BOOK REVIEW

TAKING BAIL SERIOUSLY: THE STATE OF BAIL JURISPRUDENCE IN INDIA. By Salman Khurshid, Sidharth Luthra, Lokendra Malik and Shurti Bedi (2019) Lexis Nexis, Gurgoan.Pp.xlii+467.Rs 995/-.

ANY SERIOUS student of the law and practice of bail jurisprudence in India shall readily accept the following broad propositions. First, the law and practice of bail in India is governed by legislative enactments. The result of a prayer of bail must therefore depend upon a correct interpretation of the relevant provision of the statute applicable to the case. It is further required to be appreciated that a very large and rich corpus of case law or judicial precedents is readily available to enlighten the concerned court. Yet there is not denying the fact that in actual practice the fate of a prayer for bail is terribly uncertain and unpredictable. The approach to the question of grant of bail is *ad hoc*, the manner of dealing with the relevant submissions is casual and the final result is the hunch of the judge as rightly noticed by the apex court. It is undeniable that the result for a prayer of bail involving same offences and identical fact situations may differ substantially from judge to judge, court to court and region to region. The resultant perception of arbitrariness or whimsical exercise of discretion in the matter, calls for close introspection and clinical jurisprudential scrutiny.

Second, though there is no separate and exclusive bail legislation, the general law applicable to a plea of bail is enshrined in the Code of Criminal Procedure, 1973. The settled principles, which serve as a guideline to achieve a desirable degree of uniformity in the legal response to grant of bail lose relevance because special penal laws which we have in abundance, raise specific and additional road blocks in the grant of bail. One may refer to the legislation enacted to prevent terrorism, TADA, POTA and UAPA; Prevention of Money Laundering Act 2005 (PMLA); Scheduled caste and Scheduled Tribes(Prevention of Atrocities) Act, 1989; Narcotic Drugs and Psychotropic substances Act, 1985 (NDPS); Companies Act, 2013 (provisions relating to serious fraud investigation office) and the like. These special enactments raise very high legal barriers in the matter of grant of bail. Consequently the lack of uniformity in bail jurisprudence becomes even graver.

Third, the declared judicial principle that bail not jail is the rule, though ceaselessly chanted and reiterated has become an elusive goal.

Fourth, there is no reliable data enabling us to weigh as to whether the bail was rightly granted in some cases and declined in others. Such date would be essential to critically appreciate the efficacy of law and practice of bail in our judicial system. It is however apposite to mention that the personal experience of any participant on either side of the bar would reveal that there is no logical co-relation between the grant and refusal of bail on the one hand and the final outcome of the trial for the offence alleged. Two

widely reported prosecutions can be readily recalled. A set of cases popularly named as '2G scam' were registered on the intervention of the apex court and were also monitored by it. The cases involved allegation of corruption and other misconduct in the matter of allocation of telecom licenses. Some accused were arrested in the course of investigation while some others were not. After the presentation of the chargesheet, the prayer for bail was vehemently opposed by the prosecution. Different accused suffered incarceration ranging from nine months to one year and six months, before their release on regular bail. Strangely enough the trial of the main 2G case ended in acquittal, while in some other cases the accused were discharged at the stage of consideration of charge. Similar high profile cases were registered for large scale corruption and bungling in the matter of allocation of coal to different companies for the purpose of utilization of the same in their own enterprises. While a large number of cases have gone to trial a few have been finally decided. The coal scam cases were also investigated by the CBI like the 2G scam cases, however the investigating agency did not arrest any of the accused during the course of investigation and presented the chargesheet while they were free citizens. They faced trial on grant of bail on their appearance before the trial court. As many as seven cases ended in conviction, which is the subject matter of appeal before the High Court of Delhi. An effective database would help us in formulating just and fair guidelines in this very important area.

'Taking Bail Seriously' is a highly valuable addition to the literature in the area of bail jurisprudence in the country. It is a very ambitious project where an attempt has been made to examine and evaluate multiple dimensions of the bail jurisprudence in a single volume. It is an enterprise wherein judges, practicing advocates, research scholars and teachers have participated, which makes it formidable piece of work. There are 22 well-researched articles that deal with nearly all the aspects touching the question of bail. Thus in a single volume we have the occasion to enrich ourselves from a brain storming in depth analysis of bail jurisprudence in general on one hand and specific issues relating to the question of bail on the other. The authors have also dealt with treatment of foreign national prisoners in the matter of bail; transit bails and remand; default bail; bail in terror offences and bail in economic offences like prevention of money laundering. A short volume could not possibly answer all the questions that an insightful reader may ask yet the work must be lauded as a handy reference book for anyone confronted with a meaningful question on the subject. The volume is therefore indispensible for the advocate, the judge, the academic dealing with criminal jurisprudence and all others interested in the matter.

Before briefly touching upon the contents of the book, the foreword by Justice H.S. Bedi, former judge Supreme Court of India, calls for a special mention. Besides encapsulating very briefly the relevance of various questions, Justice Bedi has examined the matter with a remarkable candour and in a truly realistic perspective. He has thus kept in focus the 'raw reality' (an expression insightfully used by Late Justice Krishna

Iyer while grappling with the vexing question of Bail). Justice Bedi refers to a practice by the high courts while dealing with murder appeals after a long delay of 15 or 20 years from the institution of the same. Sitting in the Supreme Court, it was noticed that in number of such cases the high court had scaled down the offence from the charge of murder (section 302 IPC) to culpable homicide not amounting to murder (section 304 (I) and (II) with the unstated objective of doing effective justice and avoiding the sending of the appellants back to jail after decades of the actual occurrence. The judges of the Supreme Court while noticing the alteration of the conviction under a lesser offence was not legally sustainable and was a 'travesty of the law', refrained from interfering keeping the larger perspective of justice in focus. Justice Bedi also rightly notices, "The lack of consistency in Bail Jurisprudence is the most vexing question before the lawyers and judges alike."

Rightly or wrongly while the volume in hand was in advance stage of preparation the apex court decided the prayer of P. Chidambram, a senior advocate himself and a former Finance Minister, for pre arrest bail, against the Petitioner in a case under PMLA. The decision rendered by a bench comprising Justice R. Bhanumati and Justice A.S. Bopanna generated a nationwide controversy. Expectedly the majority was critical of the judgment as the propositions enunciated therein ran counter to many settled judicial principles. The decision has directly cast a shadow on the present volume. In the very first article by A.M. Singhvi, there are direct and indirect references to the manner in which the enforcement directorate was able to effectively oppose the prayer for bail by relying upon the sealed cover process. Salman Khurshid refers to the case by discreetly calling it the 'bail matter of a high profile political leader.' Fortunately Professor Upendra Baxi has devoted his entire article to various questions emanating from the decision. He has rightly questioned the divorce between Constitution and the statutory law regarding bail, as one of the unwarranted fallout of the decision. Professor Baxi's article is a must read for its enlightening focus on some basic and critical questions. A mention may be made to an article by Khagesh Gautam and Sebastian Lefrance, on a comparative survey of the law of bail in India and Canada. The authors notice that both in Canada and also in United States Constitutions an express basis has been laid down touching the question of bail.

Justice S.S. Saron in his very concise overview of bail jurisprudence has highlighted decisions of the High Court of Punjab and Haryana linking the question of bail with prolonged detention at the appellate stage. Shruti Bedi's own contribution is a brief and incisive evaluation of the judgment of the apex court in *Nikesh Tarachand Shah* v. *Union of India*.[1] She has effectively raised the question for need of constitutional review of various legislative provisions placing a near embargo on the power of the court to grant bail.

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1 (2018) 11 SCC 1.

Majority of the contributions embark upon a general review of the bail jurisprudence, hence, there is repetition, quite unavoidable in a scenario like this. The title of the book 'Taking Bail Seriously' resoundingly echoes through majority of the articles. The article on default bail by Monica Chaudhary though exhaustive confines the debate to default bail made available to an accused upon the failure of the investigating agency to complete the investigation and file the charge sheet within the statutory period permissible under the law. It is time that the principle of default bail is extended to inordinate delays in the conclusion of the trial. The acquittal of several accused under stringent penal laws like the TADA/POTA or narcotic legislation after long incarcerations of several years is legitimately a cause for huge embarrassment. It is time that legislative provisions are inserted for grant of bail on ground of delay. A specific reference may be made to a salutary provision for grant of such bail in magisterial trials (section 437 (5) Cr PC) if the trial does not conclude within 60 days from the commencement thereof. It is regrettable though that the provision is never observed strictly and there is dearth of binding precedent. The articles shedding light on the plight of the poor in the matter of bail effectively underline the truth that some citizens are more equal than others under our legal system. Here again it is for the constitutional courts to direct the courts below to play a proactive role in such cases. One fondly recalls the landmark judgments rendered by Justice Iyer and others in the seventies in this area.

The law and practice of arrest is an integral part of bail jurisprudence. Similarly the manner in which orders of remand are passed mechanically also calls for brain storming analysis. Both these aspects have been critically scrutinized by the authors. An important omission in this regard is the failure to fully appreciate the effect of amendment of section 41 Cr PC as also the insertion of section 41A in the code. The amended section 41 provides for clear-cut guidelines on the power to arrest. It is often presumed that the investigative function essentially encompasses the power to arrest, in every cognizable case. The amended provision is a radical departure from this presumption and recognizes the coexistence of the power to investigate without exercise of the power of arrest. The amended provisions have been creatively interpreted in *Arnesh Kumar's* case. The apex court has prescribed that the arresting officer's reasons recorded as per the law have to be judicially examined by the area magistrate. The failure to do so has been held to be actionable. This is a radical move forward in cases punishable with imprisonment up to seven years. The question of arrest does not get settled and rendered infructuous by the mere factum of arrest, it has to be subjected to judicial audit. Similar audit must be provided in cases where the power of grant of remand is exercised mechanically in violation of the law. As noticed by various authors the power to grant remand continues to be exercised casually with little concern for the liberty of the citizen. The words of Justice Y.B. Chandrachud in *State of UP* v. *Ram Sagar Yadav,*[2]

2 (1985) 1 SCC 552.

need to be recapitulated, "It is notorious that remand orders are often passed mechanically without a proper application of mind. Perhaps, the magistrates are not to blame because, heaps of such applications are required to be disposed of by them before the regular work of the day begins".

While the editors and the authors have done a commendable job, the subject is much too vast for all the questions to be raised and answered in one single volume of less than 500 pages. It is essential to carry out empirical studies of the process of grant of bail in the magisterial court, court of sessions and the high court. It is the common experience of every busy practioner that the presiding officers at the magisterial and sessions court level exhibit extreme conservatism while exercising their discretion in bail matters. Such is the level of hesitation that the power pertaining to grant of pre-arrest bail is rarely exercised at the level of the sessions judge. The empirical studies would provide reliable data to meet the flood of pending bail applications in the various high courts and help in evolving a just, fair and equitable bail jurisprudence. It is equally important to empower the Public Prosecutor to decide appropriate cases where bail ought not to be opposed. It is equally desirable that the states formulate appropriate guidelines to facilitate the process. Afterall the overcrowded jails are a perpetual challenge to the system and ways and means must be found to keep the numbers of prisoners in the jail within manageable limits.

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