

## BALANCING PERSONAL LIBERTY AND FAIR INVESTIGATION IN BAIL JURISPRUDENCE

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Hon'ble Supreme Court<sup>1</sup> has defined bail as "*a surety inclusive of a personal bond from the accused. It means the release of an accused person either by the orders of the Court or by the police or by the Investigating Agency.*"

*"The issue of bail is one of liberty, justice, public safety and burden of the public treasury, all of which insist that a developed jurisprudence of bail is integral to a socially sensitized judicial process".*

**Justice V.R. Krishna Iyer**

*"No person shall be deprived of his life or personal liberty except according to the procedure established by Law".- Article 21 of The Constitution of India.*

### 1.1. INTRODUCTION

The legal landscape governing bails in India has undergone a transformative shift with the implementation of the **Bharatiya Nagarik Suraksha Sanhita (BNSS), 2023**,<sup>2</sup> which replaced the age-old **Code of Criminal Procedure (CrPC), 1973**. While the core philosophy of "Bail, not Jail" remains a guiding light, the new Sanhita introduces specific definitions and procedural timelines that every legal professional and citizen should understand.

The principle of bail in India is deeply rooted in the constitutional guarantee of **Article 21 (Right to Life and Personal Liberty)** and the presumption of innocence. Bail serves as a mechanism to balance the State's duty to ensure the accused's presence for trial with the individual's right to liberty.

Chapter XXXV of The Bhartiya Nagrik Suraksha Sanhita, 2023 deals with "**PROVISIONS AS TO BAIL AND BONDS**". The term "bail" was not been defined in CrPC, though it is used very often, however, following can be termed to be the meaning of bail:

- Bail is nothing but **surety** inclusive of a personal bond from the accused.
- It means the release of an accused person either by the orders of the Court or by the police or by the Investigating Agency.
- It is a set of **pre-trial restrictions** imposed on a suspect while enabling any interference in the judicial process.
- Thus, it is a **conditional release** on the solemn undertaking by the suspect that he would cooperate both with the investigation and the trial.

### 1.2. Definition of Bail:

For the first time in Indian statutory history, the **BNSS** explicitly defines these terms under **Section 2**, resolving long-standing semantic ambiguities:

- **"Bail (Sec. 2(1)(b) BNSS):** The release of a person accused of an offence from the custody of law upon certain conditions and execution of a bond or bail bond.

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<sup>1</sup> Satender Kumar Antil vs Central Bureau Of Investigation, 2025 INSC 909

<sup>2</sup> Hereinafter referred as BNSS.

- **Bail Bond (Sec. 2(1)(d) BNSS):** An undertaking for release **with surety**.
- **Bond (Sec. 2(1)(e) BNSS):** A personal recognizance or undertaking for release **without surety**.”

### 1.3 Significance of Bail Jurisprudence in the Indian Legal System

The significance of bail jurisprudence in the Indian legal system is profound, as it performs multiple essential functions within the framework of criminal justice.

#### 1.3.1 Presumption of Innocence:

Bail jurisprudence reinforces the fundamental principle that an individual is presumed innocent until proven guilty. The grant of bail enables the accused to remain at liberty while awaiting trial, thereby preventing premature punishment and upholding the principle that guilt must be established beyond a reasonable doubt.

#### 1.3.2. Protection of Fundamental Rights:

It serves as a crucial safeguard for constitutional rights, particularly the right to personal liberty and due process. Bail ensures that pre-trial detention is neither arbitrary nor excessive in relation to the alleged offence, thereby promoting fairness and protecting individuals from unjust deprivation of liberty.

Supreme Court considered Article 21 of the Constitution of India in a prolonged incarceration of an undertrial accused, in an appeal against Delhi High Court order denying bail. “Appellant in custody since June 4, 2019, with a combined incarceration of 8 ½ years in NIA and ED cases. Trial proceeding at a "snail's pace" with only 34 out of 248 witnesses examined so far. It has been held by Supreme Court that prolonged detention where a trial is unlikely to conclude within a reasonable time results in undue curtailment of personal liberty under Article 21. Stringent bail provisions in special statutes (UAPA/PMLA) cannot be used to incarcerate an accused indefinitely without trial. The rigours of such statutory provisions melt down when there is no likelihood of the trial completing in a reasonable time and the accused has undergone a substantial part of the sentence. Considering the appellant's advanced age (74 years), medical ailments, and bleak chances of early trial disposal, Supreme Court enlarged the appellant on bail subject to stringent conditions.”<sup>3</sup>

#### 1.3.3. Exercise of Judicial Discretion

The grant or denial of bail reflects the judiciary’s role as a guardian of constitutional values. Courts exercise discretionary powers by considering factors such as the nature and seriousness of the offence, the likelihood of the accused absconding, prior criminal history, and the interests of victims and society at large.

Supreme Court held that while a history-sheeter is not automatically disentitled to bail, criminal antecedents are a significant factor in judicial discretion, especially when the allegations involve systematic and organized crime (e.g., educational fraud rackets); that once an investigation is complete and a chargesheet is filed, transfer to a special agency like the CBI should only be directed in exceptional circumstances showing bias, mala fides, or involvement of high-ranking officials<sup>4</sup>

<sup>3</sup> Shabir Ahmed Shah v. National Investigation Agency, 2026 LiveLaw (SC) 305, [Relied on V. Senthil Balaji v. Deputy Director, Enforcement Directorate, 2024 SCC OnLine SC 2626; Union of India v. K.A. Najeeb, (2021) 3 SCC 713; Paras 18-20]

<sup>4</sup> Zeba Khan v. State of U.P., 2026 LiveLaw (SC) 139 : 2026 INSC 144 : AIR 2026 SC 1006 : 2026 CriLJ 1113 [Relied On Ash Mohammad v. Shiv Raj Singh @ Lalla Babu and another (2012) 9 SCC 446; Paras 28-33, 35- 41]

### 1.3.4. Prevention of Unnecessary Incarceration

Bail jurisprudence plays a vital role in preventing the unnecessary detention of individuals who do not pose a flight risk or threat to public safety. By allowing such individuals to remain free pending trial, it reduces undue hardship and helps maintain a balance between individual liberty and societal interests.

### 1.3.5. Promotion of an Efficient Legal Process

The grant of bail contributes to the efficient functioning of the criminal justice system. It helps alleviate prison overcrowding, reduces the burden on correctional facilities, and allows accused persons to actively participate in their defence, thereby facilitating a smoother and more effective trial process.

## 2. TYPES OF BAILS

As per the Criminal Law, there are various types of bails, which can be described by way of following figure:

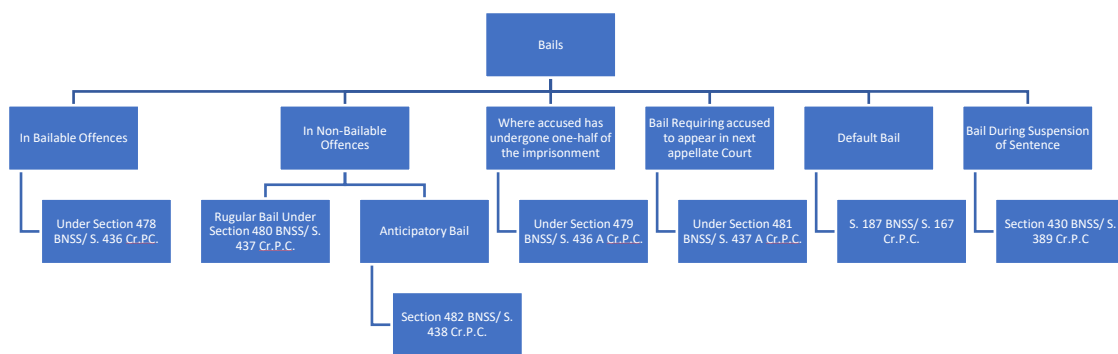


Figure 1- Categories of Bails in Indian Criminal Justice System.

### 2.1 Bail in Bailable Offences

Bail in bailable offences is governed by Section 436 of the Code of Criminal Procedure (CrPC) and the corresponding provision under Section 478 of the Bharatiya Nagarik Suraksha Sanhita (BNSS). In such cases, the grant of bail is not a matter of judicial discretion but an absolute legal right of the accused. This means that once a person accused of a bailable offence expresses readiness to furnish bail, the police officer or the court is under a mandatory obligation to release them, and refusal to do so would amount to a violation of statutory rights. The provision reflects the principle that individuals accused of less serious offences should not be unnecessarily deprived of their liberty.

### 2.2. Regular Bail

Regular bail is sought by an accused person who is already in custody, and its legal framework is governed by Sections 437 and 439 of the Code of Criminal Procedure (CrPC), along with the corresponding provisions under Sections 480 and 483 of the Bharatiya Nagarik Suraksha Sanhita. Unlike bail in bailable offences, the grant of regular bail is not a matter of right but lies within the discretionary domain of the courts, to be exercised in accordance with established legal principles and the facts of each case.

Under the statutory scheme, a Magistrate's powers to grant bail in non-bailable offences are subject to certain limitations. In particular, where the offence is punishable with death or imprisonment for life,

the Magistrate generally refrains from granting bail unless there are exceptional circumstances, such as the accused being a minor, a woman, or a person who is sick or infirm. The Magistrate must also consider factors such as the nature and gravity of the offence, the strength of the evidence, and the likelihood of the accused absconding or interfering with the course of justice.

### **2.3. Anticipatory Bail (Pre-arrest Bail)**

Anticipatory bail, often referred to as pre-arrest bail, is a significant legal safeguard that protects an individual from potential arrest in situations where there is a reasonable apprehension of being taken into custody. It is governed by Section 438 of the Code of Criminal Procedure (CrPC) and the corresponding provision under Section 482 of the Bharatiya Nagarik Suraksha Sanhita. Unlike regular bail, which is sought after arrest, anticipatory bail operates as a preventive remedy in the form of a direction issued by a competent court—typically the Sessions Court or the High Court—that in the event of arrest, the individual shall be released on bail.

The nature of anticipatory bail reflects a balance between safeguarding personal liberty and ensuring that the legal process is not obstructed. It is generally invoked in cases where an individual fears arrest due to false implication, motivated complaints, or misuse of legal provisions. While granting such relief, courts exercise careful discretion and may impose conditions such as requiring the applicant to cooperate with the investigation, refrain from influencing witnesses, or restrict travel without prior permission.

Under the earlier framework of the CrPC, courts were guided by certain statutory factors—such as the nature and gravity of the accusation, the antecedents of the applicant, and the likelihood of fleeing justice—while deciding anticipatory bail applications. Although the Bharatiya Nagarik Suraksha Sanhita does not explicitly enumerate these guiding factors in the text, they continue to inform judicial reasoning as established principles developed through case law and constitutional interpretation.

A notable development under the BNSS is the introduction of explicit restrictions on the grant of anticipatory bail for certain grave offences. In particular, the law places an embargo on anticipatory bail in cases involving serious sexual offences, such as the rape of a girl below the age of sixteen or gang rape of a girl below eighteen, as defined under Sections 65 and 70(2) of the Bharatiya Nyaya Sanhita. This reflects a legislative intent to adopt a stricter approach in dealing with offences of a heinous nature while still preserving the broader framework of anticipatory bail as a tool for protecting individual liberty.

### **2.4. Interim Bail**

Interim bail is a temporary form of bail that courts grant while an application for regular bail or anticipatory bail is pending. The concept addresses a practical reality in our criminal justice system. When bail application is filed, the court needs time to examine case documents, hear arguments from both sides, and make an informed decision. This process can take days or even weeks. Interim bail ensures that accused does not spend this waiting period in jail, especially when immediate detention would cause irreparable harm to accused's reputation, health, or livelihood.

A temporary bail granted while a regular or anticipatory bail application is pending, often to protect the applicant's liberty until a final hearing.

### **2.5. Default Bail (Statutory Bail)**

Article 21 of the Constitution of India declares that no person shall be deprived of his life or personal liberty except according to procedure established by law. The right to default bail is part of the

procedure established by law under Article 21 of the Constitution. It is, therefore, not merely a statutory right but a fundamental right granted to an accused person.<sup>5</sup>

Clause (a) of the first proviso to Section 167(2) of the Code of Criminal Procedure, 1973 (for short 'the Code'), which provided for the release of a person on default bail, now stands replaced by Section 187(3) of the Bharatiya Nagarik Suraksha Sanhita, 2023 (for short 'the BNSS').

Default bail, also known as statutory bail, is a vital safeguard under criminal procedure law that protects an accused from prolonged and unjustified pre-trial detention. It is governed by Section 167(2) of the Code of Criminal Procedure (CrPC) and the corresponding provision under Section 187 of the Bharatiya Nagarik Suraksha Sanhita. This form of bail arises not from the merits of the case but from the failure of the investigating agency to complete the investigation and file the charge sheet within the prescribed statutory time limit.

The time limits for completing the investigation are strictly defined under the law. For most offences, the investigation must be completed within 60 days. However, in cases involving more serious offences—such as those punishable with death, life imprisonment, or imprisonment of ten years or more—the permissible period extends to 90 days. If the investigating agency fails to file the final report or charge sheet within this stipulated period, the accused acquires an indefeasible right to be released on bail, provided they are willing to furnish the required bail.

## 2.6. Bails to Juveniles

The criteria for granting bail to juvenile is different from regular offenders. Section 2 (13) of Juvenile Justice (Care & Protection of Children) Act, 2015 defines "child in conflict with law" as a child alleged or found to have committed an offence who has not completed 18 years of age at the time of such offence. Section 12 of Juvenile Justice (Care & Protection of Children) Act, 2015 deals with bails of juvenile.

The consideration for grant of bail to a juvenile delinquent are entirely different. Firstly, the prosecution, opposing the bail to the applicant, must establish or there must be some material on record for believing that in case, the juvenile delinquent is released on bail, he is likely to come into association with a known criminal. Or in the alternative secondly, the aforesaid juvenile delinquent is likely to be exposed to moral danger. Or in the other alternative thirdly, his release would defeat the ends of justice. It is only third ground which appears to have prohibited the Court below because it held that it was not proper to release the applicant on bail on the ground that there was a prima facie case against him.<sup>6</sup>

## 2.7. Bail Pending Appeals:

The situation of undertrials in the matter of bail gets further deteriorated post- conviction. The protection of presumption of innocence is not available to the convicts or rather not as firmly as an undertrial. It has been noticed that harsher the punishment, the lesser are the chances for bail at post-conviction stage. In *Kashmira Singh v. State of Punjab*<sup>7</sup>, Justice Bhagwati has remarked that if the Court has admitted the appeal, it is because the Court is of the opinion that the case has prima facie merit. At the same time, the Court is aware that there are high chances that the convict's appeal may not be heard in near future due to the already pending appeals filed earlier in time. In such scenario the bail should not be denied because of the failure of the Court to hear the appeal and the convict should

<sup>5</sup> *Bikramjit Singh v. State of Punjab*: (2020) 10 SCC 616.

<sup>6</sup> Malik, *Law of Juvenile Justice in India*, 3<sup>rd</sup> Edition 2023, The Delhi Law House. Page 133.

<sup>7</sup> (1977) 4 SCC 291

not be asked to remain in jail, even though he may be innocent. The Court can never compensate for the unjustified period of incarceration in case the convict is found innocent. Justice Bhagwati voiced for reconsidering the approach taken by the Courts in such cases and suggested that “so long as the Court is not in a position to hear the appeal of an accused within a reasonable period of time, the Court should ordinarily, unless there are cogent grounds for acting otherwise, release the accused on bail in cases where special leave has been granted to the accused to appeal against his conviction and sentence.”<sup>8</sup>

### **2.7. Bail under S. 436-A Cr.P.C./S. 497 BNSS**

There is yet another instance of granting bail to the accused, which is enriched in S. 436-A Cr.P.C./S. 497 BNSS. According to this section, if an undertrial has been detained for a period that equals half the maximum sentence possible for the crime they are accused of (except for crimes punishable by death), then they are eligible to be released on bail. This release can be on their personal promise to return to court, known as a personal bond, and may or may not include a surety, which is a guarantee by another person. However, the court can decide to keep the person in detention for longer than half the maximum sentence if there are good reasons to do so.

### **3. Parameters for Granting Bail.**

The Supreme Court emphasized that while considering a bail application in cases of dowry death, the High Court must consider:

- (i) the nature of the crime;
- (ii) the prescribed punishment;
- (iii) the relationship between the parties;
- (iv) the place of incident;
- (v) the postmortem report; and
- (vi) the statutory presumption of commission of offense.

Supreme Court held that under Section 118 of the Bharatiya Sakshya Adhinyam, 2023, if a woman is subjected to cruelty or harassment for dowry soon before her death, the Court shall presume the person caused the dowry death.<sup>9</sup>

### **4. Conditions of Bail.**

However, he may be required, before release on bail, to provide a surety or sureties to secure his surrender to custody. In addition, he may be required, before release on bail, to give security for his surrender to custody; and the security may be given by him or on his behalf.

He may be required to comply, before release on bail or later, with such requirements as appear to the court necessary:

- (a) to secure that he surrenders to custody;
- (b) to secure that he does not commit an offence while on bail;
- (c) to secure that he does not interfere with witnesses or otherwise obstruct the course of justice whether in relation to himself or any other person,

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<sup>8</sup> Supra.

<sup>9</sup> Chetram Verma v. State of U.P., 2026 LiveLaw (SC) 141, Paras 15-20

- (d) for his own protection or, if he is a child or young person, for his own welfare or in his own interests;
- (e) to secure that he makes himself available for the purpose of enabling inquiries or a report to be made to assist the court in dealing with him for the offence;
- (f) to secure that before the time appointed for him to surrender to custody, he attends an interview with an authorised' advocate or authorised litigator.

## 5. CONCLUSION

A defining focus of this study has been the systemic and structural transition from the Code of Criminal Procedure, 1973 (Cr.P.C.) to the Bharatiya Nagarik Suraksha Sanhita, 2023 (BNSS). While statutory nomenclatures and section placements have shifted—such as the evolution of regular bail provisions or the recalibration of statutory default timelines under Section 167 CrPC to the new BNSS parameters—the core judicial benchmarks governing the grant or denial of bail remain tied to established evaluative criteria. Landmark directives, notably *Satender Kumar Antil v. CBI*, continue to guide the trial judiciary away from mechanical, punitive detentions and toward systematic, rights-respecting enforcement.

Furthermore, this chapter's analysis of the latest jurisprudence highlights that judicial discretion in imposing bail conditions is not absolute; it must remain within the bounds of reasonableness and proportionality. As observed by the Hon'ble Supreme Court (per Hon'ble Mr. Justice Dipankar Datta and Hon'ble Mr. Justice Satish Chandra Sharma) in setting aside the Delhi High Court's restrictive condition in the Hauz Khas building dispute, bail conditions must be preventive rather than punitive. Courts cannot unreasonably curtail fundamental civil rights, such as an accused's right to reside in their own home under the guise of crime prevention, when such duties are already statutorily cast upon law enforcement agencies under frameworks like Section 168 of the BNSS (corresponding to Section 149 of the CrPC).