Chapter - 1

THE CONCEPT AND SYSTEM OF BAIL : EVOLUTIONARY PERSPECTIVE

Meaning

BAIL, THOUGH primarily a legal term, has acclaimed usage both by law men and lay men. It, however, has not been statutorily defined. Conceptually, it continues to be understood as a right for assertion of freedom against state imposed restraints. The main purpose of arrest of an accused is to secure his presence on trial and to ensure his being available for punishment on conviction. If the presence of an accused at his trial can be ensured by means other than his arrest or detention, it would be quite possible to allow him the enjoyment of his liberty during his trial. One of the ways to prevent unnecessary deprivation of the liberty of an accused is 'bail'.

Literally the expression 'bail' denotes a security for appearance of a prisoner for his release.[1] Etymologically, the word is derived from an old French verb "bailer" which means to "give" or "to deliver", [2] although another view is that its derivation is from the Latin term *'bajulare'* meaning "to bear a burden".[3] *Stroud's Judicial Dictionary* spells out certain other details about bail as follows :

> When a man is taken or arrested for felony, suspicion of felony, indicted of felony, or any such case, so that he is restrained 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 Goale delivery at the next Sessions, &c. Then upon the bonds of those sureties, as is aforesaid, he is bailed—that is to say, set at liberty untill the day appointed for his appearance.[4]

Bail is thus a grant of conditional liberty to an accused who assures or on whose behalf assurance is given that he would be present at the trial. 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 : and is supposed to continue in their freindly custody instead of going to goal.[5]

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1. See *Concise Oxford Dictionary, Chambers Twentieth Century Dictionary.*
2. See *Webster's New International Dictionary.*
3. *Shorter Oxford English Dictionary.*
4. *Stround's Judicial Dictionary, Vol. I,* 244 (1971).
5. Sir William Blackstone's, *Commentaries on the Laws of England,* Vol. III, 290 (*London*, 1844).

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.

Preview

Under the English 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.[6] 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, under the recognised principle of law that a body could be detained for the body released.

Such a 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.

It can thus be found 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.

In India the concept is traced back to ancient Hindu jurisprudence which required, *inter alia*, an expedient disposal of disputes by the functionaries responsible for administration of justice. No laxity could be afforded in the matter as it entailed penalities on the functionaries.[7] Thus, a judicial interposition took care to ensure that an accused person was not unnecessarily detained or incarcerated. This indeed devised practical modes both for securing the presence of a wrongdoer, as well as to spare him of undue strains on his personal freedom.

During Mughal rule, the Indian legal system is recorded to have an institution of bail with the system of releasing an arrested person on his furnishing a surety. The use of this system finds reference in the seventeenth century travelogue of Italian traveller Manucci who himself was restored to his freedom by bail from imprisonment for a false charge of theft. He was granted bail by the then ruler of Punjab, but the *Kotwal*

6. See A.N. Chaturvedi, *Rights of Accused under Indian Constitution*, 283 (1964).
7. See R.P. Kangle (ed.), *Kautilya Arthshastra* IV ch. 9 (1963, R.P.).

released him only after he furnished a surety.[8] Under Mughal law, an interim release could possibly be actuated by the consideration that if dispensation of justice got delayed in one's case then compensatory claims could be made on the judge himself for losses sustained by the aggrieved party.[9]

The advent of British rule in India saw gradual adaptation of the principles and practices known to Britishers and prevalent in the common law. The increasing control of the East India Company over *Nizamat Adalats* and other *fouzdary* courts in the mofussil facilitated gradual inroads of English criminal law and procedure into the then Indian legal system. At that juncture of history, criminal courts were using two well understood and well defined forms of bail for release of a person held in custody. These were known as *Zamanat* and *muchalka*. A release could be effected on a solemn engagement or a declaration in writing. It was known as *muchalka* which was an obligatory or penal bond generally taken from inferiors by an act of compulsion. In essence, it was a simple recognisance of the principle of bail. Another form of judicial release was a security with sureties known as *zamant*, in which the *zamin* (surety) became answerable for the accused on the basis of a written deed deposited by him with the trying court. With discretionary powers vested in courts under the doctrine of *tazeer* in *Muslim* criminal law, a decision on the issue of grant or refusal of bail or the mode of release, did not pose much difficulty. However, in place of local mechanism the form and contents of the British institution of bail were statutorily transposed into Indian legal system by the passing of Code of Criminal Procedure in 1861, followed by its re-enactment in 1872 and 1898 respectively. Its latest reflection is the improved version of the provisions relating to bail in the Code of Criminal Procedure, 1973 which were preceded by the adoption of the Constitution in 1950 and some recommendations of the Law Commission brought out in the 41st Report in 1969.

On the adoption of the UN Declaration of Human Rights of 1948, the concept of bail formally pierced into the arena of personal liberty. Its constitutional bulwark is to be found in article 21 of the Constitution of India, 1950 which also subsumes the spirit of clause 12 of the *Magna Carta*. 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.[10] The administrators of law and justice, in this changed context, are

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8. William Irvine, *Mughal India*, Vol. II, 198 (1907); Manucci's travel account of the mid-seventeenth century was originally published in Italian and was translated later by William Irvine.
9. J.N. Sarkar, *Mughal Administration in India*, 108 (1920).
10. See *Ratan Nihal Singh* v. *State of M.P.*, AIR 1959 MP 216.

mandated to function in a manner that the constitutional equilibrium between the 'freedom of person' and the 'interests of social order' are maintained effectively. Thus, the ushering of a new democratic social order necessarily required updating and streamlining of the then existing laws.

The broad principles specified by the Law Commission, on the subject of bail are : (i) bail is a matter of right if the offence is bailable (ii) bail is a matter of discretion if the offence is non-bailable (iii) bail is not to be granted if the offence is punishable with death or imprisonment for life but the court has discretion in limited cases to order release of a person. The law Commission has also stated that even in respect of offences punishable with death or imprisonment for life, the sessions court and the high court ought to have even a wider discretion in the matter of granting bail.[11]

The Law Commission has suggested that avenues of freedom by way of release on bail be denied to those who have earlier abused it by not appearing before a court or by absconding themselves. But the commission has not accepted the proposal that those who once had been accused of having committed serious offences punishable with death or imprisonment for life, if they are accused again of having committed any other serious offence, the grant of bail may be refused. The rationale for this approach lies on the assumption that persons accused of serious offences may again commit serious offences during their release on bail. Since such proposal did put an undue restriction on the power to grant bail, the Law Commission rightly countered it by stating that in cases where liberty was likely to be abused, the answer lays in concellation of the bail itself.

In order to blunt the effect of deprivation of liberty for alleged commission of serious offences carrying severe penalty upto seven years of imprisonment, the law Commission innovated the rule that courts be vested with power to grant bail by imposing necessary conditions. The conditions may be such as are necessary to ensure presence of a released person as well as to ensure that the accused does not engage himself in acts which may again involve him in similar accusations.

Other conditions warranted in the interests of justice can also be imposed. Reliance on judicial discretion has thus been the keynote of recommendations of the Law Commission. All such difficult situations are to be regulated and governed by judicial discretion on a case to case basis.

Streamlining of the law on bails was set up in the framework of basic principles of personal liberty with the purpose that these are minimally affected, and a flexible mechanism adopted to secure interests of the society through an exercise of judicial discretion. The approach seems to be consistent with the policy and purpose of the institution of bail. The suggested scheme is, therefore, supposed to accomplish and reinforce the immutable principles of liberty, as well as to meet challenges thrown by deviant elements.

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11. The Law Commission of India, *41st Report on Code of Criminal Procedure*., Vol. I, 311 (1969).

Nexus Between Bail and Liberty

The requirement of the law to enlarge a person on bail is 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 obligation to 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.[12] Since all 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 cannot 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 bail means "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 prison...."[13]

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

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 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

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12. *Kamlapati Trivedi* v. *State of W.B.*, AIR 1979 SC 777.
13. *Venkatarmaiya's, Law Lexicon*, Vol. I, 131 (1971).

interjected in passing that in the event of delivering custody to the state 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 in general and personal liberty in particular.[14]

Straying Scenario

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 over 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 responsibilities 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. In actual practice, serious deviations are reported affecting credibility and utility of the bail system. There has also been a noticeable trend of bail jumping.

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 some professional bondsmen or sureties have emerged 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 myriad 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 enables 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.

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14. See D.C. Pandey, "Criminal Law", XVI *ASIL* 452 *et. seq.* (1980).

There are other factors which contribute towards confusion about the utility of the system of bail in criminal cases. One such factor is the malpractices prevailing extensively amongst law enforcement agencies already brought to the notice by the National Police Commission.[15] The abuse of criminal law has been a sequel to these malpractices, which in turn have created greater sensitivity towards human rights. This trend is a healthy development in our constitutional system for reinforcing personal liberties of an individual. Working of the general law and its administration is now being compared with the standards of human rights jurisprudence. It has an impact because considerable emphasis on personal liberty by higher judiciary 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. Its effect has provided a justification for having a fresh look on the working of the bail system and the aberrations, if any, caused to it. The requisite equilibrium in the system can be produced only with a better political understanding of the system by the police and the public. The obnoxious practices which have crept in may also call for a frontal attack—both administratively and by legislation—in order to redeem the institution of bail.

Need for Balancing the Values

Passionate pleas for personal liberty are often being made while seeking release of an accused person in pre-trial cases. This approach is in keeping with the growing awareness about 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.

Tales of unlawful and arbitrary actions being numerous, the increased sensitivity towards the personal freedom and emphatic judicial pronouncements thereon have accorded further legitimacy to assertion of human rights. The accelarated leaning towards human rights jurisprudence has also been due to 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. Moreover, the human rights jurisprudence, studded on constitutional bases, has been used by courts to contain oppressive state actions and correct deviant officials. This all is an irradiation. 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. Co-mingling human rights with

15. National Police Commission, *Third Report*, 33 (1979).

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 to prepare itself. Looking to realities of the situation, it would be worthwhile to administer effective, but gradual 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.[16] 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 of 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 get generally distributed as dividends amongst dangerous depredators at the cost of social interests. In the context of bail, it has been found that the poorer sections 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.[17]

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16. *Ibid.*
17. 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).

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