

Jurisprudence of Bail Under Criminal Procedure Code

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Introduction

Generally the Bail is described as a mean of judicial release from *custodia legis*. Bail sets a person free from the jail once he furnishes security or surety for his liberty. This security or surety is decided by the court keeping in view the offence committed by person. It is one of the aspect of human rights and principle of a civilized society. It will be unjust to keep a person in jail or detain a person, who is willing to assure his presence in court as per the conditions of the court. The main objective of the arrest of a person is to ensure his presence in the court at the time of trial and during the investigation, before the police.²

Historical Background

History of bail can be found out long back in 399 BC. Here, Plato created a bond for Socrates to get him set free. The system of bail which we follow nowadays has evolved from middle age in England.

Concept of bail in England

In England, judges use to go to one circuit to another for the hearing of cases, due to this process there were number of under trial prisoner, who were living in deplorable conditions in jails. Later on in medieval times they had been separated from the accused, and they were being set free on arranging a surety for them, who assured the court about their presence in subsequent hearings. Later on this took shape of monetary bail, where the under trails can secure their release on giving monetary bond.

In 1215, the Magna Carta has given the first right to citizens where it has been stated that no one can be imprisoned without being judged according to law. In 1275, the statute of Westminster was enacted. It classified offences intoailable and non-ailable and recognized that who will have power to decide the bail cases.

In 1677, the Habeas Corpus Act states that , "A Magistrate shall discharge prisoners from their Imprisonment taking their Recognizance, with one or more Surety or Sureties, in any Sum

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² Gaur, K. D., *Criminal Law: Cases and Materials*, 3rd Edition 1999 pg. 786

according to the Magistrate's discretion, unless it shall appear that the Party is committed for such Matter offenses for which by law the Prisoner is not bailable."

The English Bill of Rights, 1689 stated "excessive bail hath been required of persons committed in criminal cases, to elude the benefit of the laws made for the liberty of the subjects. Excessive bail ought not to be required."

The Bail Act, 1976 talks about right of bail and the conditions of its refusal according to the type of wrong committed by the accused. Section 5(3) states that if the court withhold the bail, the court has to state the reasons for the same. There is a standard pattern of grounds for not granting the bail.

Bail in America

The modern concept of bail in America was introduced by Tom and Peter P. McDonough in San Francisco in 1898. The Bill of rights was also introduced in 1898 stating which type of offences will be bailable and non-bailable. By 5th, 6th and 8th amendment in the Bills of rights in the year 1791, the citizens were guaranteed right to due process, speedy and fair trial and also provides that excessive bail is not required. The American law does not gave right to bail in absolute nature, but defendant will have right to bail unless there be any sufficient reson to refuse the same.

The bail Act, 1976 states the major three grounds for refusal of bail. If the court believes that person will

1. Escape
2. Commit more offences
3. Temper the evidence or interfere with the witnesses.

The court may impose some conditions while granting bail like; residing at a particular place, payment of an amount in the court, arrangement of surety etc.

The bail reforms act, 1966 provides that the defendant can be releases on his personal recognizance. It states "bail in an amount higher than reasonably calculated to be necessary to assure the presence of the accused is excessive and stated certain factors which need to take into consideration while determining the amount of bail":

1. Capability of the accused to give security bond for bail.
2. Character of offence
3. Punishment of offence.
4. The social status of the accused.
5. Medical and health conditions
6. Nature of evidence involved.
7. Probability of the accused to be present before court.
8. Forfeiture of other bonds of accused.

9. Chances of accused to flee from justice.³

Concept of bail in India

Bail is a term which denotes to procurement of release of an accused that has been charged of any offence. It is a kind of assurance given by the accused that he will present himself before the court whenever it is required by the court. He will face trial and follow all the conditions which are imposed on him while releasing him. While granting the bail court is ensuring that accused will not hamper the interest of any witness and he will not tamper any evidence related to his case. This power of granting bail is with police, magistrates, judges and courts. It's discretionary for court to pass bail order in cognizable cases in favour of accused, while it's mandatory for the court to grant bail in non-cognizable cases. Before using its discretion, court or officer has to keep in mind the concerns of the society without prejudicing the rights of the accused person.

Constitution of India

Article 22 (1) of the constitution states that the arrested person must not be denied the right to seek advice from the counsel of his own choice. If the accused is not able to arrange advocate by himself Article 39 A, imposes a duty of the state to provide him with the counsel at the cost of the state, under free legal aid.⁴ While protecting the rights of citizens given by the constitution and granting bail, the court should maintain a balance between protection of the requirements of the society i.e. the interest of society and basis of criminal jurisprudence.⁵ Usually the system allows a person to stay out of jail during the trial. In India bail can be granted to a person on recognizance of the offence is not serious offence. And to the women and child even the offence is serious in nature.

“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 undertrials 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 vs. State of Bihar*.”⁶

“In *Kadra Pahadiya*,⁷ the Supreme Court observed that the *Hussainara* judgment had not brought about any improvement and reiterated that ...in *Hussainara Khatoon*, right to speedy trial was held in the light of article 21. The court is having power to give directions to the state to secure the rights of accused. The SC took initiative for ensuring the institutional improvement to make speedy justice a reality. In regard to prisoners awaiting commitment, Court might suo motu

³Delaney v Shobe, 218 (inability to give bond in the amount set is not sufficient reason for holding the amount excessive).

⁴www.lawversclubindia.com/right to bail and right to free legal aid/p. 1 of 10. Last visited on November 25th 2019.

⁵Superintendent and Remembrance of Legal Affairs vs. Amiya Kumar Roy Chowdary (1974).

⁶AIR 1979 SC 1360.

⁷AIR 1982 SC 1167.

consider granting of bail in accordance with the above mentioned principle laid down in Hussainara.”⁸

Criminal Procedure Code

The main notion of adversarial system of criminal law is based on presumption of innocence of accused unless he proved guilty beyond reasonable doubt. The prosecution has to establish their case. Till the time prosecution has not established their case, the liberty and freedom of a person should be respected. The liberty of a person must not be hampered without any fair or just reason. If it is taken away without just reason it is violation of fundamental and human rights of person.

The objects of bail are as follow:

1. Bail is granted to person to present his case in defence and to prevent punishment to innocent persons. Bail is a right with the person before the trial gets concluded, where there is always a presumption of his being innocent. So the court should look into every aspect where the benefit of doubt can be given to him, keeping in mind the social security.
2. The bail is granted to person on furnishing of security or bail bond to make sure his presence in front of court whenever it is needed. At the same time it does not mean that the accused is free from all the allegations made against him. It can be explained in following words-

“One enlarged on bail is, however, also considered as being in the custody of the law and the bail does not divest the Court of its inherent power to deal with the person accused”.

3. On grant of bail person will be not in the custody of jailor or jail, he will be in custody of the court which has granted him the bail. The court will have power to deal with that person. The time person is in the custody of court, he is under obligation to present himself before the court, otherwise his bail will be forfeited.

The term bail not been defined in any law. Even the definition of bail is not given under criminal procedure code. The code define the term bailable and non-bailable offence under section 2 (a). “Bailable offence means an offence 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 offence means any other offence.”Section 436-450 of the code deals with the different provisions of bail and bail bonds.

The Law Commission in its 41st Reportrecommended⁹ – law with regard to bail in criminal procedure was rightfully modified, to maintain a balance between liberty of person and concern of the society. The provisions of bail in sections 436, 437 and 439 of Chapter XXXIII Cr.P.C. were streamlined in 1973. There is need of reforms in bail provisions, specifically in relation to social context, changing pattern of crimes, the discretion of court for granting and refusing bail.

⁸www.lawversclubindia.com/right to bail and right to free legal aid/p.5 of 10.

⁹ 41st Law Commission Report, 1969, The Code Criminal Procedure, 1898, Vol. I.

Recommendations made in the report will bring into line the bail laws with socio-legal problems and guarantee the justice for under-trials and needy persons.

Meaning of bail

“Bail, in law, means procurement of release from prison of a person awaiting trial or an appeal, by the deposit of security to ensure his submission at the required time to legal authority. The monetary value of the security is called as bail bond. Value is set by the court having jurisdiction over the prisoner. The security may be cash, the papers giving title to property (moveable or immoveable), or the bond of private persons of means.”

“In *Moti Ram v. State of Madhya Pradesh*,¹⁰ the Supreme Court clarified that the definition of the term bail includes both release on personal bond as well as with sureties. It is to be noted that even under this expanded definition, ‘bail’ refers only to release on the basis of monetary assurance—either one’s own assurance (also called personal bond or recognizance) or third party’s sureties.”

There are certain interesting facts about the bail:

1. The term bail is not defined in any criminal law.
2. No res-judicata applies in bail cases.
3. There is no provision of appeal in bail cases, always there will be a fresh bail application.
4. Subsequent bail can be filed in the same court on new cause of action.
5. Bail is deemed custody of court.
6. The order of bail remain in force, even the accused does not furnish the bail bond in the court.
7. bail can be granted both in Bailable/ non-cognizable offences and Non- bailable/ cognizable offences. In former the court shall grant bail and in the later case it’s the discretion of the court.

Types of Bail

- **Regular bail**

It can be granted to an accused when he is in custody of police or he is under trail prisoner. Usually grant of this type of bail is discretion of the court unless the offence is non-cognizable in nature.

- **Interim bail**

It is temporary bail in nature, for a short time so the accused can appear before court without fear of arrest. Grant of this bail is discretion of court, depends upon the circumstances of each case.

- **Anticipatory bail**

¹⁰AIR 1978 SC 1594.

Accused applies for this bail when he is apprehended arrest or under apprehension that his name may get involve in any of the case. An accused apply for the bail without appearing before the court. He appears before the court through his counsel.

- **Bail on arrest/Bail by police**

If the offence is bailable one or it is acknowledge upon the arrest warrant that the accused can be released on bail after his arrest by the police officer, then the police officer can release him on bail, after making his arrest and taking security/surety bond, if any.

- **Default bail/Statutory bail**

If police fails to complete the investigation within stipulated time period prescribed under section 167 (2) i.e., 90 and 60 days, and fails to furnish charge sheet, then the court shall grant bail to the accused, even if he has committed non-bailable offence.

- **Blanket bail**

It is a concept of Hollywood movie, where blanket bail is already granted by the court to some eminent persons of the society.

Stages, where bail can be granted

There are 3 stages:

- Pre-trial (by police/ by court)
- Post – trial (by court)
- During trial (by court)

Mandatory circumstances for granting bail

- “Bailable offence (S. 436 (2))
- Investigation not completed within prescribed time period (s. 167 (2))
- No reasonable ground for believing that accused is guilty of non-bailable offence (S. 437 (2) (4))
- Where trial before magistrate not concluded in 60 days (S. 437 (6))
- Where no reasonable ground exists for believing the accused guilty after conclusion of trial but before judgement (S. 437 (7))”.

Discretion of court for granting bail

It is the discretion of the court in Non- Bailable offence to grant or refuse bail. The court may grant bail if the offence is punishable with imprisonment of 3-7 years. The laws says the court shall not grant bail if the offence is punishable with Death Penalty/ Life imprisonment. But as it's discretion with the court the court can grant the same with conditions which must be just and reasonable. While granting the bail the various factors which court can consider are as follow:

- Character or gravity of the offence
- Type of the evidence
- Circumstances of accused
- Apprehension of tempering the witnesses and evidence available
- Interests of the public or the state and similar other factors.

- Medical conditions of the Accused
- Age of accused
- Sex of accused
- Previous conduct of the accused

Rights of Accused person who is seeking bail

Presumption of innocence

Every person who is charged with any offence is having right to presume innocent unless the contrary get proved.¹¹ It is obligatory on the part of prosecution to establish the guilt of an accused, this principle is the golden thread and heart of criminal jurisprudence.¹² Merely putting allegation on someone does not make that person guilty. The charges need to be get prove against the person beyond reasonable doubt only then he can be convicted.

Right to non-discrimination

In “*GudikantiNarasimhuluv. Public Prosecutor, High court of Andhra Pradesh*”¹³ court observed that if bail is refused then it will amount t deprivation of right of liberty. The judge should exercise its discretion very judicially, with a concern about individual and the community as a whole. The rule of law is a tool which talks about non-discrimination and prohibits wrong use of powers.¹⁴ “Our judicial system seems to have evolved two approaches to bail—bail as a right for the financially able; and for rest, bail is dependent on the judicial discretion, exercised through manipulation of the amount of reasonable bail that will be required”.¹⁵

Right against unlawful detention

“In *Maneka Gandhi v. Union of India*,¹⁶ it was held that a person can be deprived of his personal liberty only by the procedure established by the law and procedure must be followed in its strict senses. In the case of *Joginder Kumar v. State of Uttar Pradesh*,¹⁷ and *GudikantiNarasimhuluv. Public Prosecutor, High Court of Andhra Pradesh*,¹⁸ the Supreme Court has given directions on the rights of the arrested persons in the light of Articles 21 and 22. There is no right which is absolute in nature, reasonable restrictions are always there. Even the right to bail cannot said to be absolute just because of prolonged confinement, as it depends upon the facts and circumstance of every case.”

Right to speedy and fair trial

In *Abdul RehmanAntulayv. R.S. Nayak*¹⁹, the following guidelines were issued for speedy trail:

¹¹Smirnovav. Russia, Applications nos. 46133/99 and 48183/99 (2003).

¹²*Woolmingtonv. DPP* [1935] UKHL 1; See also *Golbar Husain &Ors. v. State of Assam &Anr.* (2015) 11 SCC 242 and *Vinod Kumar v. State of Haryana* (2015) 3 SCC 138.

¹³ AIR 1978 SC 429

¹⁴Article 14 of the Constitution of India.

¹⁵Caleb Foote, “The Coming Constitutional Crisis in Bail” 113 *U. PA Law Review*.1125, 1180 (1965).

¹⁶AIR 1978 SC 597.

¹⁷AIR 1994 SC 1349.

¹⁸Supranote 17

¹⁹AIR 1992 SC 1701.

1. Fair and reasonable procedure to provide speedy trial in the interest of society as well as of accused.
2. Right of speedy trial includes investigation, inquiry, trial, pronouncement of judgment, appeal, revision etc.
3. No unnecessary detention of accused.
4. Mental and physical disturbance due to prolonged trial should be minimal.
5. Delay should be minimal.

Documentation required for moving application of bail and for submitting the bail bonds**Requirements for taking the bail from in-charge of police station**

- Bail bond
- Security (Amount of bail/ copy of papers of property)
- Sureties
- Photograph of surety/accused/witness
- One witness
- Personal Identity Proof

Requirements for taking the bail from Magistrate/Session Court/ High Court

- Copy of FIR
- Bail application
- Affidavit supporting bail application
- Court fee
- Record of the police/magistrate court /session court (to be called by court)
- Bail bond/ personal bond (if bail granted)
- Security (Amount of bail/ copy of papers of property)
- Surety/Sureties
- Photograph of surety/accused/witness
- One witness
- Personal identity Proof
- Copy of the order of magistrate court (for session court)
- Copy of the order of session court (for High Court)

Requirements for taking the bail from Supreme Court

- Bail Application
- Affidavit of the accused or pairakar
- Record of the High Court (to be called by court)
- Copy of order of High Court
- Court fee

Conclusion

The court should avoid unnecessary confinement and focus upon the fair practice of bail. Mere allegation on someone or suspicion must not be the ground of arrest, unless it is well founded ground. The accused must not be deprived of right of liberty as it's a basic essence of human life and dignity. Before making an arrest the police officer should maintain a case diary, the arrest

must not be made a matter of course. The criminal jurisprudence and the bail provisions under law draw a presumption in favour of accused that till the time his guilt is not proved he is innocent. So the bail should be granted to him as a matter of right and court should keep him in its custody rather than putting him behind the bars.