

TO BAIL OR NOT TO BAIL

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‘The issue of bail is one of liberty, justice, public safety and burden of the public treasury, all of which insist that a developed jurisprudence of bail is integral to a socially sensitized judicial process’²

ABSTRACT

The historic concept of custody of an accused is to have a guarantee that the person will be present, for the aid of investigation, and to maintain the sanctity of the same by prohibiting him from tampering with pieces of evidence or witnesses.

This is in direct contradiction to the right of personal liberty guaranteed to a person under Article 21.³ Striking the right balance between the two and not jeopardizing the interest of the society, makes the decision making, on part of the Executive or Judiciary, even more, challenging and grueling. The other aspect also to be considered is the public expense of keeping the accused in custody, his safety in prison, and the effect of it in a larger sense.

In current times, Bail is itself a huge earning mechanism for the government and the courts. A contributing factor is a monetary bond that is required to be furnished at the time by the accused, to ensure his attendance at the time of trial.

The courts in India are more Judge based, which means, the personal opinion or mentality of a judge affects the decision-making process, gravely. Hence, the chances of Human Rights violations of the accused are very high.

Keywords: Bail, Liberty, Courts, Custody, Accused.

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²Justice V.R. Krishna Iyer in *Gudikanti Narasimhulu and Ors vs Public Prosecutor, High Court Of Andhra Pradesh* (1978 AIR 429).

³The Constitution of India, 1950.

INTRODUCTION

The Hon'ble apex court in *Sanjay Chandra v. CBI*⁴ stated:

“The grant or refusal to grant bail lies within the discretion of the Court. The grant or denial is regulated, to a large extent, by the facts and circumstances of each particular case. But at the same time, the right to bail is not to be denied merely because of the sentiments of the community against the accused. The primary purposes of bail in a criminal case are to relieve the accused of imprisonment, to relieve the State of the burden of keeping him, pending the trial, and at the same time, to keep the accused constructively in the custody of the Court, whether before or after conviction, to assure that he will submit to the jurisdiction of the Court and be in attendance thereon whenever his presence is required”.

The purpose of granting bail can be correctly understood by the opinion of the Hon'ble SC in the above case. Hence, the worst situation comes forward when a respectable member of the society with no criminal background, is accused of a crime, on mere suspicion. He is forced to stay imprisoned when bail is delayed or denied due to biasness or technical issues like court holidays, malicious intention on the part of the petitioners, or the procedure of the court, which may take months to complete. One may also be too poor to pay the security⁵, which may lead to negative consequences for seeking bail.

Article 21⁶ recognizes the right of a speedy trial to every accused, irrespective of the type, number, or severity of the crime he may have committed. Hence, a more modern approach needs to be applied that is free of any preconceived notion of the judge or the court.

In cases where the accused is involved in bailable offenses, their bail can be claimed as a right rather than a request. The Police or the Magistrate did not possess the discretionary power in this regard. Due to lack of awareness, this provision can be misused and become an extortion agent in the hands of some dishonest and corrupt police officers. The relevant provision of the same is Section 436 of Cr.P.C. Bail can be given by the same police officer arresting the accused, but if he does not give the bail, then the court will surely issue bail to the accused.⁷

⁴ (2012) 1 SCC 40

⁵ *Hussainara Khatoon v. State of Bihar* (AIR 1979 SC 1369).

⁶ The Constitution of India, 1950.

⁷ *Surendra Kumar v. State of M.P.*, 1995 Cri LJ 1517 at p. 1519 (MP).

WHO CAN GRANT BAIL AND INTERPRETATION OF ITS PROVISIONS

1) **POLICE OFFICER** – Any person, who has been arrested by the police without the issuance of a direction/warrant from the magistrate under Section 41 of the Criminal Procedure Code, will have to be released on bail, as per the power conferred to police by this code if the offense is a bailable one. The same power is also vested with the Officer in Charge in case of non-bailable offense if detained without a warrant. But it is extremely important to such an officer to make sure that there is not even the slightest chance or hint to believe that the person accused can be held to be as guilty of the act, that can award the death sentence or imprisoning him/her for life. Then the discretion seizes.

Types of an arrest made by police-

- a) Made without warrant of arrest (Section 42, 43, 56, 59, 169, 170, 436, 437, and 5th Column in the 1st Schedule of the code.
- b) Made with a warrant of arrest (By Section 71 of the code).

2) **EXECUTIVE MAGISTRATE** – Section 44(1) empowers a judicial or executive magistrate to issue an order to arrest any person who has committed a crime in his presence or a crime that he is witness to. As they have the authority to issue arrests, they can also use their authority to let go of the same person on bail. He has to be produced in front of a competent magistrate within 24 hours of such arrest as beyond that, detaining him would be illegal.⁸ This is mentioned under Section 167 (1) of the code. Under Section 81 of the Criminal Procedure Code, the executive magistrate possesses the authority to grant bail to the person accused of an offence that is bailable and who has been picked up with a valid warrant and the incident took place in a different jurisdiction.

3) **JUDICIAL MAGISTRATE** – At any point of the process of inquiry into the case of the accused, bail can be secured from a judicial magistrate, before or after one's sentencing until an appropriate release is issued from the appellate court.⁹

4) **SESSIONS JUDGE** – Section 439 enables a session court judge to enquire into a bail matter or order against the person accused when the trial is still pending and the bail of the said person is rejected by the session's judge at the start of the preliminary proceedings. The power of such a session's judge is concurrent to the power of the High Court. Such power

⁸ M.R. Malik; Bail Law & Practice, Fourth edition, p. 54.

⁹ Section 436-437 of Criminal Procedure Code, 1973.

according to Section 439 to free the accused from imprisonment on bail is off as an original court. The session's judge may impose restrictions or appropriate conditions on bail. Although now by various judgments of the Apex court, conditional bail is not acceptable anymore. Section 439 also gives the session's judge the power to set aside or reinstate any conditions imposed by the magistrate earlier while admitting the accused on bail.¹⁰

5) **HIGH COURT** – These appellate courts have been vested the power to grant bail as a court of superior jurisdiction. It can perform functions of a trial court, an appellate court, or as a court of revision. On becoming convinced that the sum of money for bail is unreasonable or disproportionate, a High Court may either decrease the term of the bail given by the magistrate or the judge of session court. It possesses the authority to revoke the bail issued either by magistrates or the sitting judges, on being convinced that it was unfairly provided in consideration of the nature and scenarios of the case. The person's bail could also not be approved for best dividends of people's health and wellbeing and for a fair prosecution in case of a person who is accused. The HC has a large authority and command in these kinds of cases of refusing or granting bails.¹¹

6) **THE SUPREME COURT** – The Constitution of India under Article 134 and 136 confers a limited special appellate jurisdiction to the Apex Court- the Supreme Court.

This Court, under art.142 of the Constitution of India, has the authority to enforce its decree, etc. Article 145 resides power upon the SC to make regulations for the practical and procedural aspect of the ode, generally. In Article 134, The Supreme Court can consider an appeal against any ruling or sentence of a HC. The SC, under art. 136, can authorize any SLP to come before it. Article 142 the Judgement of The Supreme Court law and it is implementable throughout the territory of India.¹²

RIGHT TO LIBERTY v. GRAVITY OF THE CRIME, THE RIGHT BALANCE?

The right choice between the two, liberty and police investigation, both are equally essential for the process of a fair trial to being and complete, Also their importance depends upon

¹⁰ Section 439 of Criminal Procedure Code, 1973.

¹¹ M.R. Malik; Bail Law & Practice, Fourth edition, p. 172

¹² The Constitution of India, 1950.

various factors including facts and circumstance of the case, the time phase, the hold and effect of political conditions.¹³

The concept of human rights is no more a mythical saying but very much a widely accepted necessity of humans across, the globe, to sustain and flourish. At the same time, the growth in crime rates cannot be denied and is a matter of deep concern. Thus, the SC in a proceeding stated that recently, it has had to collate numerous accusations of violations of human rights in the hands of police because of indiscriminate arrests. Emphasizing the need to striking the right balance, the SC held that a real and improved approach should be taken in this regard.¹⁴

The police in this country play a key role in performing a very tense and intricate job, specifically seeing the worsening state of our law and order, political affluence, student's activism, terrorism unrest, and the day by day increasing crimes, both on a state level and a country as a whole. Many criminals' even terrorists, smugglers, and mafias have a strong hold in society and they may turn into politics. This will lead to the criminalization of politics and make the pool even dirtier than before. There are aspects of negativity as well where more liberalizing and enforcing of rights which are fundamentally granted is done, it can pop up problems in the findings of crimes performed by such people, as they are proficient in manipulating the system and misusing the loopholes of it. Such guilty people go and roam around freely, with not even any proper investigation being conducted against them and in some cases with merely a slap on the hand which would eventually lead to a more disintegrated and criminalized society.

The problem is genuine, hence there needs to be a proper authority and responsibility hierarchy established. A proper balance needs to be struck. Even more so, keeping the interest of the society or the greater good in mind, the police should deal with the accused properly and take appropriate measures on actually guilty people. The concept of a fair trial should be given utmost importance.

The cure cannot, however, be worse than the disease itself.¹⁵

¹³ Gurbaksh Singh Sibbia v. State of Punjab, AIR 1980 SC 1632 at p. 1635.

¹⁴ Joginder Kumar v. State of U.P., (1994) 4 SCC 260 at p. 263.

¹⁵ D.K. Basu v. State of W.B., (1997) 1 SCC 416 at p. 434.

CONCLUSION

The right of personal liberty is the most important aspect in our criminal as well as constitutional system. Denying this right must be considered one of the most serious disregard of the basic structure and essence of The Constitution of India as well as the contempt of the aim of the welfare of the society. Even though the Supreme Court in various cases has tried to discuss its ideas and have also brought down guidelines to be followed but very few actions have been taken.

The current need of the hour is a detailed reevaluation, renewal, and review of the bail system persistent in India keeping into consideration the socio-economic conditions and the awareness about the same to the majority of the country. While granting bail, the court must be free of all prejudice and also take into consideration the social and economic status of the accused and the circumstances in which the accused is habitating.

Before the arrest and release of such accused, a proper investigation must be conducted that is free from corruption and safe in the hands of police. As for a common man facing police brutality, corruption, to economic exploitation, all is very common.

The books of law and practice of the same should be in harmony and concurrence with each other. The society also should be taken into consideration as to how an accused person's bail or denial of bail may affect the same.

“Society has a vital interest in grant or refusal of bail because every criminal offence is an offence against the state. The order granting or refusing bail must reflect perfect balance between the conflicting interests, namely, sanctity of individual liberty and the interest of the society”.¹⁶

¹⁶ Justice Dalveer Bhandari in S.S. Mhetre vs. State of Maharashtra (2010)