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Law relating to bail in India: A study of legislative and judicial trends

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Introduction

The institution of bail like any other branch of law has its own philosophy and to understand the same it is necessary to go through its various stages of development. In ancient period and that too in uncivilized society one can hardly conceive the system of bail while in the civilized society it has become the rule.

No one can question the importance of bail in the administration of criminal justice system and it is a very valuable branch of procedural law. In the ancient period criminal justice was so quick and crime rate was so law that the criminal trial got concluded in a day or two. That is why the provision of bail was unknown to the society. With the passage of time the criminal trials got delayed day by day and a basic principle of law developed that one cannot be convicted unless the guilt of person is not proved. On the basis of the principle it was deemed unjust to keep a person behind the bar on the basis of an assumption that his guilt is likely to be proved after the conclusion of a trial. The concept of bail emerged to save a person from the police custody which may be for a longer period because the justice delayed has become the normal phenomenon of our criminal justice.

Webster's Dictionary defines bail as follow [1]:-

"Bail is a security given for due appearance of prisoner in order to obtain this release from imprisonment; a temporary release of a prisoner upon security; one who provides bail".

Wharton's Law Lexicon defines bail in the following manner:

"To set at liberty a person arrested or imprisoned, on security being taken for his appearance on a day and at a place certain, which security is called bail, because the person arrested or imprisoned is delivered into the hands of those who bind themselves or become bail for his due appearance when required in order that he may be safely protected from prison to which if they have, if they fear his escape, etc, the legal power to deliver him'.

Stroud's Judicial Dictionary defined "bail" as follows [2]:-

"Bail is when a man is taken or arrested for felony, suspicion of felony, indicated of felony or any such case, so that he is restrained of his liberty. And being by law bailable offereth surety to those which have authority to bail him, which sureties are bound for him to the king's use in a certain sum of money, or body for body, that he shall appear before the justice of Gaole delivery at the next sessions, etc."

In Concise Oxford Dictionary and Chamber's 20th Century Dictionary, the meaning of the world "bail" has been explained as a sum of money paid by or for a person who is accused of wrong doing, as security that he will appear at his trial, until which time he is allowed to be free.

Etymologically the world "bail" has been derived from the French old verb "bail" or having meaning of "to deliver" or "to give". Another view is that the world is derived from the Latin term "Bajalure" which means, to bear burden".

Hon'ble Mr. Justice M.R. Malick, in this book "Bail" has deducted the meaning of Bail [3] as a technique evolved for effecting a synthesis of two basic concepts of human values, namely, the right of an accused to enjoy his personal freedom and the public interest on which a person's release in conditioned on the surety to produce the accused person in court to stand the trial.

The concept of bail denotes a form of pre-trial release or removal of restrictive and punitive consequences of pre-trial detention of an accused. Corpus Juris Secundum defines bail as a means to deliver an arrested person to his sureties, on their giving security for his appearance at the time and place designated, to submit to the jurisdiction and judgment of the court. Halsbury's Laws of England defined it - "Bail in criminal proceedings means bail granted in or in connection with proceedings for an offence to a person accused or convicted of the of

The word "bail" has, nowhere, been defined in Code of Criminal Procedure. The old and the new Code have defined the expression "bailable" and "non-bailable offences" in section 4(1)(b) and section 2(a) respectively Bailable offence has been defined to mean an offence which is made bailable by any law for the time being in force; and the expression "non bailable" to mean any offence other than bailable.

The main object of bail is to remove the restrictive and punitive consequences of pretrial detention of the accused which is made by delivering the accused to the custody of a third party(s) i.e. surety by way of furnishing of surety bonds or to one's own self by ray of execution of personal bond only. Bail may be ordered to be allowed with appropriate conditions covering three different type of situations:

(a) Where the custody is deemed to be safe with the accused himself,
(b) Where it is delivered to the surety, and
(c) Where it may be given to the state for safe custody.

The institution of bail has been made to keep the accused available to answer the charge and in order to perform this function, the institution of bail has been made to deliver the accused to safe custody in aforesaid manner, but in all cases accused is assured of beneficial enjoyment of freedom in regulated manner.

Bail, a vital aspect of every criminal justice system, is a mechanism, which should seek to strike a balance between these competing demands. While presence of an accused person for trail must be ensured and any threat to the administration of justice and just social order warded off, he should not be disabled to continue with his life activities. Custodial remands are also financially burdensome for the

State, both in terms of the detention places, which have to be provided, and because the constant escorting of the accused to and fro from court eats into the resources of the prison staff. Further, detention in jail may have a deleterious effect on pretrial detainees because of the possibility of their developing delinquent tendencies.

Law of bail is one of the important braches of the legal regime, which governs the criminal justice system of any country. 'Bail or jail' constitutes an enigmatic question in the judicial decision-making process, of everyday occurrence and importance, The question of bail-jail alternatives needs to be answered at the stages of arrest, investigation inquiry and trail and also at the stage of appeal after conviction of the accused. The jurisprudence of bail should equilibrate the 'freedom of person' and the 'interests of social order'.

The 'golden principle' of presumption of innocence is of central importance, governing all stages of the criminal process until a verdict of guilty is reached. The law of bail has to be compatible with the principle of presumption of innocence. Any person held in custody pending trial suffers the same restrictions

on his liberty as one serving a sentence of imprisonment after conviction. By Keeping accused persons out of custody until tried convicted and sentenced, bail should protect against the negation or dilution of the presumption of innocence.

The quality of bail hearing by courts must improve in that full information about the accused's background should be taken into consideration, besides what the police submit. Schemes should be developed to has certain and verify the relevant information Courts must think more deeply and give reasons while refusing an application for grant of bail for the cost of pretrial detention is very high. Greater care must be taken in dealing with matters concerning bail. Bail should be treated a basic human and not refused mechanically. If need be, conditions of hail may be stringent, but its refusal must rare. Pretrial detainees may not be punished, but pretrial detention itself, unless justified by overwhelming necessity cannot realistically be viewed as other than a form *of* punishment. Precious human rights of under trail prisoners should not he held hostage to inadequacies of our legal system and various kinds of delays in our criminal justice administration system. Fleeing justice has to he forbidden and escape can he considered a separate crime, but denial of bail should neither be punitive nor 'preventive detention incomplete through, it becomes difficult to rationalize the exercise of discretion one way or the other in a particular case.

Personal liberty is deprived when bail is refused, is too precious a value of our Constitutional system recognized under Article 21 that the crucial power to negate it is a great trust exercisable, not casually but judicially, with lively concern for the cost to the individual and the community. To glamorize impressionistic orders as discretionary may, on occasions, make a litigative gamble decisive of a fundamental right. After all, personal liberty of an accused or convict is fundamental one, suffering lawful eclipse which is possible only, in terms of "'procedure established by law." So deprivation of personal freedom, ephemeral or enduring, must be founded on the most serious considerations, relevant to welfare objectives of society, specified in the Constitution. Reasonable ness postulates intelligent care and predicates that deprivation of freedom by refusal of bail is not for punitive purpose but for bifocal interests of justice to the individual involved and society affected [4].

Like any other Constitution of a civilized country, Article 21 of our Constitution provides: -

"No person shall be deprived of his life or personal liberty except according to procedure established by law." So what if in millions of cases, people are routinely being deprived of their personal liberty with "no bail but jail" in the absence of expedited triails and years after KRISHNA IYER, J., having raised the the questions of "Bail or Jail?" in his oft-quoted words!.

Article of 22 of Constitution of India provides [5]:-

(1) "No person who is arrested shall be detained in custody without being informed, as soon as may he, of the grounds for such arrest nor shall be denied the right to consult, and to be defended by, a legal practitioner of his choice.
(2) Every person who is arrested and detained in custody shall he produced before the nearest magistrate within a period of twenty-four hours of such arrest excluding the time necessary for the journey from the place of arrest to the court of the magistrate and no such person shall be detained in custody beyond the said period without the authority of a magistrate.
(3) Nothing in clauses (1) and (2) shall apply-
    (a) To any person who for the time being is an enemy alien or
    (b) To any person who is arrested or detained under any law providing for preventive detention."

It is also recognized in the English Law and American Constitutions. VIth Article of American Constitution provided that in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and District wherein the crime shall have been committed which district shall have been previously ascertained by law and to be informed of the nature and cause of accusation.

To concept of bail in England may be traced back to the system of frank pledges adopted in England following Norman Conquest where the community as a whole was required to pledge its property as a security for the appearance of the accused at the trial. The concept of community's liability was later on replaced by the system of third person responsibility and there still remained the capacity of the accused to remain free till the conclusion of trial by furnishing security. Thus, under the Common Law of England, the system of interim release pending trial was prevalent, and the sureties had to be bound to produce the accused to face the trial on his failure to appear or to face the trial in his place. It was subsequently replaced by the issue of forfeiture of bond and surety and imposition of penalty upon the surety for failure to bring the accused to trial on the appointed date.

With the advent of British Rule in India, the common Law rule of bail was introduced in India as well and got statute recognition in Codes of Criminal Procedure, 1861 1872 and 1898.

The system of bail was also in use to some extent in the ancient period in India and to avoid pre-trial detention, Kautilva's Arthasastra also advocated speedy criminal trial. The bail system was also prevalent in the form of Muchalaka i.e. personal bond and zamanat i.e. personal bond and Zamanat i.e. bail in Mugal period.

After independence, the Law Commission of India in its 41st Report on Code of. Criminal Procedure also recommended the system of bail in the light of personal liberty guaranteed in the

Constitution and recognized the bail as a matter of right if the offence is bailable and matter of discretion if the offence is non-bailable, denial of power to Magistrate to grant bail if the offence is punishable with life imprisonment, death and conferring wide discretionary power on High Court and Sessions Judge to grant in such cases.

Reference

1. Webster's 7th New Judicial Dictionary.
2. Stroud's Judicial Dictionary, 5th edition.
3. Kamalapati v. State of West Bengal, AIR 1979 SC 777.
4. Babu Singh v. State of U.P., AIR 1978 sc 527 (529).
5. Indian Constitution.