

THE UNSETTLED JURISPRUDENCE OF BAIL AND ANTICIPATORY BAIL

ABSTRACT

Bail is the right of freedom of an individual against the imposition of restraint by the State. It is granted to secure the presence of the person before the appropriate authority. The concept of bail is all about balancing the equities with Personal Liberty of an alleged accused on one hand and the interest of the general public on the other. Liberty of an individual is too precious a value of our constitutional system recognized under Article 21 and the liberty is thwarted when the bail is refused to an individual. Therefore, the crucial power to negate the liberty is a great trust exercised judicially with a lively concern for the cost to an individual and the community. Liberty of an individual can be lawfully eclipsed in accordance with the procedure established by law. And the last four letters of article 21 “*procedure established by law*” are the life of that human right. Bail is the rule and committal to jail an exception. Committal to jail is under the circumstances which suggest that the alleged accused would flee from justice or create trouble in form of repeating offences or intimidating witnesses and the like.ⁱ

But the jurisprudence of bail is quite unsettled and irregular when it comes to the practical application of the concept. It is not debated that each case must be viewed on the basis of its own facts and circumstances. But the question which requires consideration is that whether there are enough judicial considerations on the subject and if yes do they conflict with each other. This paper focuses on the indifferences that are caused due the judicial consideration on this subject thus leaving it quite unsettled and unclear.

I. INTRODUCTION

The strength of the under-trial prisoners has increased quite significantly in the recent times. The judiciary takes time to decide the case as it has to take into consideration various factors in relation to the offences that a person is alleged to have committed. And during this time, it is impossible to hold a person for too long in prison or detain him because it questions the fundamentally cherished right of liberty that is granted to an individual. It is a settled principle of a criminal jurisprudence that Bail is a matter of right and Jail an exception to that right. Denying a person his liberty can be done only in exceptional circumstances. Also, it is important to note that an individual's freedom from the State's restraint rests on the discretion of the judiciary. And such discretion must be exercised sparingly and a proper judicial discipline must be adhered to. The term judicial discipline is not defined but can be understood considering the facts and the practice prevailing in the courts. For instance: if a bail matter is decided by a particular judge, then as part of the judicial discipline, subsequent bail application must also be decided by the same judge. This prevents the abuse of process of court.

II. UNSETTLED PRECEDENTS

The entire judicial system is based on precedents, where the question of law already decided is binding upon all the lower courts. Similarly, in the matters of bail, as part of the judicial discipline, there are several settled principles such as balancing equities, allowing the bail applications only when there is change in circumstances and so on. It is quite settled that liberty of an individual must be zealously safeguarded by the Court. But a judge should not be unduly influenced by the concept of liberty, disregarding the facts and circumstances of the case. In **Shahzad Hasan Khan vs Ishtiaq Hasan Khan & Anrⁱⁱ** the first respondent and three others were alleged to have murdered the deceased. The first respondent absconded after the occurrence and surrendered in court later. The trial court rejected his bail application, and three successive bail applications were rejected by a Single Judge of the High Court. The first respondent made another attempt in the High Court to get bail. Having regard to the judicial discipline and prevailing practice in the High Court, another Single Judge of the High Court, sitting as a Vacation Judge, ordered that the bail application be placed before the same learned Judge who had dealt with the case on earlier occasions. However, a few days later, the Judge, after recalling his earlier order, granted bail on the ground that the trial could not be commenced or completed

as directed by another Single Judge and **because of the delay the accused was entitled to bail, and that the liberty of a citizen was involved**. But the Supreme Court set aside this order of the High Court observing that:

- the single judge has erred in recalling his previous order of placing the matter before the same judge who had decided the earlier bail petitions.
- the single judge failed to satisfy itself of the fact that the accused was capable of tampering with the evidence (as he had done earlier)

In **Kalyan Chandra Sarkar vs Rajesh Ranjan @ Pappu Yadav & Anr**ⁱⁱⁱ seven bail applications of the accused-respondent were dismissed by the High Court of Judicature at Patna and the same court allowed the 8th bail application and enlarged the bail to the accused-respondent as he had undergone incarceration for a period of 3 years and that there was no likelihood of the trial being concluded in the near future and appeal filed against the said grant of bail came to be allowed in the Supreme Court on the ground that the **High Court could not have allowed the bail application on the sole ground of delay** in the conclusion of the trial without taking into consideration the allegation made by the prosecution in regard to the existence of the prima facie case, gravity of offence, and the allegation of tempering with the witness by threat and inducement when on bail.

It is indeed a travesty of justice to keep a person for too long in prison and as seen above the delay may be one of the factor for consideration of the bail application but other factors must not be ignored. But the same court in **Kashmira Singh v. State of Punjab**^{iv} has had a different finding altogether. It observed:

"It would indeed be a travesty of justice to keep a person in jail for a period of five or six years for an offence which is ultimately found not to have been committed by him. Can the Court ever compensate him for his incarceration which is found to be unjustified? Would it be just at all for the Court to tell a person: "We have admitted your appeal because we think you have a prima facie case, but unfortunately we have no time to hear your appeal for quite a few years and, therefore, until we hear your appeal, you must remain in jail, even though you may be innocent?" What confidence would such administration of justice inspire in the mind of the public? It may quite conceivably happen, and it has in fact happened in a few cases in this Court,

that a person may serve out his full term of imprisonment before his appeal is taken up for hearing. Would a judge not be overwhelmed with a feeling of contrition while acquitting such a person after hearing the appeal? Would it not be an affront to his sense of justice? Of what avail would the acquittal to be such a person who had already served out his term of imprisonment or at any rate a major part of it? It is, therefore, absolutely essential that the practice which this Court has been following in the past must be reconsidered and so long as this Court is not in a position to hear the appeal of an accused within a reasonable period of time, the Court should ordinarily, unless there are cogent grounds for acting otherwise, release the accused on bail in cases where special leave has been granted to the accused to appeal against his conviction and sentence."

Also the Hon'ble Supreme Court in **State of Kerala v. Raneef**^v has observed that keeping a person in prison questions the liberty of that individual and delay in concluding the trial is not only one of the factor but the most important factor in deciding whether to grant bail. And the Hon'ble Supreme Court in **Sanjay Chandra v. CBI** has observed that the period of incarceration by itself would entitle bail to the accused. And on both the occasions the Hon'ble Supreme Court granted bail to the accused, thus leaving it for the respective courts to decide what is to be done depending upon the facts and circumstances.

Another important aspect of bail is that an accused can file subsequent bail application after the previous bail applications are dismissed but only if there are change in circumstances and this is a settled principle. The civil law concept of resjudicata and finality does not apply in the criminal law as it involves an important question of liberty of an individual. This allows the accused to get a favorable order of bail questioning the creditability of the court and pestering the judges. And the words "*change in circumstances*" are of much relevance in subsequent bail petitions. In **Kalyan Chandra Sarkar vs Rajesh Ranjan @ Pappu Yadav & Anr**^{vi} the accused had applied for his bail eight times which were sought to be dismissed by the High Court and further in appeal by the Supreme Court. Subsequently, his ninth bail application was allowed and the accused was enlarged on bail on the very same grounds on which he was previously denied bail and without there being any change in circumstances or new facts or grounds. The Hon'ble High Court, thus had ignored the earlier orders of the Hon'ble Supreme Court which was violative of the principle of binding nature of the judgments of the superior court rendered in a lis between the same parties, and noted that such approach of the High Court in effect amounts to ignoring or

over-ruling and thus rendering ineffective the principles enunciated in the earlier orders especially of the superior courts. The Supreme Court observed that though an accused had a right to make successive applications for grant of bail the court entertaining such subsequent bail applications had a duty to consider the reasons and grounds on which the earlier bail applications were rejected and in such cases the court also had a duty to record what are the fresh grounds which persuaded it to take a view different from the one taken in the earlier applications. Thus, allowing the application on the very same ground without there being any new facts or grounds is an abuse of process of court.

A person who anticipates his arrest for any offence can also file anticipatory bail. The difference between bail and anticipatory bail is that bail is a post arrest legal process, that is, it is granted only after arrest of the person whereas anticipatory bail is a pre-arrest legal process in anticipation of possibility of arrest of a person and bail is ordinarily granted as a matter of right in case of bailable offence and it may also be granted in non-bailable offences under Section 437, Cr. P. C. but power to grant anticipatory bail is of an extra-ordinary character which is to be used by the Court sparingly.

And the principles with respect to the same are also unsettled and its application may also vary from case to case basis. In **Gurbaksh Singh Sibbia Etc v. State Of Punjab**^{vii} the full bench of the Hon'ble High Court of Punjab had held that larger interest of the public and State demand that in serious cases like economic offences involving corruption, which shakes the economic fabric of the nation, anticipatory bail cannot be granted. But the Hon'ble Supreme Court held contrary observing that:

“We find ourselves unable to accept, in their totality, the submissions of the learned Additional Solicitor General or the constraints which the Full Bench of the High Court has engrafted on the power conferred by Section 438. Clause (1) of Section 438 is couched in terms, broad and unqualified. By any known canon of construction, words of width and amplitude ought not generally to be cut down so as to read into the language of the statute restraints and conditions which the legislature itself did not think it proper or necessary to impose. This is especially true when the statutory provisions which falls for consideration is designed to secure a valuable right like the right to personal freedom and involves the application of a presumption as salutary and deep-grained in our Criminal Jurisprudence as the presumption of innocence”.

But this very Hon'ble Supreme Court in **P. Chidambaram v. Directorate of Enforcement**^{viii} vide two judge bench has reiterated what was observed by the full bench of the Hon'ble High Court of Punjab and observed that grant of anticipatory bail, particularly in economic offences would definitely hamper the effective investigation and thus the same cannot be granted. It is important to note that the decision of the 5-Judges bench of the Hon'ble Supreme Court has been given a go-bye by the division bench of the same court. And as part of the judicial discipline the courts now would be bound by this very judgment and not the earlier judgment.

III. CONSLUSION

It is important that the principles with respect to bail and anticipatory bail are carved out in precise terms and followed in cases depending on their factual basis. Also, in order to ensure that proper judicial discipline is maintained, the accused should not be allowed to select a court depending upon his liking or encouraged to file successive bail applications without there being any new facts being cropped up. If successive bail applications on the same subject are permitted to be disposed of by different Judges there would be conflicting orders and a litigant would be pestering every Judge till he gets an order to his liking resulting in the credibility of the court and the confidence of the other side being put in issue and there would be wastage of court's time. While this involves a question of one's liberty, the power to curtail such freedom should be used judicially and the liberty should only be secured only through the process of law, which is administered keeping in mind the interests of the accused, the near and dear of the victim who lost his life and who reel helpless and believe that there is no justice in the world as also the collective interest of the community so that parties do not lose faith in the institution and indulge in private retribution.

ⁱ State of Rajasthan v. Balchand, (1977) 4 SCC 308

ⁱⁱ 1987 SCC (2) 684

ⁱⁱⁱ 2004 SCC (7) 528

^{iv} 1977(4) SCC 291

^v 2011 (1) SCC 784

^{vi} 2005(3) SCC 284

^{vii} 1980 (2) SCC 565

^{viii} 2019 SCC OnLine SC 1143