RIGHT TO BAIL VS. PERSONAL LIBERTY

ABSTRACT

Krishna Iyer J., remarked that the subject of bail-

" ..... belongs to the blurred area of 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 sensitised judicial process.[1]

It is precisely this much needed jurisprudence of bail is discussed in the article in the light of the personal liberty of a person and its value in view of Indian constitutional system and interpretations given by the judiciary. An attempt is made to explore the varied dimensions of the concept of bail as a right in tune with the emerging trend of human rights jurisprudence. Further the article addresses major issues that crept in to the criminal justice administration system by giving overemphasis to the human rights.

INTRODUCTION

Conceptually bail continues to be understood as a right for assertion of freedom against state imposed restraints. The rationale behind detention of an accused in prison is primarily to secure his appearance at the time of trial being available to receive sentence in case found guilty. If his presence at the trial could be reasonably ensured other than by his detention, it would be unjust and unfair to deprive the accused of his personal liberty during pendency of criminal proceedings. One of the ways to prevent unnecessary deprivation of the liberty of an accused is 'bail'.

Bail though primarily a legal term has hailed usage both by law men and lay men. However, it has not been statutorily defined. In its literally meaning, the expression 'bail' denotes a security

[1] Gudikanti Narasimhulu V. Public Prosecutor, AIR 1978 SC 430.

for appearance of a prisoner for his release. Etymologically, the word is derived from an old French verb "*bailer*" which means to "*giv*e" or "*to deliver*".

Blackstone observed on bail:

"the *intent of the arrest being only to compel an appearance in court at the return of the writ, that purpose is equally answered. whether the Sheriff detains his person, or takes sufficient security for his appearance, called bail... because the defendant is bailed. or delivered to his sureties. upon their giving security for his appearance: and is supposed to continue in their friendly custody instead of going to gaol*."[2]

Bail may thus be regarded as a mechanism whereby the state devolves upon the community the function of securing the presence of the prisoner and at the same time involves participation of the community in administration of justice.

DEVELOPMENT

Under the English law. the operational mode for interim release of an accused was that a surety had to be bound to produce the accused to stand his trial on the day appointed for such trial. If the accused failed to appear as stipulated, then the surety himself would stand trial in his place. The law of bail subsisted and emanated from the courts' concern and obligation towards the King's Peace which theoretically had been intolerant of any disturbance being caused to the public or to interests of the sovereign.

In India, the concept is traced back to ancient Hindu jurisprudence which required an expedient disposal of disputes by the functionaries responsible for administration of justice. No leniency could be afforded in the matter as it necessitated penalties on the functionaries. Thus the system took care to ensure that an accused person was not unnecessarily detained or incarcerated and indeed developed practical modes both for securing the presence of a wrongdoer as well as to spare him of undue strains on his personal freedom.

During Mughal reign, the Indian legal system devised an institution of bail wherein the arrested person was released on furnishing a surety. The advent of British rule in India saw gradual adaptation of the principles and practices known to British prevalent under common law.

[2] Sir William Blackstone's, Commentaries on the Laws of England. Vol. 111.290 (London. 1844).

During British period, criminal courts used two well understood and well defined forms of bail namely Zamanat and Muchalka for release of a person in custody. Under Muchalka, the release could be effected on a solemn engagement or a declaration in writing which was obligatory in nature. In strict sense, it was a penal bond generally taken from inferiors by an act of compulsion. Under Zamanat, the judicial release was made on a security with sureties known as *zamins,* where the sureties became answerable for the accused on the basis of a written deed deposited with the trial court.

On the adoption of the UN Declaration of Human Rights of 1948, the concept of bail formally pierced into the arena of personal liberty. Articles 9, 10 11 (1) of the Universal Declaration of Human Rights, 1948 deals with protection of the persons from arbitrary arrest, their right for a fair public hearing and the principle of presumption of innocence until proved guilty.

The constitutional bulwark of the concept of bail under UN Declaration of Human Rights of 1948 is to be found in Article 21 of the Constitution of India, 1950 which also subsumes the spirit of clause 12 of the Magna Carta. Accordingly, an application for bail in principle meant invoking a process for one's right to the safety of life and limb as well as for insulating oneself against the depredations of authority upon enjoyment of one's personal liberty. Right to bail mandated to function in a manner that the constitutional equilibrium between the freedom of person and the interests of society are maintained effectively.

The form and contents of the British institution of bail was statutorily transposed into Indian legal system by the passing of Code of Criminal Procedure in 1861 followed by its re-enactment in 1872 and 1898 respectively. Its latest reflection is the improved version of the provisions relating to bail in the Code of CriminaI Procedure, 1973 which were preceded by the adoption of the Constitution in 1950 and some recommendations of the Law Commission brought out in the 41st Report in 1969.

Law Commission specified that bail is considered as matter of right only in a bailable offence and in a non bailable offence, the granting of bail is matter of discretion. Further it was stated that bail is not to be granted if the offence is punishable with death or imprisonment for life. The Commission granted discretion to Sessions Courts and High Courts to order release of a person in limited cases. In order to blunt the effect of deprivation of liberty for alleged commission of serious offences carrying severe penalty up to seven years of imprisonment, the Commission innovated the rule that courts be vested with power to grant bail by imposing

necessary conditions to ensure presence of a released person as well as to ensure that the accused does not engage himself in acts which may again involve him in similar accusations.

Streamlining of the law on bails was set up in the framework of basic principles of personal liberty with the purpose that these are minimally affected and a flexible mechanism adopted to secure interests of the society through an exercise of judicial discretion.

BAIL AND PERSONAL LIBERTY

The requirement of the law to enlarge a person on bail is an expressive concern towards the right of an accused to enjoy his personal liberty. A direction on the surety to produce the accused for purposes of fulfilling his obligation to the court and to accomplish the objective of the law to determine the liability of person so released is meaningful in terms of 'public interest'. Implicit in the meaning of bail is also the use of a technique evolved for effecting a symbiosis between these two co-equal values. Accordingly, judicial activism cannot spare itself from engaging in the exercise of striking a balance between the two since both has to co-exist. In this scenario, bail means to set at liberty a person arrested or imprisoned, or security being taken for his appearance on a day at a place certain because the party arrested or imprisoned is delivered into the hands of those who bind themselves or become bail for his due appearance when required, in order to that he may be safely protected from prison .[3]

Thus, protection of the prisoner and his liberty is given equal emphasis along with the requirement of his being brought to trial. The principal aim of bail is removal of restrictive and punitive consequences of pre-trial detention of an accused and the same is achieved by delivering him to the custody of his surety who may be a third party. In some cases, such custody may also be given to one's own self by way of furnishing a bond by the accused himself that he will attend the court when he is directed to.

It is an obligation of law enforcement agencies that if a criminal process is initiated by the alleged action of a wrong-doer, it is to be accomplished. Accordingly, the grant of bail for release may be allowed with appropriate conditions which result in the situations, (a) where the custody is deemed safe with the accused himself, (b) where it is delivered to the surety, (c) where it may be delivered to the state for safe custody. In all these cases, the common condition

[3] Venkatarmaiya's, Law Lexicon. Vol. I. 13 (1971).

attached is that the person released on bail will be brought before the court on demand. The mechanism of bail is thus meant for manoeuvring a best arrangement for custodial control of the accused in the system.

Right to bail is concomitant of the accusatorial system 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.

Article 21 of the Constitution is said to enshrine the most important human rights in criminal jurisprudence. The Supreme Court had for almost 27 years after the enactment of the Constitution taken the view that this Article merely embodied a facet of the Diceyian concept of the rule of law that no one can deprived of his life and personal liberty by the executive action unsupported by law.

In the case of *Hussainara Khatoon v. State of Bihar*, [4] the Hon'ble Supreme Court was brought to the notice of the facts that under trial prisoners formed 80 percent of Bihar's prison population and in some cases their period of imprisonment ranged from a few months to ten year even it exceeded the period of imprisonment prescribed for the offences they were charged with. Justice Bhagwati found that these unfortunate under trials languished in prisons not because they were guilty but because they were too poor to afford a bail. Following judgment in *Maneka Gandhi v. Union of India*,[5] Justice Bhagwati read into fair procedure envisaged by Article 2, the right of speedy trial and sublimated the bail process to the problems of the destitute. Further the release of persons whose period of imprisonment exceeded the period of imprisonment for their offences were ordered to be released. The Court further noted the failure of the magistrates to respect Section 167(2) of Cr.P.C. which entitles an under trial to be released from prison on expiry of 60 days or 90 days as the case may be.

The Apex Court once again in *Mantoo Majumdar v. State of Bihar,*[6] upheld the under trials' right to personal liberty and ordered the release of the petitioners on their own bond without sureties as they had spent six years awaiting their trial in prison. The travails of illegal detainees

[4] Hussainara Khatoon v. State of Bihar, AIR 1979 SC 1360.
[5] Maneka Gandhi v. Union of India, [1978] 2 SCR 621.
[6] Mantoo Majumdar v. State of Bihar, AIR 1980 SC 847.

languishing in prisons who were uninformed or too poor to avail of their right of bail was further brought to light in letters written to Justice Bhagwati by the *Hazaribagh Free Legal Aid Committee in Veena Sethi v. State of Bihar,*[7] and *Sant Bir v. State of Bihar*.[8] The court recognized the inequitable operation of the law and condemned it:

"The rule of law does not exist merely for those who have the means to fight for their rights and very often for perpetuation of status quo… but it exists also for the poor and the downtrodden… and it is solemn duty of the court to protect and uphold the basic human rights of the weaker section of the society. Thus having discussed various hardships of pre-trial detention caused, due to unaffordability of bail and unawareness of their right to bail, to under trials and as such violation of their right to personal liberty and speedy trial under Article 21 as well as the obligation of the court to ensure such right. It becomes imperative to discuss the right to bail and its nexus to the right of free legal aid to ensure the former under the Constitution- in order to sensitize the rule of law of bail to the demands of the majority of poor and to make human rights of the weaker sections a reality."

The right to free legal assistance is an essential element of any reasonable, fair and just procedure for a person accused of an offence and it must be held implicit in the guarantee of Article 21. Hence the right to bail which is inextricably fitted into the constitutional scheme in the context of criminal jurisprudence contained in Articles 21 is also linked to Article 39A of the Constitution which directs the State to provide free legal aid. However, this being only a Directive Principle of State Policy which lays down only an obligation on the State not enforceable in court of law does not confer a constitutional right on the accused to secure free legal assistance. However, the Supreme Court filled up this constitutional gap through creative judicial interpretation of Article 21 following *Maneka Gandhi's* case.

The Supreme Court held in *M.H. Hoskot v. State of Maharashtra* [9] and *Hussainara Khatoons* case that a procedure which does not make legal services available to an accused person who is too poor to afford a lawyer and who would, therefore go through the trial without legal assistance cannot be regarded as reasonable, fair and just. It is essential ingredient of reasonable, fair and just procedure guaranteed under Article 21 that a prisoner who is to seek his liberation through the court process should have legal services made available to him.

[7] Hazaribagh Free Legal Aid Committee in Veena Sethi v. State of Bihar, AIR 1983 SC 339.
[8] Sant Bir v. State of Bihar, AIR 1982 SC 1470.
[9] M.H. Hoskot v. State of Maharashtra, AIR 1978 SC 1548.

Hence it is clear that it is the constitutional right of every accused person who is unable to engage a lawyer and secure legal services on account of reasons such as poverty, indigence or incommunicado situation and the State is under a mandate to provide a lawyer to an accused person if the circumstances of the case and the needs of justice so require.

DIVAGATE SCENARIO

The mechanism of providing bail to an arrested person is thus based on the twin principles of securing the presence of any accused in a criminal trial as well as to place only a minimum restraint on the freedom of the accused. The extended emphasis on the individual freedom, which has grown as a result of conscious assertion of human rights in recent years, has posed some problems having a direct bearing on the law and practice of bail. This has in turn led the criminal law administration agencies to face some responsibilities not within their traditional command. It is factual that while the value of individual freedom cannot be minimised, it is also necessary to consider to what extent the freedom of an accused can be regulated within the bail system in the interest of criminal justice. In actual practice, serious deviations are reported affecting credibility and utility of the bail system. There has also been a noticeable trend of bail jumping.

In the operation of the system of bail some professional bondsmen or sureties have emerged as an adjunct to the processes of criminal justice. These professional bondsmen readily volunteer to furnish sureties for an accused and receive payment for such "services". The availability of such professional sureties on payment of a certain percentage of the bail amount brings in corruption and abuses the process of bail in myriad ways. The mode of verifying the credibility of sureties like their character, status and property has always been perfunctory. The courts are engaged in judicial work and have very little time to pay attention to supervisory duties in this regard. Furthermore, court officials are often under blame for colluding with interested parties in getting necessary legal formalities pushed up. It enables the questionable sureties to get acceptance for expeditious release of the accused.

There are other issues which contribute towards confusion about the utility of the system of bail in criminal cases. One such factor is the malpractices prevailing extensively amongst law enforcement agencies which in turn was already brought to the notice by the National Police Commission. The abuse of criminal law has been a sequel to these malpractices, which in turn have created greater sensitivity towards human rights. This trend is a healthy development in

our constitutional system for reinforcing personal liberties of an individual. Working of the general law and its administration is now being compared with the standards of human rights jurisprudence. It has an impact because considerable emphasis on personal liberty by higher judiciary has largely come out in the nature of a repercussion towards the inconsideration shown by authorities to an individual in the course of law enforcement. Its effect has provided a justification for having a fresh look on the working of the bail system and the anomalies if any caused to it. The necessary stability in the system can be produced only with a better political understanding of the system by the police and the public. The abhorrent practices which have crept in may also warrant for a frontal attack both administratively and by legislation in order to redeem the institution of bail.

REQUISITE FOR BALANCING

Obsessive pleas for personal liberty are often being made while seeking release of an accused in pre-trial cases. This approach is in keeping with the growing awareness about individual rights and conscious assertion to protect them. The global march of human rights movement and the country's accountability in various UN fora for having adopted civilised standards, imperatively require the need to keep a watchful eye on such actions and behaviour of government agencies that tend to erode basic human dignity. Since the instances of unlawful and arbitrary actions being numerous, the increased sensitivity towards the personal freedom and emphatic judicial pronouncements thereon have accorded further legitimacy to assertion of human rights. The wave of human rights jurisprudence has also been due to excessive police high handedness in effecting indiscriminate arrests as well as an extreme callousness shown towards under-trial prisoners together with the abuse of criminal process for corrupt gains and the like.

However, any elated enthusiasm to view the aspect of human rights alone may have a tendency to rob the efficacy of measures designed for social protection. The institution of bail also seeks to serve it. The incidental impact of human rights jurisprudence on the legal plane of social defence as contained in the procedural and substantive criminal law is inevitable until the administration itself undertakes to eliminate anomalies which make inroads into the working of criminal judicial administration. An elimination of these anomalies is also necessary for enabling the existing system of release on bail to respond properly to needs of administration of criminal law and justice. Further the use of police power is considerably abused. The present

trend of the police is to make indiscriminate arrests in the course of investigation which creates unnecessary annoyance and harassment to arrested persons and their families.

Threats emanating from authorities are necessarily to be countered by the judiciary. In the wake of meeting evil challenges from guardians of social defence, the courts resort to the theme of human rights and put a check on the use of their power. This in turn has an effect of diluting legal processes of arrest and remand. The controls on regulated freedom of the accused also get loosened. All those add to the discomfort of an honest police professional, while it makes hard-core of criminals gleeful. Any approach to the problems of criminal justice pivoted on the human rights, if moved merely by the plight of oppressed and poverty stricken humanity of this country may well be conducive to samaritanism; but it will not be consistent with community interests in containing criminality. The gains achieved by the community on the front of personal liberty get generally distributed as dividends amongst dangerous depredators at the cost of social interests. In the context of bail, it has been found that the poorer sections of the society are generally unable to avail of the benefits. It is an irony that to avail his freedom the less resourceful accused is fleeced of his moneys by touts and the professional sureties prowling around courts.

The well-intentioned approach of human rights jurisprudence has unfortunately activated the functioning of extra-legal institution of professional sureties to operate as some kind of a lobby for exchange of prisoners with the courts. In this way the basic purpose of ensuring the safe custody of an accused is frustrated and operation of the bail system gets bereft of its utility in the scheme of administration of criminal justice.