

TAKING BAIL SERIOUSLY – THE STATE OF BAIL JURISPRUDENCE IN INDIA (2020). Edited by Salman Khurshid, Sidharth Luthra, Lokendra Malik and Shruti Bedi. Published by Lexis Nexis, Gurgaon, Haryana^{1st} edn., Pp xx+ 512. Price: Rs 995.

CRIMINAL JUSTICE system in any country is generally gigantic and complex bestowed with multifarious goals, amongst which the safety and society of its citizens is primary. In Indian criminal justice system, apart from many agencies involved, “Police” and its role in preventing and deterring crime has always been a central point of discussion. Their role in the system become crucial by the fact that they form the link between the society members and the “system” whereby they not only conscientiously detect the crime and criminal but also ensures the fair application of law in doing so.

A meticulous investigation has always been contended as a prerequisite for the fair trial in a “due process model” followed in India, wherein *firstly*, there is presumption of innocence (barring few) till the guilt is proved beyond reasonable doubt; *secondly*, the benefit of doubt is to be given to the accused. In the aforesaid model, unlike “crime control” approach, the detentions of the innocent are seen as double failure of the system. A wrongful detention on one hand violate the rights of the person so detained and also leads to breach of the security of the society and therefore the strict adherence to this model emphasizes the prevention of unjustified detentions more than guilty going unpunished.

“Pre-trial Detentions” as an integral part of investigations has always been questioned and despite the fact that Cr PC in the year 2005 has been amended for the purpose of decreasing the number of pre trial detentions, the frequency of arrest remains the same. Arrest and the associated stigma attached has been a point of concern amongst judiciary and is been highlighted by the apex court. Issuance of notice under sector 41A has been insisted by the judiciary for the offences punishable up to seven years rather than arresting a person.

Further, in addition, for mitigating the instances of unnecessary continued detentions, bail provisions in the code have played a vital role. Since the grounds for releasing the person are not exhaustively mentioned in the code, it leads to non-uniform application of the laws. Though courts have on various occasions while interpreting bail provisions in light of article 14, 19 and

21 reiterated that granting bail is a rule and its rejection is an exception but irony is that the data of under trial prisoners have time and again proved otherwise.

The book under review is a compendium on the various aspects of the law of bail in India. It consists of valuable and thought-provoking contributions from former judges, eminent jurists, academicians, legal practitioners and research scholars who have highlighted important areas of concern on the nature and procedure of bail in India. In fact, the preface by the editors themselves impresses upon the imperative need of closely studying the trends related to grant of bail by courts which has undergone a sea change in the last decades. This shift in the approach has been identified by the editors as moving towards a stricter standard in case of special legislations, as opposed to an earlier jurisprudence which was dominated by more liberal notions that leaned in favor of grant rather than denial of bail. The unbridled judicial discretion that operates in a case of regular or anticipatory bail has lent itself to criticism. The fact that no guideline or precedent can bind a judge in reality while deciding a bail matter has been pointed out expressly by Justice H.S. Bedi in the foreword written and impliedly by the editors while setting the tone for the forthcoming book chapters of the book.

Incarceration is the highest form of deprivation of liberty of an individual. In order to strike a balance between this extreme measure in the interest of societal safety and human rights, bail serves as a meaningful device ensuring that the criminal trial is not vitiated. As mentioned aforesaid that there is no exhaustive list of the conditions on which bail or anticipatory bail can be granted or rejected but, primarily the decision of rejection or grant of bail depends upon the fact that whether the accused will cooperate in the investigation, will not tamper with the evidences or threaten the witnesses and will not commit any other offence. Bail is germane to the system of the criminal justice administration to maintain its standards of fairness and justice for all and therefore the courts while disposing bail applications ideally should draw a fine balance between the individual liberty and the interest of the society without compromising on either. True to its given title, the book delves into this subject matter with assiduous rigor and all seriousness by highlighting emergent as well traditional concerns related to bail. It draws from a vast history of judicial pronouncements, the Indian criminal law framework vis-à-vis the actual practice of bail in courts of law.

This review studied the book from two aspects, *firstly*, the form and layout in general and *secondly* based on the comprehensive coverage of the varied aspects of bail through meaningful contributions contained within the volume. Under both the criteria, the book while providing an overarching coverage to the multifarious aspects of bail misses out on a structural clarity, organizational continuity and thematic coherence.

As noted before, there are various issues highlighted with regard to the law on bail in India. However, a general schema outlining the issues addressed or a thematic classification of the chapters based on their focus of study would have greatly assisted in presenting a lucid reading for the reader. The papers are amorously listed as part of the contents due to which certain important aspects raised by the contributors on the subject of bail do not become readily apparent. For instance, two broad themes are emergent upon a closer inspection of the work, one that deals with the jurisprudential aspect of bail delving into the philosophy and motivations that have guided and molded the law of bail in the country over the years and the other that deals with the procedural challenges that have created the quagmire that law of bail operates within today. Following a thematic presentation of chapters would have added clarity to the significant aspects of bail dealt lucidly in the book. The contributions could have been grouped variously which would have helped the editors in avoiding repetitiveness of the same topic though addressed by different authors in their respective style and mode of writing.

One of the unique contributions to the body of work comes directly from the former judges and legal practitioners who deal with the subject matter on a routine basis, which could be the basis for a theme within the edited volume. An interesting insight is offered from the perspective of a legal practitioner, Abhishek Manu Singhvi who not only listed the lacunae in the application of the legal doctrines based on his experience in dealing with bail matters, but also gives an insight to the manipulations done in the court undermining the cardinal principle of rule of law. For instance, under section 167 Cr PC theoretically it is been understood and taught that under no circumstance the police custody can extend beyond 15 days. But, only an experienced lawyer like him can so boldly elaborate in an illustrative manner as to how two agencies namely CBI and ED work in collusion to get the custody extended, which makes the reader who is not having that vast experience or is a student can actually understand as to how the provisions written in theory are different when it comes to application. But the given misuse of this provision in the

chapter from point of view of a seasoned and experienced lawyer is a one sided depiction. As also pointed out by Justice H.S. Bedi in the foreword that this provision of default bail is grossly misused in favor of the accused whereby the investigations are intentionally delayed. Nonetheless, the imminent areas of concern were duly identified by the author wherein the court's clarification in future can contribute towards eliminating errors in deciding questions of bail. Further, the fact that this contribution provides a reasoned and threadbare analysis of the 268th Report of 21st Law Commission of India thereby making recommendations regarding which reforms, as suggested in the report, are practically viable and which are not, makes it immensely useful not only for the academia but even to other members of the legal fraternity.

Multiplicity of available remedies in varied judicial forums creates confusions and the mighty and powerful invokes the remedy in a way that leads to inequalities. Ashish Bansal selected recent cases and instances to show that there are troubling practices resorted to by the parties when they are implicated in special Acts. In a subtle and illustrative manner he shows that how the malpractice of filing bail applications under the guise of writ petition under article 32 and 226 for obtaining a swift order of bail are transgressing on sacrosanct constitutional principles of life, liberty and effective denial of equality to other accused who await their chances of being set at liberty for years thereby creating an imbalance between the justice seekers. He suggests in his concluding remarks that courts should refrain from entertaining the bail applications in case of special laws under writ jurisdiction which is an ideal situation. The suggestions provided by the author seek a normative and lack a practical application in the real world situation. The author has understood this and has implied it as a part of the conclusion of the chapter.

Continuing this trend of highlighting court practices in relation to matters of bail, Shriya Maini argues that granting of transit anticipatory/ pre-arrest bail in apprehension of pre-trial arrest has been a subject of abject discretion of the court and there have been divergent decisions regarding the same. In this chapter though the author attempts to address an issue which the student of law should be aware about for all he practical purposes, but unfortunately the analysis of the provision *i.e.*, 438(1) which she quotes is the provision prior amendment of 2005. After the aforesaid amendments the provision itself provides the factors which play a key role in deciding the grant of relief under this provision. Though the author quotes these factors as part of the discussion in *Siddharam Satlingappa Mhetre* , but as quoted by Neeraj Tewari in his chapter on

anticipatory bail, section 438 post amendment of 2005 is more or less in line with the parameters laid down in *Sibbia* case. Further, the judicial discretion exercised so as to decide whether transit bail can be given or not in the particular case and secondly whether the courts within whose jurisdiction the offence has not been committed can grant this bail or not, is elaborately discussed in this chapter. But this discussion and the consequent conclusion somehow create confusion. After the amendment of 2005 in the provision the bare reading of the provision depicts, *firstly*, that the interim bail can be given by the court keeping in mind the relevant factors and; *secondly*, the final order can't be passed without giving notice to the public prosecutor and the district superintendent of police. This serves dual purpose as the person apprehending false implication and a consequent arrest can have an interim relief from the court where such apprehension arises (it may be the court in whose jurisdiction the offence is not committed) and secondly the final relief can be given deciding after hearing the prosecutor and investigating agency.

Further, the author in her conclusion, wrongly mentions that 156(3) give statutory authority to investigate any cognizable offence for which the FIR is recorded and such investigation can't be questioned u/s 482 on the ground of there is lack of territorial jurisdiction. Section 156(1) is the provision which authorizes the police officer to initiate the investigation even without the permission of the magistrate and as per section 156(2) which categorically mentions that no investigation shall be called in question at any stage on the ground that such officer is not authorized to investigate the case. Unfortunately, author quotes it to be held by Supreme Court of India in *Satvinder Kaur*. Interestingly the author in her concluding remark draws an analogy with the recording of Zero FIR and argues that on the similar lines the right should be extended in case of transit anticipatory bail, but the question is that whether the right of getting the information recorded in case of cognizable offence even outside the jurisdiction where offence is not committed can be compared with the grant of transit anticipatory bail.

Complimenting the aforesaid chapter, two chapters dedicated to the concept of "Anticipatory bail" comes from Yogesh Pratap Singh who deals with the law and judicial discourse on anticipatory bail tying its existence inextricably to the due process models of criminal procedure and Neeraj Tiwari who not only traces the answers of the questions arising out of the 'silences' in the provision with the help of judicial discourse but also explains the scope and application of the provision and the associated jurisprudential developments. Since the topic under discussion is

alike, the chances of repetitive content become very high. The two mentioned chapters also fall prey to this. Neeraj Tewari in his chapter gives an updated and precise account of recent developments in the subject area. He succinctly identifies the core issues like for instance whether exhaustion of remedies is essential for approaching high court or the time limitation for which anticipatory bail can be granted and whether such application are also bound by jurisdictional limitations. The easy readability of the chapter provides a lucid understanding of the subject to the reader.

In one of the sections even Charu Mathur, Sidharth Luthra and Aayushi Khazanchi in their respective chapters also gives the similar discussion regarding the issues surrounding anticipatory bail. To their credit both chapters have attempted to theoretically explicate upon in great detail on the precedents regarding bail, anticipatory bail and related questions therein. On one hand Charu Mathur concludes on a hurried note with summary, single line recommendations that, if elaborated upon in light of the development of case law would certainly add more depth to the aforesaid recommendations, whereas Sidharth Luthra and Aayushi Khazanchi though elaborate on the adverse effects of pre-trial detentions in the conclusion but surprisingly misses out on giving any concrete suggestions for the same. A similar piece of writing comes from Justice S.S. Saron who alike other authors while mapping the disparities in the disposition of bail applications has also advocated the need of uniformity. The contents of the aforesaid chapters are covered in varied sections of different chapters, but repeated discussion is inevitable in such compendium which is not divided thematically.

Default bail or statutory bail under section 167, is yet another area in the realm of bail which now and then receives judicial interpretations. As mentioned aforesaid Abhishek Manu Singhvi and Justice H.S. Bedi gives a practical account of the misuse of this provision against and in favor of the accused. But, a detailed and dedicated chapter on the default bail finds place in this compendium authored by Monica Chaudhary explaining arduously the scope and applicability of the provision, lamenting that the lack of awareness on part of the accused of such a provision in the law leads to prolonged detention and undermines the legislative intent behind enacting a provision for providing default bail. This chapter gives the theoretical clarity as far as the nuances of default bail are concerned.

Further, even Charu Mathur also while tracing the Supreme Court decisions on varied aspects of bail dedicates a small section on default bail within her chapter. While comparing the provisions and working of bail provisions in India and Canada Khagesh Gautam and Sebastien Lafrance appeared to be fascinated by the “innovative” concept of default bail and advocated close study and examination in Canadian legal circles, especially in light of the decision of the Supreme Court of Canada in *R. v. Jordan*,¹ wherein the court rejected the framework traditionally used to determine whether an accused was tried within a reasonable time under section 11(b) of the *Canadian Charter of Rights and Freedoms* and replaced it with a presumptive ceiling of 18 months between the charge and the trial in a provincial court without preliminary inquiry, or 30 months in other cases.

Therefore, taking it from here since it is been contended and also been held by Supreme Court in *Aslam Babalal Desai v. State of Maharashtra*,² the legislative intent behind section 57 and 167 is primarily the paramount importance of individual’s liberty whereby the legislature has insured that there is no detention beyond 24 hrs without judicial authority and further there should not be continued detention pending investigation, the observation given by Monica Chaudhary while explaining the scope and applicability of the provision, lamenting that the lack of awareness on part of the accused of such a provision in the law leads to prolonged detention and undermines the legislative intent behind enacting a provision for providing default bail, becomes crucial.

“Judicial discretion” forms the central point of discussion when it comes to the disposition of bail application, and therefore in maximum articles it is been pointed out that how disparate is the application of this discretion which results in non uniformity and a consequent failure of justice. Chirag Balyan juxtaposes the bail jurisprudence in India against the liberal model of criminal law and argues that the root cause of the variance in bail standards arises from this ambivalent liberal theory. Analyzing it thus, he presents a strong case for a cogent bail policy based on the principle of ‘bail not jail’ and the same is interestingly advocated to be modeled around section 12 of the Juvenile Justice Act, 2015. He suggests relevant structural changes whereby the presumption of innocence should be made applicable in both,ailable and non-ailable offences. Further, he with the help of the contradictory observations including reasons of

¹ (1956) 40 Cr App R 152.

² (1992) 4 SCC 272.

granting or denying bail by trial court, high court and Supreme Court in a single case, builds up a case substantiating that the pre-judging at the stage of bail adversely impacts the presumption of innocence which in turn is fatal for the understanding of evidences by the trial court. Though he proves it theoretically, but this is a very potent area for future research, whereby the researcher can prove by data that if, *firstly*, the bail is denied by the superior court (which is not a trial court) and; *secondly*, if the court gives an observation about the strong incriminatory evidence present against such person, then it will lead to conviction because the trial court will be biased by such an observation.

Further, Dipa Dubey also attempts to inject analysis into the turgid realm of discretion in bail cases. The methodology adopted by the author is noteworthy. She has adopted a string search method for selection of cases of bail decided by the various high courts and apex court of the country in order to draw common factors that informed the judicial discretion of the court. By such analysis she tries to convince the reader that the discretion exercised while deciding bail application has assumed abstract notions and it operates as a bane to the system rather than providing tensility for serving the interest of justice it aimed for. Though such content analysis is a welcome step but the methodology suffers from a significant oversight. Neo classical school of thought argues that no two homicides are similar for the purpose of sentencing as before deciding on the quantum of the sentence the balance sheet of aggravating and mitigating factors is to be drawn. Similarly, when it comes to granting of bail pending trial in case of homicides the material considerations can't be identical.

Author in this chapter have mentioned in her methodology that 52 decisions which includes wide range of offences like murder, rape, kidnapping, offences relating to property and economic offences have been analyzed for establishing non reasoned and disparate application of judicial discretion. It is submitted that as a matter of fact such comparison is bound to give a flawed picture. It is been argued in this book by various authors in their respective chapters that the discretion is used differently for the purpose of granting bail, anticipatory bail when it comes to special laws in comparison to IPC offences. Further, even in IPC offences the considerations of bail differ amongst offences against body, women, property and documents. For instance, Shruti Bedi and Vrinda Bhandari in their respective papers deal with the law of bail relating to matters of terror and money laundering. These are exclusive contribution to law of bail under special

legislations that operates on different and often subjected to stricter standards when faced with the question of granting bail.

The concern of the poor and indigent is taken up by M.N. Bhatt and Shachi Bhatt and also in a separate paper by Talha Abdul Rahman. Both of them address the issue of monetary aspect of bail wherein the excessive amount fixed for bail, in effect, nullifies the right. Though several legislative and judicial reforms have been initiated to remedy this situation but the inequality when it comes to the right to bail still persists for the impoverished according to both the authors.

Role of police officers in granting bail is yet again a contentious issue and is been contended by Anurag Deep in his contribution, as an area which is lesser explored than many of the Common law jurisdictions. He has studiously compared the scope and applicability of the bail given by police not only in bailable offences but also in non-bailable offences in select countries like United Kingdom, and New Zealand. In this chapter he gives brief account of provisions regarding power of police in United States, Australia, China Pakistan and Bangladesh which in interest of the readers could have included more details. Especially in case of Pakistan and Bangladesh only passing reference is given of the provisions, is slightly disappointing in an otherwise exhaustive article. His suggestions based on the best practices pertaining to police bail which can be borrowed from these countries are appreciable which if adopted, will not only decrease the number of under trials but will also substantially lower down the workload on judiciary.

Though Anurag Deep has critically analyzed the shortcomings of the provisions regarding police bail, their practical applicability and also have suggested 'cautious' amendments, but the 2005 amendments in section 41(1) Cr PC for only required arrests concerning offences up to seven years and also inclusion of Section 41A are some of the positive steps that requires some mention in this scholarly article. In one of the chapters Ashish Bansal rightly in his concluding remarks have pointed out that the inception of getting bail starts with the fear of arrest and therefore if one is talking about the police bail it becomes mandatory to point out that when provisions require the person to be arrested and when a police officer may not arrest if the purpose of ensuring the presence of the person during investigation is ensured by serving notice only.

More lessons from the comparative studies are shared by Khagesh Gautam and Sebastien Lafrance who have compared and contrasted the Indian system with that of Canada which can be dubbed as “long lost siblings” due to their similar constitutional setup. Authors attempted to give a detailed outline of Canadian and Indian provisions pertaining bail and also compared them giving the best practices for mutual learning in each jurisdiction. But as a reader who is a student of law and not so proficient in Canadian provisions when reads this article have to look into other resources to find out what actually the provision states which easily could have been incorporated in the footnotes if not in the main text either by the authors or the editors making it simpler to comprehend the differences then and there. Anurag deep who vehemently argues upon the increased use of police bail though with checks and balances has been an obvious omission in this chapter where it could have been an important point of comparison between India and Canada.

Salman Khurshid set the tone for the discussion on curtailment of liberty that is inextricably attached with the issue of bail and discussed a catena of judicial pronouncements that have emphasized the same. He laments that often the courts forget the costs that excessive incarceration accrues and deny bail to the accused. Again, the issue of liberty and bail is reiterated in a similar manner by Lokendra Malik and Shailendra Kumar wherein they elaborately try to carve out the balancing of aforesaid consistently contentious issues. In this chapter authors suggest disciplinary action against the judicial officers in case of non-observation of the guidelines by the Supreme Court. Further, the authors quite ambitiously suggest audit of arrest by police officers and hint a stern action if arrest is found unnecessary. Despite this the content and discussion in the chapter addresses issues without much differentiation from the previous papers and seems to be repetitive.

Saumya Devraj has presented a persuasive case for adoption of more modern technology such as GPS tracking of accused or through devices that enabled electronic monitoring of accused by the authorities. In its foreign experiments, such technology has been useful in bringing down number of pre-trial detentions while at the same time ensuring that the accused does not flee. However, she surmises that given the present infrastructure it would be a bold move as there are huge infrastructural costs and matters of violation of privacy and misuse of data involved in such kind

of electronic monitoring. Unless such fundamental problems are addressed, these could potentially undermine the adoption of this kind of a technology.

Shuvro and Prakash shed light on an aspect that is not often discussed pertaining application of bail laws on accused of crime belonging to a foreign country. They surmise that absence of explicit legal provisions to deal with such prisoners has led to their arbitrary and prolonged detention by Indian authorities. After locating that there is no specific law that addresses the incarceration or even bail of foreign nationals, it locates that such cases are also governed by the existing procedure which are not in conformity with the international initiatives. In this process, the authors draw an analogy that problems such as teeming number of under trials in the Indian jails, heavy workload of courts and undetermined criterion for granting bail are some of the factors that also plague the treatment meted out to foreign nationals accused of a crime in India. By drawing this analogy in the law and its practice, the authors are able to show that the complicated and confusing set of policies that perpetuate injustice to the foreign prisoners in India.

A volume which includes contributions from authors of such diverse experience and backgrounds deserves an end note which truly reveals the title of the volume and its relevance in contemporary times. The epilogue of this exhaustive compendium is provided by the leading legal luminary of our times Professor Upendra Baxi. This masterpiece not only challenges the approach adopted by the Apex court in deciding the anticipatory bail application of P. Chidambaram but also poses need for imperative interventions in the near future for aligning the bail provisions with the constitutional mandate underlying article 21.

The renowned jurist in his concluding remark very rightly urges the need of revisiting the fundamentals of life and freedom as these cherished tenets goes beyond the question of fundamental rights. The anxieties of almost all the contributors in this book in their respective contributions about the disparities in realm of bail are appositely addressed by Professor Baxi, wherein he tersely shows the way forward saying that now is the time to move beyond the principle followed by the court that the investigations can't be interfered by the court to the mandate of investigations being subjected to judicial scrutiny at every stage, particularly over the issue of jail over bail.

In conclusion, the publishers and the editorial team accomplishes a commendable job of bringing together professionals from diverse fields and their rich perspectives in one volume which in addition of being exhaustive is certainly informative about the various contemporary developments and working of the law relating to bail in India. However, such important perspectives are partially lost in the haphazard and unorganized presentation of the chapters in the volume. A parting remark, the pleasure of reading such a comprehensive volume is partly barricaded by overlapping and repetitions of content on bail law that could have been possibly eliminated by the use of editorial discretion. Ignoring these discrepancies, the volume is a gainful addition to the body of work related to bail and the associated jurisprudence.

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