

Evolution and Development of Bail System in India: A Study

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Abstract: The aim of legal system is to provide safeguards/justice to every innocent person. Keeping in view this phenomenon the provision of bail has been introduced in all civilized legal systems of the world including India. The evolution of Bail system in India can be divided as grant of bail in ancient time, grant of bail during Mughal era, grant of bail under the British era and Legal/Current position of granting bail in India. This paper throws a light over evolution of bail system in India step by step from ancient period to present period.

Key Words: Bail, Accused, Zamindar, Kotwal, Commission, Cr.PC, Muchalka, Zamanati

Introduction: The concept of bail is not a new one in the Criminal Procedure of India. It has its reflection of the Victorian legacy left behind by the British.

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Bail in Ancient Period:

The concept of bail in India may be traced back to ancient Hindu jurisprudence which required an expedient disposal of disputes by the functionaries responsible for administration of justice. No laxity could be afforded in the matter as it entailed penalties on the functionaries.¹ Thus, a judicial interposition took care to ensure that an accused person was not unnecessarily detain or incarcerated. This indeed devised practical modes both

¹ R.P. Kangle (ed), Kautakiya Arthshastra 4 Ch. 9 (1963, R.P.)

for securing the presence of wrongdoer, as well as to spare him of undue strains on his personal freedom.

Bail during Mughal Era:

In the Mughal Era, the zamindari system began to ensure proper collection of taxes during a period when the power and influence of the Mughal emperors were in decline. With the Mughal conquest of Bengal, "zamindar" became a generic title embracing people with different kinds of landholdings, rights and responsibilities ranging from the autonomous or semi-independent chieftains to the peasant-proprietors. All categories of zamindars under the Mughals were required to perform certain police, judicial and military duties. Zamindars under the Mughals were, in fact, more the public functionaries than revenue collecting agents. Although zamindaris were allowed to be held hereditarily, the holders were not considered to be the proprietors of their estates.^[11]

During this era, the rights of the accused in some forms or the other existed under the Muslim Criminal Jurisprudence and thus devised ways and means to ensure a fair trial to a person accused of crime. Therefore, the right of an accused to be released on bail did exist during the Mughal rule in India. Mohammad Amin Khan, the Governor of Lahore put Manucci in Prison on a false case of theft, but the Governor designated Fidal khan granted bail for his release by issuing order of release. In spite of his release order he was required by the Kotwal to furnish surety.²

The Indian legal system during the Mughal era, has 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 travelers 'Manucci' who himself was restored to

² Manucci, 2, p. 198

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 released him only after he furnished a surety.³

Right to be released on bail and security was discouraged during Mughal era and a Kotwal the incharge of the arrest had the power to arrest an accused person of committing a cognizable offence, will report to the Qazi and will obtain his order whether the arrested person be released or prosecuted. Aurangzeb laid emphasis on prime facie evidence before arrest and warned Court against keeping man under trial for a longer term than was strictly necessary.

Bail during British Rule:

The Increasing control of the East India Company over Nizamat Adalats and other fouzday Courts in Mofussil Facilitated gradual inroad of English Criminal law and Procedure into the then Indian legal system. Therefore, the advent of British rule in India saw gradual adaptation of the principles and practices known to the British and prevalent in the common law.

At the time of British rule, the criminal Courts were using two well understood and well defined form of bail for release of a person held in custody. These were known as ‘Zamanat’ and Muchalaka’. A release made 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 recognizance of the principle of bail.

During the British rule, the accused person was also released with sureties known as ‘Zamanati’ became answerable for the accused. Since the discretionary powers vested in Courts under the doctrine of tazeer in Muslim criminal law, a decision on the grant of bail or refusal of bail or the mode of

³ William Irvine, Mughal India, Vol. 2, 198 (1907)

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 Law Commission brought out in the 41st report in 1969. Another form of judicial release was a security with sureties known as 'Zamant', in which the zamanti (Surety) became answerable for the accused on the basis of a written deed deposited with the trying Court.

Present Legal System of Bail in India:

The British institution of bail was 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 Law Commission brought out in the 41st report in 1969. The amended Criminal Procedure Code, (1973), (Cr.P.C. hereinafter), does not define bail, although the terms bailable offence and non-bailable offence have been defined in section 2(a) Cr.P.C. as follows: 'Bailable offence means an offence which is shown as bailable in the First Schedule or which is made bailable by any other law for the time being in force, and non-bailable offence means any other offence'. Further, ss. 436 to 450 set out the provision for the grant of bail and bonds in criminal cases. The amount of security that is to be mentioned in the Cr.P.C. . The unreasonable and exorbitant amounts demanded by the Courts as bail bonds clearly show their callous attitude towards the poor. Therefore, it is the discretion of the Court to

put a monetary cap on the bond. Unfortunately, it has been seen that Courts have not been sensitive to the economic plight of the weaker section to the society.

The Law Commission of India in its 78th report published on April 1, 1977, pointed out that out of 1,84,169 prisoners as many as 1,01,083 (55%) were under- trials. The large scale poverty amongst the majority of the population in our country is one of the reasons for the under-trials to be in the prison. Fragmentation of land holding, one of the common phenomena, in rural India is responsible for this poverty. A family which consists of around 8 to 10 member depends on small piece of land for their subsistence which is also an important reason for disguised unemployment. When one of the members of such a family gets charged with an offence, the only way out is to secure his release paying the bail amount either by selling off the land or by giving it on mortgage. This would further trap them into the jaws of poverty. This would rather be a jail instead of being out on bail.

An overview of the cases given below will highlight the adverse condition of the poor people with regard to the unjust bail system in India. In *State of Rajasthan v Balchand*⁴, the accused was convicted by the trial Court when he went on appeal to the High Court, he was acquitted. Through a special leave petition, the State went on appeal to the Hon'ble Supreme Court under Act. 136 of the Constitution. The Supreme Court directed the accused to surrender. Then he filed for bail. Then for the first time justice Krishna Iyer raised his voice against this unfair system of pecuniary bail. Now the time has come to think over this system again.

No Definition of bail has been given in the code, although the offences are classified asailable and non-ailable. In *Maneka Gandhi v. Union*

⁴ AIR 1977 SC 2447

of India⁵, Justice Krishna Iyer once again spoke against the unfair system of bail that was prevailing in India. Justice P.N. Bhagwati also spoke about how unfair and discriminatory the bail system is when looked at from the economic criteria of a person. This discrimination arises even if the amount of bail fixed by the magistrate isn't so high for some. A large majority of those persons who are brought before the Courts in criminal cases are so poor that they would find it difficult to furnish bail even if it's a small amount.

In the case of *Hussainara Khatoon and others v. Home Sec, State of Bihar*,⁶ the Court laid down that when the man is in jail for a period longer than the sentence he is liable for, then, he should be released.

Conclusion: Thus, this paper speaks about evolution and development of bail system in India by speaking about ancient period, Mughal era, British period and present period regarding granting of bail in India. It tells how modification occurred time to time and place to place. At present what care to be taken by magistrate while hearing on the application for bail. This paper cites several cases regarding granting bail. Still, there is need to keep changing mind according to the changing circumstances while hearing on the question of bail at present scenario.

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⁵ AIR 1978 SC 571

⁶ AIR 1979 SC 1360