liberty and social interest.** The court held that **the duration of the Anticipatory Bail can not be limited by time because there is no limitation set by any law.** Therefore wide discretion has been conferred to the court to grant Anticipatory Bail as per the facts of the case.

## **Sushila Agrwal And Others VS State (NCT OF Delhi) & ORS.(2020)**

In this **landmark** Hon'ble Supreme Court clarified that **Anticipatory Bail extends to the end of the trial and is not a fixxed duration.**

### **Interim Bail**

As the name suggests this type of bail is granted temporarily. Interim bail is granted before the hearing for a grant of regular bail or anticipatory bail for a shorter span of time.

### **Default Bail.**

This kind of bail procedure differs from the bail granted under the sections mentioned above. Default bail is granted on the default of the police or investigating agency to file its report/complaint within the prescribed period. For an offence where an arrest can be made without a warrant, Section 57 of the CR.P.C. commands that the police officer shall not detain the accused for more than 24 hours. **Section 167** grants the accused **the right to statutory or default bail.**

### **IN CHAGANTI SATYANARAYANA AND ORS.V/S STATE OF ANDHRA PRADESH (1986) 3 SCC 141**

The Hon'le apex court held that -S.167(2)Proviso (a)(ii)-Total period of 90 days or 60 days prescribed in sub-clause (i) and (ii) of proviso(a) **to be computed from the date of remand of the accused and not from the date of his arrest U/S.57** -Remand to custody can not be beyond the period of 15 days -Further remand must be to judicial remand.

**UNION OF INDIA V/S NIRALA YADAV @RAJA RAM YADAV@DEEPAK YADAV (2014) 9 SCC 457-**

S 167(2)Proviso-Default Bail-Accused has an indefeasible right to be released on bail U/S 167(2).Once the statutory period has expired without charge sheet having been filed and court must dispose of bail application of accused U/S167(2) on the same day itself-Application for extention of period of custody without charge sheet ,for filling of charge sheet by prosecution (when such extention is permissible) can not be entertained by court after expiry of the prior prescribed period,while keeping the bail application U/S167(2) pending-On the day accused filed application for default bail,adjournment by court to consider extension application of prosecution was misconceive and court was obliged on that day to deal with the application filed by accused as required U/S167(2) CR.P.C.-There was no question of any contest since the application for extention had been filed after the expiry of time.

**RAKESH KUMAR PAUL V/S STATE OF ASSAM (2017)15 SCC 67-**

S.167 CR.P.C-Prescription of 90 days for investigation in cases of offence punishable with death,life imprisonment or minimum 10 yrs of imprisonment,and 60 days in other case.

In our own Hon'ble High Court relied upon the Rakesh Kumar Paul in **SHYAM KUMAR BISWAS V/S STATE OF C.G.CRMP 974/2020.**

**UDAY MOHANLAL ACHARYA V/S STATE OF MAHARASHTRA (2001) 5 SCC 453-**

Section 167(2) proviso-Magistrate is obliged to grant bail even after filling of the application by accused, a charge sheet had been filed- Therefore, where accused's application is erroneously rejected by Magistrate and accused then moves the Higher forum but during pendency of the matter before that forum a charge sheet is filed accused's indefeasible right is not affected-In case , however accused fails to furnish the bail as directed by the Mgistrate, his right to be released on bail would be extinguished.

**IN ARNESH KUMAR V/S STATE OF BIHAR  
(2014) 8 SCC 273**

Hon'ble Supreme Court issued direction .Before going direction we need to discuss the offences which is punishable upto seven years especially matrimonial case u/s 498-A of IPC.

Hon'ble apex court observed that there is phenomenal increase in matrimonial disputes in recent years. The institution of marriage is greatly revered in this country. Section 498 A of the IPC was introduced with avowed object to combat the menace of harassment to a women at the hands of her husband & his relatives. The fact that Section 498 A is a cognizable and non bailable offence has lent it a

dubious place of pride amongst the provisions that are used as weapons rather than shield by disgruntled wives. The simplest way to harass is to get the husband and his relatives arrested under this provision.

In a quite number of cases bed ridden grand father & grand mother of the husbands their sister living abroad for decades are arrested. Arrest brings humiliation curtails freedom and cast scars forever. Law Commissions ,Police Commissions and This court, in a large number of judgements emphasized the need to maintain a balance between individual liberty and societal order while exercising the power of arrest.

**No arrest can be made in a routine manner on a mere allegation of commission of an offence made against a person.** It would be prudent and wise for a police officer that no arrest is made without a reasonable satisfaction reached after some investigation as to the genuineness of the allegation, despite this legal position the legislature did not find any improvement, number of arrest have not decreased. Ultimately the parliament had to intervaence and on the recommendation of **177th report** of the law commission submitted in the year **2001 Section 41** CR.P.C. in the present form enacted.

From a plain reading of the Section 41 it is evident that a person accused of offence punishable with imprisonment for a term which may be less than seven years or which may extend to seven years with or without fine can not be arrested by the police

officer only on its satisfaction that such person had committed the offence punishable as aforesaid.

Police officer before arrest in such case has to be further satisfied that such person from committing any further offence or for proper investigation of the case or to prevent the accused from causing the evidence of the offence to disappear or tampering with such evidence in any manner or to prevent such person from making any inducement threat or promise to a witness so as to dissuade him from disclosing such facts to the court or the police officer or unless such accused person is arrested his presence in the court whenever required can not be ensured. Law mandate the police officer to state the facts and record the reasons in writing which led him to come to a conclusion covered by any of the provisions aforesaid while making such arrest.

When an accused is produced before the Magistrate before a magistrate authorises detention u/s 167 CR.P.C. He has to be first satisfied that arrest made is legal and in accordance with law and all the constitutional rights of the person arrested is satisfied. **If the arrest effected by the police officer does not satisfy the requirements of section 41 of the CR.P.C. Magistrate is duty bound not to authorise his further detention and release the accused.**

**Another provision Section 41 A CR.P.C.** aimed to avoid unnecessary arrest or threat of arrest looming large on accused requires to be vitalised. **Section 41A as inserted by section 6 of the CR.P.C. (amendment) act 2008.**

Provision of Section 41A makes clear that in all cases where the arrest of a person is not required u/s 41(1) the police officer is required to issue notice directing the accused to appear before him at specified place and time. Law oblige such an accused to appear before the police officer and it further mandates that if such an accused complies with the terms of notice he shall not be arrested, unless for reasons to be recorded the police officer is of the opinion that the arrest is necessary. At this stage also the condition precedent for arrest as envisaged U/S 41 CR.P.C. has to be complied and shall be subject to the same scrutiny by the Magistrate as aforesaid.

**Direction issued by the Hon'ble court are-**

1. All the state government to instruct its police officers not to automatically arrest when a case u/s 498A of the IPC. is registered but to satisfy themselves about the necessity for arrest under the parameters laid down above flowing from section 41 CR.P.C.
2. All police officers be provided with a **check list** containing specified sub clauses U/S 41(1)(b)(ii),
3. The police officer shall forward the check list duly filed and **furnish the reasons and materials which necessitated the arrest while forwarding/ producing the accused before the Magistrate for further detention.**
4. The Magistrate while authorising detention of the accused shall peruse the report furnished by the police officer in terms aforesaid and only after recording its satisfaction the Magistrate will authorise detention.

5. The decision not to bearrest an accused be forwarded to the Magistrate within **two weeks** from the date of the institution of the case with a copy to the Magistrate which may be extended by the Superintendent Of Police of the district for the reasons to be recorded in writting,

6. Notice of appearance in terms of Section 41 A of CR.P.C. be served on the accused within two weeks from the date of institution of the case, which may be extended by the Superintendent Of Police of the district for the reasons to be recorded in writting.

7. Failure to comply with the directions aforesaid shall apart from rendering the police officers concerned liable for departmental action they shall also be liable to be punished for contempt of court to be instituted before High Court having territorial jurisdiction.

8. Authorising detentention without recording reasons as aforesaid by the Judicial Magistrate concerned shall be liable for departmental action by the appropriate High Court.

Hon'ble apex court further held the direction issued by this court shall not only apply to the cases **U/S 498A of IPC** or **Section 4 of the Dowry Prohibition Act** the case in hand, but **also such cases where offence is punishable with imprisonment for a term which may be less than seven years or which may extend to seven years with or without fine.**

**LIBERTY IS ONE OF THE MOST ESSENTIAL REQUIREMENT OF THE MODERN MAN.IT IS SAID TO BE THE DELICATE FRUIT OF A MATURE CIVILIZATION .IT IS THE VERY QUINTESSENCE OF CIVILIZED EXISTENCE AND ESSENTIAL REQUIREMENT OF A MODERN MAN.**

## **PART II**

In **Satinder Kumar Antil**, a bench comprising Justices SK Kaul and MM Sundersh, expressing concerns at the large number of undertrials languishing in jails, issued elaborate guidelines to ease the process of bail. The judgment also emphasized that accused should not be remanded in a mechanical manner. The judgment also suggested that the Union Government should bring a 'Bail Act' to streamline the process for granting bail. There are certain prerequisites for the guidelines to apply. The accused:

- a. Should not be arrested during investigation.
- b. Should have co-operated throughout the investigation including appearing before the investigating officer whenever called.

For the purposes of guidance, offences have been categorized as follows:

“Categories/Types of Offences:

- A) Offences punishable with imprisonment of 7 years or less not falling in category B & D.
- B) Offences punishable with death, imprisonment for life,

or imprisonment for more than 7 years.

C) Offences punishable under Special Acts containing stringent provisions for bail like NDPS (S.37), PMLA (S.45), UAPA (S.43D(5), Companies Act, 212(6), etc.

D) Economic offences not covered by Special Acts.”

In the cases of **CATEGORY 'A' OFFENCES**, the guidelines for securing accused's appearance are:

- Court concerned should issue ordinary summons at the 1st instance/including permitting appearance through a lawyer.
- If such an accused does not appear despite service of summons, then a Bailable Warrant for physical appearance may be issued.
- NBW (non-bailable warrant) on failure to appear despite issuance of Bailable Warrant.
- NBW may be cancelled or converted into a Bailable Warrant/Summons without insisting physical appearance of the accused if such an application is moved on behalf of the accused before execution of the NBW on an undertaking of the accused to appear physically on the next date of hearing.
- Bail applications of such accused on appearance may be decided without the accused being taken in physical custody or by granting interim bail till the bail application is decided.

With respect to Category A, the Guidelines appear to be comparatively lenient to the Accused, given the lesser gravity of the offences involved. Here, after filing of the charge sheet or the complaint taking cognizance, ordinary summons must be issued at the first instance including an appearance through lawyer. However, if the accused does

not appear despite service of summons, then a Bailable Warrant for physical appearance may be issued. Again, if the accused fails to appear despite issuance of bailable warrant, a non-bailable warrant will be issued. Such non-bailable warrant may be converted by the Magistrate into a bailable warrant/summons without insisting

On physical appearance of the accused, if the accused moves an application before execution of the non-bailable warrant on an undertaking to appear physically on the next date of hearing. Once an appearance is made in Court, bail applications may be decided without taking such accused into custody or by granting interim bail till the bail application is decided.

### **CATEGORY 'B' AND 'D' OFFENCES**

For Category B and D offences, the bail application has to be decided on merits on the appearance of the accused in Court.

With respect to Categories B and D, the bail application will be decided on merits on appearance of the accused in Court pursuant to process being issued. Furthermore, as far as economic offences are concerned, the Supreme Court observed that to determine whether or not to grant bail, two aspects need to be considered i.e., seriousness of the charge and severity of the punishment. In the context of white-collar crimes, the aforementioned factors are usually considered to decide on bail applications.

### **CATEGORY 'C' OFFENCES**

For Category C offences, the same guidelines as Category B & D are applicable with the additional condition of compliance of the provisions of Bail under NDPS, PMLA, Companies Act, UAPA, POSCO etc.

## **OTHER BROADER GUIDELINES AS REGARDS THE GRANT OF BAIL**

In addition to the abovementioned guidelines, the Supreme Court also conducted a broader analysis of provisions of the Code of Criminal Procedure, 1973 ("CrPC") and laid down.

Certain other guidelines on the grant of bail ("CrPc") as analysed hereinunder:

### **I. Section 41/41A Notice and bail on its non-compliance**

As regards Section 41 of the CrPC, the Supreme Court has significantly observed that even for a cognizable offence, an arrest of the accused is not mandatory and that an arrest in offences punishable with imprisonment below seven years or extending to seven years can only be made if the IO is satisfied that there is a reason to believe that the accused committed the offence and that there is necessity for such an arrest. Pertinently, Section 41 mandates the IO to record the reasons while choosing to arrest/or not choosing to arrest.

However, this is not required if the offence alleged involves imprisonment for more than seven years. The Supreme Court relied on its judgment in **Arnesh Kumar** wherein it was held:

"In pith and core, the police officer before arrest must put a question to himself, why arrest? Is it really required? What purpose it will serve? What object will it serve? It is only after these questions are addressed that the power of arrest needs to be exercised...Apart from this, the police officer has to be satisfied further that the arrest is necessary for one or more purposes envisaged by sub-clauses (a)

to (e) of clause (1) of Section 41 CrPC”.

Furthermore, the Court also held that in addition to the reason to believe, the satisfaction for the need to arrest shall also be present. As regards Section 41A CrPC, it requires the IO to issue a notice to the person against whom a reasonable complaint has been made, or credible information has been received or a reasonable suspicion exists that he has committed a cognizable offence, and arrest is not required under Section 41(1). In this regard, the Court held that Sections 41 and 41A are facets of Article 21 of the Constitution and that any arrest in non-compliance of Section 41/41A CrPC would entitle the accused to bail. Further, the Court mandated all States and Union Territories to facilitate standing orders to comply with Section 41/41A and observed that the directions laid down in the Arnesh Kumar judgment had not been followed. These guidelines clearly underline the intent of the Supreme Court to ensure procedural safeguards are complied with and any non-compliance is sufficient to grant bail to the accused.

## **II. Default bail under Section 167(2) CrPC**

Section 167 of the CrPC pertains to the procedure when an investigation cannot be completed in twenty-four hours and also provides the maximum period of time to complete an investigation i.e., ninety days when the investigation relates to an offence punishable with death, imprisonment for life or imprisonment for a term not less than ten years; or sixty days where the investigation relates to any other offence. In this regard, the Court held that a failure by the IO to complete the investigation within the prescribed time would enable the release of the accused and such right is absolute and indefeasible and that such right cannot be taken away even during unforeseen circumstances such as the pandemic. At this

junction, it may be pertinent to point out the observations of the Supreme Court in **Rakesh Kumar Paul**:

“The legislature has also and always put a premium on personal liberty and has always felt that it would be unfair to an accused to remain in custody for a prolonged and indefinite period.”

### **III. Execution of bond under Section 440 CrPC**

Section 440 of the CrPC provides that the amount of a bond executed under Chapter XXXIII CrPC is to be fixed with regard to the circumstances of each case and shall not be excessive. As regards Section 440, the Court held that the conditions imposed for grant of bail such as a bond shall not be mechanical and uniform, and that imposing a condition that is impossible of compliance would be defeating the very object of the release of the accused. Further, the Court observed that the High Courts must enquire into the conditions of the undertrials who are not able to comply with the bail conditions and that the mandate of Section 440 CrPC must be kept in mind while insisting upon sureties for grant of bail. The Supreme Court relied on its judgment in **Hussainara Khatoon** wherein it held that the object of a bond is only to ensure that the undertrial does not flee or hide from trial.

### **IV. Role of the Court and timelines for deciding bail applications:**

One of the most important observations in the judgment is that the Supreme Court reiterated the principle that bail is rule and that jail is the exception[12]

and that the purpose of bail is to secure the appearance of the accused person at his trial by reasonable amount of bail.[13] Further, the Supreme Court relied on its judgment in Nimesh Tarachand Shah to observe that an accused person who enjoys freedom is in a much better position to look after his case and to properly defend himself than if he were in custody and that a presumably innocent person must have his freedom to enable him to establish his innocence. Further, the Court reiterated the principle that innocence of an accused is presumed through a legal fiction and that it is for the prosecution to establish that the guilt of an accused before the Court.

### **CONCLUSION**

While the judgment in Satender Kumar Antil reiterates long-standing principles pertaining to bail, it is significant considering the current backdrop and context in which it has been passed. It cannot be clearer that as far as the principles for grant of bail are concerned, the Court has emphasized the need for the investigative agencies and Magistrates to ensure greater procedural compliances and safeguard of the rights of the accused in a criminal investigation, inquiry and trial. Importantly, the judgment proceeds on the foundation that more than two-thirds of inmates in prisons constitute

undertrial prisoners and that majority of such prisoners may not even be required to be arrested despite registration of a cognizable offence punishable with seven years or less. It further reiterates the rule that bail is the rule and jail is the exception and that arrest is a draconian measure resulting in curtailment of liberty. Consequently, the Supreme Court has directed the Courts to decide on bail applications within a time bound manner.

In essence, the judgment goes a long way to protect

constitutional liberties and the right to presumption of innocence of the accused persons and cements these salubrious principles into the realm of criminal jurisprudence. While the Supreme Court has prominently reiterated that the burden vests on the investigative agencies to comply with procedural safeguards, the real test is in its practical application especially by the Magistrates and the investigative agencies to implement these guidelines in its letter and spirit. and accordingly, strike a balance between the rights of the accused and the interest of a criminal investigation.

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