GRANTING OF BAILS - WHETHER TO THE PRIVILEGED CLASSES AS COMPARED TO THE UNDERPRIVILEGED CLASSES

By

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The Concept of the Bail implies a form of previous restraint. The meaning of the term 'Bail' is to set free a person who is under arrest, detention or under some kind of restraint by taking security for his appearance. Section 436 of Criminal Procedure Code with Form 45 of Schedule II of that code contemplate to kinds of securities:

(i) Security with sureties and

(ii) Recognizance of the principal himself.

Therefore, in view of the definition of the word 'Bail' the person must be under some sort of restraint and the order of releasing a person under arrest or detention or some other kind of restraint by taking security for his appearance.

In case of *Sunil Tulchand Shaw v. Union of India*, 2000 Cri. LJ 1444, the Supreme Court held that 'Bail' is a security obtained from a person arrested regarding an offence for the purpose of securing his presence during the course of trial. Though, such a person is released on bail, still Court will have hold on him by way of surety and other conditions set on the bail.

One important purpose of arrest is to secure the presence of the accused person at the time of his enquiry or trial and to ensure that he is available to receive sentence on convictions. If this purpose can be achieved without forcing dentition on the accused during enquiry of trial, it would be ideal blending of to apparently conflicting claims namely, (i) Freedom of the individual and (ii) the interest of justice. The provisions relating to bail aim at such blending. They have been enacted with a view of restoring liberty to the arrested person without jeopardizing the objectives of arrest.

A common man or law people (who know law) are said to law-abiding citizens until; all of us abide by and create no problem. But what about the people who break the law. They can claim that we don't know the law. But there is well-known maxim of criminal law that "*ignorantia facti excusat, ignorantia legis neminem excusat*" it means ignorance of fact is an excuse, ignorance of law is no excuse. Hence ignorance of law is not excusable.

When a person commits a crime under the heads which fall under Indian Penal Code or under any special Act, he will be arrested and put in custody he will brought into the Court where actual trial of the case commences. It takes a long time for all this procedure of law. Meanwhile accused will be unnecessarily put in custody before his acquittal or conviction is decided and put in prison for number of days as a result his liberty will be deprived.

If we think with reasonability an accused was put in custody it may be a 'judicial or police' for securing his presence at the time of trial than about his 'personal liberty' which is a constitutional guarantee under Article 21 to every citizen of India, which becomes unconstitutional.

For this purpose under the Code of Procedure, 1973 a provision of "bail" is inculcated to avoid such hinderences. Hence there is need for every citizen to have knowledge about such bail provisions

provided by our law otherwise an accused will be put in custody or jail for number of years until the of his case even though he is innocent. Of course there are persons who may mis-utilise this provision by releasing on bail though they really commit a crime but by following a basic principle of criminal law that "hundreds of criminals may escape but one innocent should not be punished", a person accused of an offence is brought before shall be provided with the "bail" basing upon the merits of the case

The term 'Bail' is not defined in the code, the meaning as found in the dictionaries and as explained in the precedents has to be applied the concept of bail implies a form of previous restraint. Definition of bail according to Oxford Dictionary is "Money *etc*., required as security against the temporary release of a prisoner pending trial" many other dictionaries define bail as in their own ways. Whatever their context may be the meaning of the term 'Bail' is to set free a person who is under arrest, detention or under some kind of restraint by taking security for his appearance. Sections 436 of Criminal Procedure Code read with Form 45 of Schedule II of that Court contemplate two kinds of securities:

(1) Security with sureties and

(2) Recognizance of the principle himself

The object of detention of an accused primarily to secure his/her appearance at the time of trial and is available to receive sentence, in case found guilty if his/her presence at the trial could be reasonably ensured other than by his\her arrest or detention, it would be unjust and unfair to deprive the accused of his liberty during pendency of criminal proceedings. The object of granting bail is enriched in the Universal Declaration of Human Rights:

> Article 9: No one shall be subjected to arbitrary arrest, detention or exile
>
> Article 10: Everyone is entitled in full equality to a fair and public hearing by an impartial Tribunal, in the determination of his rights and obligations and of any criminal charge against him
>
> Article 11(1): Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he had all the guarantees necessary for his defence.[1]

The code has classified all offences into "Bailable" and "Non-Bailable" offences. Under Section 2(a) bailable offence means an offence which is listed as bailable in the first schedule or which is made bailable by any other law for the time being in Courts non-bailable offence means any other offence.

Section 436 of Criminal Procedure Code, 1973 deals bailable offences. This provides that when a person not accused of a non-bailable offence is arrested or detained he can as a right of claim to be released on bail and such a right is available to all those arrested under different categories of bailable offences, except in cases of accused against whom security proceedings have been initiated. A police officer has no discretion at all to refuse to release the accused on bail so long as accused is prepared to punish surety and the police officer also can't refuse the bail on the ground that the person arrested may be granted bail by a Court and this was held in *Dharma v. Rabindranath*, 1978 Cri. LJ 864 (Ori.). The criminal has no discretion in bailable offence while granting bail under this section to impose any condition except the demanding of security with sureties

The three conditions which were laid down in *State v. Basvanath Rao*, 1966 Cri. LJ 267, where treated as condition precedent and consideration for granting bail under Section 436 of Cr.P.C. They are:

1. www.Lawyersclubindia.com/Right to bail and Right to free legal aid/P2 of 10 retrieved on October 10th 2013.

(1) He has been accused of a bailable offence;

(2) He has been arrested or detained without warrant by an officer in-charge of a police station or appears or is brought before a Court and

(3) He is prepared to give bail at any time while in the custody of such officer or at any stage of the proceedings

Section 437 of the Code of Criminal Procedure deals with the aspect of non-bailable offences. It is essentially discretionary. Generally while making a decision regarding grant of bail under this section the following circumstances are taken into consideration:

(1) nature and seriousness of the offence

(2) the nature of circumstances in which the offence was committed

(3) the *prima facie* character of the evidence

(4) the circumstances which are peculiar to the accused

(5) position and status of accused with reference to victim and witnesses

(6) reasonable possibility of presence of accused not being secured at the trial

(7) history of the case as well as investigation

(8) reasonable apprehension of witnesses being tampered with on jeopardizing his own life

(9) larger interest of public or the State repeating the offences and similar other considerations which arise when a Court is approached for a Court in a non-bailable offence, *Gurucharan Singh v. State of Delhi (Administration)*, AIR 1978 SC 179.

A person covered by sub-section (1) of clause (ii) may be released on bail if such person is under the age of 16 years or is a woman or sick or infirm. Sub-section (2) of Section 437 provides that if the Investigating Officer or the Court at any stage of the investigation, enquiry or trial as the case may be is of opinion that there are no reasonable grounds for believing that the accused has committed a non-bailable offence, but there are sufficient grounds for further inquiry into his guilt pending such inquiry the accused shall be released on bail.

Sub-section (3) of Section 437 confers discretion on the Court releasing a person on bail under sub-section (1) of Section 437 to impose any condition when the Court considers necessary. Any person releasing on bail under sub-section (1) or sub-section (2) of that section is required to record in writing his for its reasons for doing so under sub-section (4) of Section 437, sub-section (5) of Section 437 of Criminal Procedure Code confers discretion on any Court which has released a person on bail under sub-section (1) or sub-section (2) to direct that, such person be arrested and him to commit custody if it considers it necessary so to do.

Sub-section (6) of Section 437 provides that the trial of a accused of any non-bailable offence is not concluded within a period of sixty days from the first date fixed for taking evidence, if he is in custody during the whole of the said period, be released on bail to the satisfaction of the Magistrate. This sub-section has to be read along with the Section 167 clause (2) and also be read with Section 309 of Criminal Procedure Code which explains procedure when investigation cannot be completed in twenty four hours and power to postpone or adjourn proceedings, respectively. Sub-section (7) of Section 437 lays down that if it appears to the Court after the conclusion of trial that there are no reasonable ground for believing that the accused is not guilty of a non-bailable offence the accused shall be released, if he is in custody, on the execution of a bond by him for his appearance before the Court to hear the judgment under this sub-

section, it is enough if he executes a bond without sureties

Section 439 deals with special powers of Court of Session regarding bail. The restrictions under section clause (1) Cr.P.C has no application to Sessions Court acting under Section 439. But considerations for grant of bail in both Sections 437 and 439 are one and the same.

Section 438 of Criminal Procedure Code provides for conditions under which a person apprehending arrest on an accusation of having committed a non-bailable offence may apply for bail. The Law Commission in its 41st report observed that "the necessity for granting anticipatory bail arises mainly because sometimes influential persons try to implicate their rivals into false cases for the purposes of disgracing them". Therefore pursuant to this recommendation, Section 438 was put into the code in order to ensure that the life and liberty of an innocent person is not jeopardized on flimsy and frivolous grounds. Thus there are only two questions that the Court needs to consider while passing an order of anticipatory bail:

(1) where there is reason to believe that the petitioner may be arrested, on an accusation of having committed to non-bailable offence and

(2) whether it thinks fit that in the event of such arrest he will be released on bail and also it can impose such conditions on the order in the light of a particular case

In *Gurubaksh Singh Sibha v. State of Punjab*, AIR 1980 SC 1632, following guidelines are laid down in case of anticipatory bail.

(1) the High Court and the Session Court have been given wide rules, discretionary – left free in the use of their judicial discretion to grant bail on the facts and circumstances

(2) The Court must apply its own mind to decide the question without learning it to be decided by the Magistrate under Section 437 as and when occasion arises

(3) The operation of the order should not be limited to a period of time

(4) Apprehension of arrest should not be vogue. The applicant must show by disclosing specific facts and events that he has reason to believe the existence of power by the Court and not vogue apprehension that he may be arrested for a non-bailable offence to that, the Court may take care to specify the offence or offences in respect of which alone the order will be effective and not a blanket order.

Especially, when a matter of bail applications comes before the Court it is only the Magistrate or Sessions Court or the High Court in which the power is imposed to grant it. But if the accused feels that, even by going to the High Court his bail application is rejected on considering no grounds or non-perusal of grounds to be considered for granting bail to him then in such a case, the accused approaches the Hon'ble Supreme Court on pointing the High Court decision and apex Court can reverse the decision of High Court which will obviously binding on all Courts in India. The question is which Court it may be from apex Court to Magistrate Courts actually on what point of considerations they are granting bails to the applicants, whether the Courts in India is focusing on the privileged classes while granting bail? Or on what grounds generally Courts will grant bail.

In *Shahzad Hasan Khan v. Ishtiaq Hasan Khan*, AIR 1987 SC 1613; *Gudikanti Narashimhulu v. Public Prosecutor of Andhra Pradesh*, AIR 1978 SC 429; *Baghirath Sinh v. State of Gujarath*, AIR 1984 SC 372; *State (through Deputy Commissioner of Police, Special*

Branch, Delhi) v. Jaspal Singh Gill, AIR 1984 SC 1503; *Jagadesh Singh v. Harindrajit Singh*, 1986 SCC (Cri.) 1; *Chandra Swami and another v. Central Bureau of Investigation*, 1997 (1) ALD (Crl.) 188 (SC); *Bharat Chandra and another v. State of Bihar and another*, 2003 (2) ALD (Crl.) 976 (SC); *Mansab Ali v. Irfan*, 2003 Cri. LJ 871; *Shameem Ahmaed v. State*, 2003 Cri. LJ 2815 (Cal.) (FB); *Salauddin A. Shaik v. State*, 1996 Cri. LJ 1368; *Bhuvaneswar Yadav v. State of Bihar*, AIR 2009 SC 1452; *Kalian Chandra Shekar v. Rajesh Ranjan @ Pappu Yadav*, 2004 Cri. LJ 1796 (D); *Biman Chatterjee v. Sanchita Chatterjee*, 2004 Cri LJ 1451; *Vipin Mehra v. State*, 2004 Cri LJ (NOC) 41 (Del.); *Mehboob Dawood Shaik v. State of Maharashtra*, 2004 Cri. LJ 1359 (A); *Adridharan Das v. State of West of Bengal*, AIR 2005 SC 1057; has taken the same considerations while granting bail to the accused persons they are:

(1) The nature of accusation and the severity of punishment in case of conviction and the nature of supporting evidence

(2) The reasonable apprehension of tampering of the witness or apprehension of threat to the complainant

(3) *Prima facie* satisfaction of the Court in support of the charge

(4) The nature of the charge is the vital factor and the nature of the evidence also is pertinent. The punishment which the party may be liable, if convicted or conviction is confirmed, also bears upon the issue.

(5) As to whether the course of justice would be thwarted by him who seeks the benignant jurisdiction of the Court to be freed for the Court considering the likelihood of the applicant interfering with justice. It is not only traditional but rational in this context, to enquire into the antecedents of a man who is applying for bail to find whether he has a bad record – particularly a record which suggests that he is likely to commit serious offences while on bail in regard to habitual. It is part of criminological history that a thoughtless bail order has enabled the bailee to exploit the opportunity to inflict further crimes on the members of society. Bail discretion on the basis of evidence about the criminal record of a defendant is therefore, not an exercise in irrelevance.

(6) That deprivation of freedom by refusal of bail is not for punitive purpose for the bifocal interests of justice to the individual involved and society affected.

(7) It makes sense to assume that a man on bail has a better chance to prepare or present his case than one remanded in custody and if public justice is to be promoted, mechanical detention should be demoted.

(8) Bad records and police prediction of criminal prospects to invalidate the plea are admissible in principle, but shall not stampede the Court into a complacent refusal.

(9) The period in prison already spent and the prospect of the appeal being delayed for hearing.

(10) The delicate light of the law favours release unless countered by the negative criteria necessitating that course. The corrective instinct of the law plays upon release orders by strapping on to them protective and curative conditions.

(11) Heavy bail from poor men is obviously wrong.

Thus the above considerations made by several Courts in case of granting bails to the accused in India are all same and it is clearly viewed that bail applications are not granted basing upon the factor of privileged and

underprivileged classes of people. The application of mind of Judges in granting bails where only on the seriousness of the nature of the offence committed by the accused but not on the economical status of the accused. The number of articles were published on bail system in India, number of suggestions were made by Law Commissions that bails are to be granted without observing economical status of accused.

There is no lacunae in the provisions of law laid down in the Cr.P.C. 1973 about bails. The only thing what is required in granting of bails is the nature of offence with which accused is charged. If such a offence is so heinous, will obviously be observed as per the facts and the circumstances of the case.

The following suggestions are forwarded to the policy makers to make the bail system operative in tune with the changing trends of Prison and Criminal Justice System:-

(i) Bail procedure had to be simplified and be made understandable to even illiterate persons.

(ii) The modes and forms of release on bail are to be rationalized and streamlined, so as to enable an accused to ask for a specific form of release commensurate with the nature of the offence and circumstances of the case.

(iii) There is need to make statutory classification of offences for granting or refusing a bail.

(iv) Procedure relating to insisting on furnishing monetary sureties be rationalized,

(v) The Court should not reject the persons as sureties just because they are not owning the property within the jurisdiction of the Court concerned.

(vi) A number of Court decisions have already crystallized the factors which are relevant to access risks involved in releasing arrested person on bail. These factors together with other necessary conditions may be cataloged to set up discernible criteria for use by the Courts while exercising their discretion.

JUDICIAL ACCOUNTABILITY — IMPACT OF ACCOUNTABILITY ON JUDICIAL SYSTEM - TAINTED JUDGES AND LAWYERS EFFECTED ON JUDICIAL SYSTEM — A CASE STUDY

By

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Introduction

Judiciary is one of the indespensible organs of democracy. It is through the Judiciary the law of a democratic state are enforced with the aid of the executive. Non-enforcement of law is anathema to a civilized society because it results in anarchy. The sacred duty of enforcing the laws is placed in the hands of judiciary. This duty is entrusted to the judiciary because the society has reposed its conference in it. Judicial duty discharged under a constraint is again anathema to impartial justice. Similarly on unrestrained duty may turn anathema to quality justice. Principle independence and