

## Examining the Judicial Perspective on the Law of Bail in India

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### Abstract

The concept of the bail involves two conflicting concerns- an individual's right to liberty and his right to be presumed innocent until proven guilty against the society's interest in maintaining law, order and security. The custody of a person pending the completion of trial may cause great hardship to that person which may include loss of liberty, livelihood during that period. The object of keeping an accused person in detention prior to or during the trial is not punishment but to prevent repetition of offence with who is charged, to seek the presence of the accused during the trial and to prevent destruction of evidence. According to the Supreme Court of India, Bail is devised as a technique for effecting a synthesis of two basic concepts of human values, namely the right of the accused person to enjoy his personal freedom and the public interest; subject to which, the release is conditioned on the surety to produce the accused person in the court to face the trial. The current scenario on bail is a paradox in the criminal justice system, as it was created to facilitate the release of accused person but is now operating to deny them the release.

**Keywords:-**Bail, Custody, Liberty & Accused.

### Introduction

'Bail is derived from the old French verb 'bailer' meaning to 'give or deliver'. The term bail has not been defined in the Criminal Procedure Code, nevertheless, the word 'Bail' has been used in the Cr. P.C. several times and remains one of the vital concepts of criminal justice system in consonance with the fundamental principles enshrined in Parts III and IV of the Constitution along with the protection of human rights as prescribed under International treaties and covenants.

The bail, in lay man's term, means a guarantee or assurance given by a arrested person to appear before a competent court at a specified time at a specified place. The provision so flaw which govern the bail are provided under Chapter XXXIII of Cr. PC, which is the premier statute laying down criminal procedure in India. The bail involves two conflicting concerns- an individual's right to liberty and his right to be presumed innocent until proven guilty against the society's interest in maintaining law, order and security. The custody of a person pending the completion of trial may cause great hardship to that person which may include loss of liberty, livelihood during that period. The object of keeping an accused person in detention prior to or during the trial is not punishment but to prevent repetition of offence with who is charged, to seek the presence of the accused during the trial and to prevent destruction of evidence.

The origin of bail dates back to medieval times, when the first known drafted constitution came to be enacted in the year 1215 by king john of England and was referred as "Magna Carta" as we know it today. The genesis of the bail can be extracted from the clause 39 of Magna Carta, the simple translation of which reads as "No free man shall be seized or imprisoned, or stripped

of his rights or possessions, or outlawed or exiled, or deprived of his standing in any other way, nor will we proceed with force against him or send others to do except by the lawful judgment of his equals or by the law of land.” From a perusal of this clause it can be understood that a person shall not be restricted or confined unless and until there is a final judgment in accordance with the laws of land. On a careful reading and decoding of this clause we can greatly relate the said provision with the provisions of bail as provided in the Code of Criminal Procedure, 1973.

Thus, to safeguard the accused from such unreasonable practices, the provision of “Bail” is provided in the criminal law. ‘Bail’, simply means, “To procure the release of a person from 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”. Bail aims at ensuring the presence of the accused at his trial but without unreasonably and unjustifiably interfering with his liberty. But the law of bail has to strike balance between two circumstances; on one hand, where the arrested person, if released on bail, is likely to put obstructions to fair trial by destroying evidences or likely to commit more offences during period of release then it would be improper to release such 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 inappropriate to deny him bail.

### **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 because 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 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<sup>1</sup>i.e. , right to life and personal liberty.

Further, the application of reformatory 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 reformatory theory is to reform an accused and keep him away from habituated criminals in jail who are considered varieties 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*<sup>2</sup>, 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*<sup>3</sup> 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.

- <sup>1</sup> Article-21 of The Constitution of India.
- <sup>2</sup> Sanjay Chandra v. C.B.I., Bail Application No.508/2011 decided by the High Court of Delhi on May23, 2011.
- <sup>3</sup> State Of Bihar vs Deokaran Nenshion 24 August,1972,1973 AIR 908,1973 SCR(3)1004.

### **Current Scenario: Jail is Rule, Bail is Exception**

In recent time the exercise of discretion of granting bail has become a serious blockade in achieving the ends of justice. Now days, it has become a cakewalk 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 so 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.*<sup>4</sup> 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*<sup>5</sup> where Justice VR 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*<sup>6</sup>, 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 the *Arnab Goswami case* Supreme Court<sup>7</sup> quoted valuable lines for the law of bail that –

“Even for one day, this precious right of Right to life and Personal liberty cannot be violated.” But in this case also, there were so many inconsistencies in the order of bail whether it is about the High Court, Lower Court or different benches of the Supreme Court.

<sup>4</sup> Gudikanti Narasimhulu And Or svs Public Prosecutor, High Court Of A.P. on 6 December, 1977, 1978 AIR 429, 1978 SCR(2)371.

<sup>5</sup> Hussainara Khatoon & Or svs Home Secretary, State Of Bihar on 9 March, 1979 1979 AIR 1369, 1979 SCR(3)532.

In *Chinmayan and Case and Kanhaiya Kumar Case*<sup>8</sup> 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.

In *Arnesh Kumar Case*<sup>9</sup>, the Apex Court imposed several checks and balances on the powers of police before arrest and after arrest. The hon'ble Supreme Court directed to all the state governments across the country to instruct police officers not to arrest an accused without scrutinizing all the facts and circumstances of the case and shall conduct a preliminary inquiry before arrest.

Instead of Justice VR Krishna Iyer's judgments on bail having a significant impact on the criminal justice system in India and his legacy inspiring judges and lawyers to uphold the principle that bail is the rule and jail is the exception, the opposite appears to be true in trial courts in 2023. It is settled law that arrest is not a punishment. But in Indian social conditions, it carries a stigma and accused are perceived to be guilty, the moment they are arrested.

### **The Difficulty in Obtaining Bail**

The difficulty in obtaining bail and the high number under trial prisoners was addressed four decades ago by the Supreme Court notably in its judgment in *Hussainara Khatoon vs. Home Secretary, State of Bihar*<sup>10</sup> where the 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 under trial 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 the 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.

### **The State of Under trial Prisoners**

The Supreme Court had asked the states to issue directions to jail authorities to provide details of such UTPs to NALSA, which will process it for making necessary suggestions on how to deal with this issue and provide legal assistance wherever necessary. The November 29 last year order was passed days after President Droupadi Murmu, in her maiden Constitution Day address on November 26 last year at the Supreme Court, had highlighted the plight of poor tribals of her home state Odisha and Jharkhand, saying they remain incarcerated despite getting bail for lack of money to furnish the bail amount or arrange sureties. The matter, which relates to policy strategy for grant of bail, came up for hearing on Tuesday before a bench comprising Justices SK Kaul and AS Oka. Advocate Gaurav Agrawal, who is assisting the top court as a



namicuscuriae in the matter, referred to the report filed by NALSA. The report said that pursuant to the November 29 order, NALSA wrote to the state legal services authorities (SLSAs) to obtain details of such UTPs within 15 days and they were also directed to provide necessary legal assistance for their release.

- <sup>6</sup> State Of U.P vs Deoman Upadhyaya on 6 May, 1960, 1960 AIR 1125.
- <sup>7</sup> Arnab Ranjan Goswami vs Union Of India on 19 May, 2020, Writ Petition (Crl) No.130 of 2020.
- <sup>8</sup> Kanhaiya Kumar vs State Of Nct Of Delhi on 2 March, 2016, W.P.(CRL)558/2016 & Crl.M.A.Nos.3237/2016.
- <sup>9</sup> Arnesh Kumar vs State Of Bihar & Anr on 2 July, 2014 CRIMINAL APPEAL NO.1277 OF 2014.
- <sup>10</sup> Hussainara Khatoun & Or vs Home Secretary, State Of Bihar on 9 March, 1979, 1979 AIR 1369, 1979 SCR(3)532.

It said by the end of December 2022, data was received from almost all the SLSAs after which the NALSA asked them to furnish a progress report regarding legal assistance and release of such UTPs who were in custody despite being granted bail.

"Based on the information received from almost all the state legal services authorities, it transpires that there were about 5,000 under trial prisoners who were in jail, despite grant of bail. Out of which, 2,357 persons were provided legal assistance. As many as 1,417 persons have since been released, "the report said<sup>11</sup>. It said as per data received from Maharashtra SLSA, 703 UTPs, who continue to be in custody despite being granted bail for inability to fulfil bail conditions, were identified out of which 215 have been provided legal assistance and 314 have been released. It said the reasons for non-release of remaining such UTPs in Maharashtra include inability to arrange surety.

The report according to which the number of such identified UTPs in Odisha is 238 (as per the data received from Odisha SLSA), out of which 138 have been provided legal assistance and 81 have been released. As per the data, in Delhi, 287 such UTPs have been identified out of which 217 have been provided legal assistance and 71 have been released. The report said one of the main reasons why the accused are in jail despite the grant of bail is that they are accused in multiple cases and are not willing to furnish bail bonds until they are given bail in all the cases, as under trial custody will be counted in all the cases.

It said wherever the reason for non-release is due to inability to furnish bonds or surety, the NALSA would be following up those cases with the respective state or district legal service authorities and hopefully in the next one or two months, more UTPs would be able to get out of the prison. "All such prisoners in need of legal aid for modification of bail conditions will be given legal aid by the DLSAs," it said. The report said several meetings were also held with a view to find out mechanisms for helping such prisoners.

"Accordingly, a Standard Operating Procedure has been prepared by NIC (National Informatics Centre) which also deals with this aspect (besides other issues like premature release)," it said. There Port Said the NIC e-prison software, which is working in about 1,300 jails across the country, would now have a field where the date of grant of bail would have to be entered by jail authorities. "If the accused is not released within 7 days of the date of grant of bail, the e-prison software would automatically generate a flag/reminder. Simultaneously, an email would be sent to the office of the concerned DLSA so that the DLSA could find out the

reason for non-release of the accused," it said.

In the report, the NALSA has sought several directions from the top court, including that the court which grants bail to an UTP/convict would be required to send a copy of the bail order to the prisoner through the jail superintendent on the same day or next day. It further sought a direction that the Secretary of DLSA, with a view to find out the economic condition of the accused, may take help of the probation officers or the para-legal volunteers to prepare a report on the socio-economic conditions of the inmate which may be placed before the concerned court with a request to relax the condition of bail or surety.

<sup>11</sup>As per National Legal Service Authority Report given to Supreme Court on 31-01-23.

After the breakout of COVID-19 in March 2020, the Supreme Court also took into account the issue of overcrowded prisons and the possibly fatal consequence of COVID breakouts in jails. Based on the Supreme Court's directions, HPCs were constituted and each state laid down its own guidelines for release of prisoners. In its meeting dated 04.05.2021, the HPC was also informed by the DG (prisons) that against the optimum holding capacity of 10,026 inmates, prisons in Delhi were housing a staggering 19,679 prisoners, nearly double the capacity.

### 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 a fore mentioned 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 under trial 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 Armesh Kumar vs State of Bihar (2014).

Moreover, in cases where notice of appearance under Section 41A of Cr PC is issued, it is soon followed by arrest irrespective of compliance with the notice by the accused there by, 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 direction sin *Arnesh Kumar*. The focus should be shifted from curtailing the liberty of the accused at the first instance to securing the presence of the accused by other means (summons, warrants, Section 41A CrPC).

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