

Right to Bail and its Cancellation in Bailable and Economic Offences

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Abstract—Discretionary powers of the court should not be curtailed in cancellation of bail in bailable offences affecting society and economic offences merely based on the guise that ‘Right to Bail’ is absolute as it flows from Article 21 of the constitution. The Right of Bail is viewed as a necessary instrument in the criminal Jurisprudence of common law. The right of bail is as old as English law itself, in earlier times, it would often take long for the King to deliver his itinerant justice thus it was important for the defendant to be able to obtain a provisional release from the custody. This paper aims to analyze the nature and scope of Right to Bail. However, Right to Bail in case of non-bailable offences is not covered under the ambit of this Article. The Right of bail is premised upon the right to personal liberty flowing from Article 21 of the constitution. This Article critically analyses section 436 of the Code of Criminal Procedure which lays down the said right in case of bailable offences. This Article analyses various judicial pronouncements where the court had to pitch the right to bail against the interest of the society especially from the perspective of section 436 and 439 of the Code. Section 436 does not explicitly lay down any provision for cancellation of bail in bailable offences and such a decision left to the inherent power of the High Court and Sessions court under section 439. Also the Article covers the paradigm of cancellation of bail in economic offences and how the burden of proof is taken as different from the traditional approach. The Article looks at varying and inconsistent decisions given by the Supreme Court and various High Courts while trying to relate it to the reason of lack of a specific provision for cancellation of bail in bailable offences.

Index Terms—Bailable Offences, Right to Bail, Right to Personal Liberty, Cancellation of Bail, Discretionary power

I. INTRODUCTION

The Law of Bails, like any other branch of law, has its own rationale to understand, for which one has to go through the various stages of its development. In a civilized society bail has become a quintessential rule under the criminal law systems across countries. The concept originates from tussle between the police power to restrict the liberty of a man who is alleged to have committed a crime and the presumption of innocence in his favor. The object of bail is to secure the appearance of the accused person at his trial by reasonable amount of bail. The object of bail in a criminal case are to relieve the accused of imprisonment, to relieve the state of the burden of keeping him, pending the trial, and at the same time, to keep the accused constructively in the custody of the court, whether before or after conviction to assure that he will submit to the jurisdiction

of the court and be in attendance thereon whenever his presence is required.

A person accused of a bailable offences has the right to be released on bail, it becomes mandatory in case of bailable offences. Thus, in bailable offences, granting bail is a rule and refusal is an exception. This right of bail in case of bailable offences is enshrined under section 436 of the Crpc. Where a person who is arrested is not accused of a non-bailable offences no needless impediments should be placed in the way of his being admitted to bail. In such cases the man is ordinarily to be at liberty and it is only if he is unable to furnish such moderate security, if any as is required that he should remain in detention. Thus the scope of Right to Bail is extensive, however, there arises a complex position when this right is pitched against the discretion of the court to cancel or refuse the grant of bail in certain offences which are not blanketed under the term ‘bailable offences’ but are also not of the nature of ‘non bailable offences’, i.e; Economic and white collar offences.

For the purpose of granting or refusing bail there is no classification of the offences except the ban under Section 437(1) of the Criminal Procedure Code against grant of bail in the case of offences punishable with death or life imprisonment. Hence there is no statutory support or justification for classifying offences into different categories such as economic offences and for refusing bail on the ground that the offence involved belongs to a particular category. When the Court has been granted discretion in the matter of granting bail and when there is no statute prescribing a special treatment in the case of a particular offence the Court cannot classify the cases and say that in particular classes bail may be granted but not in others. Not only in the case of economic offences but also in the case of other offences the Court will have to consider the larger interest of the public or the State. Hence only the considerations which should normally weigh with the Court in the case of economic offences also. It cannot be said that bail should invariably be refused in cases involving serious economic offences.

II. BAIL AND PERSONAL LIBERTY

Liberty of an individual has been safeguarded by the modern Constitutions of all civilized countries. Personal freedom, protection of one’s life and limb and of one’s reputation are well recognized rights in India as in other countries. When an

accused person seeks bail from the court, he is essentially seeking the right to be at liberty from the court. Personal Liberty is a very precious value of constitutional system recognized under Article 21, so much so that the crucial power to negate it is a great trust and wisdom exercisable, not casually or informally but judicially, with due concern for the cost to the individual and the community. Depriving someone of his personal liberty as enshrined under Article 21 is a very sensitive matter and permissible only when the law authorizing it is reasonable, even-handed and geared to the goals of the community good and state necessity. Reasonableness postulates intelligent care and predicates that deprivation of freedom by refusal of bail is not for punitive purpose but for the bifocal interests of justice to the individual involved and society affected. Thus, it is reasonable enough to conclude that under the Indian criminal system, right of bail directly connotes to the right of personal liberty and is treated, mostly, as absolute in case of bailable offences.

In *Mantoo Mujumdar v. State of Bihar* the apex court once again upheld the under trials right to personal liberty and ordered the release of petitioners on their own bond and without sureties as they had spent six years awaiting their trial in prison. The court deplored the delay in police investigation and the mechanical operation of remand process by the magistrates insensitive to the personal liberty of under-trials, and the magistrate failure to monitor the detention of the under-trials remanded by them to prison. From *Babusingh's* case it has been accepted that law does not prevent second consideration of an application for bail on rejection of the first one. An order for refusal of bail stems from the discretion vested with the court. However, in many judicial decisions it has been stated that the refusal of bail under the garb of court's discretion cannot be defended when pitched against the personal liberty of the accused. However, in many cases courts have curtailed the scope of Right of bail. In *Jagjit Singh v. State of Punjab*, the court stated that citizen's liberty is not paramount consideration in every situation and that it can be denied to the person in the interest of justice and the Bail provisions in the CrPc, are undoubtedly enacted to achieve the said objective.

III. SCOPE OF SECTION 436 OF CRPC

Section 436 of the CrPc reads as:

(1) When any person other than a person accused of a non-bailable offence is arrested or detained without warrant by an officer in charge of a police station or appears or is brought before a court and is prepared at any time while in the custody of such person shall be released on bail:

Provided that such officer or court if he or it thinks fit may (may and shall if such person is indigent and is unable to furnish surety instead of taking bail) from such person discharge him on his executing a bond without sureties for his appearances as hereinafter provided:

(Explanation – where a person is unable to give bail within a week of the date of his arrest it shall be sufficient ground for the

officer or the court to presume that he is an indigent person for the purpose of this proviso.)

Provided further that nothing in this section shall be deemed to affect the provisions of sub-section (3) of section 116 [or section 446A.]

(2) Notwithstanding anything contained in sub section (1) where a person has failed to comply with the conditions of the bail-bond as regards the time and place of attendance the court may refuse to release him on bail when on a subsequent occasion in the same case he appears before the court or is brought in custody and any such refusal shall be without prejudice to the powers of the court to call upon any person bond by such bound to pay the penalty thereof under section 446.

A bare reading of sub section (1) of the above mentioned section states that in matters of bailable offences, the accused shall be released on bail. This sub section gives a connotation that an accused who has not been charged with a non-bailable offence has a Right to be released on bail and that such right flows from the concept of personal liberty enshrined under Article 21 of the Indian Constitution. The court in *Praghnandan Pershad's* case held that the section is imperative and under its provision the magistrate is bound to release the person on bail or recognizance. The basis rule is to release him on bail unless there are circumstances suggesting the possibility of his fleeing from justice or thwarting the course of justice.

The law presumes an accused person to be innocent till his guilt is proved and as a presumably innocent person, he is entitled to every freedom and facility to defend himself effectively. One of the main salutary themes of our Code of Criminal Procedure is providing sufficient opportunity to an accused person to defend himself and it cannot be gainsaid that an accused person will be in a much better position to captain his case if he is allowed freedom during the trial against him. The general policy of law is to allow bail rather than to refuse it. A duty has been cast on the shoulders of the Courts to see to it that while dealing with the provisions of law relating to individual liberty and freedom, they should construe them in such a way which advances the object and intent of the legislature and curbs the mischief.

Thus, the judicial position on section 436 clearly indicates that getting bail is a right of the accused. Bail is a matter of Right if the offence is bailable. In every bailable offence bail is a right and not a favor.

IV. CANCELLATION OF BAIL

The courts are also vested with the discretion to cancel the grant of bail. The concept of cancellation operates only after an original grant of bail and is allowed in very selective circumstances where due to prevailing circumstances it would not be in the interest of justice to allow the accused to retain his freedom. Granting of bail always has a risky undertone to it that the person enlarged on bail will not reappear before the court or

that a criminal act will continue to happen. If such power is not expressly provided then there will be great misuse of the right to bail to abscond the ends of justice. There have been many instances and many continue to happen where the provisions relating to right of bail have been misused. The abuse stems from the element of personal liberty attached to section 436 which is a very sensitive area for courts to restrain. In the Code of Criminal Procedure, 1973, the provisions relating to cancellation of bail have been provided for under Sections 436(2), 437(5) and 439(2).

It is important to note that the code does not expressly lay down the power to cancel bail in bailable offences under section 436. A bare reading of section 436 will present an inaccurate and misleading picture. It portrays that a bail granted under section 436 can be cancelled by the Magistrate if bailee fails to comply with the conditions set out in bail bond. In reality it is not so. The institution of judiciary seems to follow the tradition prior to the enactment of the code of criminal procedure where the authority to cancel bail was vested in the inherent powers of the High Court.

In the case of *Madhab Chandra Jena v. State of Orissa*, the Orissa high court reiterated the common judicial trend with regard to the authority for cancellation of bail and the right of bail flowing from personal liberty of an individual under Article 21. It stated,

"The petitioners had been granted bail under Section 436 of the Code of Criminal Procedure under which section admission to bail is as of right. The section itself does not make any provisions for cancellation of the bail. A benefit to which one is entitled to cannot be taken away without express sanction of the law. There being no provision under S.436 Cr.P.C. such a power cannot be conceded to the Magistrate on a plain reading of the section. Accordingly, it must be held that the Magistrate had no power under the Code to cancel the bail bonds of the petitioners. In *Talab Haji Hussain v. Madhukar Purshottam Mondkar*, The Supreme Court upheld the exercise of its inherent power under 561-A (old). The court said,

"Where the accused by his conduct subsequent to his release on bail under this section puts in jeopardy the progress of a fair trial itself and there is no other remedy which can be effectively used against him the High Court may in exercise of its inherent powers under Section 561-A (482. New) cancel his bail and order him to be arrested forthwith and committed to custody. The order committing the accused to custody is a judicial order passed by a criminal Court of competent jurisdiction is commitment to custody thereafter is not by reason of the fact that he is alleged to have committed a bailable offence at all, but is result of a judicial order-passed on the ground that he has forfeited his bail and that his subsequent conduct showed that pending his trial, he cannot be allowed to be at large. When a person is committed to custody under such an order, it would not be open to him to call back upon his rights under 8.496 (8.436, new Code), for S.496 in such circumstances would be inapplicable to his case. It may be that there is no special

provision for the cancellation of the bond and the re-arrest of a person accused of a bailable offence, / but that does not mean that S.496 (S.436.new) entitles. Such an accused person to be released on bail even though it may be shown that he is guilty of conduct entirely subversive to a fair trial in the Court".

In the case of *Ratilal Bhanji Mutani v. Asstt. Collector of customs, Bombay*, the accused and other persons were charged with certain offences of the Sea Customs Act, 1878 and the Import and Export Control Act, 1947, which were bailable. The case reached Supreme Court by challenging the order of the Maharashtra High Court to cancel the grant of bail to the accused. The Supreme Court stated that the order was legally sound and was not in violation of Article 21. The Code makes no express provisions for the cancellation of a bail granted under this section. If at any subsequent stage of proceedings it is found that any person accused of a bailable offence is intimidating, bribing or tampering with the prosecution witnesses or is attempting to abscond, the High Court has inherent power to cause him to be arrested and to commit him to custody for such period as it thinks fit. This power can be invoked in exceptional cases only when the High Court is satisfied that the ends of justice will be defeated unless the accused is committed to custody.

The Supreme Court has held that though a person accused of a bailable offence is entitled to be released on bail pending his trial, if his conduct subsequent to his release is found to be prejudicial to a fair trial, he forfeits his right to be released on bail and such forfeiture can be made effective by invoking the inherent power of the High Court under S. 482 of the Code.

V. INNOCENT UNTIL PROVEN GUILTY

The general rule of criminal law system is that an accused is treated as an innocent until his guilt is established before the court, beyond any reasonable doubt. However, sometimes due to circumstances being of such nature that treating the accused as innocent would be detrimental to the judicial system and to the society as a whole, the judiciary has to waver from the said principle in the greater interest of society.

The denial or cancellation of bail runs counter to that principle. The concept of bail is premised upon the freedom of personal liberty which is one of the most significant characteristics of a democratic society. Bail is not an assurance for absolute freedom but rather it is more of conditional freedom. Cancellation of bail is a very sensitive legal issue. The parameters for cancellation range from intimidating the witness, tampering with the evidence and interfering with the course of justice. The entire issue of the absoluteness of the right to bail under section 436 has seen contravening orders being promulgated by the Supreme Court and various High Courts in the country. The Allahbad High Court in *State of UP v. Karam Singh*, held that a decision granting bail is an interlocutory order and hence it cannot be challenged under exercise of revision in a sessions or High Court by virtue of mere discretion of the court. But the Bombay High Court

relying on the principles laid down by Supreme Court, decided contrary in *R. Shakuntala v. Roshan Lal*. The matter of bail cancellation is only an incidental matter in a criminal case. This means that the criteria required to prove the case is not 'beyond reasonable doubt' but rather 'preponderance of probabilities'.

Thus, it is not unreasonable to say that the stand of the Indian judiciary is very inconsistent when it comes to sticking to the doctrinal principles in matters of cancelling bail. Also due to the lack of any section in the criminal code explicitly providing for cancellation of bail in case of bailable offences, this authority is left to only High Court or Session's Court discretion and inherent power under section 439 (2). However, it has to be noted section 439 (2) is very rarely used by courts in the country. This allows people charged with bailable offences to escape the justice system of the country by either tampering with the evidence or fleeing the country because of the inability of the Magistrate (who granted the bail in the first instance) to cancel or reverse the same order given by him/her.

VI. ECONOMIC AND WHITE COLLAR OFFENCES

The law to deal with economic offences is largely an amalgamation of various laws, and is, riddled with procedural delays and loopholes. Many of the offenders have utilized the inconsistency of the bail system in India to induce the court to grant bail in their favour before leaving the country. These loopholes allowed big-ticket tax and loan defaulters to circumvent the law and delay, or indefinitely hold off, the confiscation of their assets against their debt. Traditional crimes are emotional in nature and are generally consequences of hate or lust. White collar and economic offences are born out of sheer greed, avarice, or caprice and are non-emotional in character. The absence of heinousness, force or violence gives the general public an impression that these crimes are of lesser gravity when compared with the other traditional crimes like murder or rape.

It is not difficult to understand as to why economic and white collar offences are not perceived in the same gravity by an individual as compared to the state. White collar or economic crimes are usually not committed against specific individual but rather they are against the society at large.

Supreme Court in the case of *State of Gujarat v. Mohanlal Jitmalji Porwal and Anr.*, observed:

"The entire Community is aggrieved if the economic offenders who ruin the economy of the State are not brought to books. A murder may be committed in the heat of moment upon passions being aroused. An economic offence is committed with cool calculation and deliberate design with an eye on personal profit regardless of the consequence to the Community. A disregard for the interest of the Community can be manifested only at the cost of forfeiting the trust and faith of the Community in the system to administer justice in an even handed manner without fear of criticism from the quarters which view white collar crimes with a permissive eye unmindful of the damage done to the National Economy and

National Interest."

The Delhi High Court in the case of *Sunil Dhaiya* has taken a commendable and positive view with regard to cancellation of bail as against the one's personal liberty in matters pertaining to economic offences and other offences which are detrimental to society as a whole. The court while rejecting the bail application stated that:

"The grant of regular bail in a case involving cheating, criminal breach of trust by an agent, of such a large magnitude of money, affecting a very large number of people would also have an adverse impact not only in the progress of the case, but also on the trust of the criminal justice system that people repose. It would certainly not be safe for the society. In case the applicant accused is granted regular bail, it is also likely that he may tamper with the evidence/witnesses, or even threaten them considering that the stake for the accused is high. It is also very much likely that looking to the high stakes, the nature and extent of his involvement, and his resources, he may flee from justice."

The arguments presented by *Sunil Dahiya's* counsel relied on the order of the Supreme Court in the case of *Sanjay Chandra v. Central Bureau of Investigation* that the right to automatic bail under section 436 stems from the fundamental right of personal liberty as enshrined under Article 21 of the constitution. The court however rejected this view by highlighting a difference between traditional offences and Economic and other offences against the state. The court promulgated that even an individual's liberty can be curtailed (reasonably) if it is pertinent to the court that such liberty will come at the expense of the larger interest of the society.

VII. CONCLUSION

The discretionary or the inherent power of the court should not be curtailed in cancellation of bail in economic and bailable offences which affect the larger interest of the society. The right to personal liberty being one of the fundamental norms for the foundation of the democratic society has to be overlooked sometimes especially when the accused attempts to utilize the legal loopholes to escape the legal system by fleeing the country or by other means. This need has arisen due to lack of uniformity in court decisions on the said matter. Even the Apex court of the country has taken contrary views as to cancellation of bail. Even though there is an absence of an explicit provision for cancellation of bail in bailable offences. It was held by SC in *Gurcharan Singh Vs. State (Delhi Administration)* that under Section 439 (2) of the new Code a High Court may commit a person released on bail under Chapter XXXIII by any Court including the Court of Session to custody if it thinks it appropriate to do so. However, this cannot justify the lack of a specific provision for cancellation in bailable offences which are detrimental to the society.

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