



A BRIEF ANALYSIS OF DISCRETIONARY POWER OF JUDICIARY IN THE MATTER OF BAIL

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Abstract

The concept of the bail involves two conflicting concerns- an individual's right to liberty and his right to be presumed innocent until proven guilty against the society's interest in maintaining law, order and security. The custody of a person pending the completion of trial may cause great hardship to that person which may include loss of liberty, livelihood during that period. The object of keeping an accused person in detention prior to or during the trial is not punishment but to prevent repetition of offence with who is charged, to seek the presence of the accused during the trial and to prevent destruction of evidence. According to the Supreme Court of India, Bail is devised as a technique for effecting a synthesis of two basic concepts of human values, namely the right of the accused person to enjoy his personal freedom and the public interest; subject to which, the release is conditioned on the surety to produce the accused person in the court to face the trial. The current scenario on bail is a paradox in the criminal justice system, as it was created to facilitate the release of accused person but is now operating to deny them the release. This paper notorious delay in disposal of case is an infirmity of the legal and judicial system which is responsible for the gross denial of justice to the under-trial prisoners. It is a sad reflection on the legal and judicial system that the trial of an accused should not even commence for a long number of years. Even a delay of one year in the commencement of the trial is bad enough: how much worse could it be when the delay is as long as 3 or 5, 7 or even 10 years. Speedy trial is of the essence of criminal justice and there can be no doubt that delays in trial by itself constitutes denial of justice.

Key Words:- Bail, Custody, Liberty & Accused.

Introduction

The notorious delay in disposal of case is an infirmity of the legal and judicial system which is responsible for the gross denial of justice to the under-trial prisoners. It is a sad reflection on the legal and judicial system that the trial of an accused should not even commence for a long number of years. Even a delay of one year in the commencement of the trial is bad enough: how much worse could it be when the delay is as long as 3 or 5, 7 or even 10 years. Speedy trial is of the essence of criminal justice and there can be no doubt that delays in trial by itself constitutes denial of justice.¹

Though speedy trial is not specifically enumerated as a fundamental right in the Constitution of India. It is implicit in the broad sweep and content of Article 21, as interpreted by the Supreme Court², wherein it was held that Article 21 confers a fundamental right on every person not to be deprived of his life or liberty except in accordance with the procedure prescribed by law and it is not enough to constitute compliance with the requirement of that Article that some semblance of a procedure should be prescribed by law, but that the procedure should be "reasonable,

¹ Ram Govind Upadhyaya v. Sudarshan Singh AIR 2002 SC.,m 1475.

² Maneka Gandhi v. Union of India AIR 1978 SC 597.

fair and just". If a person is deprived of his liberty under a procedure which is not "reasonable, fair or just", such deprivation would be violation of his fundamental right under Article 21 and he would be entitled to enforce such fundamental right and secure his release. Obviously procedure prescribed by law for depriving a person of his liberty cannot be "reasonable, fair or just" unless that procedure ensures a speedy trial for determination of the guilt of such person. No procedure which does not ensure a reasonably quick trial can be regarded as "reasonable, fair or just" and it would fall foul of Article 21. There can, therefore, be no doubt that speedy trial, and by speedy trial is meant reasonably expeditious trial, is an integral and essential part of the fundamental right to life and liberty enshrined in Article 21 of the Constitution.³

What would be the consequence if a person accused of an offence is denied speedy trial and is sought to be deprived of his liberty by imprisonment as a result of a long delayed trial in violation of his fundamental right under Art 21. Would he be entitled to be released unconditionally freed from the charge leveled against him on the ground that trying him after an unduly long period of time and convicting him after such trial would constitute violation of his fundamental right under Article 21 of the Constitution?

Leaving this question, to be decided on the adjourned date, the Supreme Court observed in *Hussainara Khaton (I)*⁴ as under:

"But one thing is certain and we cannot impress it too strongly on the State Government that it is high time that the State Government realized its responsibility to the people in the matter of administration of justice and set up more courts for the trial of cases. We may point out that it would not be enough merely to establish more courts but the State Government would also have to man them by competent Judges and whatever is necessary for the purpose of recruiting competent Judges, such as improving their conditions of service, would have to be done by the State Government, if they want to improve the system of administration of justice and make it an effective instrument for reaching justice to the large masses of people for whom justice is today a meaningless and empty word."

But, subsequently, the Supreme Court continued its crusade against delayed trials in the *Hussainara Khaton (IV)* case, as detailed in the following paragraphs.

Speedy trial is an essential ingredient of "reasonable, fair and just" procedure guaranteed by Article 21 and it is the constitutional obligation of the State to devise such a procedure as would ensure speedy trial to the accused. The State cannot be permitted to deny the constitutional right of speedy trial to the accused on the ground that the State has no adequate financial resources to incur the necessary expenditure needed for improving the administrative and judicial apparatus with a view to ensuring speedy trial. The State may have its financial constraints and its priorities in expenditure, but the law does not permit any Government to deprive its citizens of constitutional rights on a plea of poverty.⁵

The State cannot avoid its constitutional obligation to provide speedy trial to the accused by pleading financial or administrative inability. The State is under a constitutional mandate to ensure speedy trial and whatever is necessary for this purpose has to be done by the State. It is also the constitutional obligation of the Supreme Court, as the guardian of the fundamental rights of the people, as a sentinel on the qui vive, to enforce the fundamental right of the accused to speedy trial by issuing the necessary directions to the State which may include taking of positive action, such as augmenting and strengthening the investigative machinery, setting up new courts, building

³ *Hussainara Khaton (IV) v. Home Secy. State of Bihar*, (1980) 1 SCC 98.

⁴ *Hussainara Khaton (I) v. Home Secretary, State of Bihar* (1980) 1 SCC 89.

⁵ *Hussainara Khaton (IV) v. Home Secretary, State of Bihar* (1980) 1 SCC 98.

new court houses, providing more staff and equipment to the courts, appointment of additional Judges and other measures calculated to ensure speedy trial.⁶

The powers of the Supreme Court in protection of the constitutional rights are of the widest amplitude and there is no reason why the Supreme Court should not adopt an activist approach and issue to the State directions which may involve taking of positive action with a view to securing enforcement of the fundamental right to speedy trial. Observing as above in the case of *Hussainara Khatoon (IV)*, and observing further that in order to enable the Supreme Court to discharge the aforesaid constitutional obligation, it was necessary that the Supreme Court should have the requisite information bearing on the problem, certain directions were issued by the Supreme Court to the State of Bihar to furnish some relevant information in this regard. A notice was also issued to the Supreme Court Bar Association to appear and make its submissions in this regard.

Thereafter, in *Hussainara Khatoon (V)*⁷, the Supreme Court required further information from the High Court of Patna as to the norms of disposals fixed by the High Court for the different categories of Magistrate; and Sessions Judges in the State of Bihar, observing that without such information, it would not be possible for it to decide whether the existing strength of courts and Judges in the State of Bihar was adequate for the purpose of ensuring speedy trial to the accused or it was necessary to have additional courts and Judges.

It is pertinent to submit that the aforesaid judgment was rendered by the Supreme Court on March 9, 1979, and several years later, the situation on the issue of speedy trial continues to be as bad as it was in 1979; in fact, it has worsened further day-by-day. However, unfortunately, the Supreme Court has not issued any such binding directions for setting up of an adequate number of courts till date in spite of the fact that the Supreme Court itself felt the need for issuing such directions to the State.

The right to a speedy trial is one of the dimensions of the fundamental right to life and liberty guaranteed by Article 21 of the Constitution. Several questions arise for consideration for deciding whether this right has been infringed in a particular case. Was there delay? How long was the delay? Was the delay inevitable having regard to the nature of the case, the sparse availability of legal services and other relevant circumstances? Was the delay unreasonable? Was any part of the delay caused by the willfulness or the negligence of the prosecuting agency? Was any part of the delay caused by the tactics of the defence? Was the delay due to causes beyond the control of the prosecuting and defending agencies? Did the accused have the ability and the opportunity to assert his right to a speedy trial? Was there a likelihood of the accused being prejudiced in his defence? Irrespective of any likelihood of prejudice in the conduct of his defence? Was the very length of the delay sufficiently prejudicial to the accused? A host of other questions may arise which one may not be able to readily visualize just now. The question whether the right to a speedy trial which forms part of the fundamental right to life and liberty guaranteed by Article 21 has been infringed is ultimately a question of fairness in the administration of criminal justice even as 'acting fairly' is of the essence of the principles of natural justice and a 'fair and reasonable procedure' is what is contemplated by the expression procedure established by law in Article 21.⁸

In the case of *R.D. Upadhyay*⁹, the Supreme Court yet again held that a speedy trial is guaranteed as a fundamental right under Article 21 of the Constitution of India. In this case, on noticing that a large number of about 1930 under-trials were languishing in the Central Jail, Tihar, Delhi, for a period ranging from one year to eleven years,

⁶ *Hussainara Khatoon (IV) v. Home Secretary, State of Bihar* (1980) 1 SCC 98.

⁷ *Hussainara Khatoon (V) v. Home Secretary, State of Bihar* (1980) 1 SCC 108.

⁸ *Raghubir Singh v. State of Bihar*, AIR 1987 SC 149

⁹ *R. D. Upadhyay v. State of A.P.* 1999 SC 2183.

the Supreme Court, while observing that a speedy trial is guaranteed as a fundamental right under Article 21 of the Constitution of India, directed that for die 880 under-trials facing murder cases, ten Additional District Judges be nominated to take up exclusively the trial of these cases, to dispose of these cases preferably within a period of six months or so. For the attempt to murder cases pending for more than 2 years, the under-trials were directed to be released on bail.

Persons facing trial for Kidnapping, Theft, Cheating, Arms Act, Counterfeiting, Customs, under Section 326 IPC, under Section 324 IPC, Riots and under Section 354 IPC who were in jail for a period of more than one year, were directed to be released on bail. It was also directed that the under-trials would not have to move applications for bail and that the trial courts would themselves consider the bail cases. Suo motu, under the authority of the aforesaid Supreme Court order in the instant case. About two years after issuing the aforesaid directions for release of various under trial prisoners in the aforesaid case of R.D. Upadhyay, the Supreme Court directed the Commissioner of Police, Delhi, in the case reported with a similar case title in R.D. Upadhyay to submit a report indicating the impact of the aforesaid order on the general law and order situation, along with the details as to whether any of the persons who had been released in pursuance of the said directions had reported the offence after his release.

To have speedy justice is a fundamental right which flows from Article 21 of the Constitution. Prolonged delay in disposal of the trials and thereafter appeals in criminal cases, for no fault of the accused, confers a right upon him to apply for bail. The Supreme Court, has time and again, reminded the executive of their obligation to appoint requisite number of judges to cope with the ever increasing pressure on the existing judicial apparatus.¹⁰

Appeal being a statutory right, the trial Court's verdict does not attain finality during pendency of the appeal and for that purpose his trial is deemed to be continuing despite convictions. It is unfortunate that even from the existing strength of the High Courts' huge vacancies are not being filled up with the result that the accused in criminal cases are languishing in the jails for no fault of theirs. In the absence of prompt action under the Constitution to fill up the vacancies, it is incumbent upon the High Courts to find ways and means by taking steps to ensure the disposal of criminal appeals, particularly such appeals where the accused are in jails, that the matters are disposed of within the specified period not exceeding 5 years in any case. Regular benches to deal with the criminal cases can be set up where such appeals be listed for final disposal. If an appeal is not disposed of within the aforesaid period of 5 years, for no fault of the convicts may be released on bail on such conditions as may be deemed fit and proper by the Court. In computing the period of 5 years, the delay for any period, which is requisite in preparation of the record and the delay attributable to the convict or his counsel can be deducted. There may be cases where even after the lapse of 5 years the convicts may, under the special circumstances of the case, be held not entitled to bail pending the disposal of the appeals filed by them. Observing thus, the Supreme Court requested the Chief Justices of the High Courts, where the criminal cases were pending for more than 5 years to take immediate effective steps for their disposal by constituting regular and special benches for that purposes.¹¹

Noting that there was a time lag of more than eighteen years from the date of incident and nearly fifteen years from the date of acquittal and its hearing, in *Ajaib Singh*¹², the Supreme Court observed that by any standard it was shocking. Highlighting the need for more number of courts or for some other mechanism to reduce pendency in courts, the Supreme Court further observed as under "Speedy trial, early hearing and quick disposal are sine qua non of criminal jurisprudence. In some countries like England days are fixed statutorily for trial of cases. Keeping

¹⁰ *Akhtari Bi v. State of M.P.*, AIR 2001 SC 1528..

¹¹ *Akhtari Bi v. State of M.P.*, AIR 2001 SC 1528

¹² *Ajaib Singh v. State of Punjab* AIR 1995 SC 975.

an accused in custody for a day more than it is necessary, is constitutionally impermissible and violative of human dignity, freedom of life and liberty. The overcrowded Court dockets, the phenomenal rise of public interest litigation, duty to ensure enforcement of fundamental rights undoubtedly keeps this Court under stress and strain. But that cannot be an excuse for keeping the sword of Damocles hanging on the accused for an indefinite period of time. It does not do any credit rather makes one sad. If the accused is not granted bail and serves out the sentence then the appeal is rendered academic for all practical purposes. And the right to establish innocence fades away in lack of enthusiasm and interest. If he is granted bail then long delay may give rise to humane considerations. Time heals the gravest scar and mitigates deepest injury suffered physically, mentally and emotionally. Therefore, if the Courts have been rendered helpless and the exasperating delay is threatening to eat away the system then the Government may consider either to increase the strength to clear the backlog or devise some mechanism by which criminal appeals pending for more than reasonable time in higher Courts should stand disposed of.”

It is pertinent to point out that in an earlier case, Bhabadeb Mondal, the Supreme Court had observed that if the petitioner was feeling aggrieved because of the delay in the trial of his case, his remedy was to move the trial court or the High Court: likewise, if the petitioner sought bail because of the delay in the completion of the investigation, his remedy was to apply for bail to the appropriate court or the superior court. The Supreme Court had further observed that no relief could be granted to the petitioner in this petition under Article 32 of the Constitution.

It is submitted that while what is laid down in the aforesaid Bhabadeb Mondal case may generally be true even today as well, since an accused is normally required to approach the trial court or other competent courts on grievance of delay in trial or bail, etc., but the rule that a petitioner cannot resort to Article 32 of the Constitution in matters of delay in trial may not perhaps be the correct law today, in view of the fact that right to speedy trial has now been itself recognized as a fundamental right, being an integral and essential part of the fundamental right to life and liberty enshrined in Article 21 of the Constitution (e.g. Husaainara Khaton¹³).

It is submitted, therefore, that in an appropriate case where the fundamental right of an accused is violated in view of gross delays in the trial, a petition under Article 32 may become maintainable.

Right to speedy trial is the fundamental right and if the trial is delayed it would amount to the denial of justice and entitle an accused to be admitted to bail. But, a significant question, the cause of delay whether attributable to the prosecution or to the accused, has to be borne in mind at the time of exercise of judicial discretion for grant of bail. Irrefragably, the delay in trial is an important factor to be taken note of at the time of consideration of application for bail and no Court can take a myopic view in this regard but simultaneously it cannot be magnified to ostracize the role played by the accused in causing the delay. The age old principle that he who seeks discretion must conduct himself cannot be given a decent burial to confer the concession of bail to an accused who has made a deliberate attempt to cause delay with ultimate intention to gain advantage of such delay. In a case where directions were issued by Court for disposal of case within a prescribed period but subsequently a counter criminal case was clubbed together at the instance of the accused when almost all witnesses had been examined. It was held that the prosecution was not responsible for the delay caused due to the clubbing together of the said case and the accused was not entitled to be enlarged on bail on the ground of delay in trial. ¹³

An expeditious criminal trial is a fundamental right of the accused, especially when he is in jail. No accused can be kept in jail for uncertain period, as a under-trial prisoner, especially when there is no fault on his part. In Criminal cases in which the accused is in jail, it is the duty of the Presiding Officer to complete the trial as expeditiously as possible and to record the statements of the prosecution witnesses without any delay, rather day

¹³ Gokul Singh v. State of M..P. 1999 Cri L J 3455

to day; and all efforts are to be made through the police agency to secure the attendance of the witnesses on the date fixed for recording their statements.¹⁴

Article 21 of the Constitution of India recognizes the right of every citizen for a speedy trial regardless of the innocence or guilt of the accused. Protracted trial is most traumatic to an innocent person. The object of the new Code of Criminal Procedure is the expeditious investigation, inquiry and trial of criminal cases. Indefinite detention of the accused, even in graver offences, is against the Legislative intent and the object of the Code of Criminal Procedure. Procedural constraints in the Code are designed to protect the rights of the accused. Section 309, Cr. P.C. gives a mandate to the trial Court that the proceedings in every inquiry or trial shall be held as expeditiously as possible and in particular when the examination of the witnesses has once begun, the same shall be continued from day to day until all the witnesses in attendance have been examined, unless the Court finds the adjournment of the same beyond the following day to be necessary for reasons to be recorded. Section 437(6) Cr.P.C. gives a mandate to the Magistrate in the cases triable by the Magistrate to release the accused on bail if the trial of a person accused of any non-bailable offence is not concluded within a period of sixty days from the first date fixed for taking evidence in the case. Section 167(2) Cr.P.C., which deals with the investigation part, also gives a mandate to the Magistrate to release the accused on bail if the investigation is not completed within the period of sixty days or ninety days, as the case may be.¹⁵

Bail is a matter of judicial discretion. While considering whether to grant or not to grant bail, conflicting claims of individual liberty of the accused and the larger societal interest have to be taken note of. Article 21 of the Constitution of India recognizes the right of a speedy trial to every citizen. The object of the new Code of Criminal Procedure is the expeditious trial. The delay in the conclusion of the trial violates the constitutional guarantee of a fair, just and reasonable procedure and in fact a fundamental right of speedy trial.¹⁶

Indubitably, Article 21 of the Constitution contemplates early end of criminal proceedings through a speedy trial. It encompasses all the stages, namely, stage of investigation, enquiry, trial, appeal, revision and retrial. Delay in each case has to be determined on its own facts and having regard to all attending circumstances including nature of offence, number of accused and witnesses, the work load of the Court concerned, prevailing local conditions, etc. But delay alone cannot by itself be the ground for grant of bail. All other surrounding circumstances should be taken into consideration along with it. If ever a time shall come when the prisoners have to wait indefinitely, at the mercy of the State, until a golden key unlocks the doors of the prisons to the courtrooms, the seeds of revolution be sown. Better, such probable calamities or complications are avoided. Something must be done urgently. Speaking about the bail jurisdiction, in one such case¹⁷, the Supreme Court observed that the doctrine of Police power constitutionally validates punitive processes for the maintenance of public order, security of the State, national integrity and the interest of the public as a whole. Even so, having regard to the solemn issue involved, deprivation of personal freedom, ephemeral or enduring, must be found on the most serious considerations relevant to the welfare objectives of society specified in the Constitution of India.

Conclusion

Contradictions and confusions color the law of bail in our country. The provisions as to bail as contained in our Code of Criminal Procedure present a legislative policy, which is inchoate and full of blanks. Discretion conferred

¹⁴ Jar Singh v. State of Rajasthan, 1992 Cri L J 2873.

¹⁵ Om Prakash v. State of Rajasthan, 1996 Cri L J 819.

¹⁶ Om Prakash v. State of Rajasthan, 1996 Cri L J 819.

¹⁷ Babu Singh v. State of U.P., AIR 1978 SC 527 & K. Narayanswamy v. State of A.P., 1980 Cri LJ 588..

on courts in matters of bail, which is nearly unbounded legislatively, is judicially also so free that, despite the long list of considerations, it becomes difficult to rationalize the exercise of discretion one way or the other in a particular case. It is debatable whether the existing statutory provisions, also analyzed in the light of the judicial guidelines prescribed by the Supreme Court and various High Courts to govern the discretion in the matter of 'Bail or Jail', constitute 'reasonable, fair and just' law under Article 21 of our Constitution.

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