

“Considerations In Grant Or Denial Of Bail: Recent Judicial Trends”

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Citation: Dr. Neelam Kadyan, et.al (2024), “Considerations In Grant Or Denial Of Bail: Recent Judicial Trends”, *Educational Administration: Theory and Practice*, 30(9) 794-803

Doi: 10.53555/kuey.v30i9.8954

ARTICLE INFO

ABSTRACT

This article is an attempt to sensitize the readers towards law relating to grant of bail in India. Endeavour is made to enumerate and state factors that are determining in grant or refusal of bail. It further discusses the manner of categorization of offences under the statute in context of bail. It is an attempt to bring objectivity in exercise of this discretionary power by Courts of Law on the material considerations that have a role to play, in individual cases. The aim of present study is to suggest a Standard Operating Procedure for exercise of discretion efficiently and purposefully, so as to cut down variance in grant and refusal of bail observed in diversified decisions, presenting a rational operation and execution of law relating to bail. Underlying intent of present work is to ascertain some mechanism to avoid abuse and misuse of exercising the power of granting/refusing bail (arbitrarily), and to limit its unpredictability as also to address the vulnerability/plight of undertrials.

Key Words: “grant of bail”, “material considerations” “abuse”, “undertrials”, “discretion”

I. Introduction

“The law relating to grant of bail in India is very subjective. The criteria to determine or foresee if bail in a case would be granted or refused is nowhere laid down in black and white. The area is hence a grey area and this article is only an attempt to assess the parameters that should be kept in mind by Courts, while deciding bail in individual cases”

As an underlying principle, at the outset, it must be stated that Courts must strike a balance between rights of accused to his liberty and interest of society at large in keeping him confined.

The meaning and concept of bail has come to be defined under Section 2(b) of The Bhartiya Nagarik Suraksha Sanhita, 2023. It means release of a person accused of or suspected of commission of an offence from the custody of law upon certain conditions imposed by an officer or court on execution by such person of a bond or as bail bond. Section 2(c) of The Bhartiya Nagarik Suraksha Sanhita, 2023 categorises the offences as “Bailable Offences” contained in the First Schedule and “Non-Bailable Offences”, meaning any other offence. Section 2(d) of The Bhartiya Nagarik Suraksha Sanhita, 2023 defines “bail bond” meaning an undertaking for release with surety and Section 2 (e) of The Bhartiya Nagarik Suraksha Sanhita, 2023 “bond” meaning a personal bond or undertaking for release without surety. Importance has been placed by the Constitution of India on the value of personal liberty, the necessity for arrest, before filing of the chargesheet occurs, when accused’s custodial investigation or interrogation is essential or in certain cases involving serious offences where possibility of accused influencing witnesses cannot be ruled out¹.

The fact that an arrest can be made, does not mandate, that it ought to be made in every case. It has been emphasized that there is distinction between existence of power to arrest and justification in exercising it. This must always be kept in mind. Procedural requirements of Section 41A of Criminal Procedure Code (Now Section 35, The Bhartiya Nagarik Suraksha Sanhita, 2023) must always be followed.²

1 Lalita Kumari vs. State of UP & Ors., (2013) 14 SCR 713

2 Arnesh Kumar v. State of Bihar and Another, (2014) 8 SCR 128; Satender Kumar Antil v. Central Bureau of Investigation and Another, (2022) 10 SCR 351; Siddharth v. State of Uttar Pradesh and Another, (2022) 1 SCC 676

At the same time, mere fact that a chargesheet is filed would not per se entitle an accused to grant of anticipatory bail, which always remains discretionary. Court always weighs possibility of an accused depending on his past conduct of influencing witnesses or otherwise tampering with evidence.

Apex Court has emphasised values of personal liberty in context of applying discretion to grant bail. Ordinarily bail ought to be granted, as a general rule. However, in serious cases, which are specified in Section 480, The Bhartiya Nagarik Suraksha Sanhita, 2023, involving serious allegations relating to offences carrying long sentences or other special offences, Court needs to be circumspect and careful in exercising discretion of granting bail.

Paramount consideration in cases where bail or anticipatory bail is claimed are the nature and gravity of the offence, the propensity or ability of the accused to influence evidence during investigation or interfere with trial process by threatening or otherwise trying to influence the witnesses; likelihood of accused to flee from justice and other such considerations. Court must, in every case, be guided by these overarching principles³.

Despite these directives, it is a hard reality that individual cases are not far from sight where arbitrary and groundless arrests continue as a pervasive phenomenon. Hon'ble Apex Court has observed that it would not be in the larger interest of society if Court, by judicial interpretation, limits the exercise of that power. The power to regulate irrational arrests is connected and directly related to power of exercising the discretion of bail. It is only an open mindset being held on the judicial side that can contain ingrained tendency of proceeding incessantly with effecting arrest that is prevalent in the law enforcement agency.

Danger of such an exercise would be that in fractions, little by little, discretion, advisedly kept wide, would shrink to a very narrow and unrecognisably tiny portion, thus frustrating the objective behind the provision, which has stood the test of time, these 46 years⁴.

II. Legislative Categorization

The exercise of power of arrest and bail when considered in historical perspective of history of our Republic including Freedom Movement shows likelihood of arbitrary arrest, indefinite detention and lack of safeguards. This has been criticised by Hon'ble Apex Court in plethora of judgments.

The spectre of arbitrary and heavy-handed arrests too often are aimed at harassing and humiliating citizens, and often times, to serve the interest of powerful individuals (and not to further any meaningful investigation into offences). This overreach was attempted to be contained by enactment of Section 438 (Now Section 482, The Bhartiya Nagarik Suraksha Sanhita, 2023).⁵

Chapter XXXIII of the Code of Criminal Procedure, 1973 (Now Chapter XXXV, The Bhartiya Nagarik Suraksha Sanhita, 2023) envisages law relating to bail with different types of bails:

1. Regular Bail
2. Interim Bail
3. Anticipatory Bail

Offences may be generally categorized as bailable offences and non-bailable offences. Section 436 Cr.P.C. (Now Section 478, The Bhartiya Nagarik Suraksha Sanhita, 2023) deals with the cases where bail should be taken. Section 437 Cr.P.C. (Now Section 480, The Bhartiya Nagarik Suraksha Sanhita, 2023) deals with the cases where bail may be taken in non- bailable offences. Section 436-A Cr.P.C.(Now Section 479, The Bhartiya Nagarik Suraksha Sanhita, 2023) deals with the cases where a maximum limit of custody has been fixed, for which an undertrial prisoner could be detained. Section 438 Cr.P.C.(Now Section 482, The Bhartiya Nagarik Suraksha Sanhita, 2023) deals with Anticipatory Bail. Section 439 Cr.P.C. (Now Section 483, The Bhartiya Nagarik Suraksha Sanhita, 2023) defines the ambit and scope of powers conferred upon the High Court and Court of Sessions for dealing with bail.

III. Jurisdiction to grant bail:

As a general principle of criminal jurisprudence, grant of bail is the rule and its refusal is an exception. Presumption of innocence is always in the favour of accused, based upon this underlying principle, his entitlement to freedom or detention is required to be appreciated by the Courts.

While weighing and considering an application, court has to consider nature of offence, role of person, likelihood of his influencing course of investigation, tampering with evidence, including intimidating witnesses, likelihood of fleeing away from justice etc.

3 Sushila Aggarwal v. State (NCT of Delhi), 2020 (2) SCR 1; Gurbaksh Singh Sibbia v. State of Punjab (1980) 3 SCR 383

4 Md. Asfak Alam vs The State Of Jharkhand on 31 July, 2023

5 Md. Asfak Alam vs The State of Jharkhand decided by Hon'ble Supreme Court of India on 31 July, 2023

IV. Factors to be considered:

While considering a claim for bail, there is need for application of mind to ascertain whether accusations against the accused/applicant are prima facie made out or the same will be a matter to consider during trial. Some of the factors that should be considered are:

1. gravity and severity of the offence
2. nature of accusation,
3. severity of punishment,
4. position and status of the accused,
5. possibility of or opportunity to approach the victims/witnesses or pressuring them,
6. likelihood of the accused fleeing away from justice,
7. possibility of tampering with evidence or pressurizing witnesses,
8. likelihood of obstructing the course of justice,
9. possibility of repetition of offence,
10. prima facie satisfaction of court in support of charge including possibility of charge being false or false implication,
11. peculiar facts of each case and nature of supporting evidence,
12. antecedents of accused, his character and behaviour, his standing in society, circumstances which are peculiar to accused,
13. larger interest of the public welfare and safety.

Despite the liberalisation in judicial mindset qua discretion in grant of bail, it cannot be understated that purpose of detention cannot be undermined. It could be punitive or preventive. Sometimes, seriousness of allegations or availability of material in support thereof are enough considerations to decline bail.

In other cases, media trial or undue publicity being given to a particular case may lead to said discretion being not exercised considering larger public sentiment. Delay in commencement and conclusion of trial is also a material factor to be considered by Court, in passing a favourable order of bail, which may be done, solely on account of delay in prosecution, failing to conclude the evidence, as accused cannot be kept in custody indefinitely.

If it is found that trial is not likely to be concluded within reasonable time, according concession of bail, out of procedural necessity may be inevitable. At times, a Court may find it relevant to postpone grant of bail, during pendency of investigation, to allow its completion without any hurdle or intervention, considering the nature of offence and manner of its investigation.

V. Bail in specific cases:

It will now be relevant to lead the discussion by pointing areas where matters of bail are to be decided:

- **Bail in Special Acts** require emphasis on point of aspects to be considered. In special legislations, many a times, it is found that the legislature requires a particular frame of requirements in adjudicating sensitive cases relating to **PNDT Act**, **Arms Act** where the offender is habitual of carrying illegal arms and using them without holding any license for the same, becoming a threat to the society at large. Cases under **Excise Act** where illicit possession and trade in liquor is found.

- Section 37 of the **NDPS Act** makes the offences cognizable and non-bailable. Twin conditions have been imposed on grant of bail.

Section 37: Offences to be cognizable and non-bailable.

(1)Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), (a) every offence punishable under this Act shall be cognizable; (2)(b) no person accused of an offence punishable for offences under Section 19 or Section 24 or Section 27A and also for offences involving commercial quantity shall be released on bail or on his own bond unless—

- (i) the Public Prosecutor has been given an opportunity to oppose the application for such release, and
- (ii) where the Public Prosecutor opposes the application, the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail.

(2) The limitations on granting of bail specified in clause(b) of sub-section(1) are in addition to the limitations under the Code of Criminal Procedure, 1973 (2 of 1974) or any other law for the time being in force on granting of bail.

On a perusal of the Section 37 (1)(a)(i), when the Public Prosecutor opposes bail application of a person involved in a crime, where commercial quantity of the contraband was seized, the Court can grant bail only after satisfying two conditions:viz;

- (1)There are 'reasonable grounds' for believing that the accused is not guilty of such offences and
- (2)he will not commit any offence while on bail.

9. The Apex Court considered the meaning of 'reasonable grounds' in the decision reported in **Union of India v. Shiv Shankar Kesari, (2007) 7 SCC 798** and held that the expression 'reasonable grounds' means something more than prima facie grounds. It connotes substantial probable causes for believing that the accused is not guilty of the offence charged and this reasonable belief contemplated in turn

points to existence of such facts and circumstances as are sufficient in themselves to justify recording of satisfaction on that the accused is not guilty of the offence charged.

10. It was further held that the Court while considering the application for bail with reference to Section 37 of the Act is not called upon to record a finding of not guilty. It is for the limited purpose essentially confined to the question of releasing the accused on bail that the Court is called upon to see if there are reasonable grounds for believing that the accused is not guilty and records its satisfaction about the existence of such grounds. But the Court has not to consider the matter as if it is pronouncing a judgment of acquittal and recording a finding of not guilty.

- While considering the rider under Section 37 of the NDPS Act, the same principles have been reiterated, in the decisions reported in *Superintendent, Narcotics Central Bureau v. R.Paulsamy*, AIR 2000 SC 3661, *Customs, New Delhi v. Ahmad alieva Nodira* AIR 2004 SC 3022, *Union of India v. Abdulla* 2005 Cri L J 3115, *N. R. Mon v. Md. Nasimuddin*, 2008 (6) SCC 721, *Union of India v. Rattan Malik*, 2009 (2) SCC 624, *Union of India v. Niyazuddin*, AIR 2017 SC 3932, *State of Kerala v. Rajesh*, AIR 2020 SC 721.

12. On a plain reading of Section 37 (1) (b) and 37 (1) (b) (ii) of the NDPS Act, within the ambit of the settled law, it has to be understood that two ingredients shall be read conjunctively and not disjunctively. Therefore, satisfaction of both conditions are sine qua non for granting bail to an accused who alleged to have been committed the offences under Section 19 or Section 24 or Section 27A and also for the offences involving commercial quantity as provided under Section 37(1)(b) of the NDPS Act. Unless Section 37 is not amended by the legislature in cases specifically referred under Section 37(1)(b) of the NDPS Act, the Court could not grant bail without recording satisfaction of the above twin ingredients.

- **Juvenile Justice (Care and Protection of Children) Act, 2015** is special legislation that deals with cases relating to child in conflict with law and the same presents a totally radical and liberal approach towards the grant of bail in cases relating to juveniles.

- **Prevention of Children from Sexual Offences Act, 2012** being also a special legislation presents a different scheme of provisions to look at the offences relating to sexual exploitation and sexual abuse of children as heinous offences and presents specific procedure to address the cases with Trial before Special Court.

- **Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989** and offences relating to cheating and forgery under Sections 406, 420, 465, 467, 471 etc. also depend upon the nature of embezzlement and fraud and the affected persons and their rights

- **Section 376, Indian Penal Code, 1860 and other Crimes against Women** are also delved into by the Courts based upon the nature of allegations and the circumstances of the cases being sensitive offences.

- **Economic Offences** and offences relating to violation of **Intellectual Property Rights** are streamlined with a different process of thought and approach for the purpose of adjudicating bail.

VI. Judicial Approach

Triple Test Doctrine has been highlighted again in the recent decision of Hon'ble Apex Court of India in *Gurwinder Singh v. State of Punjab*, 2024 INSC 92. Typically the same requires satisfying the tripod test and see if accused is granted bail, he or she is not a flight risk, it will not influence witnesses and will not tamper with the evidence.

Md. Asfak Alam vs The State Of Jharkhand, decided on 31 July, 2023 has been lauded as a landmark judgment prescribing the duty of court while dealing with arrested persons and to ensure that the said exercise is not done in a mechanical manner. Also, the authorisation of their detention shall also be looked at with deeper scrutiny and not in a routine manner. Directions of Arnesh Kumar Judgment were reiterated.

In **Union of India v. Rattan Mallik @ Habul**, (2009) 2 SCC 624 and **Union of India v. Shiv Shankar Kesari**, (2007) 7 SCC 79, the parameters while dealing with cases of bail under Section 37 of NDPS Act were discussed at length.

In **Anil Mahajan v. Commissioner of Customs & Anr.**, 2000 SCC Online Del 119, grant of bail under Section 135 of the Customs Act, was discussed and it was observed that petitioner is involved in a serious economic offence which has been committed with a cool calculated mind with deliberate designs and with an eye on personal profits regardless of the consequences to the community and nation at large.

In **Sangitaben Shaileshbhai Datanta vs. State of Gujarat**, (2019) 14 SCC 522, directions were given to decide cases relating to bail in POCSO Act in a sensitized manner and to ensure non-disclosure of the identity of the victim highlighting provisions under Section 33(7) and Section 23 of POCSO Act and further discussing the intent of the legislature under Section 228A of IPC. Refer also *State of Punjab v. Ramdev Singh* (2004) 1 SCC 421.

In **P. Chidambaram vs. Directorate of Enforcement, 265 (2019) DLT 1**, it was held that Grant of anticipatory bail at the stage of investigation may frustrate the investigating agency in interrogating the accused and in collecting the useful information and also the materials which might have been concealed. Success in such interrogation would elude if the accused knows that he is protected by the order of the court. Grant of anticipatory bail, particularly in economic offences would definitely hamper the effective

investigation. Having regard to the materials said to have been collected by the respondent-Enforcement Directorate and considering the stage of the investigation, we are of the view that it is not a fit case to grant anticipatory bail.

In **State of Bihar & Anr. v. Amit Kumar @ Bachcha Rai, (2017) 13 SCC 751**, the case dealt with Sections 40, 420, 465, 468, 471 etc. of IPC and grant of bail and its validity was discussed in cases where accused was charged with economic offences of huge magnitude and the applicant was alleged to be kingpin/ring leader. Further, Accused was involved in tampering with answer sheets by illegal means and interfering with examination system of Bihar Intermediate Examination 2016. It was observed by Hon'ble Apex Court that High Court has not given any reasoning while granting bail and has allowed the same in a mechanical way. It was found that High Court granted bail more on fact that accused is already in custody for a long time, when seriousness of offence is such mere fact that accused was in jail for however long time should not be concern of Courts. It was a fact that Investigating Agency was going to file additional charge sheet in the case. These facts were given weightage and footing.

In **Sachindra Priyadarshi v. State (NCT) of Delhi, MANU/DE/0885/2020**, Petitioner was found to be booked for commission of offences under Section 328, 376, 323, 506 IPC and as per the contents of Complaint, physical relations were made with Prosecutrix by making her consume some obnoxious substance in cold drink and when she gained consciousness, she was blackmailed for series of such acts on the threat of making her nude photos and videos public. Mobile phones containing objectionable material was also recovered. It was also found that Prosecutrix also got pregnant twice in the process and got her pregnancy terminated. The nature and gravity of offence lead Hon'ble Delhi High Court to refuse the grant of bail.

In **National Investigation Agency vs. Zahoor Ahmad Shah Watali, AIR 2019 SC 1734**, a case relating to Sections 120B, 121, 121A of Indian Penal Code and Sections 13,16,17,18,20,38,39 and 40 of the Unlawful Activities (Prevention) Act, 1967, bail was ultimately granted.

In **Ram Govind Upadhyay v. Sudarshan Singh and Ors, AIR 2002 SC 1475**, it was observed that the High Court has committed a manifest error in the matter of grant of bail when public tranquility has been stated to be disturbed on the election day and when there is no obstruction for the exercise of a right guaranteed under the Constitution and when there is no existence of crime against the society at large. Irrespective of different factors to be taken note of in regard to the cancellation of the grant of bail, in our view interest of justice seem to be over-whelmingly in favour of the appellant herein in the matter of cancellation of the bail.

In **State v. Sanjeev Kumar Chawla, Crl. M.C. No. 1468/2020 (Delhi HC)**, it was enunciated that without a change in circumstance or a supervening factor disclosing interference with the trial, bail could not be cancelled and that considerations for grant of bail were different from the considerations for cancellation of bail and it was impermissible for the court to re-evaluate the material or evidence on the basis of which bail had been granted while disposing of an application for its cancellation.

In **Ram Govind Upadhyay v. Sudarshan Singh and Ors, AIR 2002 SC 1475**, bail granted was cancelled. Orders were issued to re-arrest the accused as offence involved disturbance of public tranquility.

In **Abbas Ahmad Choudhary v. State of Assam, Crl. Appeal No. 951 of 2004**, Prosecutrix changed her story time and again and had substantially made her statement in Court which belied her truthfulness is not acceptable, and on this account bail was accorded.

In **X vs. The State of Telangana and Ors., (2018) 16 SCC 511**, no supervening circumstance has been made out to warrant the cancellation of the bail. There is no cogent material to indicate that the accused has been guilty of conduct which would warrant his being deprived of his liberty. However, we are of the view that the quantum of the personal bond fixed by the High Court should be enhanced in the facts and circumstances of the case. We, accordingly direct that the quantum of the personal bond shall stand enhanced to Rs 10 lakhs.

VII. Cancellation of Bail:

As a general rule, bail once granted should not be cancelled, unless a cogent case, based on a supervening event has been made out. The existence of supervening circumstances or other circumstances as laid down in judicial precedents, must be strictly ascertained by Court before it cancels bail already granted.

Once the investigation is complete in a case and the charge-sheet has been filed, there is no reason to initiate a suo-moto proceeding to cancel the bail.

Yet, in some cases, a situation may arise that concession of bail granted to the accused is required to be withdrawn. Hon'ble Supreme Court of India has discussed some of the situations and supervening factors that may justify such cancellation of bail including interference or attempt to interfere with the due course of administration of justice, evasion or attempt to evade the due course of justice, abuse of the concession granted to the accused, possibility of the accused absconding, likelihood of and actual misuse of bail. Likelihood of accused tampering with the evidence or threatening witnesses is also an important consideration. Other supervening circumstances, which have rendered it no longer conducive to a fair trial to allow the accused to retain his freedom by being on bail. Where court granting bail ignores relevant material and takes into account irrelevant material of substantial nature and not trivial nature. Where court granting

bail overlooks the position of the accused qua the victim especially if the accused is in some position of authority such as a policeman and there is prima facie, a misuse of position and power, including over the victim. Where court granting bail ignores the past criminal record and conduct of the accused while granting bail. Where bail has been granted on untenable grounds or where order granting bail suffers from serious infirmities resulting in miscarriage of justice, where grant of bail was not appropriate in the first place, given the very serious nature of the charges against the accused which disentitles him for bail and thus cannot be justified, when order granting bail is apparently whimsical, capricious and perverse in the facts of the given case, the same could be cancelled.⁶

In **Ram Chandra Meena vs. High Court of Rajasthan and Ors., MANU/SC/0966/2018**, in this case, High Court had initiated a suo moto proceedings for cancellation of bail and ultimately cancelled the bail granted to the appellant.

In **Dolat Ram v. State of Haryana, (1995) 1 SCC 349**, Hon'ble High Court of Punjab and Haryana was dealing with facts invoking Section 304B of IPC and observed that Dowry Death is a serious matter and cannot be taken so lightly. No positive finding has been recorded by the Additional Sessions Judge in his order to the effect that the respondents and the deceased were living separately. It was held that that no prima facie case is made out which could justify the grant of anticipatory bail. The same was declined. However, Hon'ble Apex Court observed that "Rejection of bail in a non-bailable case at the initial stage and the cancellation of bail so granted, have to be considered and dealt with on different basis. Very cogent and overwhelming circumstances are necessary for an order directing the cancellation of the bail, already granted. Generally speaking, the grounds for cancellation of bail, broadly (illustrative and not exhaustive) are: interference or attempt to interfere with the due course of administration of Justice or evasion or attempt to evade the due course of justice or abuse of the concession granted to the accused in any manner. The satisfaction of the court, on the basis of material placed on the record of the possibility of the accused absconding is yet another reason justifying the cancellation of bail. However, bail once granted should not be cancelled in a mechanical manner without considering whether any supervening circumstances 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. These principles, it appears, were lost sight of by the High Court when it decided to cancel the bail, already granted. The High Court it appears to us overlooked the distinction of the factors relevant for rejecting bail in a nonbailable case in the first instance and the cancellation of bail already granted." Cancellation of Anticipatory Bail was set aside and order of Ld. Additional Sessions Judge, Rohtak was upheld by Top Court.

In **Dinesh M.N. (S.P.) v. State of Gujarat, (2008) 5 SCC 66** was a case invoking offences punishable under Sections 120B, 121, 121-A, 122, 123, 307, 186, 224 of IPC, and Section 25, 27 of the Arms Act, it was observed that "As is evident from the rival stands one thing is clear that the parameters for grant of bail and cancellation of bail are different. There is no dispute to this position. But the question is if the trial Court while granting bail acts on irrelevant materials or takes into account irrelevant materials whether bail can be cancelled. Though, it was urged by Learned Counsel for the Appellant that the aspects to be dealt with while considering the application for cancellation of bail and on appeal against the grant of bail, it was fairly accepted that there is no scope of filing an appeal against the order of grant of bail. Under the scheme of the Code the application for cancellation of bail can be filed before the Court granting the bail if it is a Court of Sessions, or the High Court.

9. It has been fairly accepted by learned counsel for the parties that in some judgments the expression "appeal in respect of an order of bail" has been used in the sense that one can move the higher court.

10. Though the High Court appears to have used the expression 'ban' on the grant of bail in serious offences, actually it is referable to the decision of this Court in **Kalyan Chandra Sarkar v. Rajesh Ranjan @ Pappu Yadav and Anr. (2004 (7) SCC 528)**.

In Para 11 it was noted as follows:

"11. The law in regard to grant or refusal of bail is very well settled. The court granting bail should exercise its discretion in a judicious manner and not as a matter of course. Though at the stage of granting bail a detailed examination of evidence and elaborate documentation of the merit of the case need not be undertaken, there is a need to indicate in such orders reasons for prima facie concluding why bail was being granted particularly where the accused is charged of having committed a serious offence. Any order devoid of such reasons would suffer from non- application of mind. It is also necessary for the court granting bail to consider among other circumstances, following factors also before granting bail; they are⁷:

(a) The nature of accusation and the severity of punishment in case of conviction and the nature of supporting evidence.

• 6 Dolat Ram v. State of Haryana, (1995) 1 SCC 349; State v. Sanjeev Kumar Chawla | Crl. M.C. No. 1468/2020 (Delhi HC); Dinesh M.N. (S.P.) v. State of Gujarat, (2008) 5 SCC 66; Prakash Kadam and Ors. v. Ramprasad Vishwanath Gupta and Anr., (2011) 6 SCC 189; Kanwar Singh Meena v. State of Rajasthan and Anr., (2012) 12 SCC 180

7 Ram Govind Upadhyay v. Sudarshan Singh (2002 (3) SC 598), Puran v. Rambilas (2001 (6) SCC 338).

- (b) Reasonable apprehension of tampering with the witness or apprehension of threat to the complainant.
- (c) Prima facie satisfaction of the court in support of the charge.

11. It was also noted in the said case that the conditions laid down under Section 437 (1)(i) are sine qua non for granting bail even under Section 439 of the Code.

Ultimately, Apex Court upheld order of granting bail observing that the same was certainly vulnerable and appeal was dismissed.

In **Prakash Kadam & Etc. Etc vs Ramprasad Vishwanath Gupta & Anr, AIR 2011 SC 1945**. Appellants were charge-sheeted for offences punishable under Sections 302, 34, 120B, 364 IPC and other minor offences. Victim of offence is deceased Ramnaryan Gupta @ Lakhanbhaiyya. The prosecution case is that the appellants were engaged as contract killers by a private person to eliminate the deceased, it was observed by Ld. Apex Court that in our opinion, the High Court was perfectly justified in canceling the bail to the accused-appellants. The accused/appellants are police personnel and it was their duty to uphold the law, but far from performing their duty, they appear to have operated as criminals. Thus, the protectors have become the predators. This is a very serious case and cannot be treated like an ordinary case. The accused who are policemen are supposed to uphold the law, but the allegation against them is that they functioned as contract killers.

In **Bhadresh Bipinbhai Sheth v. State of Gujarat, (2016) 1 SCC 152, 376 IPC**, discussed the aspect of cancellation of anticipatory bail already granted by Court on being pursued by Prosecutrix in appeal. Guidelines in detail have been passed how cases where bail has stood granted need to be considered for the purpose of cancellation of bail.

In **Myakala Dharmarajam and Ors. vs. The State of Telangana and Ors., AIR 2020 SC 317** (Para 6), it was held that it is trite law that cancellation of bail can be done in cases where the order granting bail suffers from serious infirmities resulting in miscarriage of justice. If the court granting bail ignores relevant material indicating prima facie involvement of the accused or takes into account irrelevant material, which has no relevance to the question of grant of bail to the accused, the High Court or the Sessions Court would be justified in cancelling the bail.

In **Kanwar Singh Meena v. State of Rajasthan and Anr., (2012) 12 SCC 180**, appellant is the brother of one Purna Singh Meena. On 20/5/2009, he lodged a complaint in respect of murder of Purna Singh Meena against Khushi Ram Meena, who is respondent 2 at Gandhi Nagar Police Station, District Jaipur City (East), which was registered under Sections 147, 148, 149, 364, 302 of the Indian Penal Code. By the impugned order, Rajasthan High Court released Khushi Ram Meena on bail. Appellant has challenged the said order in this appeal. Grant of bail was revoked.

It was observed that the fact that brother of the accused is an IPS officer is not denied by his counsel. This fact is not noticed by the High Court. If it was not brought to the notice of the High Court by the investigating agency, then, it will have to be said that the investigating agency adopted a very casual approach before the High Court. In any case, the order passed by the High Court releasing the accused involved in a heinous crime on bail, ignoring the relevant material, is legally not tenable. It suffers from serious infirmities. The High Court has exercised its discretionary power in an arbitrary and casual manner. We have also noticed that the incident took place on 19/5/2009 and the accused could be arrested only on 1/6/2011. His two attempts to get anticipatory bail, one from the Sessions Court and the other from the High Court, did not succeed. Assuming that the accused is not likely to flee from justice or after release on bail he has not tried to tamper with the evidence, that is no reason why a legally infirm and untenable order passed in arbitrary exercise of discretion releasing the accused involved in a gruesome crime on bail should be allowed to stand.

This order needs to be corrected because it will set as a bad precedent. Besides, it will have adverse effect on the trial. From the complaint and the aforementioned two statements recorded under Section 164 of Criminal Procedure Code (Now Section 183, The Bhartiya Nagarik Suraksha Sanhita, 2023), it prima facie appears that there was illicit relationship between the accused and Rita. However, Rita came in contact with the deceased and intimate relationship developed between the two, which was not liked by the accused. It appears to be the case of the investigating agency that, therefore, the accused eliminated the deceased with the help of his companions.

Cancellation of bail is a serious matter. Bail once granted can be cancelled only in the circumstances and for the reasons which have been clearly stated by this court in a catena of judgments.

VIII. Practical Problems:

As a problem area, it must be considered that fact that passing of Arnesh Kumar Judgment did not have the necessary impact since 2014 and there was requirement of a reminder in the shape of Md. Asfak Judgment to reiterate the directions with punitive non-compliance. After passage of a decade since Arnesh Kumar judgment, there was a need felt to re-make and re-enforce the said directions and mandate. This typically shows mechanical and monotony that is inherent in Indian Judicial System. Scope and ambit of exercise of power of bail cannot be understated.

In Arnesh Kumar judgment, it was held that:

“9. From a plain reading of the aforesaid provision, it is evident that a person accused of an 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, cannot be arrested by the police officer only on his satisfaction that such person had committed the offence punishable as aforesaid. A police officer before arrest, in such cases has to be further satisfied that such arrest is necessary to prevent such person from committing any further offence; or for proper investigation of the case; or to prevent 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 cannot be ensured.

These are conclusions, which one may reach based on facts. The law mandates 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.

Law further requires the police officers to record the reasons in writing for not making the arrest. 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 it will achieve? It is only after these questions are addressed and one or the other conditions as enumerated above is satisfied, the power of arrest needs to be exercised.

Before arrest, first the police officers should have reason to believe on the basis of information and material that the accused has committed the offence. Apart from this, Police Officer has to be satisfied further that the arrest is necessary for one or the more purposes envisaged by sub-clauses (a) to (e) of clause (1) of Section 41 Cr.P.C. (Now Section 35, The Bhartiya Nagarik Suraksha Sanhita, 2023)”

The court also issued valuable directions to be followed by the police authorities and the courts, in all cases where the question of grant of bail arises. The importance of concept of personal liberty has been highlighted by Hon’ble Supreme Court of India in **Siddharth v. State of Uttar Pradesh and Another, (2022) 1 SCC 676:**

“10. We may note that personal liberty is an important aspect of our constitutional mandate. Occasion to arrest an accused during investigation arises when custodial investigation becomes necessary or it is a heinous crime or where there is a possibility of influencing the witnesses or accused may abscond. Merely because an arrest can be made, because it is lawful, does not mandate that arrest must be made.

A distinction must be made between the existence of the power to arrest and the justification for exercise of it. If arrest is made routine, it can cause incalculable harm to the reputation and self-esteem of a person. If the investigating officer has no reason to believe that the accused will abscond or disobey summons and has, in fact, throughout cooperated with the investigation we fail to appreciate why there should be a compulsion on the officer to arrest the accused.”

12. In the present case, this Court is of the opinion that there are no startling features or elements that stand out or any exceptional fact disentitling the appellant to the grant of anticipatory bail.

The Apex Court as directed all the courts ceased of criminal proceedings to strictly follow the law laid down in Aradesh Kumar Judgment and reiterated the directions contained thereunder, as well as other directions⁸:

“1. 11. Our endeavour in this judgment is to ensure that police officers do not arrest the accused unnecessarily and Magistrate do not authorize detention casually and mechanically. In order to, ensure what we have observed above, we give the following *directions*:

11.1. All the State Governments to instruct its police officers not to automatically arrest when a case under Section 498-A IPC (Now Section 85, BNS) is registered but to satisfy themselves about the necessity for arrest under the parameters laid down above flowing from Section 41 Cr.P.C. (Now Section 35, The Bhartiya Nagarik Suraksha Sanhita, 2023);

11.2. All police officers be provided with a check list containing specified sub-clauses under Section 41(1)(b)(ii) (Now Section 35(b)(ii), The Bhartiya Nagarik Suraksha Sanhita, 2023);

11.3. The police officer shall forward the check list duly filled and furnish the reasons and materials which necessitated the arrest, while forwarding/producing the accused before the Magistrate for further detention;

11.4. The Magistrate while authorizing 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 authorize detention;

11.5. The decision not to arrest 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 writing.

With judgments discussed above, position of law in terms of the law of exercising the power to grant or decline bail, has been extensively discussed. It is for Courts to act upon in line with guiding principles enumerated above in order to make the system more workable and accountable.

IX. Suggestions:

As a natural expectation, it is believed that necessary sensitization of all authorities in power, has resulted from above noted decisions and there shall be rationality in the exercise of power to arrest by police and power to grant or refuse bail by the Courts. Wide discretion no doubt cannot be curtailed, given the very nature of power of bail.

Right of Bail has been contained by the Statute, by providing the parameters to assess if confinement is discretion or mandate. This is by virtue of Classification of Offences as Bailable and Non-Bailable. Sometimes, the stage of grant or decline of bail is based upon the consideration that the case is in the process of investigation or trial.

In this context, it is significant to read Section 437 Cr.P.C. (now Section 480, BNSS). The same bifurcates circumstances in which an arrested person may be released on bail and when he shall be released on bail.

MAY	SHALL	NOT
Under sixteen; Woman; Sick Infirm	If there are no reasonable grounds for believing that accused has committed a non-bailable offence, but sufficient ground for further inquiry into the guilt If trial is not concluded within 60 days from inception of evidence If during trial but prior to judgment, there are reasonable grounds for believing that accused is not guilty of such offence	If there is reasonable ground to believe that he is guilty of an offence punishable with death / life imprisonment If offence is cognizable and he has been previously convicted of an offence punishable with more than seven years, or he has been previously convicted twice of an offence punishable with three to seven years

It is the Duty of Court, under Article 21 of the Constitution of India mentions that no person shall be deprived of his right to life and personal liberty, except according to procedure established by law. The procedure discussed has been expressly laid down under the law. However, its arbitrary and irrational exercise must be put to an end.

X. Conclusion:

This write up was triggered with the idea of understanding the different realms and aspects that are involved and play pivotal role in deciding how a bail application is likely to be considered and the factors that must weigh in the mind of judges, prosecutors, advocates and litigants while dealing with the same. The intention was to simplify the dodgings and uncertainties surrounding the fate of a bail application and how to expect a mechanism to make the same more understandable. It is hoped that the insights discussed present clarity of the topic and make it more understandable.

It cannot be understated that personal liberty is too precious a value of our Constitutional System, the same is recognised under Article 21 and the crucial power to grant or refuse bail, is a great repository of public trust vested in judiciary, the said power must be exercised, not casually but judicially, with genuine concern for the cost of individual liberty and community safety. Deprivation of personal freedom must be founded on most serious considerations relevant to the welfare objectives of society as enshrined in the Constitution.

An accused person (presumably innocent person) is entitled to freedom and every opportunity to look after his own case, and to establish his innocence. Undoubtedly, a man on bail has a better chance to prepare and present his case than one remanded in custody. An accused person who enjoys freedom is in a much better position to look after his case and properly defend himself, than if he were in custody. Hence, grant of bail is the rule and refusal is the exception.

The object of bail is to secure the attendance of the accused at the trial. The principal rule to guide release on bail should be to secure the presence of the Applicant to take judgment and serve sentence in the event of the Court punishing him with imprisonment.

Bail must not to be withheld as a punishment. Even assuming that the accused is prima facie guilty of a grave offence, bail cannot be refused as an indirect process of punishing accused person, before he is convicted. Judges must consider applications for bail keeping passions and prejudices, out of their decisions.

Grant of bail is undoubtedly a matter of discretion subject only to the restrictions contained in Section 437 (1) of Criminal Procedure Code. But the said discretion should be exercised judiciously.

The powers of the Court of Session or the High Court to grant bail under Section 439 (1) of Criminal Procedure Code are very wide and unrestricted. The restrictions mentioned in Section 437(1) do not apply to the special powers of the High Court or the Court of Session to grant bail under Section 439(1). Unlike under Section 437(1), there is no ban imposed under Section 439(1) against granting of bail by the High Court or the Court of Session to persons accused of an offence punishable with death or imprisonment for life. However, while considering an application for bail under Section 439(1), the High Court or the Court of Sessions will have to exercise its judicial discretion also bearing in mind, among other things, the rationale

behind the ban imposed under Section 437(1) against granting bail to persons accused of offences punishable with death or imprisonment for life.

There is no hard and fast rule and no inflexible principle governing the exercise of such discretion by the Courts. There cannot be an inexorable formula in the matter of granting bail. The facts and circumstances of each case will govern the exercise of judicial discretion in granting or refusing bail.

The answer to the question whether to grant bail or not depends upon a variety of circumstances, the cumulative effect of which must enter into the judicial verdict. Any one single circumstance cannot be treated as universal validity or as necessarily justifying the grant or refusal of bail.

While exercising the discretion to grant or refuse bail, Court will have to take into account various considerations like nature and seriousness of the offence, circumstances in which offence was committed, character of the evidence, peculiar circumstances to the accused, reasonable apprehension of witnesses being influenced and evidence being tampered with, larger public interest, position and status of accused with reference to victim and witness, likelihood of accused fleeing from justice, likelihood of the accused repeating offence, history of the case as well as stage of investigation etc.

In view of so many variable factors and considerations which should weigh with the Court cannot be exhaustively set out. However, the two paramount considerations are: (i) the likelihood of the accused fleeing from justice and (ii) the likelihood of the accused tampering with prosecution evidence. These two considerations in fact relate to ensuring a fair trial of the case, in a Court of Justice and hence, it is essential that due and proper weight should be bestowed on these two factors.

While exercising power under Section 437 of the Criminal Procedure Code in cases involving non-bailable offences except cases relating to offences punishable with death or imprisonment for life, judicial discretion would always be exercised by the Court in favour of granting bail subject to Section 437(3) with regard to imposition of conditions, if necessary.

Unless exceptional circumstances are brought to the notice of the Court which might defeat proper investigation and a fair trial, the Court will not decline to grant bail to a person who is not accused of an offence punishable with death or imprisonment for life.

At the same time, if investigation has not been completed and if the release of the accused on bail is likely to hamper the investigation, bail can be refused in order to ensure a proper and fair investigation.

If there are sufficient reasons to have a reasonable apprehension that the accused will flee from justice or will tamper with prosecution evidence he can be refused bail in order to ensure a fair trial of the case.

Court may refuse bail if there are sufficient reasons to apprehend that the accused will repeat a serious offence, if he is released on bail.

For the purpose of granting or refusing bail, there is no classification of the offences except the ban under Section 437 (1) of the Criminal Procedure Code against grant of bail in the case of offences punishable with death or life imprisonment. Hence, there is no statutory support or justification for classifying offences into different categories such as economic offences and for refusing bail on the ground that the offence involved belongs to a particular category.

When the Court has been granted discretion in the matter of granting bail and when there is no statute prescribing a special treatment in the case of a particular offence, Court cannot classify the cases and say that in particular classes bail may be granted but not in others. Not only in the case of economic offences, but also in the case of other offences the Court will have to consider the larger interest of the public or the State.

Hence, only the considerations which should normally weigh with the Court in the case of other non-bailable offences should apply in the case of economic offences also. It cannot be said that bail should invariably be refused in cases involving serious economic offences.

Law does not authorize or permit any discrimination between a Foreign National and an Indian National in the matter of granting bail. What is permissible is that, considering the facts and circumstances of each case, the Court can impose different conditions which are necessary to ensure that the accused will be available for facing trial. It cannot be said that an accused will not be granted bail because he is a foreign national.

These are the general principles that can be culled out from the evaluation of the case laws discussed above and deeper scrutiny into the insight of Hon'ble High Courts and Supreme Court of India on the point of grant of bail and the decision making process.

The purpose of present article is achieved as we have comprehensively discussed the "to do's" to be kept in mind by the Courts, while adjudicating upon the crucial right of accused to bail. The guiding principles would surely lead to transparency and accountability in the exercise of wide discretionary power in the Courts and make the procedural system fair as well as methodical and standardized. Rationality and reasonableness of procedure is the need of the hour and this must trickle down through the entire judiciary. *****