International Journal of Education and Science Research Review
E-ISSN 2348-6457
Volume-10, Issue-2 March-April-2023
P-ISSN 2349-1817
www.ijesrr.org
Email- editor@ijesrr.org

LAW OF BAIL IN INDIA AN ANALYSIS OF JUDICIAL PERSPECTIVE

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Abstract

The system of bail establishes adjustment between the state's duty to protect its citizens from the onslaught of criminals and the basic principle of criminal law that no person can be convicted unless his guilt is proved. The object of taking surety bonds in the form of bail is to get assurance of accused to remain available for facing trial. The court has also the duty to see that while allowing the bail, the accused must remain available to face the trial without interfering into the process of criminal justice. That court has also to see that accused may not flout the conditions and terms of bail. In true sense, the right to bail is concomitant of the accusatorial system in India, which favours a bail system that ordinarily enables a person to stay out of jail until a trial has found him/her guilty. In India, bail or release on personal recognizance is available as a right in bailable offences not punishable with death or life imprisonment and only to women and children in non-bailable offences punishable with death or life imprisonment.

Key Words:- Bail, criminal justice.

Introduction

The word 'bail' in its derivation has been traced to the old French word 'Baillier'. Its real meaning is to give and deliver as a whole. The word 'Bail' has not been defined in the Criminal Procedure Code in India. The dictionary meaning of the word 'Bail' is to set free or liberate a person on security being given of his appearance. Further, the word 'bail' has been similarly defined in all the dictionaries and also in Stroud's Judicial Dictionary. As such, the bail means release of a person from legal custody. On the basis of the definition given in these dictionaries, the etymological expression contemplates release from custody or restraint which, in other words, means to set free or liberate a person arrested or imprisoned on taking security for his appearance in the court. The policy of law is to allow bail rather than to refuse it in normal ways. The grant of bail is thus a rule and refusal is an exception.

The concept of 'bail' denotes a form of pre-trial release or removal of restrictive and punitive consequences of pre-trial detention of an accused. Corpus Juris Secundum defines bail as a means to deliver an arrested person to his sureties, on their giving security for his appearance at the time and place designated, to submit to the jurisdiction and judgment of the court hearing the case.

The object of arrest and detention of the accused person is primarily to secure his appearance in the court at the time of trial and to ensure that in case he is found guilty, he is available to receive the sentence given by the court. If his presence at the trial could be reasonably ensured otherwise than by his arrest and detention, it would be unjust and unfair to deprive the accused of his liberty during the pendency of the criminal proceedings against him. The provision regarding the issue of summons or those relating to the arrest of the accused person under a warrant or without a warrant or those relating to the release of the accused person on bail, are all aimed at ensuring the presence of the accused at his trial in the court but without unreasonably and unjustifiably interfering with his liberty.

Historically, bail was a tool to ensure the appearance of the person accused of an offence at trial or to ensure the integrity of the process by preventing such a person from tampering with evidence or witness. Under the Criminal procedure Code of 1973, the police, prosecutors, magistrates and judges have been enjoined to exercise the best judgment and discretion within the confines of the law for ensuring the appearance of the person accused of an offence without jeopardizing the interests of the society as a whole.

In general parlance, bail refers to release from custody, whether it is on personal bond or with sureties. In one of its decision, the Supreme Court clarified that the definition of the term bail includes both release on personal bond as well as with sureties. Under this expanded definition, 'bail' refers only to release on the basis of monetary assurance -- either one's own assurance (also called personal bond or recognizance) or third party's sureties.

Personal liberty and the rule of law find its rightful place in the Constitution of India in Article 22 which includes measures against arbitrary and indefinite detention of a person. It further provides that no person shall be detained beyond the maximum period prescribed by any law made by the Parliament of India. Even with the adoption of an elaborate procedure by the judiciary to deal with matters regarding grant of bail to a person, the system is somehow unable to meet the parameters of an archetypal system giving rise to the notion that the bail system is unpredictable in legal sense.

Based on the recommendations of the Law Commission in its 41st Report on the Code of Criminal Procedure – the law relating to bail got suitably modified, in tune with the constitutional objectives and sought to strike a fine equilibrium between the 'Freedom of Person' and 'Interest of Social Order'. The provisions namely Sections 436, 437 and 439 of Chapter XXXIII Cr. P. C. were streamlined in 1973. In last few decades, the societal contexts, its relations, changing patterns of crimes, arbitrariness in exercising judicial discretion while granting bail are compelling reasons to examine the issue of bail to a person and to chart a roadmap for further reform.

Bail in its essence is a fine balance between the right to liberty of the person accused of an offence and the interests of society at large in Indian context. Thus, the task ahead would not only include stricter bail legislations optimal for dealing with the growing rate of crime, but at the same time making them equitable. This will harmonise the bail legislations with the current socio-legal problems and ensure that under-trials and indigent persons have access to justice without any difference of status of a person.

History is replete with innumerable examples of ordeals that an accused person had to go through during his trial in the court. It is only by accident that one can get a glimpse of the common cause of business, by which the ordinary thieves or murders were brought to justice. The maltreatment of the individual at the hands of state agencies in criminal matters became a common feature in India. It was realized that the state had become capable of inflicting so much harm on an individual accused of a crime that the need to arm him with some presumptions in his favour justified on the grounds of humanity and liberty and that is the bail itself.

There was a growing demand that circumstantial evidence should be preferred with great caution and care when a man's liberty was at stake. In the presumption of innocence prior to the proof of guilt, right to be informed of the grounds of arrest, right to release on bail before trial are some rights under the Constitution of India.

The system of bail was also in use to some extent in the ancient period in India and to avoid pre-trial detention, Kautilya's Arthasastra also advocated speedy criminal trial. The bail system was also prevalent in the form of Muchalaka i.e. personal bond and zamanat i.e. bail in Mugal period. With the advent of British Rule in India, the common rule of bail was introduced in India as well and got statute recognition in Codes of Criminal Procedure, 1861, 1872 and 1898.

In the recent times, bail in India is a highly debated issue. There are number of reports that explain the state of the criminal justice system in India. The release on bail is crucial to the accused as the consequences of pre-trial detention are given by the state agencies. If release on bail is denied to the accused, it would mean that though he is presumed to be innocent till the guilt is proved beyond reasonable doubt in the court, he would be subjected to the psychological and physical deprivations of jail life. As a result, the jailed accused loses his job and is prevented

from contributing effectively to the preparation of his defence. Equally important, the burden of his detention frequently falls heavily on the innocent members of his family.

Where a person is accused of serious crime and is likely to be convicted and punished severely for such a crime, he would be prone to abscond or jump bail in order to avoid the trial and consequential sentence. If such person under arrest, is released on bail is likely to put obstructions in having a fair trial by destroying evidence or by tampering with the prosecution witnesses, or likely to commit more offences during the period of his release on bail, it would be improper to release such a person on bail. On the other hand, where there are no such risks involved in the release of the arrested person, it would be cruel and unjust to deny him bail. In order to sub-serve the above said objectives of the bail, the legislature in its wisdom has given some precise directions for granting or not granting bail. Where the legislature allows discretion in the grant of bail, the discretion to be exercised according to the guidelines provided by law in addition the courts have evolved certain norms for the proper exercise of such direction for granting bail.

There is no definition of bail in the Code, although the term bailable offence and non-available offence have been defined. Bail has been defined in the law lexicon as security for the appearance of the accused person on giving which he is released pending trial or investigation. What is contemplated by bail is to procure the release of a person from a legal custody, by undertaking that he shall appear at the time and place designated and submit himself to the jurisdiction and judgment of the court. The Supreme Court has held that bail covers both releases on one's own bond, with or without sureties.

Law of bail should balance between two conflicting demands: shielding the society from misadventures of the person allegedly involved in crime and presumption of innocence of the accused till he is found guilty. The courts below are supposed to be guided by the principle, bail is the rule and jail is an exception but that exception is further subject to an exception that the provisions of bail should not be interpreted only for the benefit of the accused person but also for the benefit of the prosecution as well as for the benefit of the society at large, which can also be effected directly or indirectly with the commission of an offence against the society as a whole. In a conflict between social security and individual liberty, court need sacrifice security of the society at the individual liberty. Personal liberty is a fundamental right protected by our Constitution; vide Article 21, for deprivation whereof merely legally approved procedure of arrest and detention are not enough unless they are shown to be reasonable, fair and just.

Objectives of Bail

In bail applications, generally, it has been laid down from the earliest times that the object of bail is to secure the appearance of the accused person at his trial by reasonable amount of bail. The object of bail is neither punitive nor preventative. Deprivation of liberty must be considered a punishment, unless it can be required to ensure that an accused person will stand his trial when called upon. The courts owe more than verbal respect to the principle that punishment begins after conviction, and that every man is deemed to be innocent until duly tried and duly found guilty. From the earliest times, it was appreciated that detention in custody pending completion of trial could be a cause of great hardship. From time to time, necessity demands that some un-convicted persons should be held in custody pending trial to secure their attendance at the trial but in such cases, 'necessity' is the operative test.

In this country, it would be quite contrary to the concept of personal liberty enshrined in the Constitution that any person should be punished in respect of any matter, upon which, he has not been convicted or that in any circumstances, he should be deprived of his liberty upon only the belief that he will tamper with the witnesses if left at liberty, save in the most extraordinary circumstances. Apart from the question of prevention being the object of a refusal of bail, one must not lose sight of the fact that any imprisonment before conviction has a substantial punitive content and it would be improper for any Court to refuse bail as a mark of disapproval of former conduct whether the accused has been convicted for it or not or to refuse bail to an un-convicted person for the purpose of giving him a taste of imprisonment as a lesson.

Bail is a Rule and Jail is an Exception

Human Rights Activism has evolved more over the years and at present while putting someone in jail requires understanding of an equilibrium between the liberty of the person who is being put into the jail and the interest of society. Therefore, to maintain such equilibrium between the two it is very much important to consider that until and unless there are strong grounds such as probability of an accused fleeing from the justice or chances of him tampering the evidence or threatening the witness or victim to the case, detention of an accused will lead to the infringement of his very fundamental right given to him under Article-21[1] i.e., right to life and personal liberty. Further, the application of reformative theory of punishment is equally important to maintain the balance between two other theories of punishment namely- Deterrent theory and Punitive theory. The main objective of reformative theory is to reform an accused and keep him away from habituated criminals in jail who are considered varsities of crimes. The theory is based upon the notion that punishment should be more curative rather than a deterrent one. A crime is considered as a disease under this type of theory which cannot be cured by killing; rather such disease can be cured with the help of medicine named, 'process of reformation'.

Rule of Bail in Continuing Offence

The incarceration of an accused pending trial is considered necessary in the interests of justice when there is a reasonable apprehension that he might attempt to subvert the case against him by tampering with the evidence, by intimidating the witnesses, or where he poses a flight risk. In absence of such apprehensions, it is considered judicious to release the accused from custody on bail. In Sanjay Chandra v. CBI[2], the Supreme Court held that the object of bail is neither punitive nor preventive, it is merely to secure the appearance of the accused at the trial by a reasonable amount of bail. The Court further held that the deprivation of liberty must be considered a punishment unless it is absolutely necessary in the interests of justice. This otherwise laudable approach is not very practicable in cases of offences that are of a continuing nature. The concept of an offence of a continuing nature was explained by the Supreme Court in State of Bihar v. Deokaran Nenshi[3] that-

"A continuing offence is one which is susceptible of continuance and is distinguishable from the one which is committed once and for all. The question whether a particular offence is a 'continuing offence' or not must, therefore, necessarily depend upon the language of the statute which creates that offence, the nature of the offence and the purpose intended to be achieved by constituting the particular act as an offence. The distinction between the two kinds of offences is between an act or omission which constitutes an offence once and for all and an act or omission which continues, and therefore, constitutes a fresh offence every time or occasion on which it continues.

In the case of a continuing offence, there is thus the ingredient of continuance of the offence which is absent in the case of an offence which takes place when an act or omission is committed once and for all." Thus, as distinguished from general offences which are of a standalone nature, in a continuing offence the commission or consequences of such a crime is not affected over a small period of time or on a single occasion but are rather spread out over a considerable period of time. An example of such an offence is money laundering.

Thus, in the case of a continuing offence, it is difficult to ascertain the conclusion or termination of the criminal act and its object. For example, in the case of money laundering, while the initial part of the offence is over quickly, the proceeds of the illegal act can theoretically be utilised over an indefinite period of time. It is in this background that releasing on bail an accused who is charged with committing an offence of a continuing nature becomes problematic since it is highly probable that he will attempt to frustrate the case against him especially since the criminal act would still be in progress.

Current Scenario: Jail is Rule, Bail is Exception

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[1] Article-21 of The Constitution of India.

[2] Sanjay Chandra v. C.B.I., Bail Application No. 508/2011 decided by the High Court of Delhi on May 23, 2011.

[3] State Of Bihar vs Deokaran Nenshi on 24 August, 1972, 1973 AIR 908, 1973 SCR (3)1004.

In recent time the exercise of discretion of granting bail has become a serious blockade in achieving the ends of justice. Nowadays, it has become a cake walk for high profile and rich peoples to get bail if they have charges of any non-bailable offence against them. They are granted bail without considering the seriousness of the offence. On the other hand, the same is not the case with the poor and underprivileged sections of the society. In most of the cases, a middle class or a poor person who is accused of an offence does not get bail even after fighting tooth and nail for it. Does justice also differentiate between rich and poor? Moreover, even the agencies dance on the whims and fancies of their political personalities and illegal detention of Advocate Sudha Bhardwaj, Dr. Kafeel Khan and many more are examples of such arbitrariness.

In today's India, inconsistency in the bail orders given by the courts could be seen easily. The fourth pillar of the government, the mass media has the power to influence the minds of the general public but it is the TRP hunger that strikes so hard the media houses (be it electronic or print media) that they pre-judge by conducting media trials, parallel to the judicial trials. The guilt or innocence of an accused is decided by the media even before the judgment is pronounced. Unfortunately, such media trials can also make the district courts and sessions courts to reject the bail application which was quite apparent in the case of the Bollywood actress Rhea Chakraborty and now could be seen in the case of the Munawar Farooqui who, along with four others was arrested by M.P Police from a café for hurting religious sentiments and whose bail was rejected by the session court in Indore without considering the principle of bail is rule and jail is exception. Though the Supreme Court had granted him the interim bail later.

Landmark Judgments on Bail

In Gudikanti Narasimhulu vs. Public Prosecutor, High Court of A.P.[4] where Justice V R Krishna Iyer held that the power to grant or deny bail is not to be exercised in a mechanical manner, but should be based on a careful consideration of the facts and circumstances of each case.

In Hussainara Khatoon vs. Home Secretary, State of Bihar[5] where Justice V R Krishna Iyer held that the right to a speedy trial is an essential part of the right to life and personal liberty guaranteed by the Constitution of India, and that the court should take into account the prolonged detention of an accused person while considering their bail application.

In State of U.P. vs. Deoman Upadhyaya[6], where it was held that the burden of proving the guilt of an accused lies solely with the prosecution, and until the prosecution proves the guilt beyond reasonable doubt, the accused is entitled to the benefit of doubt. It was recently reiterated by the apex court in Sanjay Thakur vs. Government of India that an accused is presumed innocent until proven guilty in a court of law.

In Chinmayanand Case and Kanhaiya Kumar Case[7] the bail orders were so long whereas the jurisprudence of bail says that a bail order should be precise and merits of the case must not be discussed in bail order as it hinders the trial stage later.

The Difficulty in Obtaining Bail

The difficulty in obtaining bail and the high number undertrial prisoners was addressed four decades ago by the Supreme Court notably in its judgment in Hussainara Khatoon vs. Home Secretary, State of Bihar[8] where the

[4] Gudikanti Narasimhulu And Ors vs Public Prosecutor, High Court Of A.P. on 6 December, 1977, 1978 AIR 429, 1978 SCR (2) 371

[5] Hussainara Khatoon & Ors vs Home Secretary, State Of Bihar on 9 March, 19791979 AIR 1369, 1979 SCR (3) 532.

[6] State Of U. P vs Deoman Upadhyaya on 6 May, 1960, 1960 AIR 1125..

[7] Kanhaiya Kumar vs State Of Nct Of Delhi on 2 March, 2016, W.P.(CRL) 558/2016 & Crl.M.A. Nos.3237/2016

[8] Hussainara Khatoon & Ors vs Home Secretary, State Of Bihar on 9 March, 1979,1979 AIR 1369, 1979 SCR (3) 532.

court strongly observed that the information contained in these newspaper cuttings most distressing and it is sufficient to stir the conscience and disturb the equanimity of any socially motivated lawyer or judge. Some of the undertrial prisoners whose names are given in the newspaper cuttings have been in jail for as many as 5,7 or 9 years a few of them, even more than 10 years, without their trial having begun. What faith can these lost souls have in the judicial system which denies them a bare trial for so many years and keeps them behind the bars, not because they are guilty, but because they are too poor to afford bail and the courts have no time to try them. Most pertinently the Supreme Court noted that even under tha law as it stands, what is required is that factors beyond monetary sureties are considered by the courts while granting bail. It is not that we desperately need a new law, we only need a more logical and liberal interpretation of the present.

Suggestions

It is noted that the rate of conviction in criminal cases in India is abysmally low and this factor weighs on the mind of the Court while deciding the bail applications in a negative sense. "Courts tend to think that the possibility of a conviction being nearer to rarity, bail applications will have to be decided strictly, contrary to legal principles. We cannot mix up consideration of a bail application, which is not punitive in nature with that of a possible adjudication by way of trial. On the contrary, an ultimate acquittal with continued custody would be a case of grave injustice." The Court observed that the Jurisdictional Magistrate who otherwise has the jurisdiction to try a criminal case which provides for a maximum punishment of either life or death sentence, has got ample jurisdiction to consider the release on bail. Hence, taking note of the aforementioned considerations and the number of special leave petitions pertaining to different offenses, particularly on the rejection of bail applications, being filed before it, despite various directions issued from time to time, the burden of courts regarding the bail applications is still an serious issue. So, In India there is need of a separate law on Bail matters by which justice can be served to every person who is behind the bars for so many years.

Conclusion

After the attention drawn by President Droupadi Murmu and Chief Justice of India (CJI) D.Y. Chandrachud to the issue of the undertrial prison population in India, we have to decide on whether to focus on building more prisons or make serious attempts to decongest the existing ones. First and foremost, there is a need for re-orientation of the approach of the police personnel towards the exercise of power to arrest. Time and again the constitutional courts are faced with cases where the arrest is made in violation of the 'check-list' mandated by the Supreme Court in the landmark case of Arnesh Kumar vs State of Bihar (2014).

Moreover, in cases where notice of appearance under Section 41A of CrPC is issued, it is soon followed by arrest irrespective of compliance with the notice by the accused thereby, defeating the purpose of the provision. Section 41A was introduced in 2009 as a statutory safeguard against unnecessary arrests in offences punishable by up to seven years of imprisonment. It provides that where the police officer decides not to arrest, he shall issue a notice directing the accused to appear before him to cooperate in the investigation. The attitude of 'first arrest, then investigate' must be changed especially in cases covered under the directions in *Arnesh Kumar*. The focus he accuseshould be shifted from curtailing the liberty of the accused at the first instance to securing the presence of td by other means (summons, warrants, Section 41A CrPC).

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