pISSN: 2454-7107, eISSN: 2455-4189

Indian Journal of Law and Human Behavior
Volume 9 Number 1 / January - June 2023
DOI: http://dx.doi.org/10.21088/ijlhb.2454.7107.9123.2

Original Article

An Overview of Bail Jurisprudence in India with Special Reference to Article 21 of the Constitution of India

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How to cite this article:
Rajeev Kumar Singh, Aparna Singh/ An Overview of Bail Jurisprudence in India with Special Reference to Article 21 of the Constitution of India/Indian J Law Hum Behav 2023;9(1):17-28.

Abstract

The law safeguards need to dovetail two clashing requests, on one hand, the necessities of the public for being protected from the dangers of being presented to the misfortunes of a man asserted to have carried out a wrongdoing; and on the other, the major ordinance of criminal statute. The assumption of purity of a charged, till he is discovered blameworthy. Keeping in mind the end goal, the Legislature in its intelligence has given exact bearings for giving safeguard.

Before determining the place of bail within human rights framework as conferred by the Constitution, it is important to examine the object and meaning of bail, such that an analysis of these fundamental objects and change therein may reveal a change. The object detention of an accused person is primarily to secure her/his appearance at the time of trial and is available to receive sentence, in case found guilty. If his/her presence at the trial could be reasonably ensured other than by his arrest or detention, it would be unjust and unfair to deprive the accused of his liberty during pendency of criminal proceedings.Thus, it is important to note the relevant provisions enshrined in the Universal Declaration of Human Rights in Article 9, 10, 11(1).

Keywords: Deprivation of Liberty; Clashing requests; Human Rights; Safeguard; Categorization of offences; Want of Justice.

INTRODUCTION

Bail in India

In the beautiful expressions of Krishna Iyer J....The subject of safeguard:

"Fits in with the obscured zone of criminal equity framework and to a great extent relies on the hunch of the seat, generally called legal attentiveness. The Code is enigmatic on this theme and the Court wants to be implicit, be the request custodial or not. But the issue is one of freedom, equity, open wellbeing, and weight of open treasury all of which demand that a created statute of safeguard is vital to a socially sharpened legal procedure."

Along with these lines it is expressed,where there are no dangers included in the arrival of the captured individual it would be brutal and uncalled for, to deny him safeguard.

Criminal Procedure Code, 1973 does not define bail, although the terms bailable offense and non-

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Received on 21-02-2023 **Accepted on** 26-04-2023

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bailable offense have been defined in section 2(a) Cr.P.C. as follows: "Bailable offense means an offense which is shown as bailable in the First Schedule or which is made bailable by any other law for the time being enforce, and non-bailable offense means any other offense". That schedule refers to all the offenses under the Indian Penal Code and puts them into bailable and on bailable categories. The analysis of the relevant provisions of the schedule would show that the basis of this categorization rests on diverse consideration. However, it can be generally stated that all serious offenses, i.e., offenses punishable with imprisonment for three years or more have seen considered as non bailable offenses.

Further, Sections 436 to 450 set out the provisions for the grant of bail and bonds in criminal cases. The amount of security that is to be paid by the accused to secure his release has not been mentioned in the Cr.P.C. Thus, it is the discretion of the court to put a monetary cap on the bond.

Indian Courts,however,have greater discretion to grant or deny bail in the case of persons under criminal arrest, e.g., it is usually refused when the accused is charged with homicide.

It must be further noted that a person accused of a bailable offenses is arrested or detained without warrant he has a right to be released on bail. But if the offense is non-bailable that does not mean that the person accused of such offense shall not be released on bail: but here in such case bail is not a matter of right, but only a privilege to be granted at the discretion of the court Provisions under the Code of Criminal Procedure, 1973.

The Code of Criminal Procedure, 1973, makes provisions for release of accused persons on bail. Section 436 of the Code provides for release on bail in cases of bailable offenses.[1]

Section 436 (1) of the Code signifies that release on bail is a matter of right, or in other words, the officer-in-charge of a police station or any court does not have any discretion whatsoever to deny bail in such cases. The word" appear in this sub-clause is wide enough to include voluntary appearance of the person accused of an offense even where no summons or warrant has been issued against him. There is nothing in Sec. 436 to exclude voluntary appearance or to suggest that the appearance of the accused must be in the obedience of a process issued by the court. The surrender and the physical presence of the accused with the submission to the jurisdiction and order of the court is judicial custody, and the accused may be granted bail and released from such custody.

The right to be released on bail under Sec. 436(1) cannot be nullified indirectly by fixing too high amount of bond or bail bond to be furnished by the person seeking bail. Section 440(1) provides the amount of every bond executed under this chapter shall be fixed with due regard to the circumstances of the case and shall not be excessive. Further S. 440(2) empowers the High Court, or the Court of Sessions may direct that the bail required by a police officer or Magistrate be reduced.

Sub-section (2) of Sec. 436 makes a provision to effect that a person who absconds or has broken the condition of his bail bond when released on bail is a bailable case on a previous occasion, shall not as of right to be entitled to bail when brought before the court on any subsequent date even though the offense may be bailable.

The Supreme Court in Maneka Gandhi v. Union of India[2] "The amount of the bond should be determined having regard to these relevant factors and should not be fixed mechanically according to a schedule keyed to the nature of the charge. Otherwise, it would be difficult for the accused to secure his release even by executing a personal bond, it would be very harsh and oppressive if he is required to satisfy the court and what is said in regard to the court must apply equally in relation to the police while granting bail that he is solvent enough to pay the amount of the bond if he fails to appear at the trial and in consequence the bond is forfeited. The inquiry into the solvency of the accused can become a source of great harassment to him and often resulting denial of bail and deprivation of liberty and should not, therefore, be insisted upon as a condition of acceptance of the personal bond."

It also stated that there is a need to provide by an amendment of the penal law that if an accused willfully fails to appear incompliance with the promise contained in his personal bond, he shall be liable to penal action. J. Per Bhagwati & Koshal, JJ. further observed that it is now high time that the State Government realized its responsibility to the people in the matter of administration of justice and set up more courts for the trial of cases.

The court also emphasized In Moti Ram & Others. v. State of M.P.[3] "Urgent need for a clear and explicit provision in the Code of Criminal Procedure enabling the release, inappropriate cases, of an under trial prisoner on his bond without sureties and without any monetary obligation."

Criminal courts today, are extremely

unsatisfactory and needs drastic change. In the first place it is virtually impossible to translate risk of non-appearance by the accused into precise monetary terms and even its basic premise that risk of financial loss is necessary to prevent the accused from fleeing is of doubtful validity. There are several considerations which deter an accused from running away from justice and risk of financial loss is only one of them and that too not a major one. In this case the court also pointed out the enlightened Bail Projects in the United States such as Manhattan Bail Project and D. C. Bail Project shows that even without monetary bail it has been possible to secure the presence of the accused at the trial in quite a large number of cases.

The Court has laid down following guidelines that determine whether the accused has his roots in the community which would deter him from fleeing; the Court should consider the following factors concerning the accused:

1. The length of his residence in the community.
2. His employment status, history and his financial condition.
3. His family ties and relationships.
4 His reputation, character, and monetary condition.
5. His prior criminal record including any record or prior release on recognizance or on bail.
6. The identity of responsible members of the community who would vouch for his reliability.

The nature of the offense charged and the apparent probability of conviction and the likely sentence in so far as these factors are relevant to the risk of nonappearance, and If the court is satisfied on a consideration of the relevant factors that the accused has his ties in the community and there is no substantial risk of non-appearance, the accused may, as far as possible, be released on his personal bond.

However, if facts are brought to the notice of the court which go to show that having regard to the condition and background of the accused his previous record and the nature and circumstances of the offense, there may be a substantial risk of his non-appearance at the trial, as for example, where the accused is a notorious bad character or confirmed criminal or the offense is serious (these examples are only by way of illustration), the court may not release the accused on his personal bond and may insist on bail with sureties. But in the majority of cases, considerations like family ties and relationship, roots in the community, employment status etc. may prevail with the court in releasing the accused on his personal bond and particularly in cases where the offense is not grave and the accused is poor or belongs to a weaker section of the community, release on personal bond could, as far as possible, be preferred.

The new provision Section 436 A was introduced in order to solve the problems of undertrials' who were languishing in jails as they will now be given an opportunity to be set free instead of endlessly waiting for their trial to take place. This move has been made due to a faulty criminal justice system and provides a makeshift method of providing justice and relief to undertrial prisoners. This seems to suggest that the Legislature and the Government have accepted the existence of the faulty system and their inability to do anything about it. For this purpose, Section 436 A was inserted.

According to S. 436-A, a person who has undergone detention for a period extending up to half of the maximum period of imprisonment imposed for a particular offense, shall be released on her/his personal bond with or without sureties. The procedure provided is that the Court has to hear the Public Prosecutor and give its decision with reasons in writing. The Court may release the applicant, or if not satisfied may order for the continued detention of the applicant. However, no prisoner can be detained for a period longer than the maximum period of imprisonment provided. The exception to the section is that it is not applicable to offenders who have been sentenced to death.

Moving onto the demerits of the provisions itself, S. 436-A gives discretion to the Court to set the prisoner free or to make him/her continue imprisonment. There is no mention of any applications having to be filed under the section. The first part of the section states that any prisoner who has served more than half the term of his/her imprisonment 'shall' be released. However, the proviso puts a restriction on the mandatory provision by giving discretionary powers to the courts. This raises questions regarding the implementation of the provision. There is every chance that a prisoner may be sent back to jail to serve a period longer than the half term of his/her sentence. Till the Judges give their written reasons for the same, one will not know on what grounds a continuation of the term can be ordered as the section does not provide any guidelines.

Granting of bail with conditions:

Section 437 of the Code provides for release on

bail in cases of non-bailable offenses. In such cases, bail is not a matter of right. Court has sufficient discretion to deny or to grant bail. First Schedule to the Code provides the list of bailable and non-bailable offenses. Further cases often arise under S. 437, where though the court regards the case as fit for the grant of bail; it regards imposition of certain conditions as necessary in the circumstances.

To meet this need sub-section (3) of Sec. 437 provides:

When a person accused or suspected of the commission of an offense punishable with imprisonment which may extend to seven years or more or of an offense under Chapter VI, Chapter XVI or Chapter XVII of the Indian Penal Code (45 of 1860) or abatement of, or conspiracy or attempt to commit, any such offense, is released on bail under sub-section (1), the Court may impose any condition which the Court considers necessary:

(a) In order to ensure that such person shall attend in accordance with the conditions of the bond executed under this Chapter.

(b) In order to ensure that such person shall not commit an offence similar to the offence of which he is accused or of the commission of which he is suspected.

(c) Otherwise in the interests of Justice.

It will be noticed that:

1 The power to impose conditions has been given to the court and not to any police officer

2 The power to impose conditions can only be exercised:

(i) Where the offence is punishable with the imprisonment which may extend to seven years or more.

(ii) Where the offence is one under Chapter VI (Offences against the State), Chapter XVI (offences against the human body), or Chapter XVII (offences against the property) of I.P.C.

iii) Where the offence is one of the abetments of or conspiracy to or attempt to commit any such offence as mentioned above in (i) and (ii).

Imposition of conditions:

Section 437 of the Code of Criminal Procedure empowers the Court to impose conditions at the time of granting bail. The Court may, while granting bail to a person, ask him to surrender his passport as stated in *Hazarilal vs. Rameshwar Prasad*.[4] The accused cannot be subjected to any condition which is not pragmatic and is unfair. It is the duty of the Court to ensure that the condition imposed on the accused is in consonance with the intendment and provisions of the sections and not onerous. Under Section 437(3) the Court has got the discretion to impose certain conditions, on the person accused or suspected of the commission of an offence punishable with imprisonment, such as:

(a) That such person shall attend in accordance with the conditions of the bond executed.

(b) That such person shall not commit an offence like the offence of which he is accused, or suspected, of the commission of which he is suspected.

(c) That such person shall not directly or indirectly make any inducement, threat, or promise to any person acquainted with the facts of the case to dissuade him from disclosing such facts to the Court or to any police officer or tamper with the evidence.

The Court may also impose, in the interests of justice, such other conditions as it considers necessary. To make the provision stringent and to see that the person on bail does not interfere with the investigations or intimidate witnesses, sub-section (3) has been amended to specify certain conditions[5], which carry mandatory effect. The conditions as such imposed at the time for granting bail have to be reasonable. The Hon'ble Supreme Court in the matter of *Sumit Mehta vs. State of NCT of Delhi*[6] *held,* "The words 'any condition' used in the provision should not be regarded as conferring absolute power on a Court of law to impose any condition that it chooses to impose. Any condition has to be interpreted as a reasonable condition acceptable in the facts permissible in the circumstance and effective in the pragmatic sense and should not defeat the order of grant of bail." In the said case, the Apex Court set aside the decision of High Court of Delhi wherein the Bail Applicant was directed to deposit an amount of Rs. 1,00,00,000/- (One Crore) in fixed deposit in the name of the complainant in the nationalized bank and to keep the FDR with the Investigating Officer.

The Hon'ble Supreme Court in the matter of *Sheikh Ayub vs. State of M.P.*[7], while adjudicating upon the reasonability of the imposed bail conditions held, "By the impugned order, the Appellant was granted bail and directed to deposit Rs.2,50,000/- which is alleged to be the amount appropriated by the Appellant. There was also condition for furnishing

surety bond for Rs. 50,000/-. In the circumstances of the case, direction to deposit Rs. 2,50,000/- was not warranted, as part of the conditions for granting bail." The onus is upon the Court to consider the entire facts and circumstances of the case before imposing the conditions for granting the bail. The Apex Court in the matter of *Ramathal and others vs. Inspector of Police and Another*[8], held that the High Court of Punjab and Haryana, had not considered the entire facts of the case in proper perspective while adjudicating, since the conditions imposed by the High Court asking the applicant to deposit a sum of Rs. 32,00,000/- (Thirty Two Lacs) was unreasonable and onerous, and beyond the means and power of the appellants, hence and the matter was remitted back to the High Court.

Cancellation of bail

According to S. 437(5) any court which has released a person on bail under (1) or sub sec (2) of S. 437 may if considers it necessary so to do, direct that such person be arrested and committed to custody.

The power to cancel bail has been given to the court and not to a police officer. Secondly, the court which granted the bail can alone cancel it. The bail granted by a police officer cannot be cancelled by the court of a magistrate. For cancellation of bail in such a situation, the powers of the High Court or Court of Session under S. 439 will have to invoke. Rejection of bail when bails applied for is one thing; cancellation of bail already granted is quite another. It is easier to reject a bail application in non-bailable cases than to cancel a bail granted in such case. Cancellation of bail necessary involves the review of a decision already made and can large be permitted only if, by reason of supervening circumstances it would be no longer conducive to a fair trial to allow the accused to retain his freedom during the trial. However, bail granted illegal or improperly by a wrong arbitrary exercise of judicial discretion can be cancelled even if there is absence of supervening circumstances. If there is no material to prove that the accused abused his freedom court may not cancel the bail.

In *Public Prosecutor v. George Williams*[9] The Madras High Court pointed out five cases where a person granted bail may have the bail cancelled and be recommitted to jail:

(a) Where the person on bail, during the period of the bail, commits the very same offence for which is being tried or has been convicted, and thereby proves his utter unfitness to be on bail.

(b) If he hampers the investigation as will be the case if he, when on bail; forcibly prevents the search of place under his control for the corpus delicti or other incriminating things.

(c) If he tampers with the evidence, as by intimidating the prosecution witness, interfering with scene of the offence in order to remove traces or proofs of crime, etc.

(d) If he runs away to a foreign country, or goes underground, or beyond the control of his sureties.

(e) If he commits acts of violence, in revenge, against the police and the prosecution witnessed & those who have booked him or are trying to book him.

The power given by Section 439 for cancellation has no riders. It is a discretionary power. It is not necessary that some new events should take place subsequent to the offender's release on bail for the Sessions Judge to cancel his bail; however, the court usually bases its decision of cancellation on subsequent events. For example, in the case of *Surendra Singh vs State of Bihar 1990, Patna HC*[10] pointed out that a bail may be cancelled on following grounds:

(a) When the accused was found tampering with the evidence either during the investigation or during the trial.

(b) When the accused on bail commits similar offence or any heinous offence during the period of bail.

(c) When the accused had absconded, and trial of the case gets delayed on that account.

(d) When the offence so committed by the accused had caused serious law and order problem in the society.

(e) If the high court finds that the lower court has exercised its power in granting bail wrongly.

(f) If the court finds that the accused has misused the privileges of bail.

(g) When the life of accused itself is in danger.

Considerations at the time of granting bail

At the time of deciding the application seeking bail, the Court should look at the prima facie material available and should not go into the merits of the case by appreciation of evidence. At the time of grant or denial of bail in respect of a non-bailable offence, the primary consideration is the nature and gravity of the offence. While adjudicating bail applications, the Courts should only go into

the question of prima facie case established for granting bail. The Court cannot go into the question of credibility and reliability of the witnesses put up by the prosecution. The question of credibility and reliability of prosecution witnesses can only be tested during the trial. The Hon'ble Supreme Court in the matter of *State of Maharashtra vs. SitaramPopat Vital*[11] has stated few factors to be taken into consideration, before granting bail, namely:

(i) The nature of accusation and the severity of punishment in case of conviction and the nature of supporting evidence.

(ii) Reasonable apprehension of tampering of the witness or apprehension of threat to the complainant.

(iii) Prima facie satisfaction of the Court in support of the charge.

At times certain matters require investigation for the Court to effectively decide upon the bail application, like:

(i) Whether there is or is not a reasonable ground for believing that the applicant has committed the offence alleged against him.

(ii) The nature and gravity of the charge.

(iii) The severity of the punishment which might fall in the particular circumstances in case of a conviction.

(iv) The likelihood of the applicant absconding, if released on bail.

(v) The character, means, standing and status of the applicant.

(vi) The likelihood of the offence being continued or repeated on the assumption that the accused is guilty of having committed that offence in the past.

(vii) The likelihood of the witnesses being tampered with.

(viii) Opportunity of the applicant to prepare his defense on merits.

The Hon'ble Supreme Court in the matter of *Ram Govind Upadhyay vs. Sudarshan Singh and Ors*[12] while considering various factors for grant of bail has analyzed the scenario where the applicant has already been in custody and the trial is not likely to conclude for some time, which can be characterized as unreasonable, but it is not necessary that bail shall be granted. The factors such as, previous conduct and behavior of the accused in the Court, the period of detention of the accused and health, age and sex of the accused also may be considered at the time of grant of bail. The Hon'ble Supreme Court in the matter of *Prahlad Singh Bhati vs. N.C.T. Delhi and Ors*[13], has held that, "the condition of not releasing the person on bail charged with an offence punishable with death or imprisonment for life shall not be applicable if such person is under the age of 16 years or is a woman or is sick or infirm, subject to such conditions as may be imposed." Other relevant grounds which play a vital role in deciding the bail application are the possibility for repetition of crime, the time lag between the date of occurrence and the conclusion of the trial, illegal detention, and undue delay in the trial of the case.

It is essential that the Courts should provide investigating authorities with reasonable time to carry out their investigations. It is equally necessary that the Courts strike a correct balance between this requirement and the equally compelling consideration that a citizen's liberty cannot be curtailed unless the facts and circumstances completely justify it. Upon the literal interpretation of the Section 437 of Code of Criminal Procedure, it is observed that the legislature has used the words "reasonable grounds for believing" instead of "evidence". Thus, the Court has merely to satisfy as to whether the case against the accused is genuine and whether there is prima facie evidence to support the charge.

In the case of *State of Rajasthan v. Balchand (1977)*[14] the Supreme Court declared that the rule is “Bail notjail”. It further stated that denial of bail is therefore an exception, to be exercised only when there are circumstances indicating absconding from justice or thwarting the course of justice or creating other troubles in the shape of repeating offences or intimidating witnesses and the like, by the accused who seeks enlargement on bail.

The Supreme Court, in the matter of *Dataram Singh v. The State of Uttar Pradesh (2018)*[15], has observed that “There is no doubt that the grant or denial of bail is entirely the discretion of the judge considering a case but even so, the exercise of judicial discretion has been circumscribed by a large number of decisions rendered by this Court and by every High Court in the country. Yet occasionally there is a necessity to introspect whether denying bail to an accused person is the right thing to do on the facts and in the circumstances of a case.

While so introspecting, among the factors that need to be considered is whether the accused was arrested during investigations when that person perhaps has the best opportunity to tamper with the evidence or influence witnesses. If the investigating officer does not find it necessary to arrest an accused person during investigations, a strong

case should be made out for placing that person in judicial custody after a charge sheet is filed. Similarly, it is important to ascertain whether the accused was participating in the investigations to the satisfaction of the investigating officer and was not absconding or not appearing when required by the investigating officer. Surely, if an accused is not hiding from the investigating officer or is hiding due to some genuine and expressed fear of being victimized, it would be a factor that a judge would need to consider in an appropriate case. It is also necessary for the judge to consider whether the accused is a first-time offender or has been accused of other offences and if so, the nature of such offences and his or her general conduct. The poverty or the deemed indigent status of an accused is also an extremely important factor and even Parliament has taken notice of it by incorporating an Explanation to Section 436 of the Code of Criminal Procedure, 1973. An equally soft approach to incarceration has been taken by Parliament by inserting Section 436A in the Code of Criminal Procedure, 1973.To put it shortly, a humane attitude is required to be adopted by a judge, while dealing with an application for remanding a suspect or an accused person to police custody or judicial custody."

In the case of *State of UP v. Amarmani Tripathi (2005)* it was held by the Supreme Court that a vague allegation that person accused of an offence may tamper with evidence or witnesses, may not be a ground to refuse bail, if the accused person is of such character that the mere presence at large would intimidate the witnesses or if there is evidence to show that the liberty would be used to subvert the justice or tamper with the evidence then bail will be refused.

In *Prasad Shrikant Purohit v. State of Maharashtra (2018)*[16] the Supreme Court has held, "While considering a bail application, detailed appreciation of the evidence is not required. But the court must find out if there is prima facie evidence in support of charges levelled. Court must also examine the nature and severity of the offence and penal consequences. The court must also consider apprehension of tampering with or threat to witnesses of the complainant".

ANTICIPATORY BAIL

The question is, whether anticipatory bail is limited in its duration and comes to an end on the filing of the charge sheet/summoning of accused, requiring an accused to surrender and obtain regular bail, or once granted, anticipatory bail is valid till the end of trial.[17] Considering the conflicting opinions expressed by different benches regarding the duration of anticipatory bail, a three judge bench of the Supreme Court by a recent judgment dated 15.5.2018 in *Sushila Aggarwal & Ors Vs. State (NCT of Delhi) & Anr,*[18] has referred the issue regarding the duration of anticipatory bail for consideration by a larger Bench.

The following questions came up for consideration by a larger Bench. (1) Whether the protection granted to a person under Section 438 Cr.P.C should be limited to a fixed period so as to enable the person to surrender before the Trial Court and seek regular bail. (2) Whether the life of an anticipatory bail should end at the time and stage when the accused is summoned by the court.

The Hon'ble Court made its observation that the law on the aspect of duration of anticipatory bail became ambiguous only because some judgments were rendered in ignorance of the law authoritatively laid down by the Constitution Bench in Sibbia's case.[19] In view of the clear enunciation of law by the Constitution Bench in Sibbia's case, the judgment in Salauddin's case[20] and the judgments following Salauddin's case are per incuriam as held in Siddharam judgment.[21] The issue having been referred to a larger bench in Sushila Devi's case, until the issue is settled by a larger bench, the dictum of the Constitution Bench holds the field and normally, anticipatory bail is not limited in period of its operation and unless the anticipatory bail is restricted for a limited period, for specific reasons, anticipatory bail shall continue till the end of trial unless revoked or cancelled following the well established principles for cancellation of bail.

BAIL UNDER SPECIAL LAWS

Section 37 of the NDPS Act (The Narcotic Drugs and Psychotropic Substances Act, 1985) provides that every offence under the act is cognizable offence and further no person shall be released on bail for the offences committed under Section 19 or Section 24 or Section 27A and also for offences involving commercial quantity unless the public prosecutor is heard. The accused under this Act may be released on bail, if the court is satisfied that there is no reason to believe the accused is guilty of the offence and further, he will not commit offence while on bail.

The bail provision under NDPS Act (Section 37) reads: "no person accused of an offence punishable for offences under section 19 or section 24 or section 27A and also for offences involving commercial

quantity shall be released on bail or on his own bond unless (i) the Public Prosecutor has been given an opportunity to oppose the application for such release, and (ii) where the Public Prosecutor opposes the application, the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail."

In a recent judgment in *Nikesh Tarachand Shah v. Union of India (2018)*[22], the Supreme Court has struck down the provision of Section 45 of the PMLA,(Prevention of Money Laundering Act) 2002 which provides that no person can be granted bail for any offence under the Act unless the public prosecutor, appointed by the government, gets a chance to oppose his bail; and should the public prosecutor choose to oppose bail, the court has to be convinced that the accused was not guilty of the crime and additionally that accused was not likely to commit any offence while out on bail.

This ruling struck down the clause, which made it virtually impossible to grant bail to the accused person.

Granting bail to the accused, the court observed: "But, so far as second part of Section 37(1)(b)(ii), i.e. regarding the satisfaction of the Court based on reasons to believe that the accused would not commit `any offence' after coming out of the custody, is concerned, this Court finds that this is the requirement which is being insisted by the State, despite the same being irrational and being incomprehensible from any material on record. As held above, this Court cannot go into the future mental state of the mind of the petitioner as to what he would be, likely, doing after getting released on bail. Therefore, if this Court cannot record a reasonable satisfaction that the petitioner is not likely to commit `any offence' or `offence under NDPS Act' after being released on bail, then this Court, also, does not have any reasonable ground to be satisfied that the petitioner is likely to commit any offence after he is released on bail. Hence, the satisfaction of the Court in this regard is neutral qua future possible conduct of the petitioner. However, it has come on record that earlier also, the petitioner was involved in a case, but he has been acquitted in that case. So his antecedents are also clear as of now. Moreover, since this Court has already recorded a prima-facie satisfaction that petitioner is not involved even in the present case and that earlier also the petitioner was involved in a false case, then this Court can, to some extent, venture to believe that the petitioner would not, in all likelihood, commit any offence after coming out of the custody, if at all, the Court is permitted any liberty to indulge in prophesy."[23]

Refusal of bail under the section 37 of the NDPS act is the rule and the grant of the bail is the exception. The whole purpose of enacting the NDPS Act was to curtail the menace of drugs and narcotics trafficking as there are reason to believe that if the accused is released on bail, then they will continue their work of trafficking drugs and narcotics substances in the society and thus create a potential threat.

However, the court can grant bail if there are reasonable grounds to believe that the accused is not guilty of the offence, and he would not indulge in these types of activities when released on bail.

The term 'reasonable grounds' appear very ambiguous and contains discretionary characteristic. The Supreme Court explained the term reasonable ground in the case of *Narcotics Control Bureau vs. Dilip Pralhad Namade (2004)*[24] to mean 'something more than just the prima facie grounds.

The 'reasonable belief' contemplated in the provision requires existence of such facts and circumstances as are sufficient in themselves to justify satisfaction that the accused person is not guilty of the alleged offence, and he is not likely to commit any offence while on bail.

After the TADA and POTA {Terrorist and Disruptive Activities (Prevention) Act and Prevention of Terrorism Act} were repealed, their provisions were incorporated under the UAPA (Unlawful Activities Prevention Act). The Bail provisions under the UAPA were made liberal than those under TADA and POTA as they virtually prohibited the grant of bail to the accused.

Under the UAPA, on moving of the application of bail by the accused, the bail is not straight away denied but the public prosecutor is given notice to be heard and further the bail is denied if the court feels the allegations against the accused are prima facie true. In *Jayanta Kumar Ghosh v. State of Assam (2010)*[25] the Guwahati High Court discussed what 'prima facie true' means. It held that the Court should determine whether the accusations were 'inherently improbable or wholly unbelievable'. Only in such circumstances the person can be released on bail.

Apart from terrorism, economic threat to a country could be enormous and capable to shake the public confidence.

Section 43D of the Unlawful Activities Prevention

Act, 1967 provides that every offence committed under this act is cognizable offence. Under this section the police can detain the accused person for investigation for a period of 90 days. Upon the application by the public prosecutor for increasing detention on the grounds that the investigation is not complete and giving all the details of the investigation, the period can be increased further up to 180 days.

Further under this section, sub section 5 provides that no person accused under this section be released on bail unless the public prosecutor has been given an opportunity of being heard on the application for such release and provided that such accused person shall not be released on bail or on his own bond if the Court, on a perusal of the case diary or the report made under section 173 of the Code is of the opinion that there are reasonable grounds for believing that the accusation against such person is prima facie true.

In the case of Supreme Court Legal Aid Committee representing *Undertrial Prisoners vs. Union of India (1994)*, the Supreme Court has observed, "bail under special legislations remains inconsistent and unpredictable and therefore, raises concerns regarding the violation of Article 21 of the constitution of India with regards to the rights of the accused person." Therefore, under the special Laws proper guidelines should be made so that the bails under special laws don't remain inconsistent and unpredictable.

In *Hussainand Anr. vs Union of India (2017)*[26] Supreme court made its observation in cases of appeals grievances against denial of bail pending trial/appeal where appellants have been in custody for a long period. The appellants contend that, having regard to the long period of custody, they are entitled to bail as speedy trial is their fundamental right under Article 21 of the Constitution. The court summed up as follows:

The High Courts may issue directions to subordinate courts that:

(a) Bail applications must be disposed of normally within one week.

(b) Magisterial trials, where accused are in custody, be normally concluded within six months and sessions trials where accused are in custody be normally concluded within two years.

(c) Efforts must be made to dispose of all cases which are five years old by the end of the year.

(d) As a supplement to Section 436A, but consistent with the spirit thereof, if an undertrial has completed period of custody in excess of the sentence likely to be awarded if conviction is recorded such undertrial must be released on personal bond. Such an assessment must be made by the concerned trial courts from time to time;

(e) The above timelines may be the touchstone for assessment of judicial performance in annual confidential reports.

In the last few years, the country has seen an alarming rise in white collar and financial crimes, which has affected every part of the country's economic structure. These crimes are committed for personal financial gains and are crimes which erode the faith of the public from the system.

According to the latest Law Commission Report 268, there must be stringent conditions for cases of financial and white collar crimes.

It is true that Article 21 is of great importance because it enshrines the fundamental right to individual liberty, but at the same time a balance must be struck between the right to individual liberty and the interest of society. No right can be absolute and reasonable restrictions can be placed on them. The Court, at the time of adjudicating bail applications, after taking such factors into account, is at liberty to impose reasonable conditions to be abided by the applicant.

Right to bail and Article 21 ensuring right to personal liberty:

The 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. The right of police to oppose bail, the absence of legal aid for the poor and the right to speedy reduce to vanishing point the classification of offences into bailable and non-bailable and make the prolonged incarceration of the poor inevitable during the pendency of investigation by the police and trial by a court.

The fact that under trials formed 80 percent of Bihar's prison population, their period of imprisonment ranging from a few months to ten years; some cases wherein the period of imprisonment of the under trials exceeded the period of imprisonment prescribed for the offences

they were charged with- these appalling outrages were brought before the Supreme Court in *Hussainara Khatoon v. State of Bihar.*[27]

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. In *Mantoo Majumdar v. State of Bihar*[28] the Apex Court once again upheld the "under trials right to personal liberty and ordered the release of the petitioners on their own bond and without sureties as they had spent six years awaiting their trial, in prison". The court deplored the delay in police investigation and the mechanical operation of the remand process by the magistrates insensitive to the personal liberty of the under trials, remanded by them to prison.

The travails of illegal detainees languishing in prisons, who were uniformed, or too poor to avail of, their right bail under section 167 Cr.P.C. 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.*[29] 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 exist 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". In order to provide Speedy justice and release on bail the Malimath Committee also recommended the amendment of section 167 CrPC so that the maximum period of 90 days to file charge sheets against an accused be extended by another 90 days. The Malimath Committee also seeks to double the period in remand after which if no charge sheet is filed, the person detained must be released on bail.

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 Constitutionto 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.

State duty to provide right to free legal aid underarticles 21 and 22 read with Article 39 (a) as right to bail:

Article 21 of the Constitution is said to enshrine the most important human rights in criminal jurisprudence. The Supreme Court had observed after the enactment of the Constitution the Article 21 and 22 of the Constitution merely embodied a facet of the Dicey on concept of the rule of law that no one can deprived of his life and personal liberty by the executive action unsupported by law. If there was a law which provided some sort of procedure, it was enough to deprive a person of his life and personal liberty.

In the Indian Constitution there is no specifically enumerated constitutional right to legal aid for an accused person. Article 22(1) does provide that no person who is arrested shall be denied the right to consult and to be defended by legal practitioner of his choice, but according to the interpretation placed on this provision by the Supreme Court *Janardhan Reddy v. State of Hyderabad,*[30] this provision does not carry with it the right to be provided the services of legal practitioners at state cost. Also Article 39-A introduced in 1976 enacts a mandate that the state shall provide free legal service by suitable legislations or schemes or any other way, to ensure that opportunities for justice are not denied to any citizen by reason of economic or other disabilities this however remains a Directive Principle of State Policy which while laying down an obligation on the State does not lay down an obligation enforceable in Court of law and 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*[31] *and Hussainara Khatoon's* 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.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 Article 21 of the Constitution.

Thus the Supreme Court spelt out the right to legal aid in criminal proceeding within the language of Article 21 and held that this is "a 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, provided of course the accused person does not object to the provision of such lawyer."

CONCLUSION

It is no doubt that prolonged detention in prison of under trials before being brought to trial is an affront to all civilized norms of human liberty and any meaningful concept of individual liberty which forms the bedrock of a civilized legal system.Under Section 12 of the Legal Services Authorities Act, 1987, all persons in custody are entitled to legal aid. However, the system of providing representation to those in custody is not uniform across the country. The frequency of visits by jail visiting lawyers to the jails is also not standardized with lawyers visiting only once a month in some places while at others, they may visit twice a week. The jail visiting lawyers are often not clear what is expected of them to do. Clearly the system of interaction with the inmates in jails and their representation in courts needs to be strengthened.

Thus the law of bails must continue to allow for sufficient discretion, in all cases, to prevent a miscarriage of justice and to give way to the humanization of criminal justice system and to sensitize the same to the needs of those who must otherwise be condemned to languish in prisons for no more fault other than their inability to pay for legal counsel to advise them on bail matters or to furnish the bail amount itself so that the obligation on the state must be progressively realized.

It seems desirable to draw attention to the absence of an explicit provision in the Code of Criminal Procedure enabling the release, in appropriate cases, of an under trial prisoner on his bond without sureties and without any monetary obligation. There is urgent need for a clear provision. Undeniably, the thousands of under trial prisoners lodged in Indian prisons today include many who are unable to secure their release before trial because of their inability to produce sufficient financial guarantee for their appearance. Where that is the only reason for their continued incarceration, there may be good ground for complaining of invidious discrimination.

Moreover, under a constitutional system which promises social equality and social justice to all of its citizens the deprivation of liberty for the reason of financial poverty only is an incongruous element in a society aspiring to the achievement of these constitutional objectives. There are sufficient guarantees for appearance in the host of considerations to which reference has been made earlier and, it seems to me, our lawmakers would take an important step-in defense of individual liberty if appropriate provision as made in the statute for non-financial releases.

The Law Commission has done well to recommend a complete overhaul in the way courts grant bail. The Law Commission Report No. 268 has recommended that bail practices in India should address two key goals, first, to secure participation of accused in the trial and second, to provide safety and protection to the victim of the crime & society. Bail must be the rule rather than the exception, given that every person charged with a crime is presumed innocent until proven guilty. Reform in bail jurisprudence that includes fast disposal of bail applications, easier surety requirements and minimizing pre-trial detention is overdue.

Inconsistency in the bail system is one of the main reasons for crowding of prisons. Most of the prison population is waiting for trial in India.

It is for this reason the Courts must deny bail only under three conditions. One, the person charged with the crime is likely to flee. Two, the accused is likely to tamper with evidence or influence witnesses. Three, the person is likely to repeat the same crime if granted bail. The need is to protect a citizen's right against arbitrary detention in sync with international norms.

The strict approach must be adopted towards economic offences, saying such offences hurt the economy, growth, and global competitiveness of the country.The Supreme Court had also said that the entire society is aggrieved if economic offenders are let off the hook. There are economic offences that merit only financial penalties but those that cause major harm to other people or to the state must be treated with gravity. Cheating widows and orphans of their lives' savings and pushing them into penury must be treated as serious crime, for example.

Ideally, the verdict on criminal and civil cases beyond final appeal should be delivered within two years. This calls for significant reform, quantitative and qualitative. The need is to significantly increase the number of judges and courtrooms and deploy information technology assisted, reformed procedure to deliver speedy justice.

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