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Analysis on Provisions for Granting of Bail

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ABSTRACT

The Criminal procedure code 1973 is a codified law it is arranged in the form of sections. It basically deals with the procedure for granting offences and the detailed explanation in relation to the punishments is already part of Indian Penal Code. The intent and consideration for the creation of Criminal procedure is basically to make sure that the accused is getting fair trial in accordance with law and the procedure which is laid out should be not be ambiguous and complicated along with to avoid delay in proceedings and investigation.

The topic which the researcher is working on the analysis of provisions related to bail and bond provisions which are actually part of Criminal Procedure Act 1973. The main aim of this research project is that to analyze various provisions and grounds for granting bail and bonds. Alongside the researcher is also going to focus on development aspects of the research which the innocent is going to face when he was accused. And the most important part of any law or any legislation is its working so in this project the researcher would like to do case study analysis ie use various famous case laws to interpret the law.

Introduction

The word bail has its origin from France ie it is derived from the word “baillier” which actually means to give or deliver something. The word bail is actually not defined in the code of Criminal procedure but extensively the terms both Bailable and Non Bailable offences are defined under section 2(a) of Criminal procedure code. Bail has been defined in the Law Lexicon as a security for the accused for appearing before the court for which he is released but still proceedings and investigation against him are pending. It shall be contemplated that the person who was charged for the commission of offence is now released from legal custody by undertaking that he shall appear all the time and place designated by the court for him to appear for the sake of proceedings.

Wharton and Stroud’s dictionary meaning of bail means that “the setting free of the defendant by releasing him from the custody of law and entrusting him to the custody of his sureties, who are responsible to produce him to appear for his trial at a specific date and time.”

Halsbury’s analysis for the concept of bail is that he says that the person who is released on bail is not free from liability the effect of granting is not that, the only intent for granting is that the accused

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is released from judicial custody and was entrusted to the surety who is responsible for making the accused appear. And when the surety makes himself unavailable can discharge himself from liability so as a consequence he will be handed in back to the judicial custody and he will be imprisoned.

According to Black's Law Dictionary, what is contemplated by bail is to "procure the release of a person from legal custody, by undertaking that the person accused shall appear at the time and place designated and submit themselves to the jurisdiction and judgment of the court."

In fact the person who is being granted bail he is deemed to be under the custody of the court. Bail can be applied even after its rejection several times although it is granted on basis of nature of the offence not on the number of times you try for bail. And one more thing more importantly is that the person for whose application was rejected and even during re application it should be presented before the same judge for approval. The fundamentals for the whole concept of bail is that one person who is being granted bail under same similar facts and that cannot be used as a ground by other person who is applying for bail and the person who is co-accused cannot be granted bail.

Historical development:

The term bail was started right from the period way back from 399BC by Plato. It is when he created a bond to free Socrates. And in the medieval terms in Great Britain the structure was forming and then there is a introduction of Bond in their respective courts. So, the modern law definition and existence of the term bail was actually derived from the term bail which was previously developed in medieval times.

Kautalya's Arthashastra mentioned in his writings that avoiding pre trial detention and conviction is ideal and by looking into this it is just a presumption that it is prevalent even during ancient times also.

And during the times of Mughal in 17th century the concept and duty of bail were put in practice and were not actually called under that name it was done in the form of Muchalaka and Zamanat. And now in present India the concept of bail was actually governed under the section 2(a) of Criminal Procedure code 1973 and the provisions in relation to that were dealt from sections 436-450.²

The Habeas Corpus Act 1679 states, "A Magistrate shall discharge prisoners from their Imprisonment taking their Recognizance, with one or more Surety or Sureties, in any Sum according to the Magistrate's discretion, unless it shall appear that the Party is committed for such Matter or offences for which by law the Prisoner is not bailable."

The English Bill of Rights (1689) states that, "excessive bail hath been required of persons committed in criminal cases, to elude the benefit of the laws made for the liberty of the subjects.

² Vin K Krishna, "CODE OF CRIMINAL PROCEDURE I ON BAIL" (2014) Research gate.

Excessive bail ought not to be required." This was a precursor of the Eighth Amendment to the US Constitution.

The bail act of 1976 was enacted only to prohibit or restrict people from many things which they provide or deny them a grant of bail and they introduced much kind of conditions for grant of bail.

Existing legal situation:

The whole concept of bail also have provisions which deals with the concept of bail and also have some kind of conflicting opinions one is the Individual's Right to liberty so basically putting a person in jail is against his liberty which is actually promised to him under Constitution. And the other concern is that the person will be construed as accused until he is proven as innocent as per law though he is innocent from the commission of offence. This may actually cause a lot of hardships for any person who is in that state

In the case of Vaman Narian Ghariya vs State of Rajasthan it was decided that bail continues to be understood in such a way that it is a right for assertion of freedom against the State imposing restraints.³

And since India being a signatory to the United Nations Declaration of Human Rights and the concept of bail found its scope under that convention within the scope of Human rights. It is thus a regulation of freedom which is handled by the state in order to put the community and society in order and at the same time as a functionary measure to secure the presence of the prisoners.

Section Analysis:

Section 436 of the Criminal procedure code deals with the persons who are accused for the offences committed under the name of Bailable offences. It is necessary and very much mandatory in nature and no authority can actually reject bail in cases where the accused have committed offence under this section. The power and duty of the police comes into play only when the concerned party fails to seek bail. And the mode for granting bail is through issuing bonds or securities. And in case of failure then the concerned police officer have to present him before the Magistrate within 24 hours as per section 57 of Criminal procedure Code.

Case laws:

In *Rasiklal v. Kishore s/o Khanchand Wadhvani* ; the Supreme Court held that the right to apply for bailable offences is very absolute and there is no bar for not applying bail in case of bailable offences and there is no discretion for the authority to hold the accused even after bail is granted to him by the court. And there cannot be any conditions imposed on the accused like surrendering the passport,

³ (2009) 2 SCC 281.

attend police custody anytime or even directing such accused person not to take part in public demonstration or make any public speech²¹ cannot be imposed usually they can ask only for providing the security.⁴

Vaman Narain Ghiya v. State Of Rajasthan; it was observed in this case that the court cannot act in any way to impose further conditions under this section other than to provide security⁵.

Section 437 of Criminal procedure talks about grounds for granting bail in case of Non-bailable offences. This section gives some discretionary power to the court to release the accused for the offence committed.

Section 437(1) of Criminal procedure code;

If any person who is detained for any offence arrested by officer in charge without any sort of warrant can be released on bail but if there are sufficient grounds to prove that the person who is detained is guilty for the offence committed.

And if such person shall not be released if such crime committed falls under cognizable offence or so person is previously convicted for the same similar kind of offence be it any punishment will be convicted. Or there can be anything where an instance if a same person has several times detained under same circumstances.

And this will not be applied in case of a person committed an offence is under the age of 16 years and also if an offence committed is women.

And in section 437(2) of the Criminal procedure code talks about instances where a person committed an offence that there no reasonable grounds for proving that person is guilty then the person accused should be granted bail or at a discretion of such officer or court on execution by him of a bond without sureties for his appearance as hereinafter provided.

In section 437(3) it clearly talks about offences which are punishable for imprisonment for a period of 7 years or more or any Chapter of offences under Indian penal code under subsection (1) under following conditions:

- a) Should follow and attend in accordance with the conditions of the bond executed under this chapter.
- b) That such person shall not commit any kind of offence which falls under the same category of similar offences.
- c) That such at such person shall not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from

⁴ AIR 2009 SC 1341.

⁵ 2009 (2) SCC 281.

disclosing such facts to the Court or to any police officer or tamper with the evidence.

And in section 437(4) of the Criminal procedure code talks about accused released on bail under subsections (1) and (2) should be enclosed in written format along with reasons for granting bail for so.

And in section 437(5) of the Criminal procedure code talks about under bail under subsection (1) and (2) if it considers it necessary so to do that such person be arrested and commit him to custody

And in section 437(6) of the Criminal procedure code if in case the trial is being initiated by the magistrate but still there is no conclusion from the side of court and the person accused is in detention for the whole period of 60days shall be released on bail by the Magistrate if he is satisfied with it and the same shall be recorded also.

In section 437(7) of the Criminal procedure code if, at any time, after the conclusion of the trial of a person accused of a non-bailable offence and before judgment is delivered, the Court is of opinion that there are reasonable grounds for believing that the accused is not guilty of any such offence, then in that case the accused shall be released. And if he is in custody, on the execution by him of a bond without sureties for his appearance to hear judgment delivered.

Case law:

- 1) Shakuntala Devi v State of UP; the word “may” which is being used under this section it should be construed as not mandatory through the meaning. It has to be calculated as the discretionary power of the court to ascertain.⁶
- 2) State of Rajasthan v. Balchand ; in this case it was observed that the basic option would be bail not jail and there are very less circumstances where the court feels that it is important to put the person in jail and deny bail and that happen only when the accused is liable for repeated same similar offences, And this decision is being taken by the court keeping in mind the public tranquility.⁷

Section 438 of Criminal procedure Code deals with type of bail and it talks about Anticipatory bail. The term means that a bail in anticipation of arrest. Any person who apprehends arrest can actually apply for an anticipatory bail and it is mainly for the matter of non-bailable offences.

There are some conditions to be fulfilled in order to award anticipatory bail:

- 1) Nature and gravity of the offence committed.

⁶ 1986 CriLJ 365.

⁷ (1977) 4 SCC 308.

- 2) The antecedent of the applicant did the accused previously being held liable for the offences or severely punishable for the offence which he applied anticipatory bail now.
- 3) The possibility of the accused to escape from liability
- 4) The intent for the commission of offence is it done intentionally or is it done for the sake of creation.

Case laws:

- 1) Balchand Jain v. State of M.P; the Supreme Court first defines the term “Anticipatory bail” in this case characterized the term anticipatory bail as the bail which is used to apprehend in anticipation of an arrest. It is generally granted in a instance where the court feels that the person is apprehended of being arrested. When a competent court grants “anticipatory bail”, it issues an order that in case of an arrest, the person shall be released on bail.⁸
- 2) Gurbaksh Singh Sibbia v. State of Punjab in this case it was held that section 438 of Crpc was actually in a provision which is granted to save people from their rivals against false allegations it stops them from being in jail, It is taken with the intent that people start disgracing them with their policy.⁹
- 3) Siddharam Satlingappa Mhetre v. State of Maharashtra the court believed in this case that there are two conflicting interests one is protecting the public from hazardous acts of few criminals and the other one is completely conflicting of that- the fundamental principles presumption of innocence and the sanctity of individual liberty.

Section 439 of the Criminal Procedure code deals with Special powers exercised by high court or courts of session.

Any person who is accused of commission of offence who is detained can be released on bail under section 437(3) with any special conditions imposed on the person who is in detention by the high court or courts of session if it is necessary.

And any conditions imposed under the same name can actually be released under the same can be modified or can be set aside by the Magistrate.

Provided that any kind of bails given by the Courts of session or the High court should give a statement of reasons to the public prosecutor stating that the same unless the reasons pave the way for the recognition.

⁸ AIR 1977 SC 2447.

⁹ AIR 1980 SC 1632.

Section 439(2) of the Criminal Procedure Code deals with when A High Court or Court of Sessions may direct that any person who has been released on bail under this chapter be arrested and commit him to custody.

Section 440 of Criminal Procedure Code talks about amount of bond and reduction it says that the amount of bond should always be extensively dealt on factual cases basis it should depend upon the nature of offence committed and shall not be excessive.

(2) The High Court or the Court of Sessions may direct that the bail required by a police officer or Magistrate be reduced.

Section 441 of Criminal procedure code deals with Bonds and sureties of the accused it states that if any person before getting released on bail should execute a bond and that has to be verified by the concerned Police and Magistrate and if they think its fit and then release him keeping in mind all the facts. And in case of sureties if there are more than 2 or three during the time of release then the sufficient sureties will be explained all the conditions for making the accused responsible for taking all the proceedings whenever required shall continue until directed by Police or Court.¹⁰

(2) It says that all the conditions which were agreed upon for a person to be released on bail shall also continue to be present in bond that is executed.

(3) The bond may also require the accused who is released on bail to approach the court whenever the court feels it is necessary be it High Court or even Courts of session basically they call upon to answer the charge.

(4) The courts in order to check whether the sureties are fit or sufficient can actually look into and accept affidavits in proof of the facts contained therein relating to the sufficiency or fitness of the sureties

Section 441A deals with declaration given by sureties it is an obligation given to all the sureties standing on behalf of the accused stating that they are responsible along with all the relevant particulars.

Section 442 of Criminal procedure code deals with discharge from custody as soon as the bond has been executed the reason for the same accused should be released. And if the person is in jail then the court shall issue an order of release to the Jail authorities for making him release and on orders from the court the accused is in detention shall be released on receipt of orders.

¹⁰ Suryansh Singh ,Provisions related to Bail: Overview and Analysis (2016) blog.ipleaders

Section 443 of Criminal procedure code deals with power to order sufficient bail if the first taken is rejected. And if the sureties are insufficient ie through Fraud, Mistake and Misrepresentation but were accepted by authorities but later if they came to know that it is insufficient then they can actually issue warrant to bring him back to jail and if so required they can even direct him to provide sufficient sureties and only then release him.

Section 444 of Criminal procedure code deals with Discharge of sureties it means that any person or all the persons who are acting as sureties can discharge from their obligation by submitting a letter to a magistrate saying that they discharge wholly or so far as relates to the applicants.¹¹

And upon such request being heard from the sureties then the court can issue arrest warrant against the person who is released on bail. And on doing so the magistrate can actually direct the person who is arrested to provide him a sufficient witness so that he can stay away from Jail and if he fails to does so then the accused have to continue staying in jail.

Section 445 of Criminal procedure code talks about deposition it means that any person who have to execute a bond for the sake of bail can actually deposit some money which is fixed by magistrate or by the court as a security for the release of a person this is done instead of executing a bond and it is totally at the discretion of the magistrate to accept the mode.

Section 446 of Criminal procedure code deals with the procedure when bond has been forfeited: A condition in a bond for appearance or production of property, before a Court shall be construed as including a condition for appearance, or as the case may be, for production property, before any Court to which the case may subsequently transferred.

And in case the sufficient cause is not shown then the penalty is imposed and if they don't consider it to be penalty then the court can actually recover the same from the accused through as if such penalty will be recorded as fine under the code.

And court after listening to all the stated reasons cana even actually remit the pay and let them pay in part only.

And in case the surety dies before the discharge of bond then in that case the bond gets automatically discharged and the person who had acted as a surety will be free from liability and the person who is on bail shall reappoint new surety.

Where any person who is seeking security under Section 117 or Section 360 is convicted of an offence the commission constitutes a breach of the conditions of his bond. or of a bond which is of his bond under Section 448, a certified copy of the used in lieu of inducement of the Court by which

¹¹ Deepali Vasist, Bail jurisprudence in India, Lawoctopus (November 14th 2021), <https://www.lawctopus.com/online-course-bail-application-drafting>.

he was convicted of such offence may in proceedings under this section against his or surety sureties, and. if such certified copy is used, the Court shall presume that offence was Committed by him unless the contrary is proved,

Where any person who had applied security under section 117 or section 360 is convicted of an offence and which constitutes a breach of the conditions mentioned in the bond executed instead section 448 of Crpc then the whole judgment copy can be used as an evidence and the same certified copy can be used as an evidence against the claims put forward until contrary is proved.

Section 446 A of Criminal procedure Code deals with cancellation of bail or bail bond there are certain conditions which were laid down before granting of bail and one amongst is not fulfilled then it leads to the cancellation of bail.

(a)The bond executed by such person as well as the bond, if any, executed by one or more of his sureties in that case shall stand cancelled;

(b) Thereafter no such person shall be released only on his own bond in that case, if the Police Officer or the Court, as the case may be, for appearance before whom the bond was executed, is satisfied that there was no sufficient cause for the failure of the person bound by the bond to comply with its condition: Provided that subject to any other provision of this Code he may be released in that case upon the execution of a fresh personal bond for such sum of money and bond by one or more of such sureties as the Police Officer or the Court, as the case may be, thinks sufficient.

Section 447 talks about procedure of bail and bond in case of death or insolvency of surety if that is the case then the Judicial Magistrate first class or any court where the surety was actually obliged can ask and call upon and ask for new sufficient surety so that the person who is supposed to be in detention is attending proceedings. And in failure can let the pass the order as they are defaulting to prove their ability.

Section 448 of Criminal procedure code deals with bond from minor when any person who is acting as a surety is a minor then such Court or officer may accept. in lieu thereof, a bond executed by a surety or sureties only.

Section 449 says that all orders passed under section 446 and 447 shall be applicable with following conditions: If the orders made by Magistrate to the Sessions Judge and also in case of order passed by Sessions judge to the Court which falls under that appeal.

Section 450 of Criminal procedure code talks about the power of High court and Courts of session where it may direct any Magistrate to levy the amount due on a bond for appearance or attendance at such High Court or Court of Sessions.

Criticism:

During the process of consideration of bail applications the courts in India have to consider some factors which showcase the character of the accused. This has to be implemented to bring the seriousness in the application of bail. There is no point if a person is committing the same similar kind of offences and then getting back bail in return.

The principle of innocence which is laid out is very important and it serves as a freedom from arbitrary detention and acts like a bulwark against punishment before conviction. And while considering the bail petition the reason the courts have to take into consideration both the personal liberty of the person along with public interest. And in Indian Courts you see people are to be innocent until they were proven guilty.¹²

Furthermore, this lack of a uniform precedent allows the individual outlook of particular judges to become the controlling factor in deciding bail petitions and has led to the often-unnecessary incarceration of 250,000 people, pending trial. As per the Ministry of Home Affairs today, this constitutes 66.4% of the total prison population

Practically the approach behind denial of bail is that to prevent a person from influencing witness, absconding outside the country and stop committing further offences but the irony behind the grant of bail is that though partially it is avoided by granting bail but they still continue to do the same and influence the witness in order to turn the case towards their side.

Moreover the delay in justice and trials might impact the socio economic conditions of both the parties and even the financial condition it actually runs foul on the subject of punishment till judgment is given.

Unfortunately, despite securing the presumption of innocence after great effort, it lacks firm constitutional rooting in India,¹⁵ where its applicability in respect of the law relating to bail has been understated. This is borne out by judicial decisions examined in the next section

Releasing a person on bail and putting him some restrictions not fully in the sense the court is letting the accused to act in any way that is going to tamper the witnesses.¹³

Conclusion and suggestions:

A legislative reconsideration of provisions related to bail. And in case any amendments can actually change the whole working system one is regulating the procedure for bail and other is unnecessary detention. And it is left for the courts to decide and in most cases you see there is a lot of difference between the text, purpose and interpretation.

¹² Dell, Susanne. "The Bail Act 1976". *The British Journal of Criminology* 17.2 (1977): 185-188. Academic Search Complete. Web. 31 October 2017.

¹³ Vrinda Bhandari, 'Inconsistent and Unclear: The Supreme Court of India on Bail' (2013) 6 NUJS L Rev 54.

And consequently judges should not only merely upon public interest should state reasons so that during interpretation we come to a conclusion that are they really justified or not and value earlier judgments and pronouncements in order to maintain efficiency.¹⁴

And subsequently if an innocent person is deprived then sufficient compensation should handed in which value their human rights. This is especially necessary in cases of serious offences where even an acquittal might not undo the public censure and stigmatization caused by the severity of the charge. A same similar kind of provision was already included in European Convention on Human Rights. And in bail jurisprudence you see there is no sufficient law which determines the extent of deprivation of liberty so any inclusion of provisions which is going to impact can make difference. In this way the judiciary, along with the legislature (to some extent), have important roles to play in recasting bail law in India in a manner that would protect personal liberty.

¹⁴ The Report No.268 of the Law Commission of India, on bail reforms, titled “Amendments to Criminal Procedure Code, 1973.