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A CRITICAL STUDY OF BAIL TRENDS IN INDIA

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Abstract:

Bail is a Release of the convicted person to submit a personal bond or assurance to comply with the conditions imposed by the court and to appear before the court. Just because a person is accused of a crime, an endless period of time is not required to hold the individual in custody. The Hon'ble Supreme Court of India held it in *Babua Tazmul Hossain V. State of Orissa*¹ that it is well known that pre-trial detention should not be reinstated as a punishment measure. The accused should also be granted the privilege of bail to better defend his case if Bail is a law and jails as an exception, unless the courts have a reason to assume that the accused would not stand at his trial or that it is not in the interest of society to grant bail as such. There are substantial differences are found in the judgments regarding the bail of the trial court and the High Courts. In most of the cases it has been observed that in cases where the trial court rejects the bail plea, bail is accepted by the High Court. The trial court dismisses the bail petition like other petitions without mentioning any judicial view. There is a strong need felt for a complete review of the bail system keeping in mind the socio-economic condition of the majority of our population. While granting bail the court must also look at the socio-economic plight of the accused and must also have a compassionate attitude towards them.

Keywords:Bail, Rights to Life, Human Rights, Prison, Criminal Justice System

¹Appeal (crl.) 593 of 2002

1. Introduction:

“The issue of bail is one of liberty, justice, public safety and burden of the public treasury, all of which insist that a developed jurisprudence of bail is integral to a socially sensitized judicial process.”

–Justice V.R. Krishna Iyer in Gudikanti Narasimhulu case (1977)

Bail in law means the acquisition of the release from prison of a person awaiting trial or appeal by means of a security deposit to ensure that he is submitted to the legal authority at the time necessary. The monetary value of the safeguard known as the bail, or more precisely, the bail bond, is determined by the court with jurisdiction over the inmate. The security may be cash, the papers giving title to property, or the bond of private persons or means or of a professional bondsman or bonding company. Failure of the person released on bail to surrender himself at the appointed time results in forfeiture of the security.² Bail is a post arrest remedy aimed at the release of the arrested suspect till the date of his trial. Bail vindicates the traditional right to freedom before the guilt is proved. Bail is allowed to prevent confinement of innocent persons which would otherwise result into a pre-trial punishment and to enable an accused person to prepare his defense to the charges against him which is the common law principle, presumption of innocence.³ Bail is essentially the stage of pre-conviction, including a speculated person's individual freedom. For the most part, the principle of bail involves the two opposite intrigues, one of which is the accused person's excitement, which involves the individual freedom to deliver him from treatment for some protection, which may be Monterey or some other assurance. The other intrigue, too, is the general public's passion for protecting the general public from counter social exercises.

In Black's Law Dictionary, bail has been defined as “a security such as cash or bond especially security required by a court for the release of a prisoner who must appear at a future date.”⁴

Webster's Law Dictionary defined “Bail, a temporary release of a person in exchange for security given for the prisoner's appearance at a later hearing”⁵.

² http://www.legalserviceindia.com/articles/bail_poor.htm

³ Asim Pandey, Law of Bail Practice and Procedure, Second Edition, 2015, Lexis Nexis. p. 8.

⁴ Black's Law Dictionary, 4th Edn., p. 177

The Supreme Court in the case of *Kamlapati v. State of West Bengal*⁶, defines bail as ‘a technique which is evolved for effecting the synthesis of two basic concepts of human value, viz., the right of an accused to enjoy his personal freedom and the public’s interest on which a person’s release is conditioned on the surety to produce the accused person in the Court to stand the trial.’

As thus the bail is one of the methods by which a person convicted can be designed to make the most of his liberty in order to escape a prison term. In a real sense, the word bail means the arrival of the prisoner to be delivered. Bail is a restrictive distribution of freedom to an accused who promises that the accused that is available on the preliminary or for the benefit of the attempt is available.

2. Literature Review:

Asim Pandey writes in his book about the available Bail laws and the Procedure. He describes in his book that the law of bail plays a very important role in the justice administration. The law of bail is of supreme importance since it is directly and intimately connected with the liberty of a person which is safeguarded in article of the constitution.⁷ *Janak Rajin* his book "*Bail Law and Procedures*" examined that award of bail is a standard and refusal of the bail is a special case. Tragically, the letter and actual intent of the law isn't clung to by the greater part of the Courts in our nation. Individual freedom of an individual resident and right to life under Article 21 of the Constitution is the most valuable crucial right which can't be endangered by any office or organization at all. Keeping in see the major right of residents independent of shading, position or doctrine exceptionally humble exertion has been made by the writer in this book to manage the arrangements and technique for the award of bail⁸. *P.V. Ramakrishna* says in his book the privilege to freedom is one of the principal rights ensured by the constitution of the apparent multitude of enlightened nations. This book manages the law of bail, bonds, capture and authority finally. Bail is a component by which by which the antagonistic outcomes of deferral before preliminary can be limited. Significant legal choices of High Courts and Supreme Court

⁵ Webster's Law Dictionary of Law, India Edn. 2005, p. 41.

⁶ AIR 1979 SC 777

⁷ Asim Pandey, Law of Practice and Procedure, Second Edition, 2015, Lexis Nexis.

⁸ Janak Raj Jai, Bail Law and Procedures, Universal Law Publishing, 6 th edition, 2015

have been included acceptable measure. *V.R. Krishna Ayer* in his judgment in the event that *Gudikanti Narsimulu v. Public Prosecutor*⁹ says "noteworthiness and clear of Article 21 make the hardship of freedom, fleeting or bearing, a matter of grave concern and admissible just when the law approving it, is sensible, fair and equipped to the objectives of network great and State need spelt out in Article 19. Sensibility hypothesizes smart consideration and predicates that hardship of opportunity by refusal of bail isn't for reformatory reason however for the bifocal interests of equity to the individual in question and society influenced." Justice Krishna Iyer additionally makes reference to that the code is secretive on the subject of bail and the Court wants to be the request custodial or not. But the issue is one of the freedom, equity, public security and weight of the public depository all of which demand that a created statute of bail is vital to a socially sharpened legal cycle.

3. Research Methodology:

The instrument of Bail has a significant component to secure the freedom of a person. It is at the tact of the court if to concede bail in non-bailable offenses. Examination is to look once more. This examination is involved the doctrinal type of exploration. Examination is finished with the assistance of the essential and the optional sources. Essential sources are the demonstrations, enactment, Ordinances made by the governing body itself and auxiliary sources are the different decisions articulated by the courts and different standards set somewhere around the courts. This work depends on the both Primary and the auxiliary wellsprings of the doctrinal exploration.

4. Objective of the study:

The point of this examination is to feature the disadvantage of the bail framework in India. The matter of bail is generally a matter of carefulness and such tact must be practice not discretionarily yet reasonably based on standards which at this point have gotten genuinely settled however not followed appropriately.

- The study will feature the negative mark of refusal of bail in minor offenses.
- To Study about the Criminal Justice System and Bail.

⁹ AIR 1978 SC 429 Para 12

- To assemble data about the Bail laws and Procedures.
- To examine about the Bail patterns in India.

5. Types of Bail:

There are three types of bail in India, i.e., Regular Bail, Interim Bail Anticipatory Bail.

- Regular bail: A person who is in the custody of the police can be given regular bail Under Sections 437 and 439 of the Cr.PC.
- Interim bail: This form of bail is given for a brief period of time and is given for the grant of intermittent bail or anticipatory bail before the hearing.
- Anticipatory bail: Anticipatory bail can be granted by the Session Court and the High Court under section 438 of the CrPC. An application for the grant of anticipatory bail can be filed by the person who afraid that he will be arrested by the police for a non-bailable offence.

6. Classification of Offences for the purpose of Bail

- Bailable Offence: Bailable offences are defined under Section 2(a) of the Code of Criminal Procedure. Bailable offence means an offence which is shown as bailable in the First Schedule of Cr.PC, or which is made bailable by any other law for the time being in force; and non-bailable offence means any other offence. Bailable offences are the type of offence in which an accused can be granted bail. Generally, certain forms of crimes are punishable for less than three years. The chances of getting bail are far better in the case of bailable offences. Bailable Offense refers to an offence that is listed as bailable. In the event of such an offence, after such requirements have been met, bail can be issued as a matter of law under Section 436 of the CrPC. In the case of bailable offences, at the time of arrest or incarceration, the police are allowed to issue bail to the defendant.
- Non-Bailable: Non-bailable means an offence in which the bail cannot be granted as a matter of right, except on the orders of a competent court. In such cases, the accused can apply for grant of bail under Sections 437 and 439 of The Criminal Procedure Code, 1973. When opposed to bailable offences, these offences are grievous in nature. The sentence in the case of non-bailable crimes is three years or more.

It should be remembered that the issuance of bail in respect of a non-bailable offence is subject to the Court's judicial discretion.

7. Conditions for Grant of Bail

*In Bailable Offences:*Section 436 of Code of Criminal Procedure, 1973, lays down that a person accused of bailable offence under IPC can be granted bail. If there are sufficient reasons to believe that the accused has not committed the offence. There is sufficient reason to conduct further enquiry in the matter. The person is not accused of any offence punishable with death, life imprisonment or imprisonment up to 10 years. According to section 436 of the CrPC, if the alleged crime is bailable, the accused can, as a matter of law, be entitled to bail before the Police Station itself or, if it is referred to the Magistrates Court, before the Magistrates Court. Bailing is a right in bailable offences and not a benefit. There is no question of any discretion in granting bail for such offences. Bail may be asserted as a privilege and the Police Officer and the Court have a contractual responsibility to release a person on bail if he is willing to grant bail. In a suitable circumstance, such an individual may also be released on his own bond. It is only when the defendant is unable to afford bail that he must be held in gaol. In a judgement, the Hon'ble Supreme Court held that, As soon as it appears that the convicted person is prepared to grant bail, the police officer or court before which he agrees to grant bail is obliged to release him on conditions such as bail as may seem fair to the officer or the court. Instead of taking bail from him, it would also be open to the officer or the court to discharge such person on his execution of a bond as given in the Section. However, if the alleged offences are both Bailable and Non-Bailable, the crime would be prosecuted as Non Bailable crime and the accused would not be able to benefit from securing Bail on the basis of Bailable offence.

*Non-Bailable Offences:*Section 437 of Code of Criminal Procedure, 1973 lays down that the accused does not have the right to apply for bail in non-bailable offences. It is discretion of the court to grant bail in case of non-bailable offences. If the accused is a woman or a child, bail can be granted in a non-bailable offence. If there is lack of evidence then bail in non-Bailable offences can be granted. If there is delay in lodging FIR by the complainant, bail may be granted. Bail in can be granted in Non Bailable offence If the accused is gravely sick. Section 437 requires two bodies to decide the issue of bail,

namely a court and a police station officer who has arrested or detained a person convicted or suspected of having committed a non-bailable offence without a warrant. While this section deals with the jurisdiction or discretion of a court as well as a police officer in charge of the police station to grant bail for non-bailable offences, it has also laid down certain limitations on the jurisdiction of a police officer to grant bail and certain rights of an convicted person to seek bail when a magistrate is trying him. Section 437 of the Criminal Procedure Code deals with the powers of the trial court and the judge to whom the defendant is produced or appears to be surrendered by the police or the accused to grant or deny bail to persons accused of or suspected of committing any non-bailable offence.

Only first class of police officers, namely an officer in charge of the Police Station under section 437 sub Section (I), is granted the power to release on bail a person accused of a non-bailable offence. As the power to grant bail is permissive and not compulsory, due to the risk and stakes involved, it has to be exercised with great caution. A station officer should reassure himself before exercising his authority that the release on parole does not impact the prosecution in taking home the guilt of the accused. In the event that an convicted person is admitted to bail by the officer in charge, it is necessary for him to document the reasons or special reasons in the diary of the case and to retain the bail bonds before they are released either by the defendant's presence in court or by the order of the competent court. The Legislature has listed them fewer than two heads for the purposes of bail in non-bailable offences: (1) those who are punishable by death or life imprisonment; (2) those who are not punishable as such. In case of an offence punishable with death or incarceration for life a station officer cannot enlarge a person on parole, if there appears fair grounds for assuming that he has been convicted of such offence. For the purpose of granting bail, a police officer cannot recognize the age or sex or the illness or infirmity of the accused. These matters can only be taken into account by a judge. A police station officer in charge can grant bail only if there is no fair cause to suspect that the defendant has committed a non-bailable offence or if the non-bailable offence complained of is not punishable by death or life imprisonment.

There had been instances where under trial prisoners were detained in jail for periods beyond the maximum period of imprisonment provided for the alleged offence. A new section 436A of the Code specifies that

if an inmate under trial, rather than an offence for which death has been imposed as one of the sentences, has been held in gaol for a term extending to one-half of the actual period of incarceration provided for in the alleged offence, he should be released on his personal bond, with or without guarantees. It is also provided that in no case the under trial be detained beyond the maximum period of imprisonment for which he can be convicted for the alleged offence.

8. Bail trend between District and High Courts

Substantial differences are found in the judgments regarding the bail of the trial court and the High Courts. In most of the cases it has been observed that in cases where the trial court rejects the bail plea, bail is accepted by the High Court. The trial court dismisses the bail petition like other petitions without mentioning any judicial view. Each case of a crime is of a different kind, but the order of dismissal of the bail petition is almost of the same kind which is written mechanically that the offense is of serious condition, so it would not be appropriate to grant bail. Thus, by writing, the trial court dismisses the bail plea even in cases in which the offense is not initially constituted and the accused cannot be sentenced even if the documents presented by the police are accepted.

On the other hand, the High Court and the Supreme Court adopt humane behavior towards bail and decide on bail according to the circumstances. In spite of the legal view of the High Court and the Supreme Court being conveyed to the trial court, the learned judicial officer writes the circumstances of the case differently and dismisses the bail application mechanically. But when the matter reaches the High Court, it writes in the bail order without reacting to it that in our opinion it seems appropriate to grant bail. This makes the case entirely of judicial discretion. Thus, despite having constitutional rights, the accused has to wait for 90 days to present the charge sheet for hearing the bail petition, then is forced to wait for one to two months for hearing in the High Court.

In its 154th report¹⁰, the Law Commission of India reviewed the arrest method and supported the conclusion drawn in the third report of the National Police Commission that the majority of the arrests were related to large small prosecutions and, therefore, should not be considered necessary in terms of crime prevention. Based on the

¹⁰ <http://lawcommissionofindia.nic.in/101-169/Report154Vol2.pdf>

conclusion that more than 60 percent of arrests were unnecessary and 42.3 percent of prison expenses are due to such arrests, the National Police Commission recommended that arrests be justified during the investigation of a cognizable offense if:

- The case should be about serious crime like murder, robbery, robbery, rape etc. and arrest of the accused and blocking his transmission is necessary to instill confidence in the victims of terrorism.
- There is a possibility of the accused absconding and impeding the process of law.
- The accused behaves furiously and is likely to commit further offenses until his transmission is brought under restriction.
- The accused is habitually criminal and is likely to commit similar offenses until he is kept in custody.

The Supreme Court of India opined in *Jogindar v/s Uttar Pradesh State*¹¹ that the power of arrest should not be exercised in a moral manner. The Supreme Court also determined that no arrest should be made without a reasonable belief in the goodwill of the complainant and without investigating the need for arrest. The guiding principles laid down in the Joginder Kumar case got legal shape by the Act of Criminal Procedure Code (Amendment) Act, 2008 (5 of 2009). Section 41 of the Code of Criminal Procedure, 1973 was amended to limit the power of arrest for cognizable offenses for which the punishment is seven years or less. The amendment further prescribes that the police officer shall record his reasons for making the arrest or not. Thereafter, the method of arrest without a warrant must be based on compatibility 'probabilistic'. It depends on the facts and circumstances within the officer's knowledge and information that should be reasonable and reliable.

Life and liberty have been given the highest position in the Indian Constitution. There has always been a conflict between Article 21 of the Indian Constitution and the bail provisions of Criminal Procedure Code Sections 437, 438, 439. In criminal cases, bail is the rule and judicial custody is the exception. The different judicial approach of the country's top courts and the trial court has made the law of bail disputed. The difference between the constitutional provision and the law of bail is clearly visible in the order related to the bail of the trial court and the Supreme Court. The Supreme Court says that there is no such offense in the Criminal Law wherein bail cannot be granted but

¹¹ AIR 1994 SC1349

the status of the trial court has been established by a court which can sentence but cannot grant bail. The trial judge asks his lawyer why the court sentencing cannot grant bail. Seeing the condition of women prisoners under consideration in the district jail, this question seems troubling. Why do the trial courts conduct the opposite in cases where the Supreme Court and the High Court can grant bail? In both the cases of women and men, the trial court mechanically rejects the bail application. The matter becomes a matter of debate when the High Court of India rejects the bail application of the MLA, MP and Minister for bail. The supremacy of constitutional law and the order of mechanically rejected bail come into the question.

If detailed study and research is done on the bail law of the Supreme Court, High Court and Trial Court, then the judicial approach is different at every level. Both the Supreme Court and the High Court pass an order of bail interpreting Article 21 of the Constitution, while the trial court continues to dismiss the mechanized deposition petition repeating the circumstances of the case and the seriousness of the offense. The role of the trial court appears to be to dismiss the bail plea when she dismisses the women's bail petition like other petitions without mentioning any judicial view. Every case of crime is of a different kind, but the order of dismissal of the bail petition is almost the same, which is written mechanically. Since the offense is of serious condition, granting of bail does not seem appropriate, the writ court dismisses the bail petition even in cases where the offense is not initially constituted and in case of acceptance of documents submitted by the police. Even the accused cannot be sentenced. The Supreme Court's legal approach does not follow the trial court in bail related cases.

Despite being informed of the High Court's legal approach to the trial court, the learned judicial officer writes the circumstances of the case differently, dismissing the bail application mechanically. But when the matter reaches the High Court, without reacting to it, it writes in the bail order that in our opinion it seems reasonable to grant bail. This makes the case entirely of judicial discretion. The common man pays for the difference in judicial discretion. In a case contemplated by a Magistrate Court, the accused has to seek asylum from the High Court for bail and stay in jail for three to four months in judicial custody. Despite having the constitutional right, the accused has to wait for 90 days to present the charge sheet for hearing the bail plea, then is forced to wait for one to two months for hearing in the High Court. The

number of bail petitions pending in the High Court indicates the dreaded situation. There is a huge difference between the daily rate of appearance of bail petitions and the rate of redress in the High Court. It has now been established that the trial court rejects the bail plea and the High Court accepts most of the bail pleas on the basis of merit defect in which the arguing role of the lawyer is secondary. This situation gives big business opportunity to the lawyers practicing in the High Court.

9. Criticism of bail based on money:

One of the criticisms frequently raised on the bail system is that it is based on money because even after various reforms in the penal law, it is the surety that discriminates against poor people. Financially sound individuals can easily succeed in purchasing their freedom while poor people suffering from financial bail system stay in prison because they cannot get money. In fact, the ability to pay is the only factor in deciding who is freed and who is in prison. The natural impropriety of this method raises the question whether such a method is actually practical. The judgment of the Supreme Court in the case of *Rudal Shah v. State of Bihar*¹² is an eye-opening incident of the worst example of state executive inaction regarding the status of poor people. He was released from prison after 14 years, ie on 16 October 1982, despite being acquitted of all charges by the competent penal court on 3 June 1968.

10. Conclusion and Recommendations:

“Society has a vital interest in grant or refusal of bail because every criminal offence is an offence against the state. The order granting or refusing bail must reflect perfect balance between the conflicting interests, namely, sanctity of individual liberty and the interest of the society”.

*–Justice Dalveer Bhandari in S.S. Mhetre vs. State of Maharashtra
(2010)*

The Personal liberty is of utmost importance in our constitutional system recognized under Article 21. Deprivation of personal liberty must be founded on the most serious considerations relevant to welfare

¹² AIR 1983 SC1086

objectives of the society as specified in the Constitution. Even though the law of the land and Hon'ble Higher courts in various cases have tried to intervene and also have laid down certain guidelines to be followed but unfortunately nothing has been done about it. There is also a strong need felt for a complete review of the bail system keeping in mind the socio-economic condition of the majority of our population. While granting bail the court must also look at the socio-economic plight of the accused and must also have a compassionate attitude towards them. A proper scrutiny may be done to determine whether the accused has his roots in the community which would deter him from fleeing from the court.

The 268th report of the Law Commission of India clearly states that, if our criminal justice system wants to gain some credibility with fair and equal rules and laws, then some effective steps have to be taken about how an arrested person was treated. The Commission confirms what we know- there is favor with the rich and famous and the poor are persecuted. It is clear from looking at the legal provisions related to bail and various cases that the approach of the courts on bail depends on the facts and circumstances of the case. Sixty Seven percent of the prison population is awaiting trial in India. The inconsistency in the bail system is one of the reasons for the overcrowding of imprisons across the country and the challenges facing the prison administration and the state. It has become a standard that the powerful, the rich and the influential get bail promptly and easily while the poor people remain in prison. It is an evil of the bail system that either the poor people are behind the brokers or professional giants to provide bail or pay pre-trial detention. It is also clear that the opinion of the trial court differs from the High Court in the case of bail. Often the trial court's tendency appears to be to deny bail. As a result, the accused has to knock the doors of the High Court and the Supreme Court for bail. Today, the prisons are full of under trials due to improper treatment of bail. The difference between the constitutional provision and the law of bail is clearly visible in the bail order of the trial court and the Supreme Court. The Supreme Court states that there is no offense in the Criminal Law wherein bail cannot be granted, but the status of the trial court has been established by a court which can sentence but cannot grant bail. In those cases in which the Supreme Court and the High Court can grant bail, in those cases, the trial court conducts the exact opposite. If a detailed study and research is done on the law of

bail of the Supreme Court, High Court and the Court of Judgment, then the judicial approach appears different at every level.

It is also to be said that bail is a law and detention is an exception, but the Hon'ble Court dealing with bail applications must maintain a check balance between the offender's individual constitutional rights with the interest of society, bearing in mind that neither the accused right to properly defend his case nor the right of prosecution to present his case should suffer from each other's hands. All the institutions for reform have stated in unambiguous terms that the bail process in the country is a victim of arbitrariness and unjust, which needs change. Despite this, no major changes were seen, except for some minor refuges in the law of anticipatory bail. This situation is in spite of the general consensus that if India wants to claim before the world that it is not inferior to other Western countries in the protection of human rights, it is very important to make major changes.

Bail is an essential part of criminal justice system and recognition of this is beneficiary for accused, administration and the court. By giving bail we will auspices the basic spirit of the Indian constitution and the rights of the people.

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