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## Navigating Bail Provisions in UAPA Cases: The Shoma Sen Judgment

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### INTRODUCTION

The statement '*Bail is a rule, jail is an exception*' has been frequently attributed to the Honorable Supreme Court in recent years. Now, the question is, what is bail? According to Black's Law Dictionary, '*Bail is the security required by the court for the release of a prisoner who must appear at a future time.*'<sup>1</sup>

The provisions for the different types of bail are different. For example, Section 436<sup>2</sup> is for the bailable offense, Section 438<sup>3</sup> is for Anticipatory Bail, and Sections 437<sup>4</sup> and 439<sup>5</sup> are for regular bail. However, the statement '*Bail is a rule, jail is an exception*' is not perfectly correct for the Unlawful Activities Prevention Act.<sup>6</sup> Bail is generally not given to a person detained under the

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<sup>1</sup> Santosh Bhagwan Waghmare, 'Bail provisions under the Code of Criminal Procedure' (*iPleaders*, 23 November 2021) <<https://blog.iplayers.in/bail-provisions-under-the-code-of-criminal-procedure/>> accessed 12 June 2024

<sup>2</sup> Code of Criminal Procedure 1973, s 436

<sup>3</sup> Code of Criminal Procedure 1973, s 438

<sup>4</sup> Code of Criminal Procedure 1973, s 437

<sup>5</sup> Code of Criminal Procedure 1973, s 439

<sup>6</sup> The Unlawful Activities Prevention Act 1967

Unlawful Activities Prevention Act, as the person is seen as a national threat. However, the Supreme Court mentioned the criteria under which bail can be granted. That criterion was that the allegations must be 'prima facie true' against the accused when the charges are framed.<sup>7</sup> The Supreme Court also mentioned that if there is a violation of fundamental rights, then the appellant can get bail under the Unlawful Activities Prevention Act.<sup>8</sup>

This paper, through the lens of *Shoma Sen v State of Maharashtra*<sup>9</sup>, will try to concur whether the person who has been detained under the Unlawful Activities Prevention Act, charges are not formed, and the allegations are not prima facie true, can get bail.

## FACTS OF THE CASE

In the present case, the appellant, Shoma Sen, is a senior citizen who is over 66 years old and a former professor at Nagpur University. She has appealed before the Hon'ble Supreme Court after the Bombay High Court denied her request for bail and directed her to seek bail from the trial court. The charges against her are related to offenses outlined in Chapters IV and VI of the Unlawful Activities Prevention Act. It's noteworthy that her name was not initially mentioned in the First Information Report (FIR), which was filed in relation to the violence that occurred at the event organized by the Elgar Parishad. The appellant's name was implicated after the state police expanded the scope of their investigation. The state police implicated her in connection with the violence, which they discovered was conspired by the banned organization Communist Party of India (Maoist), commonly known as CPI(M), and they found that the appellant had some connection with the CPI(M)

After facing serious allegations, the appellant filed a bail application before the Session Court once the initial chargesheet had been filed. Unfortunately, the application was rejected by the Additional Session Judge. Following this, the appellant then filed for regular bail in the Bombay High Court under Section 439 of the Criminal Procedure Code (CrPC). Despite this effort, the bail was still pending before the High Court, and the situation became more complex when the

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<sup>7</sup> *National Investigation Agency v Zahoor Ahmad Shah Watali* (2019) 5 SCC 1

<sup>8</sup> *Union of India v K A Najeeb* (2021) 3 SCC 713

<sup>9</sup> *Shoma Sen v State of Maharashtra* (2024) SCC Online SC 498

investigation was transferred from the state police to the National Investigation Agency (NIA). The single judge handling the petition decided to transfer the case to the division bench due to the transfer of the investigation to the NIA. In the process, NIA was named the respondent. Subsequently, the Division Bench of the High Court also rejected the appellant's bail application.

## **LEGAL ISSUES**

1. Whether the course adopted by the High Court can be invalidated by the Supreme Court if another course could also be adopted.
2. Whether the allegation of offenses under parts IV and VI of the Unlawful Activities Prevention Act are prima facie true against the appellant.

## **ARGUMENT OF THE APPELLANT**

The appellant's counsel contended that the appellant's actions did not constitute a prima facie commission or attempt to commit any terrorist act. Additionally, they argued that the prosecution, i.e., NIA, had failed to provide sufficient evidence to demonstrate that the appellant had financed the terrorist act. Furthermore, it was argued that simply attending a few meetings organized by the Communist Party of India (Maoist) did not establish that the appellant was a part of a terrorist act. The defence also emphasized that the prosecution had not effectively proven that the appellant was a member of the Communist Party of India (Maoist).

## **ARGUMENT OF THE RESPONDENT**

The respondent's counsel contended that the High Court functions as an appellate forum for bail matters when the National Investigation Agency Act<sup>10</sup> is applicable and should not assess the case. Furthermore, they emphasized that the appellant sought to overturn the challenged judgment and requested bail as an interim measure. The Counsel also pointed out that the incriminating evidence in the chargesheets, which serves as the basis for implicating the appellant, was not included in the petition for special leave to appeal. They argued that the prosecution does not require the appellant's custody for any purpose. Additionally, they

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<sup>10</sup> The National Investigation Agency Act 2008

stressed the gravity and seriousness of the alleged offenses against the appellant and highlighted that the bail appeal should be considered under Section 43D(5)<sup>11</sup>.

### **OBSERVATION OF THE SUPREME COURT**

The court has carefully evaluated this case's complexities and identified several legal issues that warrant thorough examination. The court has noted that the approach taken by the High Court is generally acceptable under normal circumstances. The High Court issued the order during a time when the appellant had been in detention for more than four and a half years and was also dealing with various health issues. Although the illness may not be categorized as severe, considering bail on medical grounds is inappropriate. Apart from the appellant's health challenges, charges against the appellant have also not been formed. The High Court must take all these factors into account when arriving at a decision.

The Court also observed no evidence of a connection between the appellant and the CPI(M). The court also observed that the prosecution did not corroborate the allegations of raising funds by the appellant. Mere encouraging women to join the struggle for a new democratic revolution and participating in meetings does not make the appellant liable for conspiracy of the terrorist act. However, the prosecution had to establish that the appellant had the further intention to participate in the organization's terrorist activity.<sup>12</sup>

It is also necessary that the material or evidence collected by the investigating agency in reference to the accusation against the accused concerned in the chargesheet and on the face of it, the material must show the complicity of such accused in the commission of the stated offences.<sup>13</sup> The court observed that the various evidence and witnesses provided by the prosecution failed to establish the prima facie involvement of the appellant with the terrorist activities.

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<sup>11</sup> The Unlawful Activities Prevention Act 1967, s 43D (5)

<sup>12</sup> *Vernon v The State of Maharashtra* (2023) SCC OnLine Sc 885

<sup>13</sup> *National Investigation Agency v Zahoor Ahmad Shah Watali* (2019) 5 SCC 1

## DECISION

After thoroughly reviewing the case, the Supreme Court found that the prosecution failed to substantiate the allegations against the appellant with sufficient witnesses and evidence. Consequently, the court determined that the appellant was not guilty under Chapters IV and VI of the Unlawful Activities Prevention Act. As a result, the provisions of Section 43D (5) of UAPA would not apply to the appellant. Subsequently, the Supreme Court overturned the High Court's judgment and granted bail to the appellant. Various factors, such as the appellant's age, health conditions, gender, and detention duration, were considered by the Supreme Court in reaching this decision.

Upon granting bail, the Supreme Court has imposed several conditions on the appellant. The appellant must reside within the boundaries of Maharashtra and surrender her passport to the National Investigation Agency (NIA). Additionally, she is allowed to carry only a single phone with a single SIM card, and the phone must be charged and active at all times. Furthermore, she is obligated to keep the location status (GPS) of her phone active 24 hours a day. The Supreme Court has also granted the Special Court the liberty to impose any other conditions deemed suitable. If the appellant violates any of the conditions set by the Special Court, the prosecution is granted the authority to seek a violation of the granted bail.

## ANALYSIS

Giving bail to a person under the Unlawful Activities Prevention Act depends upon whether the allegations raised against the accused are prima facie true or not. If the allegations are prima facie true, then the accused will not get bail, and if the allegation is prima facie not true, then the accused will get bail. However, the Supreme Court decided to give bail to a lady in jail for six years. But the conditions imposed by the court on bail are freakish. The court cannot impose freakish conditions while granting bail<sup>14</sup>.

On the one hand, the Supreme Court considered that the allegation made against the appellant was not true prima facie, and on the other hand, the Supreme Court imposed the freakish

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<sup>14</sup> *Munish Bhasin v State (NCT of Delhi)* (2009) 4 SCC 45

conditions on bail. One of the conditions of bail is to *'keep the live location (GPS) of her phone on'* is violative of the *'right to privacy, which is a part of a Fundamental Right under Article 21<sup>15</sup> of the Constitution<sup>16</sup>*. Recently, Justice Abhay S Oka and Ujjal Bhuyan also said that *'keeping the Google location live round the clock and sharing it with a law enforcement agency so that it could track his whereabouts is superfluous, and courts should not impose such a condition.'*<sup>17</sup> Next, on the approach that the High Court had used while rejecting the bail of the appellant, it can be said that it is not necessary the approach used by the High Court is always valid in every circumstance.

## CONCLUSION

Upon careful observation of this case, it becomes evident that it serves as a distressing exemplar of the shortcomings within our justice system. It highlights the unjust detention of a senior citizen—a woman—under the Unlawful Activities Prevention Act without a trial for six long years. Additionally, it clarifies that individuals detained under Section 43D (5) of the Unlawful Activities Prevention Act can expect bail, removing uncertainties associated with this aspect of the law. Furthermore, this case introduces a novel approach for the courts to monitor individuals out on bail by requiring them to keep their mobile phone's live location turned on, despite the fact that this infringes upon the individual's right to privacy, a fundamental right under Article 21. However, it is worth noting that maintaining a live location could potentially be exploited by the accused as a loophole, for instance, by leaving the phone in one place while moving about without it.

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<sup>15</sup> Constitution of India 1950, art 21

<sup>16</sup> *K.S. Puttaswamy v Union of India* (2017) 10 SCC 1

<sup>17</sup> Amit Anand Chaudhary, 'SC: Keeping Live Location on can't be bail condition' *Times of India* (30 April 2024) <<https://timesofindia.indiatimes.com/india/sc-keeping-live-location-on-by-accused-cant-be-bail-condition/articleshow/109704578.cms>> accessed 12 June 2024