

TAKING BAIL SERIOUSLY: JURISPRUDENTIAL EVOLUTION OF JUVENILE'S RIGHT TO BAIL

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Abstract

Bail is an important element of the presumption of innocence – a cardinal principle of criminal law. Bail is also a facet of the right to life and liberty under Article 21 of the Constitution of India, and posits that a person's liberty cannot be curtailed without just cause. Presumption of innocence has been recognized in Section 3(i) of the Juvenile Justice (Care and Protection of Children) Act, 2015 (hereinafter JJ Act) as a fundamental principle in the juvenile justice system in India. The JJ Act also places emphasis on institutionalization as a measure of last resort, and also recognizes the right of the child to be reunited at the earliest with his/her family. Emphasis is on the liberty of the child in the juvenile justice law in India. The right to bail has been specified in Section 12 of the JJ Act. The paper examines the jurisprudence relating to bail in the juvenile justice system in India. The statutory provisions in the JJ Act are critically analysed in the paper to delineate the scope and ambit of the right to bail for juveniles in conflict with law. The judgments of the High Courts and Supreme Court have also been analysed to comprehend the dimensions of the bail jurisprudence in the juvenile justice system in India. The paper seeks to highlight notable features of the jurisprudence of bail in the juvenile justice law in India and seeks to study the operation of the juvenile justice system as a dimension of the criminal justice system.

Keywords: juvenile justice, bail, juvenile (child) in conflict with law; child rights; criminal justice

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Introduction

The juvenile justice system in India, established under the Juvenile Justice (Care and Protection of Children) Act, 2015 (hereinafter “JJ Act”) is a specialised system to deal with children who, on account of certain factors and causes, require the intervention, protection and care of the State. This system is rooted in the doctrine of *parens patriae* which vests parental role in the State as the guardian and protector of vulnerable sections of society including children. This system deals with two categories of children i.e. persons under the age of 18 years (Juvenile Justice (Care and Protection of Children) Act of 2015, § 2(12)) viz. ‘child in conflict with law’ (hereinafter “CICL”) and ‘child in need of care and protection’ (hereinafter “CNCP”). CICL are children who are alleged or found to have committed an offence under the penal law of India (Juvenile Justice (Care and Protection of Children) Act of 2015, § 2(13)) while CNCP are children who are vulnerable, neglected, abandoned or at risk of exploitation and/ or abuse (Juvenile Justice (Care and Protection of Children) Act of 2015, § 2(14)). The juvenile justice system provides for a special mechanism to deal with these categories of children on the rationale that the child in question is in the current predicament due to certain factors and causes, and these may be addressed through interventions in the welfare of the child. The system operates with the objective of ensuring the ‘best interests of the child’ (Juvenile Justice (Care and Protection of Children) Act of 2015, § 2(9)) which is a welfare goal encompassing care, protection, development and well-being (Rohith Thammana Gowda v. State of Karnataka, 2022). The concept of ‘best interests of child’ has wide connotation which includes parental association and care (Yashita Sahu v. State of Rajasthan, 2020), as well as developmental needs (Lahari Sakhamuri v. Sobhan Kodali, 2019), and protection from victimisation and exploitation (Eera v. State (NCT of Delhi), 2017).

The juvenile justice system operates on the fundamental principles listed in Section 3 including the presumption of innocence, best interests, non-stigmatising semantics, family responsibility, equality and non-discrimination, diversion, repatriation and restoration and institutionalisation as a measure of last resort. These principles have been laid down to ensure a diversionary, child-friendly and child rights-friendly approach to deal with CICLs and CNCPs. This system is focussed on the child and addressing the causes which have resulted in his/her vulnerability.

The juvenile justice system dealing with CICLs has been envisioned as a diversionary mechanism to the criminal justice system providing for child-appropriate procedures and approaches to deal with offending by children, based on the goal of rehabilitation and restoration, seeking to address the causes of delinquency through State intervention. It is based on the principle of presumption of innocence, and further to the avowed principle of ‘institutionalization as a measure of last resort’ (Juvenile Justice (Care and Protection of Children) Act of 2015, §3(xii)) the juvenile justice system seeks to address the causes of delinquency through orders that promote family responsibility for the child’s welfare and re-integration of the child into society. It seeks to ensure that children are subjected to institutional care only in rare cases and as a measure of last resort. The juvenile justice system dealing with CICLs is notably liberty-oriented as it shuns the concepts of arrest and interrogation (instead it uses the term ‘apprehension’ and ‘inquiry’), sentencing (employs dispositional orders for dealing with CICLs) and also provides for a statutory right to bail.

The paper examines the juvenile justice system specifically relating to CICLs with specific analysis of the jurisprudence of bail with regard to the CICL under the JJ Act. The reported judgments of the Supreme Court of India and the High Courts on Section 12 of the JJ Act have been analysed to identify the developments in the bail jurisprudence in juvenile justice law. To ensure relevance, the judgments which have not delved into the interpretation of Section 12 have been excluded from the analysis in the paper. Analysis has been undertaken on the jurisprudential interpretation of Section 12, as well as the developing jurisprudence regarding the applicability of anticipatory bail and default bail in juvenile justice cases. The paper is limited to the jurisprudence with regard to the right to bail of CICLs under the JJ Act.

Bail: Constitutional Underpinnings

The term ‘bail’ has its origins in the French term ‘*baillier*’ which translates to mean “to control, to guard, to deliver”; and is also rooted in the Latin term ‘*baiulare*’ which means “to bear a burden” (Singhvi, 2022 p.2). The term ‘bail’ has been explained by the Law Commission of India to mean a release from custody - “*judicial interim release of a person suspected of a crime held in custody, on entering into a recognisance, with or without sureties, that the suspect would appear to answer the charges at a later date; and includes grant of bail to a*

person accused of an offence by any competent authority under the law” (Law Commission of India, Amendments to Criminal Procedure Code, 1973 – Provisions Relating to Bail, 2017 p.22). The term ‘bail’ is defined in the Bharatiya Nagarik Suraksha Sanhita, 2023 (hereinafter BNSS) to mean “*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 a bail bond*” (Bharatiya Nagarik Suraksha Sanhita of 2023, § 2(b)). The term is essentially an element of the liberty jurisprudence which strives to protect the liberty of the individual against state excesses (Kurshid, 2022 p. 177-182). Bail is rooted in Article 21 of the Constitution of India and requires that a person’s liberty is not curtailed or deprived without just cause. Bail requires that a person is not required to suffer incarceration (which may be likened to punishment) before his/her guilt is established according to the procedure established by law. It acts against unnecessary deprivation of a person’s liberty and strives to strike a balance between the goals of criminal justice and the individual’s liberty. Bail is an important facet of the criminal justice system which is rooted in the human rights jurisprudence and the due process jurisprudence. It is based on the principle of presumption of innocence i.e. the belief that every person is innocent until proven guilty. It also is an intrinsic element of fair trial as it requires that a person’s freedom should not be unduly or unnecessarily curtailed, and incarceration should only be resorted to in the interests of justice.

Bail in Juvenile Justice

The juvenile justice system in India is governed by the JJ Act which applies to all children under the age of 18 and deals with children who are alleged or found to have committed an offence as well as children who are in need of the state’s care and protection. The JJ Act is a special legislation enacted with the objective of ensuring the welfare and protection of the child. (Juvenile Justice (Care and Protection of Children) Act of 2015, Preamble) Protection of the “best interests of the child” is the goal and basis of decisions and measures taken under the JJ Act (Juvenile Justice (Care and Protection of Children) Act of 2015, §3(iv)).

Bail as a Statutory Right

Bail in cases of CICLs is provided for in Section 12 of the JJ Act, which mandates that persons who are under the age of 18 years (thereby falling within the definition of ‘child’ under the JJ Act) and are alleged to have committed an

offence punishable under the penal laws of India, are required to be released on bail. Section 12 operates as an imperative mandate, and this mandate is evidenced by the use of the word 'shall' which signifies that bail is to be granted as a rule (Sandeep Ayodhya Prasad Rajak v. State of Maharashtra, 2022).

The Supreme Court in *Re Exploitation of Children in Orphanages in the State of Tamil Nadu v. Union of India*, 2020 expressly underscores the grant of bail as a mandatory rule in juvenile justice cases. In this judgment, the Supreme Court has observed that the letter of law requires that the child be released on bail and the embargo on the liberty of the child is only in three exceptional situations which are not in the best interests of the child. Further, in case of denial of bail, the JJB is required to record the reasons in writing for such denial. The Supreme Court has emphasised on the proactive role to be played by the JJB to ensure that the immediate grant of bail in accordance with the letter and spirit of the JJ Act. Further, in *Juvenile in Conflict with Law v. State of Rajasthan & Anr*, 2024 the Supreme Court held that a CICL cannot be denied bail without recording a finding regarding the applicability of the proviso to Section 12(1) i.e. the existence of reasonable grounds to deny bail.

The right to bail is in consonance with the objective of the JJ Act i.e. protection of the best interests of the child. (Sandeep Ayodhya Prasad Rajak v. State of Maharashtra, 2022) The principle of dignity and worth which is a fundamental principle governing the juvenile justice system in India (Juvenile Justice (Care and Protection of Children) Act of 2015, §3(ii)), the fundamental human rights and freedoms along with the juvenile justice objectives of rehabilitation and reintegration are the factors which necessitate the adoption of a beneficial approach towards the child in matters of bail under Section 12 (Tejram Nagrachi v. State of Chhattisgarh, 2019).

The provisions of the CrPC/ BNSS and any other law in force in India do not apply with regard to the determination of bail in juvenile justice cases and the application of Sections 437 and 439 CrPC/ Sections 482 and 483 BNSS is excluded in cases of bail to CICLs. (CCL 'A' v. State (NCT of Delhi), 2021; Tejram Nagrachi v. State of Chhattisgarh, 2019) The parameters for the grant of bail as prescribed in Section 439, CrPC are distinguishable from the parameters for grant of bail under Section 12 of the JJ Act. (Sandeep Ayodhya Prasad Rajak v. State of Maharashtra, 2022) It has been noted in *Tejram Nagrachi Juvenile v.*

State of Chhattisgarh through the Station House Officer, 2019 that the CrPC does not provide for the situation which warrants the modification of bail. Hence, if bail is determined under Section 439 CrPC, the CICL will be deprived of the rights available to him/her under Section 12 clauses (2), (3) and (4). Accordingly, Section 12 has been given an overriding effect in matters of bail to CICL. Accordingly, the grant of bail to CICLs is required to be determined as per Section 12 of the JJ Act and not Section 437 and 439 CrPC/ Sections 482 and 483 BNSS.

Parameters for Grant of Bail

The parameters for grant of bail in juvenile justice cases are different from the parameters applicable under the CrPC (*Babu Lal v. State, 2023*). The best interest of the child is the primary consideration and paramount factor for the determination of bail the CICL. (*Virendra Singh v. State, 2020*) Bail is required to be granted irrespective of the nature and gravity of the offence that has been committed by the child (*Virendra Singh v. State, 2020; Rahul v. State of Rajasthan 2020; Mahendra v. State, 2020*) and the merits of the case have no relevance in the determination of bail (*Devanand @ Bala Bhat v. State of Rajasthan, 2020*). The scheme of the JJ Act favours the grant of bail to CICLs (*Anmol Kumar v. State of Bihar, 2019; Virendra Singh v. State, 2020; Rupesh Kumar v. State of Bihar, 2019*). While it has been noted that Section 12 is silent on the issue of whether the heinousness of the offence is a consideration in the determination of bail (*Ayaan Ali v. State of Uttarakhand, 2022*), the Courts have held that the nature and gravity of the offence are not determinant factors in the determination of bail (*Anmol Kumar v. State of Bihar, 2019; Virendra Singh v. State, 2020; Rupesh Kumar v. State of Bihar, 2017*). Furthermore, a CICL is entitled to bail in both bailable and non-bailable offences (*Nirmala v. State of Uttarakhand, 2022*) and this distinction is irrelevant in the determination of bail (*Ayaan Ali v. State of Uttarakhand, 2022*). In *Karan v. State through Ratkal Police Station, 2017*, the possibility of danger to the life of the child in conflict with law was not held to be sufficient basis for denial of bail.

In *X s/o Laxman v. State and Others, 2021* it was stated that the legislative mandate of Section 12 does not require that the victim be notified before the hearing of the bail application and the practice of impleading the complainant as a party in bail hearings under Section 12 is without any basis. Presence of the prosecutrix at the time of determination of bail is not envisaged under Section 12 and hence,

the views and apprehensions of the prosecutrix will not have any bearing on the determination of bail (Babu Lal v. State, 2023).

In *Vigneshwaran @ Vignesh Ram Rep. by his father Rajaiyan v. State rep by the Inspector of Police, 2016* it was noted that the provisions of Section 12 did not require the obtaining of the Probation Officer's report prior to the grant of bail and hence, the report cannot be a pre-condition for determination of bail.

Exceptions to the Rule of Bail

The provision to Section 12(1) specifies three situations in which bail is to be denied to the CICL. The proviso carves out three limited exceptions to the mandate of bail in juvenile justice and states that bail is to be denied in situations where the release of the CICL would –

- (i) bring him into association with any known criminal
- (ii) expose him/her to moral, physical or psychological danger
- (iii) defeat the ends of justice.

First Exception: Release would bring CICL into Association with any Known Criminal

The first situation where bail is required to be denied to the CICL is where the release of the CICL would bring him/her in to association with any 'known' criminal. This provision essentially looks to protect the CICL from influences which would be against his/her interest and would lead him/her into further criminal activities. The term 'known' indicates the legislative intent that the criminal in question be identified and his particulars be known to the court (*Ayaan Ali v. State of Uttarakhand, 2022*). It is not a mere estimation of the likelihood of coming into contact with criminal elements in society, rather it is a fixed determination of the particular criminal who the CICL would come into contact with if he/she is released. This ground of denial of bail is in the best interests of the CICL to protect him from unsavory/ criminal influences in his surroundings. To determine the fulfilment of this exception, reference has been made by the courts to the report of the Probation Officer which would reveal the peer group and circle of influence of the CICL and their impact (both negative and positive) on the CICL (*Vinay Tiwari v. State of Madhya Pradesh, 2018*). The association of the CICL with co-accused in the case has also been held by the Courts to be basis for denial of bail (*Arun v. State, 2019*). Notably, in juxtaposition, in cases where the CICL is likely to come

into contact with criminal elements, the courts have addressed this concern and released the CICL on bail by requiring the guardian to furnish an undertaking in this regard (*X s/o Laxman v. State*, 2021). It is also noteworthy that in absence of records to indicate the criminal antecedents of the CICL and his association with criminals, the refusal of bail on this ground has been held to be unwarranted (*Rupesh Kumar v. State of Bihar*, 2017).

Second Exception: Release would Expose CICL to Danger

The second situation where bail is to be refused to the CICL is where the release would expose the CICL to moral, physical or psychological danger. The second exception requires that the CICL should not be released on bail if he will be exposed to danger. While the term ‘danger’ includes various aspects, the danger in contemplation of the statute is limited to three aspects – “physical, psychological and moral”. Physical danger would mean that the CICL would be at risk of bodily harm by certain persons, exposure to domestic violence, sexual abuse, etc. Psychological danger would include within its ambit threats to the CICL’s mental health which could potentially include verbal violence, depression, substance abuse and addiction. Moral danger would include within its ambit factors like recruitment into criminal gangs, which would lead to corruption of the character of the CICL which could be caused by peer group, neighbourhood or familial influence. The denial of bail under this exception is essentially a protective measure to ensure the well-being of the CICL.

Third Exception: Release would Defeat the Ends of Justice

The third situation where bail is required to be refused to the CICL is where the release of the CICL would “defeat the ends of justice”. The term “ends of justice” has been held to include situations where the grant of bail is likely to cause injustice (*Vikas v. State of Madhya Pradesh*, 2020) and / or be against the best interests of the child, the victim or society at large. The term has been interpreted as a blanket term which includes various factors which are related to the adjudication of the case involving the CICL. It is stated to include factors like the nature of crime, merits of the case etc. (*Mr. X (Minor) v. State of Uttar Pradesh*, 2022; *Raju @ Ashish v. State of U.P.*, 2018). The term ‘justice’ in this exception has been interpreted to be fairness – to the CICL, to the victim and to society (*Virendra Singh v. State*, 2020; *Raju @ Ashish v. State of U.P.*, 2018). In cases where the CICL, if released, poses a threat to society, it has been held to defeat the ends of justice as it would impact

the society's confidence on the judicial system (Arun v. State of Karnataka, 2019). This provision is often interpreted to deny bail to the CICL on the grounds that the CICL poses a threat to the victim or will come into contact with the victim (Mr. X (Minor) v. State of Uttar Pradesh, 2022). Furthermore, the nature of the offence committed by the CICL has also been weighed as a factor which would justify denial of bail under this exception (Vikas v. State of Madhya Pradesh, 2020; Arun v. State of Karnataka, 2019). It has been held in *Mr. X (Minor) v. State of Uttar Pradesh, 2022*, that the term "ends of justice" needs to be considered with three aspects *viz.* firstly, from the angle of the best interests and welfare of the CICL; secondly, from the angle of the cause of the judicial system and the victim; and thirdly, from the angle of the interests of the society.

Denial of Bail as the Exception to the Rule of Bail

Bail is the rule under the JJ Act and denial of bail is only permissible in exceptional circumstances (Rahul v. State of Rajasthan, 2020). The proviso to Section 12(1) carves out the exceptions to the mandatory rule prescribed in Section 12(1). The exceptions carved out to the rule of bail in Section 12(1) are not generalized exceptions, rather the proviso requires that there should be reasonable grounds to believe that either of the conditions are fulfilled. The requirement of grounds reveals the intention of the legislature to require factual basis i.e. the fulfilment of the exception should be based on certain factual circumstance and should be backed by evidence and materials. It cannot be a mere conjecture or assumption. Further, the term 'reasonable' qualifies the condition to the effect that the grounds should be tested on the standard of reasonableness i.e. the fulfilment of the exception should be tested on the assessment of a reasonably prudent person. The only exceptions to the rule of bail are specified in the *proviso* to Section 12. In all cases which do not fall within the *proviso*, bail is to be granted (Re Exploitation of Children in Orphanages in the State of Tamil Nadu v. Union of India, 2020).

In cases where bail is denied to the CICL, the reasons for such denial of bail must be recorded in writing (Re Exploitation of Children in Orphanages in the State of Tamil Nadu v. Union of India, 2020; Sandeep Ayodhya Prasad Rajak v. State of Maharashtra, 2022). The recording of reasons is a mandatory requirement under Section 12 (Jiva Kumar Harijan v. State of Maharashtra, 2022; Arun v. State of Karnataka 2019). Rejection of bail which is not backed by reports, factual evidence and materials would be baseless and unwarranted (Jiva Kumar Harijan v. State of

Maharashtra, 2022). The requirement of recording reasons for denial of bail as mandated by the *proviso* to Section 12 indicates that bail is ordinarily to be granted and denial of bail would be only in exceptional situations, the reasons for which would have to be recorded (Tejram Nagrachi v. State of Chhattisgarh, 2019). Bail can be denied in both bailable and non-bailable offences if the conditions specified in the proviso to Section 12 (1) are fulfilled (Nirmala v. State of Uttarakhand, 2022). Denial of bail is required to be based on materials before the JJB (Devanand @ Bala Bhat v. State of Rajasthan, 2020; Mahendra v. State, 2020) and should not be based on mere surmises and opinions (Anmol Kumar v. State of Bihar, 2019). The materials proving the fulfilment of the conditions in the proviso are required to be brought on record by the prosecution and the burden of proving the fulfilment of the conditions is on the prosecution (Devanand @ Bala Bhat v. State of Rajasthan, 2020; Mahendra v. State, 2020).

The import of Section 12(1) is that bail is to be mandatorily granted to CICL except in the three situations specified wherein the grant of bail is in contrast to the CICL's best interests and welfare, and would render the cause of justice to be ineffective. Bail can be denied in limited situations which is evidenced by materials, and the denial is to be recorded in writing citing the reasoning of the JJB and the materials on which such denial is based. Recently the Supreme Court held that a child in conflict with law cannot be denied bail without a recording of a finding with regard to the applicability of the conditions specified in the proviso to Section 12 (Juvenile in Conflict with Law v. State of Rajasthan, 2024).

A notable issue is the requirement of the presence of the victim in bail hearings under the JJ Act. The Delhi High Court has held that the considerations for grant of bail to CICLs are not dependent on the prosecutrix's views and the parameters for grant of bail are distinct under the JJ Act. In this situation, giving audience to the prosecutrix will not have any bearing on the grant or denial of bail under the JJ Act (Babu Lal v. State, 2023).

Bail Issues Beyond Section 12

Section 12 deals with the grant of bail in situations where the CICL is apprehended or detained (Juvenile Justice (Care and Protection of Children) Act of 2015, §12(1)). It also applies to situations where the CICL appears before the JJB or is brought before the JJB. Accordingly, Section 12 deals with bail upon apprehension and appearance before the JJB, and is silent on the issue of bail prior

to apprehension as well as the issue of grant of bail subsequent to the denial of bail and consequent placement in child care institutions.

Anticipatory Bail in Cases of Children in Conflict With Law

Anticipatory bail is provided in Section 438 CrPC/ Section 482 BNSS and there are divergent views of the High Courts on the applicability of the provisions regarding anticipatory bail in juvenile justice cases.

Applicability of Anticipatory Bail to CICLs

Several High Courts have taken the view that anticipatory bail is applicable to cases involving CICLs. The reasoning of the High Courts in arriving at this conclusion may be encapsulated as follows

- The *non obstante* clause in Section 12(1) of the JJ Act does not denude the provisions of anticipatory bail in its applicability to juvenile justice cases and does not disentitle the CICL from claiming the remedy under Section 438 CrPC (Birbal Munda v. State of Jharkhand, 2019).
- Section 12 must not be interpreted to the detriment of the CICL, thereby disentitling him/her from the statutory scheme of anticipatory bail. A beneficial interpretation of Section 12(1) requires that a rational construction of the *non obstante* clause be given and the CICL be put in a better position. Accordingly, the CICL is entitled to seek the relief of anticipatory bail in terms of Section 438 CrPC (Raman v. State of Maharashtra 2022). The Act cannot be interpreted in a manner to curtail rights available to CICL under other laws (Kureshi Irfan Hasambhai v. State of Gujarat, 2021)
- The JJ Act did not exclude the application of Section 438, and hence anticipatory bail applications in cases of CICLs would be maintainable (Munwa Devi v. State of Jharkhand, 2017).
- Section 438 CrPC is applicable to ‘any person’ and accordingly the benefit would be available to a child as well (Raman v. State of Maharashtra, 2022).
- Sections 10 & 12 of the JJ Act apply to the stage post-apprehension while anticipatory bail relates to the stage prior to apprehension. Hence, there is no conflict between Sections 10 & 12 JJ Act and Section 438 CrPC (Raman v. State of Maharashtra, 2022).

- Anticipatory bail is applicable for the following reasons. – (i) need for protection of liberty of CICL; (ii) Lack of express provision in JJ Act barring application of Section 438 CrPC (Surabhi Jain (Minor) v. State of W.B, 2021).

Non- Applicability of Anticipatory Bail to CICLs

Conversely, several High Courts have held that Anticipatory Bail is not applicable to cases of CICLs. The broad reasons for this view are-

- As the CICL cannot be “arrested” so the application for anticipatory bail would not be maintainable in juvenile justice cases (K. Vignesh v. State, 2017; Mohd. Bin Ziyad v. State of Telangana, 2021).
- The JJ Act is a self-contained code and hence, the provisions of the CrPC would not be applicable (K. Vignesh v. State, 2017; Piyush minor through his natural mother v. State of Haryana, 2021; Tejram Nagrachi v. State of Chhattisgarh, 2019). The JJ Act has overriding powers in matters of apprehension and detention (Rashid Rao v. State of Uttarakhand, 2022).
- JJ Act is a complete code to deal with any eventualities relating to a child in conflict with law. The word, ‘apprehended’ is used instead of ‘arrest’ in the JJ Act. Apprehension of arrest is a condition precedent for invoking the jurisdiction under Section 438, Cr. P.C. However, in the absence of the provision of arrest under the JJ Act, the provision of anticipatory bail does not become applicable (Kara Taling v. State of Arunachal Pradesh, 2022).

Cleavage in Views on Applicability of Anticipatory Bail

The issue of applicability of the provisions of Section 438 CrPC to cases of CICLs under the JJ Act has also been an issue of cleavage in judicial opinions within High Courts.

Calcutta High Court- Coordinate benches of the Calcutta High Court have taken differing views on the issue. One bench has opined that the JJ Act is a complete code by itself and, therefore, in view of Section 5 CrPC the provisions of the JJ Act cannot be whittled down nor can be superseded by any provision of the Code of Criminal Procedure including Section 438 thereof (Krishna Garai v. State, 2016). The subsequent bench was of the view that the JJ Act does not contain any specific provision for anticipatory bail and, therefore, the right of the juvenile cannot be foreclosed if otherwise available under the general law. The bench roots the issue in the Constitution of India holding that the fundamental right guaranteed

under the Constitution is equal to all and a special protection can be provided to marginalised person or a person with some disability to augment their need in juxtaposition with the individual invoking the provision for anticipatory bail but it is unacceptable that the child in conflict with law shall be denied such right when the special law applicable does not contain any such provision. The subsequent bench has referred the matter to a larger bench for determination of the issues of whether the application for anticipatory bail under Section 438 of the Code of Criminal Procedure is maintainable at the instance of the child in conflict with law before the High Court; and whether the provision of the Juvenile Justice (Care and Protection of Children) Act, 2015 excludes the operation of the provision of Section 438 CrPC (*Surabhi Jain (Minor) v. State of W.B.*, 2021).

Kerala High Court – In *X v. State of Kerala*, 2018 the application for anticipatory bail at the instance of the CICL was held to be maintainable before the Sessions Court or the High Court. In *A v. State of Kerala*, 2019 the JJB was held to be empowered to consider applications for anticipatory bail. In *X (Prashob) v. State of Kerala*, 2018 the term “any person” in Section 438 CrPC was held to include CICLs and accordingly the section provided the liberty to the CICL to apply for anticipatory bail under Section 438 CrPC (*X (Prashob) v. State of Kerala*, 2018). However, in *Reni Krishnan v. State of Kerala*, 2018 it was held that since the JJ Act does not envisage the “arrest” of the CICL, therefore the provision of anticipatory bail would not be applicable, as the same is claimed on the “apprehension of arrest”.

Madhya Pradesh High Court – In *Missa v. State of Madhya Pradesh*, 2018 it was held that the provisions of the JJ Act did not expressly or impliedly exclude the applicability of the Section 438 CrPC and the remedy of anticipatory bail was not barred under the JJ Act. However, in *Vidhikaughan Karne Walabalak v. State of M.P.*, 2022 it was held that anticipatory bail is not contemplated in the JJ Act as the CICL is never under confinement by way of arrest.

Allahabad High Court – There were differing views on the issue of applicability of anticipatory bail to CICLs (*Shahaab Ali v. State of U.P.*, 2020; *Mohd. Zaid v. State of U.P.*, 2020; *Minor v. State of U.P.*, 2023) resulting in a reference to a larger bench which held that legislature has not barred application of S. 438 CrPC and has left it to the court to bring about harmonious construction of the two statutes. Further, Section 10 & 12 operate post apprehension stage and

not pre apprehension. The *non obstante* clause operates only when there is conflict between CrPC and Section 12 JJ Act. Since there is no conflict, availability of right under Section 438 CrPC cannot be taken away to the detriment of the child. JJ Act is a beneficial legislation and the right of the child under general law cannot be taken away (Mohd. Zaid v. State of U.P, 2020).

The opinions of the High Court on the applicability center on two core aspects viz. the nature of detention under the JJ Act (if the same is equivalent to arrest and thereby impacts the liberty of the CICL) and permissibility of a beneficial construct of the statute especially the *non obstante* clause. The differing views of the High Courts on the applicability of Section 438 to cases of CICL is an area which requires definitive judicial disposition. While several High Courts lean in favour of providing the remedy of anticipatory bail, the lack of finality on this issue leaves it open for the courts to adopt their own interpretation thereby creating judicial uncertainty on the issue. Therefore, it is necessary that this issue of applicability of Section 438 to cases of CICLs be provided finality through a judgment by the Supreme Court of India which lays down the law in this regard.

In this context, it may be worthwhile to consider the principle of institutionalization as a measure of last resort which forms a basis for the processes and decisions under the JJ Act. Apprehension, though not considered as arrest does impact the liberty of the CICL and subjects him/her to institutional care. Anticipatory bail would be a measure that upholds the liberty of the CICL and ensures that the CICL is subjected to institutional care only when it is absolutely necessary. A beneficial construct of the legislation would further the interests of the child.

Default Bail

The JJ Act is silent on the issue of whether the CICL would be entitled to the benefit of default bail, and it is unclear whether the same can be claimed as a matter of right by the CICL. Furthermore, the issue of applicability of default bail has not been subjected to much judicial interpretation. Notably, the Rajasthan High Court has dwelt on this issue and determined in *Pankaj Meena v. State, 2020* that default bail is an indefeasible right of the accused and the same is available to the CICL.

Delay and the Right to Bail

While the JJ Act is silent on the right to bail on account of delay in conclusion of the proceedings, the right to speedy trial which is guaranteed under

Article 21 of the Constitution of India entitles every individual to bail in cases where there is inordinate delay in conclusion of the proceedings. Notably, in *V.K. (Juvenile) v. State of Rajasthan, 2023*, the Supreme Court granted bail considering the fact that the CICL had spent two years in custody during the pendency of the proceedings.

Bail During Covid-19 Times

The right to bail gained prominence during the Covid-19 pandemic wherein the health and safety of the CICLs became paramount and housing of CICLs in child care institutions was noted to be against their best interests. The Supreme Court of India in *Contagion of Covid-19 Virus in Children Protection Homes, In re, 2020*, noted the vulnerability of CICLs in child care institutions, and directed the JJBs and Children's Courts to proactively consider the necessity of keeping CICLs in child care institutions and to take urgent steps to release the CICLs on bail to protect their health and well-being. The Madhya Pradesh High Court in *In reference (Suo Motu) v. State of MP and Others, 2021* considered the situation and health risk posed by the Covid-19 pandemic and directed the release of CICLs kept in Observation Homes. The CICLs were directed to be released on bail, and the legal services authorities were directed to move applications for the CICLs in this regard.

Bail in Cases Where Child is in Conflict With Law and Also is in Need of Care and Protection

The cases where the child is alleged to have committed an offence, and is also vulnerable pose a unique challenge in determination of bail. In these cases, the JJB may be required to consider the fact that the release of the child may not be in the best interests of the child and accordingly may have to curtail the liberty of the child. Here the right to bail has to be considered along with the rehabilitative needs of the child. In such cases, the matter is referred to the Child Welfare Committee (hereinafter "CWC") for consideration as the child may on one hand have committed an offence and on the other hand may be a vulnerable child who may be a CNCP. The CWC, in such cases, is required to undertake an inquiry into the matter on issues which affect the safety and well-being of the child and take appropriate action (Juvenile Justice (Care and Protection of Children) Act of 2015, §30). Notably the report of the Child Welfare Committee provides information of the antecedents of the child as well as services that must be provided to the child

(Junaid v. State, 2021) especially in cases where the child is a victim of sexual abuse or domestic violence or substance addiction (Siddhant @ Aashu v. State, 2023). In such cases, the Child Welfare Committee is tasked with the creation of an assessment report of the child, identification of suitable persons to protect the interests of the child and to receive the bail notice on behalf of the child (Juvenile Justice (Care and Protection of Children) Act of 2015, §30). Notably, the Child Welfare Committee is obligated under the JJ Act to interact with child victims, and the statement of the victim child to the Child Welfare Committee has evidentiary value and may become part of the case diary (Ajay Diwakar v. State of U.P., 2023). The recommendations of the Child Welfare Committee are vital in these cases as they may reveal the factors which increase the vulnerability of the child and are vital in the determination of grant of bail.

Conclusions

Bail in the juvenile justice system in India is distinct from the principles of bail applicable to adults under the CrPC. At the same time, in both cases i.e. children and adults, bail is the rule and its denial is the exception. The first consideration is that the JJ Act, unlike the CrPC, is a beneficial legislation which is required to be interpreted for the welfare of the child. This welfarist construct of the JJ Act requires that the provisions including bail be interpreted and applied for the child's welfare of rehabilitation and protection and restoration of the child's rights rather than from a criminal justice perspective of deterrence. The parameters for determination of bail for adults and children are distinct. The overriding determinant for grant or refusal of bail in the juvenile justice system (unlike the determinant factors applicable for adults) is the "best interests of the child". This is in keeping with the overarching objectives of welfare and protection of children. This welfare objective was the driving factor for the grant of bail to CICLs during the Covid-19 pandemic. A beneficial construction has been given by the courts to the provisions of bail in order to secure the interests of the child. The principles of 'institutionalization as a measure of last resort' (Juvenile Justice (Care and Protection of Children) Act of 2015, §2(xii)) and 'repatriation and restoration' (Juvenile Justice (Care and Protection of Children) Act of 2015, §2(xiii)) also require that children should be institutionalized only if there are no other suitable alternatives, thereby giving primacy to the care of children in the home environment and the right to association and care of the family. The thrust of the JJ Act indicates a liberty orientation with bail under Section 12 being the right and its denial the exception which is only

in three exceptional situations specified in the provision. The JJ Act requires the orientation of all actions to be focused on the child and his best interests, and all actions are required to be determined and undertaken to serve such best interests of the child (Juvenile Justice (Care and Protection of Children) Act of 2015, §2(iv)). This necessitates that the nature of the offence ought not to be the consideration for determination of bail. There is much variance in the views taken by the High Court with regard to the interpretation of Section 12. This necessitates a definitive ruling by the Supreme Court on the issue of the interpretation of the proviso to Section 12(1). Bail in juvenile justice is a significant component of fair trial which is a right that must be guaranteed to all persons including children in conflict with law. It must be ensured that children are not serving out terms in institutions as a 'pre-inquiry' inmate, and that such institutions aren't converted into institutions of punishment rather than reformation. It is therefore necessary to ensure effective interpretation and implementation of Section 12 in the best interests of the child.

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