Chapter 11

EVALUATION OF THE LAW OF BAILS

The Practice

THE LAW governing bail in India is inadequate uncertain and above the ground. The working of the system is also unsatisfactory. The administration of criminal justice has recognised that a bail decision is a recurring one which takes place through a number of distinct stages. It also recognises that pre-trial releases by the police on bail are within the purview of the bail system. Further bail can be granted before the accused makes an appearance before the court or before the verdict of the trial is passed and even after he has been declared guilty and convicted in order to enable him to avail the appeal process.

The practice of releasing on bail has assumed the form wherein an accused enters into a bond specifying a sum of money which he is liable to forfeit if he fails to perform any of the obligations imposed on him by the court.[1] Generally, the stipulated guarantee in terms of money in a bond is not deposited in cash in a court, though the practice to do so in the case of a police bail may be a valid one.

In addition to the bond, the release condition on bail may require a surety (or sureties), who has also to bind himself to pay a specified sum of money in the event of the failure of an accused to appear before the police or the court on the appointed day. In the common law, a surety was essential to bail out a person, which was later dispensed with. However, the Code of Criminal Procedure never spelled out the requirement of a surety as a pre-condition for release on bail though in practice the courts grant bail only on the accused's furnishing a bond with a surety.

Confusions and Convolutions

Law does not define the nature and extent of the conditions which may be imposed by courts on grant of bail. In *re Kota Appalakonda* it has been pointed out that a person accused of a bailable offence shall be granted bail with no conditions except those sanctioned by law.[2] The condition prescribed under the law is the preparedness of an accused to give bail. A person is entitled for his release on his readiness to offer bail on bond which he can only miss if he is unwilling or unable to offer bail or lacks the capacity to execute bail bonds.[3] Fixation of the amount of bail for the accused and surety bonds are lawful conditions that can be imposed while exercising the powers to grant bail.[4] The bail amounts ought not to be

1. The procedure when bond has been forfeited is prescribed under section 446 of the Cr.PC 1973.
2. In *re Kota Appalakonda* 44 Cr.LJ 202 (1943).
3. *Crown v. Makhan Lal*, 48 Cr.LJ 656 (1946).
4. *Rex* v. *Genda Singh*, AIR 1950 All 525; *In re District Magistrate of Vizagapatnam*, AIR 1949 Mad. 77; *Asst. Collector of Customs v. Malan Ayabo Attenda*, 1992 Cr.LJ 2349; *Swankher Gulshan v. Asst. Collector Customs*, 1993 Cr.LJ 3569 (Bom.). *In re Saradamma*, AIR 1965 AP 444.

excessive and the demand for verification of surety not unreasonable.[5] The amount can be changed with change in circumstances.[6] Condition may be imposed on the accused about his attendance in the court on a fixed date and place.[7] A condition requiring daily attendance in the court is, however, illegal.[8]

Thus, where the magistrate directed the accused in a bailable case that he should report daily twice to the commissioner of police, the order was repugnant to the provisions of the code.[9] Likewise an order could not be passed asking the accused not to enter a disputed land till the disposal of the case.[10] A condition which cannot be complied with amounts to refusal of bail.[11] In *Afsar Khan v. State*,[12] the Karnataka High Court has held a cash security of Rs. 6750 as harsh and oppresive amounting to denial of bail and deprivation of personal liberty.

However, no statutory limits exist on the amount of bail bond or the number of sureties that may be required. The entire matter is left to the discretion of the court without giving any guidelines.

The imposition of conditions can, therefore, be in the nature of prescribing certain requirements to be fulfilled for securing a release. A sum demanded by way of stipulation is to vouchsafe the economic status and social position of the accused with a view to ascertaining his roots in the community. These tests indicate the soundness of the promises made by the accused for ensuring his presence for trial.

These are, of course, goal oriented prescriptions which may not be workable and fool proof in the context of today. Effective and useful substitutes for achieving the purpose may have to be searched and suggested.

A condition imposed must have a bearing with the nature or purpose of the bail, which for all practical purposes is a process of the sysem of criminal justice besides being a mode to secure the accused's freedom. Thus, an order that the accused would appear on the requisition by the police when needed is a competent order,[13] or a direction to attend to investigation when needed is valid.[14]

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5. *Moti Ram* v. *State of MP*, AIR 1978 SC 1595.
6. *Asst. Collector of Customs v. Madan Ayabo Attenda*, 1992 Cr.LJ 2349; *Swankher Gulshan v. Asst. Collector Customs*, 1993 Cr.LJ 3569 (Bom.)
7. S. 436(2) of Cr.PC
8. *B.L. Joshi v. State*, AIR 1954 Sau. 109.
9. See also *Prosecutor* v. *A. Raghuramiah*, (1952) 2 and WR 383.
10. *In re D.M. Vizgapatanam*, *supra* note 6.
11. *Kamala Pandey* v. *King*, 50 Cr.LJ 1009 (1949).
12. 1992 Cr.LJ 1976
13. *Kimat Rai v. Emperor*, AIR 1945 Lah. 215.
14. *Giani Meher Singh v. Emperor*, AIR 1959 Cal. 714.

The courts have been putting unwarranted restrictions on the freedom of an accused even after he had fulfilled lawful conditions for securing his release on bail. In *Narendra Lal* v. *Emperor*,[15] the court held that conditions could be imposed to keep an accused within the confines of his own house and also to prevent him from communicating with any one associating in crime. Similarly in *Joglekar* v. *Emperor*,[16] a condition was imposed, on an accused under section 121-A IPC that he would not take part in any demonstration or agitation of any kind, nor would he deliver any public speech or address the press while on bail. It was held that the order was a valid one. In the context of article 19 of the Constitution of India, the exercise of judicial power to impose conditions as stated above ought not be deemed valid since such actions collide with one or the other freedoms guaranteed to an individual under the Constitution. But it is doubtful whether such conditions can be raised as unconstitutional and invalidated in view of the Supreme Court decision in *Naresh Mirajkar* v. *State of Maharashtra*.[17] From this, it is apparent that the bail order with conditions, even though it may be an unreasonable restriction on the person's fundamental rights, would remain invulnerable and the conditions valid.

Precedents continue to show that it is well within the court's jurisdiction to impose some restrictions on the freedom secured by an accused who has been granted bail, irrespective of the fact whether these restrictions really relate to the purpose of the bail or not. Unreasonable restrictions on freedom, however, cannot be justifiably imposed in any case. A court cannot impose conditions which may restrict the freedom granted to the accused on bail under section 436 of the Code. The bail in bailable cases can be fettered only by the requirements of the willingness and capacity of the accused to furnish bail bond and such other conditons as are provided under section 436(1) and (2). The prescribed requirements may not be enough to give credibility to the working of a bail system and perhaps leave some lacunae but this may not be allowed to put the bail system to an abuse either through the judicial practice of imposing conditions not covered by the statutes or those sought to be saved by virtue of *Naresh Mirajkar's* case.

The court's power to impose conditions on the grant of bail in bailable cases may frustrate the very purpose for which the bail is sought by an accused. Hence such power has neither been given nor needs to be given. However, in order to strengthen the bail system, the law requires that courts be vested with such discretion as may call for the use of such conditions as may promote the policy and purpose of bail in ensuring the accused's attendance before the court while on release and also that his behaviour during the period of release conforms to such norms as may not

15. ILR 36 Cal. 166 (1908).
16. AIR 1931 All. 504.
17. AIR 1967 SC. 1

cause prejudice in the minds of the court and the community that his freedom on bail may jeopardise the criminal process with a view to frustrating the interests of justice. The limited discretion thus vested may be helpful in tailoring a bail order to the requirements of a particular case and to a particular accused. It is, however, not to be used to put unnecessary restrictions on the enjoyment of such freedom of the person as are guaranteed to him under the Constitution.

An express legislative direction to make the position candid is most warranting. The Supreme Court direction in *Talab Husain's*[18] case that the grant of bail is dependent on the condition that it is fair both to the accused and the prosecution is also not helpful. It leads the court to answer queries other than the necessary ones, *viz.*, whether the responsibility to ensure attendance of the accused to answer the charges against him in the ensuing criminal process is vouchsafed or not. And if not, in what ways the same can be assured without denying him the freedom on bail and at the same time without putting undue restrictions on his freedom once it is granted. Such formulation would serve the policy and purpose of the bail component in the mechanism which is meant to secure pre-trial release of an accused from the custody.

It has been reiterated that the arrangement to free an accused is a mere facility that the system of criminal justice provides by way of bail, subject to such limitations as may be warranted by the exigencies of adminsitration of justice. The law and practice provide only a hazy picture in this regard. This area of the administration of criminal justice, therefore, calls for an in-depth study to bring meaningful reforms. The extent and limit of the courts' power and discretion have to be mapped out keeping in view the need for grant of bail as well as the right of the accused to enjoy his freedom once he is out on bail.

In the absence of clear statutory guidelines for grant of bail, courts have adopted some novel criteria also. In *Smt. Lahari Bai v. State of Rajasthan*,[19] a case of dowry death, the court granted bail to the husband but refused it to the mother-in-law of the deceased, though old. The court rested its decision on the logic that in our country, woman was the greatest enemy of woman.

The application of law and discretion in the matter of grant or refusal of bail has introduced another issue as well. It is the doctrine of presumption of innocence that is sometimes taken as a plea for dissuading the courts to exercise their discretion against the accused.[20] An accused is presumed innocent until it is proved to the contrary. A refusal of bail, therefore, tends to become a punitive measure for which the law does not

18. *Talab Husain* v. *B.P. Mondkar*, AIR, 1958 SC 376.
19. 1999 Cr.LJ 682.
20. *Emperor* v. *Hutchinson*, AIR 1937 All. 336.

accord sanction.[21] It can result in injustice to the individual by way of his loss of employment, his inability to support his dependants, disruption of his social and family relationships and difficulties in arranging for his own defence.

The present law is uncertain as to how far the bail process does affect the presumption of innocence. In practice the use of the doctrine has been seldom made and whenever the plea is forwarded, the courts bypass it on being satisfied that the proof of guilt in police possession outweighs the claim of the presumption. The application of the presumption of innocence for purposes of considering the issue of pre-trial release may become redundant if release is considered only as a policy in the administration of justice for the limited purpose of ensuring the presence of the accused without getting the co-equal values of freedom and security disturbed.

In the given set of affairs the state suffers in many ways. A congestion is caused in prison houses, where the remanded prisoners are housed. The cost of confining and maintaining them is borne by the state. By adopting a reckless attitude towards the welfare of the dependants of the accused, the welfare state may also not conform to the standards of social justice which it avowedly declares to profess.

Competing considerations have to be accommodated in the law of bails. It is a fact that defaults by accused persons to present themselves do occur. The opportunity granted to an accused by way of bail is sometimes abused by him in several ways. It may be either to save himself from the impending culpability or engage himself in other activities of crime in order to improve his financial position or continue to embark upon the career of crime which he has chosen for himself. Public concern gets warped as a result of the abuse of such freedom. The incidence of bail-jumping and an increase in the number of proclaimed offenders do no good either to the public concern or to the system of criminal justice. All these call for a review of considerations which have so far been existing in the law for purposes of grant or refusal of bail. The inadequacy of infra-structure to enable the court to get information about the accused and the verification of sureties and other related information may have to be removed. It may call for installation of a policing sub-agency under the control of the court, or for finding ways and means to get wider and effective public participation on the lines unfolded by the *Manhattan Bail Project.*

The present study may provide a reference plane for evaluating the utility of the existing bail system both in terms of individual freedom and the upkeep of social order. It may enable us to formulate the lines of modifications and the changes necessitated thereby.

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21. *Imperatix v. Sadashiv,* ILR 22 Bom. 549 (1898).

Ground Realities

The practice that invariably seems to operate in the enforcement of criminal law is to arrest a person accused of a crime. The person is then taken to the police station. Thus apprehended, he is either released on bail or is detained in the police lock-up pending his production before the court. Use of discretion by the police to grant or refuse bail arises at this stage.

The question of granting of bail in bailable offences is considered and taken up as a matter of right for the arrested person. It is granted by the police officer at the police station in petty matters involving persons who are otherwise not known as anti-socials. The known bad characters are detained awaiting some more investigation. The practice is, however, marked with certain inefficient and dishonest features, in as much as the discretion is effected to yield expeditious results at the instance and pressure of influential recommendations or through some settlement of pecuniary gains transacted between the agents of the parties concerned.

In case of offences alleged to be of a non-bailable nature, the practice is to detain the arrested person in the lock-up for an unduly long period for standing his trial. No formal case is registered. The arrested person is also not produced before the court on the expiry of twenty-four hours after his arrest. A large number of these arrested persons are semi-literates or illiterates with limited means of income and influence and are thus unable to avail of the opportunity to communicate with a lawyer, friend or relative to arrange for legal aid or for standing sureties. In such cases, the arrest is not entered into the formal records although some paper work is shown to be done.

The police does not generally discriminate between avoidable and unavoidable arrests and detention. It is also callous in applying the judicial mind while issuing the warrant for arrests under warrant In cases where the antecedents of a person are known to the police and the police can safely assume that the presence of the person when required would not create much difficulty, the perfunctory practice of arresting a person on mere accusation obviously abuses the very process. The police should exercise the power to arrest and bail out only after some investigation has been carried out. The fact that the necessary investigations are not done can be borne out by the fact that a majority of accused persons brought before the court for trial are finally discharged either before or after the trial. Use of the system of summons instead of arresting a person without warrant may also eliminate cases of unlawful arrest.

The frequent adjournment of cases in criminal courts is also a factor to be reckoned with to assess the efficacy of the system of release on bail. The delayed disposal of criminal cases together with the fact that the accused person had been enlarged on bail affords opportunity to an accused to approach and influence witnesses and also to exploit the gains of dismal memory of the events narrated by a witness after a long lapse of

time. This adversely affects the administration of criminal law and justice. A prolonged release on bail of an accused person caused by successive adjournments of trial has the potential of reducing even the chances of the accused appearing in the court to receive his conviction, if found guilty. The factor of delay may thus have a direct bearing on the increased rate of absconding of offenders.

There is a complete absence of any standard to determine the amount of bail. The amount required to be furnished in a case is mostly detrmined arbitrarily. No consideration is ever given to the personality of the accused or to his financial ability. No standards are followed to ascertain the integrity and capacity of the sureties as well. The quantum of bail amount can be deemed excessive from the general standards since most of the accused persons are from poor economic background. The usual mode of granting release is to ask for a personal bond from the accused stipulating a guaranteed sum of money for his presence along with a surety with a similar stipulation. Alternative bail processes, particularly the recognizance without sureties virtually do not exist.

The existence of professional sureties in the system of bail, within the knowledge of the magistracy, the lawyers and the police is a wonder- work in the system. Bonds are accepted from them as sureties for those who are unknown to them personally. These bailsmen have come to stay as an integral part of the system in subordinate courts and identifiable lawyers trade with them in the release of the arrested persons from custody. No system of verifying the character or status of the person standing as surety or his property exists in the records of the courts. The verification of sureties may be the responsibility of the lawyers or of the officials but the records, in the course of field survey, were found without showing any such verification, suggesting thereby that either the verification of sureties does not take place at all or the records are removed with the connivance of the officials. It has come to notice that the verification is done by requiring the surety to produce his ration card. The details of his status, income and address are generally vouchsafed by the lawyer. No endorsement is made on the ration card. Bogus ration cards are even sometimes shown with the connivance of officials of the civil supplies department.

The capacity, antecedents and character of the sureties are seldom questioned during the proceedings. There have also not been prosecutions for perjury or furnishing false bail bonds. Contrary to the above, the professional surety is generally considered an important person who helps in lessening the burden of the court by enabling it to make its order effective. He also unburdens the task of jail authorities, who otherwise have to take the arrested person in custody. Indeed, the professional surety is able to provide succour to the person securing release from custody on mere payment of a "fee". This instrumentality has become a convenient agency for the implementation of law of bails.

The professional sureties appear simultaneously in many cases on the basis of one and the same property which is sometimes even non-existent. The forfeiture of bail bonds is a rare phenomenon. If the proceedings are initiated they are commonly set aside.

The collusion of court officials, lawyers and professional sureties is evident and the willing indifference of the police, prosecution and the courts towards the existing mode of securing the bail is distinctly discernible. The services rendered by professional sureties in collusion with others, referred to above, and the diffidence shown by the administrators of criminal law and justice has proved to be gainfully useful to the organised groups and racketeers who deal in the business of crimes. While expenses incurred by these organised groups to pay for the services of professional sureties is considered a routine business expense, it comes as a ruthless exploitation of the individual who seeks their assistance and help. This is the ground available against Justice Krishna Iyer's observation : "a developed jurisprudence of bail is integral to a socially sensitized judicial process."[22]

The law on bail as legislatively enacted is poorly drafted, leaving broadly the system to be build by the enforcement agencies themselves, which they have been doing till date. The preceding pages have brought to the fore criss-cross of confusion that pervades the jurisprudence of bail. The classification of offences as bailable and non-bailable hardly indicates any rationale. The inter-changeable forms and modes of release like surety, security, bond and bail prescribed under the Code serve an identical purpose. The various forms for the same mode of release make most of them repetitive and redundant except that their retention in the Code without declaring the specific purpose and scope helps confusion worse confounded.

The object and purpose of bail have always been intelligible in the criminal law jurisprudence. The perspectives are at times lost and the bail process has either been used to give an over-emphasis either to the liberty of the individual or to the security of the state. The mal functioning of the administrative machinery and its loose control over the law-enforcement agencies have brought to the fore instances where judicial action to protect personal liberty in the wake of the growing awareness of human rights has hardly been a redeeming feature. This approach has resulted in some imbalances in the mechanism, system and process of bail, which is a vital component of the machinery geared to serve the ends of criminal justice. This perspective has to remain constantly in view while understanding the working of the bail system.

The inclusion of provisions like anticipatory bail in the scheme of bail system is according to some critics an anomaly because of semi assimilation of this concept with the ordinary concept of bail. It is being suggested that

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22. *Gudikani Narasimhulu v. Public Prosecutor*, AIR 1978 SC 429.

the provisions of anticipatory bail be kept out of the domain of bail altogether. However, the withdrawal of the scheme will not be justified in any way.

In sum, the confusion in the concept of bail and also in the working of the bail system is largely the result of a basic misunderstanding of the concept and the lack of its proper formulation under the Code. A new law on the subject alone can rectify the errors. However, a proper functioning of the bail process in our legal system should guarantee the existence of changed social facts, which may be prerequisites for a successful functioning of the bail system.