

Navigating the rule of bail and not jail and its implementation in letter and spirit

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INTRODUCTION

In India criminal procedure code 1973 deals with procedure aspects when accused is tried for any criminal offence unless explicitly provided differently under other statute. *Section 4* of criminal procedure code 1973 provides that:-

“(1) All offences under the Indian Penal Code (45 of 1860) shall be investigated, inquired into, tried, and otherwise dealt with according to the provisions hereinafter contained.

(2) All offences under *any other law* shall be investigated, inquired into, tried, and otherwise dealt with according to the same provisions, but subject to any enactment for the time being in force regulating the manner or place of investigating, inquiring into, trying or otherwise dealing with such offences.”

Bail has not been defined anywhere in criminal procedure code 1973. It is necessary to carve out the definition of bail from other sources to understand its meaning. The word ‘bail’ has been defined in the *Law Lexicon* – “To set at liberty a person arrested or imprisoned, on security being taken for his appearance on a day and at a place certain, which security is called bail, because the party arrested or imprisoned is delivered into the hands of those who binds themselves or become bail for his due appearance when required, in order that he may be safely protected from prison, to which they have, if they fear his escape, etc., the legal power to deliver him.”¹

In *Encyclopedia Britannica* , the ‘bail’ is defined as “the procedure by which a judge or magistrate sets at liberty one who has been arrested and imprisoned in connection with a legal matter, criminal or civil upon receipt of security to ensure the released prisoner's later appearance in court for further proceedings in the matter.”²

In *Moti Ram v State of M.P.*³ that “There is no definition of bail in the Code although offences are classified as bailable and non-bailable. The actual Sections which deal with bail, as we will presently show, are of blurred semantics. We have to interdict judicial arbitrariness depriving of liberty and ensure ‘fair procedure’ which has a creative connotation after Maneka Gandhi”

The bail is a matter of judicial restraint and setting free the accused at the same time. This is said as “The concept of bail has long history and deep rooted in English and American law. In medieval England the custom grew out of the need to free untried prisoners from disease ridden jails while they were waiting for the delayed trials conducted by travelling justices. Prisoners were bailed, or delivered, to reputable third parties of their own choosing who accepted responsibility for assuring their appearance at trial. If the accused did not appear, his bailor would stand trial in his place.”⁴

Under criminal procedure code 1973 we find that there are two sections (besides a separate section 438 dealing with anticipatory bail) section 436 which deals with bail in ' bailable offences ' and section 437 which is devoted to bail in ' non-bailable offences '. It may be emphasized that these two sections, barring few changes and additions, are the verbatim reproduction of sections 496 and 497 of the Code of Criminal Procedure, 1898 (The earlier code dealing with the criminal procedure).

“Bail is a provision which protects human liberty when an accused is arrested. Human liberty is a precious constitutional value which is undoubtedly subject to regulations and restrictions by validly enacted legislation. As such, the citizen is subject to the edicts of criminal law and procedure. In a celebrated judgement in *State of Rajasthan, Jaipur vs Balchand*⁵

¹Venkataramaiya's, *Law Lexicon* 131(1971)

² *Encyclopedia Britannica* 1046 (1968)

³A.I.R. 1978 S.C 1594

⁴*Vera Institute of Justice Ten Year Report 20 (1961-1971) quoted by Krishna Iyer*

⁵A.I. R (1977) 4 SCC 308

Justice Krishna Iyer reminded us that basic rule of criminal justice system” is ‘bail and not jail’

But this rule has not been implemented equally and appropriately in all cases. The famous recent case of *Arnab Manoranjan Goswami vs The State of Maharashtra &Ors* (arising out of SLP (CrI) No. 5598 of 2020)⁶ is the best example of evaluating the implementation of the rule of bail and not jail. In the words of Justice D Y Chandrachud:- “The High Court did have the power to protect the citizen by an interim order in a petition invoking Article 226. Where the High Court has failed to do so, this Court would be abdicating its role and functions as a constitutional court if it refuses to interfere, despite the parameters for such interference being met. The doors of this Court cannot be closed to a citizen who is able to establish prima facie that the instrumentality of the State is being weaponized for using the force of criminal law. Our courts must ensure that they continue to remain the first line of defense against the deprivation of the liberty of citizens. Deprivation of liberty even for a single day is one day too many. We must always be mindful of the deeper systemic implications of our decisions.”⁷

However, this judgement was criticised by the Legal scholars and Bar members on the ground of ‘selective listing’. Advocate Dushyant Dave⁸ remarked that “This is a gross abuse of administrative power, whosoever has exercised it on administrative side. It gives an impression that Clients represented by certain Lawyers are getting special treatment, which does not speak well if the great Institution, that the Supreme Court is,”

Thus, this aspect of assessing the system of granting bail by supreme court when same can be granted by the lower court on same grounds is to be analyzed.

Indian Judiciary has regularly and strongly supported the rule of bail and not jail but Prosecuting authority and judicial authority at subordinate level turned blind eye to everyday bail applications within can be inferred from the data of the pending bail petitions and denial of bails.

Along with this, another question also requires answer India being a country where legal foundations are laid on the Due process model and its passive judicial role and some bail applications went to Apex court and granted while others struggle at the lower judiciary level and remain pending and where Judiciary plays an active role in ensuring that accused be released on bail certain impediments come across which affected the constitutional mandate and rights provided to the citizens of India.

Moreover, this paper looks into the aspect that how far India reached in fulfilling the mandate of constitutional and statutory laws to providing bail on equal footing. Lastly, this also compels that India should re-legislate or reformative approaches to be undertaken to satisfactorily implement the rule of bail and not jail in letter and spirit in appropriate cases

II. Bail Jurisprudence in India

Bail means setting an accused on liberty on conditions or without them. When an accused is arrested in cognizable and non-bailable offence then he is put in prison for maximum 24 hours as per section 167 of CrPC⁹. When investigation is not completed within 24 hours the accused is sent to magistrate for further custody then Magistrate may or may authorize further custody of any type that is judicial custody or police custody.

The purpose of jailing the accused is many folded. This may help police in interrogation, in collecting evidences removing possibilities of tampering with the evidences etc. However when an accused is innocent and he is framed in wrong case then jailing him amounts to abridging his Fundamental right propounded in the constitution of India.

It was observed in a decision of a three judge bench in *Romila Thapar vs Union of India*¹⁰ that “The basic entitlement of every citizen who is faced with allegations of criminal wrongdoing, is that the investigative process should be fair. This is an integral component of the guarantee against arbitrariness under Article 14 and of the right to life and personal liberty under Article 21. If this Court were not to stand by the principles which we have formulated, we may witness a soulful requiem to liberty.”

⁶ Authored by Justice Dhanajay Chandrachud in SC Criminal Appeal No. 742 of 2020

⁷ *ibid*

⁸ Dushyant Dave, *Supreme Court Bar Association President*

⁹ Criminal Procedure Code 1973

¹⁰ (2018) 10 SCC 753

In *State of Rajasthan, Jaipur vs Balchand*¹¹, Justice Krishna Iyer reminded us that the basic rule of our criminal justice system is “bail, not jail”. It was observed in the judgement that “The High Courts and Courts in the district judiciary of India must enforce this principle in practice, and not forego that duty, leaving this Court to intervene at all times. We must in particular also emphasise the role of the district judiciary, which provides the first point of interface to the citizen. Our district judiciary is wrongly referred to as the subordinate judiciary. It may be subordinate in hierarchy but it is not subordinate in terms of its importance in the lives of citizens or in terms of the duty to render justice to them. High Courts get burdened when courts of first instance decline to grant anticipatory bail or bail in deserving cases. This continues in the Supreme Court as well, when High Courts do not grant bail or anticipatory bail in cases falling within the parameters of the law. The consequence for those who suffer incarceration are serious. Common citizens without the means or resources to move the High Courts or this Court languish as undertrials. Courts must be alive to the situation as it prevails on the ground – in the jails and police stations where human dignity has no protector. As judges, we would do well to remind ourselves that it is through the instrumentality of bail that our criminal justice system’s primordial interest in preserving the presumption of innocence finds its most eloquent expression. The remedy of bail is the —solemn expression of the humaneness of the justice system.” as we are with the primary responsibility of preserving the liberty of all citizens, being in the democratic country where welfare of the citizens is prime responsibility of the state we cannot countenance an approach that has the consequence of applying this basic rule in an inverted for all.

“Bail, not jail, is the general rule in Indian criminal jurisprudence. This is based on the cardinal principle that a person is presumed to be innocent till his conviction. ‘Presumption of innocence’ is well recognized under Article 11 of the Universal Declaration of Human Rights (1948)¹². Therefore a person who is accused in an offence and whose personal liberty is curtailed by arrest by the police is entitled to bail.” Earmarked by the above author.

III. Bail provisions in Indian Law

The criminal procedure code 1973 which is the latest procedure to be followed by the criminal courts deals with mainly 3 types of bail. This is also adopted from the article which says that “There are generally 3 types of bail in India which a person can apply depending upon the stage of the criminal matter:

1. **Regular Bail:** A regular bail can be granted to a person who has already been arrested and kept in police custody. A person can file a bail application for regular bail.¹³
2. **Interim Bail:** Interim Bail is a bail granted for a short period of time. Interim bail is granted to an accused before the hearing for the grant of regular bail or anticipatory bail.
3. **Anticipatory bail:** People, who discern that he may be arrested by the police for a non-bailable offence, can file an application for anticipatory bail¹⁴. It is like an advance bail obtained under Section 438 of Cr.p.c. A bail under Section 438 is a bail before arrested and a person cannot be arrested by the police if anticipatory bail has been granted by the court.”

Section 439 deals with Special powers of High Court or Court of Session regarding bail.—“(1) A High Court or Court of Session may direct,— (a) that any person accused of an offence and in custody be released on bail, and if the offence is of the nature specified in sub-section (3) of section 437, may impose any condition which it considers necessary for the purposes mentioned in that sub-section; (b) that any condition imposed by a Magistrate when releasing any person on bail be set aside or modified: Provided that the High Court or the Court of Session shall, before granting bail to a person who is accused of an offence which is triable exclusively by the Court of Session or which, though not so triable, is punishable with imprisonment for life, give notice of the application for bail to the Public Prosecutor unless it is, for reasons to be recorded in writing, of opinion that it is not practicable to give such notice. (2) A High Court or Court of Session may direct that any person who has been released on bail under this Chapter be arrested and commit him to custody”.

The jurisprudence of bail under Indian criminal law is observed in the words of Dr Nelanchalasethy :- “The law of bail like any other branch of law has its own philosophy and occupies an important place in the administration of justice and the concept of bail emerges from the conflict between the police power to restrict liberty of a man who is alleged to have committed a crime, and the presumption of innocence in favour of alleged criminal. An accused is not detained in custody with the object of punishing him on the assumption of guilt. The court in this case, dealt with the difference between bail

¹¹ (1977) 4 SCC 308

¹² Universal Declaration of Human Rights, 1948

¹³ Section 437 & 439 of the Criminal procedure code 1973

¹⁴ Section 438 of the Criminal procedure code 1973

under sections 438 and 439 pointing out that section 439 can be invoked only when the accused is in custody. The court has authority to refuse bail if it apprehends that the accused may not be available for trial. This is so even when the accused is entitled for bail on the ground of non-submission of charge-sheet within the statutory period.”¹⁵

In *Brij Nandan Jaiswal v. Meena Jaiswal*¹⁶ the petitioner was charged with murder. He was refused bail by the session’s court. However, the High court granted him bail under Section 437, Crpc. It was questioned by the complaint. Upholding the right of the complaint; The S.C. declared that “it was now a settled law that the complaint can always question the order granting bail if the said order is not validity passed. It is not as if once a bail is granted by any court, the only way is to get it cancelled on account of its misuse. The bail order can be tested on merits also in this case the court found that the High Court granted bail mechanically and hence it was reversed by the supreme court.”

SC observed, in *P. Chidambaram* case "It is not a rule that bail should be denied in every case. Delhi High Court was justified in denying bail relating to gravity of the offence. However, we disapprove of the Delhi High Court making observations on the merits of the case.”¹⁷ The purpose of the bail is ensuring the appearance of accused before the court when ever required but in certain cases, granting bail is not required.

SC observes in *Arnab Goswami* case¹⁸ that:-While granting bail to the accused SC criticized the stand of High court of Bombay by saying “there was a failure of the High Court to discharge its adjudicatory function at two levels – first in declining to evaluate prima facie at the interim stage in a petition for quashing the FIR as to whether an arguable case has been made out, and secondly, in declining interim bail, as a consequence of its failure to render a prima facie opinion on the first. The High Court did have the power to protect the citizen by an interim order in a petition invoking Article 226. Where the High Court has failed to do so, this Court would be abdicating its role and functions as a constitutional court if it refuses to interfere, despite the parameters for such interference being met. The doors of this Court cannot be closed to a citizen who is able to establish prima facie that the instrumentality of the State is being weaponized for using the force of criminal law. Our courts must ensure that they continue to remain the first line of defense against the deprivation of the liberty of citizens. Deprivation of liberty even for a single day is one day too many. We must always be mindful of the deeper systemic implications of our decisions.”

IV. Judicial Discretion over granting and denying Bail

Criminal procedure code 1973 provides discretionary power over Magistrates while granting bail to accused of non bailable offence. Krishnaiyer, V.R. J. observed that “in case of considering the question of bail, the gravity of the offence committed and the brutality of the crime plays an important role.”¹⁹

In the case of *GudikantiNarasimhulu v. Public Prosecutor* it was emphasised that “grant of bail in India depends on the hunch and discretion of the bench hearing the plea, at large. Our penal code is not discreet and does not provide with an exhaustive set of circumstances for its grant and it has been left largely to the application of judicial minds.” “The grant of bail is hence clearly matter of judicial discretion and questions involving one’s individual liberty and the larger societal and public interest must be considered, keeping in mind that the object is finally to ensure an expeditious trial. The constitutional mandates provided to the citizens of India must be kept in supreme as held in the case of *Om Prakash v. State of Rajasthan*.”

In the case of *Hussainara Khatoon and others v. Home Sec, State of Bihar*²⁰, “the Court observed that the ratio that when the man is in jail for a period longer than the sentence, he is actually liable for then he should be released.” The discretion enjoyed by the Magistrates is to be exercised judicially as held in various judgements of Supreme court. However the conditions imposed by the magistrates while granting bails are not limited or mentioned in the code. Thus conditions imposed on the accused ranged from keeping a particular book to not visiting a place or visiting a place regularly has been imposed while granting bail. The magistrate may according to the facts of the case grant bail with or without conditions. The conditions imposed depend upon the discretion of the Trial court.

¹⁵DR. NilanchalaSethy,RIGHT TO BAIL: A JURISPRUDENTIAL APPROACH

¹⁶ 2009 ISCC(Cri)594

¹⁷ <http://www.indiatoday.in/india/story/supreme-court-grants-bail-to-chidamabram-in-inx-meia-case1624960--> 04.12.2019

¹⁸ibid

¹⁹ibid

²⁰AIR 1979 SC 1360

The discretion of the magistrate is widely exercised keeping in view the facts and circumstances of the cases. Regarding the 'judicial discretion', Cardozo has remarked that “the judge, even when he is free, is still not wholly free....He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to the primordial necessity of order in social life.”²¹

Krishna Iyer, J., in Narasimhulu's case²² remarked that “the subject of bail belongs to the blurred area of the criminal justice system and largely hinges on the hunch of the bench, otherwise called judicial discretion. The Code is cryptic on this topic and the court prefers to be tacit, be the order custodial or not. And yet, the issue is one of liberty, justice, public safety and burden of public treasury, all of which insist that a developed jurisprudence of bail is integral to a socially sensitized judicial process. I thus, when bail is refused, a man is deprived of his personal liberty, which is of too precious a value under our constitutional system, recognized by articles 19, 21 and 22. It is a great trust exerciseable not casually, but judicially with lively concern in the interest of the individual and community. After all, personal liberty of an accused or convict, which is fundamental in nature can be lawfully eclipsed only by a procedure established by law as provided by article 21.”

While exercising the judicial discretion and imposing the bail conditions magistrate has to think judicially as remarked by the SC judge Justice Goswami, speaking for the Supreme Court has observed “We may repeat the two paramount considerations viz. likelihood of the accused fleeing from justice and his tampering with prosecution evidence relate to ensuring a fair trial of the case in a Court of Justice. It is essential that due and proper weight should be bestowed on these two factors apart from others. There cannot be an inexorable formula in the matter of granting bail. The facts and circumstances of each case will govern the exercise of judicial discretion in granting or cancelling bail”²³

The inevitable result which may be arised from the judicial decisions of the constitutional courts is that while exercising the discretion given to the judges in bail matters, the court should be conscious of the object to keep the person in judicial custody pending trial or disposal of the appeal.” The accused person should be admitted to bail wherever practicable unless judge find strong grounds for supposing that such person would not appear in trial. It thus submitted that bail is not to be withheld as a punishment but that the requirements as to bail are merely to secure the attendance of the accused at trial to take the judgement and serve the sentence if court punishes him in future. Thus it is not exaggeration in saying that citizen's liberty should receive paramount consideration in all situations and the discretionary power of the judge should always be correlated to the values of the constitution of India.” This is also not stated in any other way. The outcome will surely be focused in the desired level.

V. Law Commission Report Regarding Bail in India

The law commission is a body which make recommendations over the need of changes in the laws and also advises to the government through ministry of law and justice for the need of new laws to be enacted by the parliament. “Based on the recommendations of the Law Commission in its 41st Report on the Code of Criminal Procedure²⁴ – 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, are changing pattern of crimes, arbitrariness in exercising judicial discretion while granting bail are compelling reasons to examine the issue of bail and to chart a roadmap for further reform. The Department of Legal Affairs, Ministry of Law and Justice, Government of India, vide its letter dated 11.09.2015 forwarded a note from the Minister of Law and Justice dated 01.09.2015, on the need for a Bail Act in India.” The Department made a reference to the Law Commission “to examine the desirability of having a separate Bail Act, keeping in view the similar provisions in the United Kingdom and other countries.”

For instance

“**Under s. 4 of the Bail Act 1976 of UK**, on each occasion that a person is brought before a court accused of an offence, or remanded after conviction for enquiries or a report, he must be granted bail without condition, if none of the exceptions to bail apply.

²¹ Cardozo, The Nature of Judicial Process (1921)

²² GudikantiNarasimhulu v. Public Prosecutor, A.I.R. 1978 S.C. 429

²³ Gurcharan Singh v. State, (1978) 1 S.C.C. 118 at 12

²⁴ 41st Law Commission Report, 1969, The Code Criminal Procedure, 1898, Vol. I.

Prosecutors must keep the issue of bail under review throughout the life of the case.

Conditions of bail may only be imposed where necessary to ensure that the exceptions to bail are addressed. Only where conditions are not sufficient to address the exceptions to bail should a remand in custody be sought.” This section deals with the bail provision which is dealt with by the separate law which help the court in strictly focusing on the bail aspect as a matter of right.

“**Under s. 5 of the Bail Act 1976 of UK**, the court or officer refusing bail or imposing conditions must give reasons for their decision.”

However, the Law Commission vide letter dated 21.12.2016 was referred to achieve the objective by bringing necessary changes in the existing provisions of the Cr.P.C.

VI. Conclusion

The inevitable result which may be arised from the judicial decisions of the constitutional courts is that while exercising the discretion given to the judges in bail matters, the court should be conscious of the object to keep the person in judicial custody pending trial or disposal of the appeal. The accused person should be admitted to bail wherever practicable unless judge find strong grounds for supposing that such person would not appear in trial. It thus submitted that bail is not to be withheld as a punishment but that the requirements as to bail are merely to secure the attendance of the accused at trial to take the judgement and serve the sentence if court punishes him in future. Thus it is not exaggeration in saying that citizen’s liberty should receive paramount consideration in all situations and the discretionary power of the judge should always be correlated to the values of the constitution of India.

The provision of bail may be limited to the chapter XXXIII of the criminal procedure code but the constitutional mandate compels the courts to interpret the sections of the bail in more liberal manner. The delay in deciding the bail applications and other ancillary matters of bail is also a matter of great concern. The person which is accused in an offence and denied bail but when undergoing trial for years and court comes out with a decision concluding him not guilty is cheating on the constitutional rights which are given to all. When the citizen is not able to enjoy the most basic fundamental right then the state being welfare state is a big lie on the face of the citizens.