

## Chapter 2

### ETYMOLOGY OF THE CONCEPT OF BAIL

#### What is Bail ?

'BAIL' REMAINS an undefined term in the Code of Criminal Procedure, 1973. Nowhere else the term has been statutorily defined. Conceptually, it continues to be understood as a right for assertion of freedom against state imposed restraints. Since the U.N. Declaration of Human Rights of 1948, to which India is a signatory, the concept of bail has found a place within the scope of human rights.

The constitutional bulwark of the right to bail is to be found in article 21 of the Constitution of India, 1950. This provision also subsumes the spirit of clause 12 of the British *Magna Carta*, since it was being practised in India through the procedural jurisprudence of bail. Accordingly, an application for bail, in essence, meant invoking a process for one's right to the safety of life and limb, as well as, for insulating oneself against the depredations of authority upon enjoyment of one's personal liberty.<sup>1</sup> This view may partially reflect the nature of bail. If the concept of bail is to be guided merely by these two considerations, it may unconditionally enable an accused person to be at large. The meaning of the term 'bail' has to be understood in the context of the total mechanism of the bail system. In the absence of any statutory definition of bail, a search for the meaning of the term has to be made in the dictionaries, commentaries and common law jurisprudence.

The dictionary meaning of the expression 'bail' denotes a security for appearance of a prisoner for his release.<sup>2</sup> Etymologically, the word is derived from an old French verb "*bailer*" which means to "give" or "to deliver", although another view is that its' derivation is from the Latin term '*bajulare*' meaning "to bear a burden".<sup>4</sup>

*Stroud's Judicial Dictionary* spells out certain other details, It states :

[W]hen a man is taken or arrested for felony, suspicion of felony, indicted of felony, or any such case, so that he is restraint of his liberty. And being by law baileable, offereth surety to those which have authority to baile him, which sureties are bound for him to the Kings use in a certaine summe of money, or body for body, that he shall appeare before the Justices of Gaole delivery at the next Sessions,

---

1. See *Ratan Nihal Singh v. State of M.P.*, A.I.R. 1959 M.P. 216.

2. See *Concise Oxford Dictionary*, *Chambers Twentieth Century Dictionary*.

3. See *Webster's New International Dictionary*.

4. *Shorter Oxford English Dictionary*.

etc. Then upon the bonds of those sureties, as is aforesaid, he is bailed—that is to say, set at liberty until the day appointed for his appearance.<sup>41</sup>

Bail is thus a conditional liberty. According to Blackstone :

[T]he intent of the arrest being only to compel an appearance in court at the return of the writ, that purpose is equally answered, whether the Sheriff detains his person, or takes sufficient security for his appearance, called *bail*...because the defendant is bailed, or delivered to his sureties, upon their giving security for his appearance....<sup>5</sup>

Bail may thus be regarded as a mechanism whereby the state devolutes upon the community the function of securing the presence of the prisoner, and at the same time involves participation of the community in administration of justice.

### The Concept of Bail

#### (a) A Blend of the King's Peace with the Magna Carta

It may thus appear that under the common law, the operational mode for interim release of an accused was that a surety had to be bound to produce the accused to stand his trial on the day appointed for such trial. If the accused failed to appear as stipulated, the surety himself would stand trial in his place.<sup>6</sup> Perhaps this position was in keeping with the concept of the *King's Peace*, which did not show any indulgence towards any *tresspass vi et armis* particularly of the kind caused by disappearance of a felonious accused. In that event, it made responsible the party in whose custody the accused had been delivered, since the law also recognised that a body could be detained for the body released.

The above position would seemingly be untenable in a land where *Magna Carta* has remained the mainstay of liberty. But the law of bail, of the kind mentioned above, subsisted and emanated from the courts' concern and obligation towards the *King's Peace* which, theoretically had been intolerant of any disturbance being caused to the public or to interests of the sovereign.

One may thus find that the concept of bail under the English common law concerned itself with both the values namely, that of personal freedom as well as that of the security of the politico-legal system. On prognosis the concept also unfolds that the emphasis on both these values is co-equal. The requirement of the law to enlarge a person on bail to a third party by the court is thus an expressive concern towards the right of an accused to enjoy his personal freedom. A demand on the surety to produce the accused person for purposes of fulfilling his obligations to

4a. *Stroud's Judicial Dictionary* 244 (1971).

5. Blackstone's III, *Commentaries on the Laws of England* 290 (1844).

6. See A.N. Chaturvedi, *Rights of Accused under Indian Constitution*, 283 (1984).

the court and to accomplish the objective of the law to determine the liability of person so released is meaningful in terms of public interest. Implicit in the meaning of bail is also the use of a technique evolved for effecting a symbiosis between these two co-equal values.<sup>7</sup> Since these values are cherished by the social order they cannot be regarded as being in competition with each other. Neither one can be deemed to have precedence over the other. Accordingly, judicial activism can spare itself from engaging in the exercise of striking a balance between the two since both have to go hand in hand. In this context the *Law Lexicon's* definition of 'bail' is helpful. It says that a bail is

To set at liberty a person arrested or imprisoned, or security being taken for his appearance on a day at a place certain...because the party arrested or imprisoned is delivered into the hands of those who bind themselves or become bail for his due appearance when required, in order to that he may be safely protected from the prison....<sup>7a</sup>

Thus, protection of the prisoner and his right to liberty is given equal emphasis along with the requirement of his being brought to trial.

#### (b) Custodial Control of the Accused

The principal aim of bail is removal of restrictive and punitive consequences of pre-trial detention of an accused. This is achieved by delivering him to the custody also of his surety who may be a third party. Such custody may also be given to one's own self by way of his furnishing a bond that on demand made upon him to attend, he will readily attend the court. It is an obligation of law enforcement agencies that if a criminal process is initiated by the alleged action of a wrong-doer it is to be accomplished. Therefore, this aspect assumes substantial significance in the operation of bail. Accordingly, the grant of bail for release may be allowed with appropriate conditions which may resultantly cover three types of situations namely, (a) where the custody is deemed safe with the accused himself, (b) where it is delivered to the surety, (c) where it may be delivered to the state for safe custody. The mechanism of bail is thus meant for manouevring a best arrangement for custodial control of the accused in the system. The bail is a matter of right for safe keeping of the accused to answer a charge. In order to implement this right, the mechanism of bail has been designed to deliver the custody of the accused either to self, to a surety or to the state, but in each case the accused is to be assured of the beneficial enjoyment of regulated freedom.

In all these cases, the common condition attached is that the person released on bail will be brought before the court on demand. Other conditions may be imposed as may be deemed appropriate. It may be interjected in passing that in the event of delivering custody to the state

7. *Kamlapati Trivedi v. State of W.B.*, A.I.R. 1979 S.C. 777.

7a. *Venkatarmaya's*, 1 *Law Lexicon* 131 (1971).

by way of refusal of bail to the accused or his surety the court may set out other conditions for the benefit and enjoyment of liberty by the accused. Legislative prescriptions governing inmates in prison may be said to be serving this end. These regulations have to be in conformity with the themes of such human dignity as are now being expounded by the court as a part of human rights jurisprudence.<sup>8</sup>

#### **Aberrations in the Bail Concept**

The mechanism of providing bail to an arrested person is thus geared on the twin principles of securing the presence of any accused person in a criminal trial as well as to place only a minimum of restraint on the freedom of the individual. However, the application of the law of bails has been given an extended scope as a result of an overly emphasis on personal freedom, which has grown as a result of conscious assertion of individual rights in recent years. This has led the criminal law administration agencies to face some of the problems not within their traditional comprehension. It is true that while the value of individual freedom cannot be minimised, it is necessary to consider to what extent the freedom of an accused can be regulated within the bail system in the interest of criminal justice. A survey of the working mechanism of bail recently conducted in Delhi courts brought to surface serious deviations affecting credibility and utility of the bail system. There has been a noticeable increase in the incidence of bail jumpers.

The extended emphasis on the individual freedom, which has grown as a result of conscious assertion of human rights in recent years, has posed some problems having a direct bearing on the law and practice of bail. In the operation of the system of bail, it has come to light that a professional type of bondsmen or sureties has emerged itself as an adjunct to the processes of criminal justice. These professional bondsmen readily volunteer to furnish sureties for an accused and receive payment for such "services". The availability of such professional sureties on payment of a certain percentage of the bail amount brings in corruption and abuses the process of bail in many other ways.

The mode of verifying the character, status and property of a surety has always been perfunctory. The courts are engaged in judicial work and have very little time to pay attention to supervisory duties in this regard. They also lack resources to deal with this type of work. Furthermore, court officials are often blamed of colluding with interested parties in getting necessary legal formalities pushed up. It may enable questionable sureties to get acceptance for expeditious release of the accused. Consequently, a band of bogus sureties, with questionable antecedents and spurious identities have come to stay as an integral part of the system of release on bail.

Two other factors can also be counted to contribute towards confusion about the utility of the system of bail in criminal cases. One such factor

8. See D.C. Pandey, *Criminal Law*, XVI *A.I.S.L.* 452 *et. seq.* (1980),

is the malpractices prevailing extensively amongst law enforcement agencies already brought to the notice by the National Police Commission in recent years.<sup>9</sup> The abuse of criminal law has been a sequel to these malpractices, which in turn have created an awareness of human rights. This trend is a healthy development in our constitutional system for reinforcing personal liberties of an individual. However, the impact of human rights jurisprudence has been felt in the working of our criminal law and its administration. Much of it is due to the fact that overemphasis on personal liberty by courts has largely come out in the nature of a backlash to the high-handedness shown by authorities to an individual in the course of law enforcement. However, its effect has to be reckoned in order to assess the aberrations caused to the system of bail. These may be removed only with a better political understanding of the system by the police and the public. The other obnoxious practices may also call for a frontal attack—both administratively and by legislation—in order to redeem the institution of bail, which is gradually being used as a protective measure to counter the attack on human rights.

Passionate pleas for personal liberty are often made while seeking release of an accused person in pre-trial cases. This overemphasis has subtly affected a balanced working of the bail mechanism. This approach is in keeping with the growing awareness for individual rights and is also expressive of the conscious assertion to protect them. The global march of human rights movement and the country's accountability in various UN fora for having adopted civilised standards, imperatively require the need to keep a watchful eye on such actions and behaviour of official agencies of the government that tend to erode basic human dignity.

These issues have come to notice of courts in the administration of criminal law and justice. Tales of unlawful and arbitrary actions are numerous. The increased sensitivity towards the personal freedom and emphatic judicial pronouncements thereon have brought human rights jurisprudence into action. By co-mingling human rights with procedural penal laws, designed to meet an administrative need or functioning of criminal law administration, has stirred up some problems for which the administration has not prepared itself. The accelerated pace of human rights jurisprudence has been the result of excessive police high handedness in effecting indiscriminate arrests, as well as an extreme callousness shown towards under-trial prisoners, together with the abuse of criminal process for corrupt gains and the like. The human rights jurisprudence is indeed studded on constitutional bases. It has been used by courts to contain oppressive state actions and correct deviant officials. However, any euphoric zeal to view the aspect of human rights alone may have a tendency to rob the efficacy of measures designed for social protection. The institution of bail also seeks to serve it. Looking to realities of the

---

9. National Police Commission, *Third Report*, 33.

situation, it would be worthwhile to administer effective, but homeopathic doses, of human rights to the ailing system of criminal law and justice for its correction and recovery, while devising punitive and preventive actions against erring officials.

The incidental impact of human rights jurisprudence on the legal plane of social defence as contained in the procedural and substantive criminal law, is inevitable, until the administration itself undertakes to eliminate aberrations which make inroads into the working of criminal judicial administration. An elimination of these aberrations is also necessary for enabling the existing system of release on bail to respond properly to needs of administration of criminal law and justice.

The National Police Commission has pointed out that the use of police power is considerably abused. The present police practice is to make indiscriminate arrests in the course of investigation. This becomes a source of annoyance and harassment to arrested persons and their families.<sup>10</sup> Likewise, the threat of handcuffs on persons under arrest is another source of corruption and harassment. Threats emanating from authorities are necessarily to be countered by the judiciary.

In the wake of meeting evil challenges from guardians of social defence, courts *per force* resort to the theme of human rights; and put a check on the use of their power. This has, however, an effect of diluting legal processes of arrest and remand. The controls on regulated freedom over the accused also get loosened. All those add to the discomfort of an honest police professional, while it makes hard-core of criminals gleeful. Any approach to the problems of criminal justice pivoted on the human rights, if moved merely by the plight of oppressed and poverty stricken humanity of this country, may well be conducive to samaritanism; but it will not be consistent with community interests in containing criminality. The gains achieved by the community on the front of personal liberty at the cost and the plight of the oppressed ones' get distributed as dividends amongst dangerous depredaters to buy their freedom at the cost of social interests. In the context of bail, it has been found that the poorer section of the society are generally unable to avail of the benefits. It is an irony that to avail his freedom the less resourceful accused is fleeced of his moneys by touts and the professional sureties prowling around courts.<sup>11</sup> The well-intentioned approach of human rights jurisprudence has unfortunately activated the functioning of extra-legal institution of professional sureties to operate as some kind of a cartel for exchange of prisoners with the courts. In this way the basic purpose of ensuring the safe custody of an accused is frustrated and operation of the bail system gets

---

10. *Ibid.*

11. See generally the *Report of the Legal Aid Committee* appointed by the Government of Gujarat (1977). Also, D.C. Pandey, *Release of Arrested Persons on Bail and Misuse of the System*, Report of the Bureau of Research and Police Development, Ministry of Home Affairs, Government of India (1980).

devoid of its utility in the scheme of administration of criminal justice.

### Judicial Approach to Bail : Effect of 'Liberty'

As has been pointed out above, callousness of law enforcement agencies attendant with other abuses in the criminal judicial administration started showing up oppressive burdens on indigent, poor and illiterate accused persons. These factors arouse the sensitivity of the court, and in countering ill effects of the same the courts use the lever of human rights to take a relaxed view of the bail system. Indeed, no harm was intended to the traditional bail institution, but side effects of such an approach are also not inquired into or taken note of. In this process, however, the court lay emphasis on certain aspects of pre-trial releases and thus enable the concept of bail to assume an expanded concept which could not be understood as being in conflict with values of human rights, but at the same time being a necessary instrumentality for serving the needs of criminal justice. In this regard, the cases of an undertrial prisoner *Hussainara Khatoon*<sup>12</sup> have contributed substantially. The petitioner could draw attention of the Supreme Court as many as four times. On each occasion, the court had the opportunity to examine the matter of pre-trial release in the context of human rights as well as in the light of other constitutional norms governing the rights of such persons who are exposed to processes of criminal law and justice in the capacity of an undertrial prisoner. In this process the Supreme Court did reiterate certain propositions that are indeed inbuilt in the concept and mechanism of bail but have been put to disuse for reasons of expediency or paucity of resources. However, the propositions laid down by the Supreme Court refreshingly get incorporated again as part of the bail system. It is in this way that the refurbishing of the concept has given a new look. Bail has thus assumed a new dimension.

While disposing of the petition of *Hussainara Khatoon*<sup>13</sup> the Supreme Court observed that "it would be more consonant with the ethos of our Constitution that instead of risk of financial loss the system should take into consideration other relevant factors such as family ties, roots in the community, job security, inembership of stable organisations etc."<sup>14</sup> The court emphasised that these ought to be the determinative factors and laid down that primarily the pretrial release should be obtained on "personal bond without monetary obligation".<sup>15</sup> The court has thus to look for and inquire into the objective considerations while determining as to what kind of custodial arrangement has to be ordered in each case. In case release is warranted, it should be facilitated without putting the

---

12. (i) 1979 Cr. L.J. 1036 (S.C.) (ii) 1979 Cr. L.J. 1045 (S.C.) (iii) 1979 Cr. L.J. 1052 (S.C.) (iv) 1979 Cr. L.J. 1134 (S.C.).

13. 1979 Cr. L.J. 1036.

14. *Ibid.*

15. *Ibid.*

constraint of financial obstacle. The court has, discouraged the practice of exercising its discretion also in a manner which makes the power to be mechanically fixed to a schedule keyed to the nature of charge.

Refusal to admit bail would mean that exercise of discretionary power by the court requires that the undertrial prisoner be put in the custody of the state. At this point the court has to reckon the application of the constitutional mandate of speedy trial, since reasonably expeditious trial has been held to be "an integral and essential part of the fundamental right to life and liberty enshrined in Art. 21 of the Constitution."<sup>16</sup> A speedy trial is the essence of criminal justice and there can be no doubt that delay in trial by itself constitutes denial of justice. It has implicitly been interpreted to be so by the Supreme Court in *Maneka Gandhi v. Union of India*.<sup>17</sup> Since a person can secure his release as a fundamental right if he is deprived of his liberty because of the procedure which does not ensure a speedy trial for determination of his guilt with reasonable delay. Accordingly, it is necessary that an implementation of a valid order for putting the person in custody of the state must insure that a speedy trial will follow for determination of guilt or innocence of the detained accused. There is no reason why "under-trial prisoners should be allowed to continue to languish in jail, merely because the State is not in a position to try them within a reasonable period of time"<sup>18</sup> The court further said that "if persons accused of offences should be speedily tried, so that in cases where bail, in proper exercise of discretion is refused, the accused persons have not to remain in jail longer than is absolutely necessary".<sup>19</sup> A continued incarceration under these circumstances is clearly illegal and is in violation of the fundamental right under article 21 of the Constitution. Thus any bail order by a court for pre-trial prisoner must be in specific terms denoting the period for which constraints can be imposed on the liberty of the individual.

It has been pointed out above that an admission to bail or refusal to grant bail constitute an arrangement of having a custodial control by the court over an accused. And, since a speedy trial is the right of every person accused of an offence, custodial control of the court over an accused for purposes of administering justice should not last longer than what is reasonably due. In fact a speedy trial must put an end to the ordeal of being under the strict regulation of freedom.

Since such a decision has to overcome procedural intricacies and has to depend on legal submissions as well as critical examination of evidence and other information sought to be brought on record for purposes of determining the roots of the accused in the society, the court shall have to lean heavily on the professional expertise. Such guidelines have already

---

16. *Supra* note 12(ii) at 1050.

17. A.I.R. 1978 S.C. 597.

18. *Hussainara Khatoon v. State of Bihar*, 1979 Cr. L.J. 1045 at 1050 (S.C.).

19. *Id.* at 1048.



been provided by the Supreme Court in *M.H. Hoskat v. State of Maharashtra*.<sup>20</sup> In other words the collaboration of a lawyer would necessarily provide "power for steering the wheels of equal justice under the law".<sup>21</sup> This theme has not been extended further in the cases of pre-trial release as a necessary element. In *Hussainara Khatoon's* case<sup>22</sup> the court has reiterated that free legal services to an indigent and poor accused is necessarily implicit in the guarantee under article 21 of the Constitution. It has also been emphasised under article 39-A of the directive principles of state policy. Constitutional provisions as well as, judicial provisions thus give further sustenance to adopt a reasonable, fair and just procedure to any state action aimed at regulating or controlling individual liberty. They are applicable with equal emphasis to the pre-trial stage where the issue of having a custodial control by way of bail proceedings is to be determined. Thus, the mechanism of bail when put to operation must find proper legal services for an undefended accused to secure for him the best mode of custodial control commensurate with judicial justice. In other words, the bail action has to bring in an effective assurance from the accused for his being present for trial on the appointed time without putting him to money obligations for his undertaking and also to seek insurance against the other party that controls on his personal freedom will not subsist longer than what is reasonable. To exact this assurance the right of the accused for a speedy trial has to be arranged as a matter of right accompanied by necessary legal services. Both these rights are now guaranteed under the law of bails.

The need of justice in securing freedom to an accused under the law is as important as for the state to hold an accused in custody to promote community interests or for the court to discharge its obligation to the rule of law. In view of the needs of justice legal services have to be provided to a person who is in an incommunicable situation by reason of his presumption of innocence; and an accusation involves him in a possible situation of being deprived of his liberty right from the pre-trial stage. In the circumstances "legal aid is an absolute imperative".<sup>23</sup> Thus, the needs of justice, *inter alia*, impose a constitutional mandate on the court as well as the state to secure legal services for the accused in a bail proceeding with a view to passing a valid order of bail since "Legal aid is really nothing else but equal justice in action".<sup>24</sup> The court explained that "Legal aid is in fact the delivery system of social justice. It is intended to reach justice to the common man,"<sup>25</sup> who is invariably found in portals of the trial court awaiting to get it.

---

20. A.I.R. 1973 S.C. 1548(ii).

21. *Ibid.*

22. *Supra* note 12.

23. *Supra* note 12(iii) at 1055.

24. *Ibid.*

25. *Ibid.*

Thus, a proper bail order exacted from the court after invoking legal provisions to that effect through professional legal assistance secured by him is a meaningful mode of securing his right to speedy trial. It also ensures constitutional freedom which get threatened on his being accused of a criminal charge. His freedom can be scuttled only on his being proved guilty for which he may be deprived of his liberty for a duration which is prescribed under the law but not "for a moment longer, since such continuance of detention would be clearly violative not only of human dignity but also of...fundamental right under Article 21 of the Constitution".<sup>26</sup>

With a view to translating rights and freedom of an undertrial, who is guaranteed protection by the state to enjoy the same right from the pre-trial stage onwards, the institution of bail is the only answer.

However, operation of the bail system has produced irritants both for those who champion the cause of freedom of the individual and for those who seek to promote social interests. The courts have not yet been able to concentrate their full attention to the problems of individual liberty, social protection and the obligation to accomplish processes of criminal justice by the court in a cumulative way. However, the judicial approach has been to curb callousness of the administration and to activate the attitude of neutrality of the courts in preservation of human dignity and constitutional rights and freedom of the individual by tackling the issues of criminal judicial administration incidental to the larger issue of personal liberty.

The court has thus to face the question of grant of bail on the basis as to whether the release granted to a person fully ensures his recall for trial on the appointed day or not. In arriving at any such decision, the court has to resort to the use of professional legal assistance and to secure necessary information about the accused for purposes of using that as a determinative factor. In addition, the court has to ascertain for itself firstly, that if the release can be granted it is to be availed of without putting the person to any monetary obligation, and secondly, that the court has to chart out a schedule for speedy trial of the accused person, so that he does not remain under restraints of the penal law even for a moment longer than what is required under the law.

---

26. *Supra* note 12(iv).