

COVERING LETTER

Title of Paper - Relevance of Sureties in Criminal Jurisprudence when every person in India has an Identity

Name - Siddhant Maniktala

Designation - Student of B.A. LL.B 2nd Year

Contact details - sidhantmanik@gmail.com Mobile - 9805084450

Institution - Amity Law School, Amity University Noida. UP

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ABSTRACT

The fundamental principal of our criminal jurisprudence is that a person accused of an offence is presumed to be innocent till proven guilty after following due process of law. Grant of bail is the rule and jail is the exception. Article 21 of Constitution of India guarantees the fundamental right of speedy justice to a person accused of an offence. However, even after 72 years after independence, the trial against the accused takes years to conclude.

In this backdrop, when the accused is arrested on an accusation of having committed an offence, he has a right to apply for bail. But the right to secure bail is often defeated on the basis of considerations – (1) that the accused has to furnish a bail bond and a surety bond of a sum determined by the court. It is a fact that more than one third of our population lives in penury and they have no means of arranging a surety bond of a sum, which is to be supported by surety's property of equivalent value. (2) Insistence of large sums of money in personal bonds and surety bonds (3) Non acceptance of sureties from an area out of the local jurisdiction of the court or from another State in India.

As a result thereof, the accused end up languishing in jails for a number of years. And it is a fact that 65% of the prisoners happen to be undertrials.

Many Committees, consisting of legal luminaries, as well as Law Commission, have recommended appropriate reforms in the system. The Apex Court has also delved into such questions from time to time.

In this background, the Aadhaar, issued by UIDAI, may replace the need for surety, as it conclusively establishes the identity of accused.

Relevance of Sureties in Criminal Jurisprudence when every person in India has an Identity

By Siddhant Maniktala

B.A.LLB. 2nd Year

Amity Law School,

Amity University, NOIDA.

Introduction:

This paper analyses the considerations for grant of bail in criminal proceedings in form of personal bond or surety bond. “Bail is the rule and jail is the exception” is often defeated by inability of accused persons coming from poor families to furnish the surety bonds of pecuniary value beyond their means. Similarly, insistence of courts to have a surety within their local jurisdiction, also defeats the bail rights of citizens who are residents of other states or are foreign nationals. Lot of money exchanges hands for arranging a local surety before the court. This paper further analyses the relevance of surety in present times, when Aadhaar establishes the identity of a person (accused) and he could be easily located in order to undergo the punishment awarded, in case he flees from the process of law.

What is bail bond?

Bail bond is a written document signed by an accused person and his friends for families or any other person (known as surety), to ensure that the accused will appear before the court at the schedule time and date, as ordered by the court. The bail amount is determined by the court which is in proportion to the alleged offence which is to be paid if the accused fails to appear before the court on the trial date.

The bail bond acts as the security for the appearance of the accused on which he is released pending trial or investigation.

The term “bail” has not been defined in the code of criminal procedure but it has been used in the Code several times and remains one of the vital concepts of criminal justice system which is administered in consonance with the fundamental principles enshrined in the Indian Constitution and the scope of human rights.

Different types of Bails

- **Anticipatory bail** - Under Indian criminal law, anticipatory bail is defined under section 438 of the Criminal Procedure Code. This provision allows a person to seek bail in anticipation of an arrest on suspicion of having committed a non bailable offence.
- **Cash bail**- In this type of bail, the accused has to pay the entire stipulated amount. The amount required for issuing the bail depends upon the seriousness and circumstances of the case. After the bail has been granted, the accused is expected to appear in all the court proceedings.
- **Surety bond**- Before any person is released on bail on his own bond, a bond for such sum of money as the police officer or court, as the case may be, thinks sufficient shall be executed one or more sureties to the effect that such person shall attend the trial or investigation at the time and place mentioned in the bond, and shall continue so to attend until otherwise directed by the police officer or court, as the case may be.
- **Property bond**- If the accused is not able to pay the bail amount in cash then one can obtain the bail charging his property in lieu of cash. Accused has to show an equal value of property as the bail amount. But if the accused fails to appear before the court on the stipulated date, the property kept as guarantee will be foreclosed by the court.
- **Release on own personal recognition**- A judge may allow an accused to be released on personal recognition. The crime committed by an accused may not be of serious nature or a minor crime of non-violent nature and the accused may be released from the jail on the promise of the accused. In such cases there is no need to pay any amount for getting the bail.

- **Release on citation-** The officer may not arrest and book the offender but simply sends a citation that the offender should appear before the court. If the offender does not appear before the court on stipulated time, he may be arrested.

How the system is exploited to disadvantage the poor, non-residents of local area and foreign nationals

The present system of bail is heavily influenced by economic status and discriminates against the impoverished and the illiterate. Our judicial system seems to have evolved two approaches to bail - bail as a right for the financially able, and for the rest, bail is dependent on judicial discretion, exercised through manipulation of the amount that would be required to furnish bail bond.

The primary objective of the provisions providing for the bail should not be to detain and arrest an accused person but to ensure his appearance at the time of trial. The concerned system should also make sure that, if the accused is held guilty, he is available to suffer the consequence of the offence committed, in terms of punishment imposed in accordance with the law.

Since the accused is presumed innocent till he is proved to be guilty, it would be unjust and unfair to deprive him of his liberty during the pendency of the criminal proceeding. The release on bail upon appropriate considerations and imposition of reasonable conditions is significant not only to the accused, and his family members who might be dependent upon him but also the society large. Hence the Court is duty bound to contemplate the facts and circumstances prevailing in the matter and strike a balance between considerations and imposition of the reasonable conditions and then pass the appropriate order.

The other important consideration for grant of bail remains the furnishing of a bond by the surety, which again depends upon owning property having an equivalent value to the surety bond. This is specifically relevant in a country like India where one third of the population remains in poverty. A person, mainly the accused and his friends or family members have to specifically sign a written document to ensure that the accused would appear before the court at the scheduled time, date, as ordered by the court. The document termed as a bail bond acts as a security for the appearance of the accused on which he will be released pending trial and investigation. Usually a person with sufficient financial sources and contacts would be granted bail easily but on the other hand a person

with insufficient financial resources would find it difficult to arrange for sureties and also to pay the reasonable bail amount to the court. Hence, it would become difficult for him/her to come out on bail.

In case of foreign nationals, the same provisions are applied to them which makes it extremely difficult for them to be released on bail. An accused whose origin is not from India and is accused of committing a crime in India has to produce local sureties in order to get bail. In this way foreign nationals are also exploited by local people who may demand money in exchange for being a surety for the said accused.

The law presumes that the people with sufficient financial sources and sureties would be able to afford bail but poor people in that case would be deprived of pre-trial bail which would have negative consequences for them. Thus, it is the need of the hour to amend certain provisions regarding bail and sureties to ease the process of furnishing bail bonds and granting bail.

Some instances of International Practices

How the Bail Bond Industry strives in the US (USA)

The U.S. is one of the only two countries in the world with a legal bail bonds industry thrives, which allows bail bond companies to pay a defendant's bond in exchange for a fee (typically 15% of the bail price) when the defendant can't afford to pay the bail price and doesn't want to wait in jail until their trial. The bail system often favours those who are rich and hurts citizens who can't manage to organise the hundreds to tens of thousands of dollars required for bail.

In addition to the US, Philippines is another country in which the commercial bail bond industry is legal. The bail bond companies deal in about \$14 billion in bonds each year. Bail is intended to ensure that the accused show up for their trial. To determine whether an accused person qualifies for bail, the judge will look at their physical and mental health, financial resources, family ties, drug and alcohol abuse, criminal history and their history of appearing in the court. If a bail is less than \$2,000, bail bond companies are not always able to make a profit and they do not take up such cases, leaving many people no other option but to wait in jail.

Bail bond companies make the profits from the criminal justice system by keeping poor people in debt even after they've been cleared of charges. The \$14 billion-a-year bail bond industry, underwritten by nine large insurance companies including some owned by multinational corporations, perpetuates a system in which people who can't afford bail remain in jail before trial. This leaves them with a choice between borrowing money or staying locked up. Those who remain incarcerated are less likely to win their court cases. Also those who borrow from bondsmen to buy their freedom often spend months or years paying it back. This cycle of poverty and jail makes the for-profit bail system indefensible.

Under the California's law, those arrested and charged with a crime will not put up any money or borrow it from a bail bond agent to obtain their release. Instead, the local courts will decide who to keep in custody and whom to release while they await trial. Those decisions will be based on some principles devised by the courts in each jurisdiction.

Meanwhile, among other states of the USA, Washington D.C., already has an existing and functional cashless bail system. Other states, including New Jersey, have passed laws that reduce their reliance on money bail and other states are also considering to make similar changes in the interest of the general public.

Justice V.R. Krishna Iyer made an observation about the system of bail prevailing in the United States in a celebrated case *Moti Ram vs State of MP*¹:

“It sounds like a culture of bonded labour, and yet are we to cling to it! Of course, in the United States, since then, the bondsman emerged as a commercial adjunct to the processes of criminal justice, which, in turn, bred abuses and led to reform movements like the Manhattan Bail Project. This research project spurred the National Bail Conference, held in 1964, which in its crucial chain reaction provided the major impetus to a reform of bail law across the United States. The seminal statutory outcome of this trend was the enactment of the Bail Reform Act of 1966 signed into law by President Lyndon B. Johnson. It is noteworthy that Chief Justice Earl Warren, Attorney-General Robert Kennedy and other

¹ *Moti Ram v. State of M.P.* (1978) 4 SCC 47 para 10

legal luminaries shared the view that bail reform was necessary. Indeed, this legislative scenario has a lesson for India where a much later Criminal Procedure Code, 1973 has largely left untouched ancient provisions on this subject, incongruous with the Preamble to the Constitution.”

Justice Iyer further observed²:

“It is interesting that American criminological thinking and research had legislative response and the Bail Reforms Act, 1966 came into being. The then President, Lyndon B. Johnson made certain observations at the signing ceremony:

“Today, we join to recognize a major development in our system of criminal justice: the reform of the bail system.

This system has endured — archaic, unjust and virtually unexamined — since the Judiciary Act of 1789.

The principal purpose of bail is to ensure that an accused person will return for trial if he is released after arrest.

How is that purpose met under the present system? *The defendant with means can afford to pay bail. He can afford to buy his freedom. But the poorer defendant cannot pay the price. He languishes in jail weeks, months and perhaps even years before trial.*

He does not stay in jail because he is guilty.

He does not stay in jail because any sentence has been passed.

He does not stay in jail because he is any more likely to flee before trial.

He stays in jail for one reason only—because he is poor....”

² Moti Ram v. State of M.P. (1978) 4 SCC 47 para 15

California Becomes First State To End Cash Bail After 40-Year Fight (USA)

California will become the first state in the USA to abolish cash bail for the accused awaiting trial which is the result of a reform bill signed by Governor of California state, Jerry Brown.

Efforts were being made by several concerned groups to change the existing cash bail system in USA and it became a reality when a California appellate court declared the state's cash bail system unconstitutional. The California state has reformed the cash bail system striving in the US so that the rich and poor are treated fairly thus not depriving them of their rights of liberty and freedom. This new law would come into effect in October 2019.

Supreme Court of India on Bail

”Personal liberty, deprived when bail is refused, is too precious a value of our constitutional system recognised under Article 21 that the curial power to negate it is a great trust exercisable, not casually but judicially, with lively concern for the cost to the individual and the community.”
- Justice V.R. Krishna Iyer³

• State of Rajasthan v Balchand

In this case, Justice Krishna Iyer explains that the basic rule is bail and not jail. In his inimitable words, he observes⁴:

“The basic rule may perhaps be tersely put as bail, not jail, except where there are circumstances suggestive of fleeing from justice or thwarting the course of justice or creating other troubles in the shape of repeating offences or intimidating witnesses and the like by the petitioner who seeks enlargement on bail from the court.”

³ Gudikanti Narsimhulu vs Public Prosecutor, High Court of AP (1978) 1 SCC 240 para 1


⁴ State of Rajasthan vs Balchand (1977) 4 SCC 308 para 2

• **Moti Ram and Ors. v State of M.P**⁵

This remains one of the most important of cases decided by the Supreme Court emphasizing the concept of bail bonds. The accused, a poor mason, was convicted. The apex court passed an order referring the accused to the Chief Judicial Magistrate(CJM) to release him on bail, without making any specifications as to sureties, bonds etc. The CJM assumed full authority on the matter and fixed Rs. 10,000 as surety and personal bond and further refused to allow his brother to become a surety as his property was in the adjoining village. Moti Ram appealed once more to the apex court and Justice Krishna Iyer condemned the act of the CJM, and came to the conclusion that judges should be more inclined towards bail and not jail. Three questions were framed by Justice Iyer:

“When this Court’s order for release was thus frustrated by magisterial intransigence the prisoner moved this Court again to modify the original order “to the extent that petitioner be released on furnishing surety to the tune of Rs 2000 or *on executing a personal bond* or pass any other order or direction as this Hon’ble Court may deem fit and proper”. From this factual matrix three legal issues arise (1) Can the Court, under the Code of Criminal Procedure, enlarge, on his own bond *without sureties*, a person undergoing incarceration for a non-bailable offence either as undertrial or as convict who has appealed or sought special leave? (2) If the Court decides to grant bail *with sureties*, what criteria should guide it in quantifying the amount of bail, and (3) Is it within the power of the Court to reject a surety because he or his estate is situate in a different district or State?”

With respect to insistence upon surety or demanding heavy amounts for grant of bail or accepting surety across the local area, he observes:

“This formulation turns the focus on an aspect of liberty bearing on bail jurisprudence. The victims, when suretyship is insisted on or heavy sums are demanded by way of bail or local bailors alone are *persona grata*, may well be the weaker segments of society like the proletariat, the linguistic and other minorities and distant denizens from the far corners of our country with its vast diversity. In fact the grant of bail can be stultified or made impossibly inconvenient and expensive if the Court is powerless to dispense ⁵⁰ with surety or to receive an Indian bailor

⁵ Moti Ram v. State of M.P., (1978) 4 SCC 47 para 3, 4, 30, 31

across the district borders as good or the sum is so excessive that to procure a wealthy surety may be both exasperating and expensive. The problem is plainly one of human rights, especially freedom *vis-a-vis* the lowly.”

After examining various provisions of Code of Criminal Procedure relating to bail, the Court observed:

“Bearing in mind the need for liberal interpretation in areas of social justice, individual freedom and indigents’s rights, we hold that bail covers both — release on one’s own bond, with or without sureties. When sureties should be demanded and what sum should be insisted on are dependent on variables.”


“Even so, poor men — Indians are, in monetary terms, indigents — young persons, infirm individuals and women are weak categories and courts should be liberal in releasing them on their own recognisances — put whatever reasonable conditions you may.”

Justice P.N.Bhagwati⁶ also spoke about how unfair and discriminatory the bail system is when looked at from the economic criteria of a person. According to him this discrimination arose even when the amount of bail fixed by the magistrates isn't high for some, but a large majority of those who are brought before the courts in criminal cases are so poor that they would find it difficult to furnish bail even if it's a small amount.

Report of the Legal Aid Committee appointed by the Government of Gujarat, 1971 and headed by then Chief Justice of the State, Mr Justice P.N. Bhagwati

A Committee was appointed by State of Gujrat which was headed by the then Chief Justice of State, Mr Justice P.N. Bhagwati, to delve into various aspects of law of bail and suggest its recommendations. The Committee observed:

⁶ Former Chief Justice of India

“The bail system, as we see it administered in the criminal courts today, is extremely unsatisfactory and needs drastic change. In the first place it is virtually impossible to translate risk of non-appearance by the accused into precise monetary terms and even its basic premise  53 that risk of financial loss is necessary to prevent the accused from fleeing is of doubtful validity. There are several considerations which deter an accused from running away from justice and risk of financial loss is only one of them and that too not a major one. The experience of enlightened Bail Projects in the United States such as Manhattan Bail Project and D.C. Bail Project shows that even without monetary bail it has been possible to secure the presence of the accused at the trial in quite a large number of cases. Moreover, *the bail system causes discrimination against the poor* since the poor would not be able to furnish bail on account of their poverty while the wealthier persons otherwise similarly situated would be able to secure their freedom because they can afford to furnish bail. This discrimination arises even if the amount of the bail fixed by the Magistrate is not high, for *a large majority of those who are brought before the Courts in criminal cases are so poor that they would find it difficult to furnish bail even in a small amount.*”

The Committee took into consideration various factors causing prejudice to the accused on account of the prevailing system of grant of bail:

“The evil of the bail system is that either the poor accused has to fall back on touts and professional sureties for providing bail or suffer pre-trial detention. Both these consequences are fraught with great hardship to the poor. In one case the poor accused is fleeced of his moneys by touts and professional sureties and sometimes has even to incur debts to make payment to them for securing his release; in the other he is deprived of his liberty without trial and conviction and this leads to grave consequences, namely: (1) though presumed innocent he is subjected to the psychological and physical deprivations of jail life; (2) he loses his job, if he has one, and is deprived of an opportunity to work to support himself and his family with the result that burden of his detention falls heavily on the innocent members of the family, (3) he is prevented from contributing to the preparation of his defence; and (4) the public exchequer has to bear the cost of maintaining him in the jail.”

Expert Committee on Legal Aid

Another Committee of Judges, lawyers, members of Parliament and other legal experts⁷, also arrived at similar conclusion that the accused should be released on his own personal bond. It was so noted:

“We think that a liberal policy of conditional release without monetary sureties or financial security and release on one’s own recognizance with punishment provided for violation will go a long way to reform the bail system and help the weaker and poorer sections of the community to get equal justice under law. Conditional release may take the form of entrusting the accused to the care of his relatives or releasing him on supervision. The court or the authority granting bail may have to use the discretion judiciously. When the accused is too poor to find sureties, there will be no point in insisting on his furnishing bail with sureties, as it will only compel him to be in custody with the consequent handicaps in making his defence.”

Law Commission Report

the 268th The Law commission is a statutory body that suggests legal reforms to the government in the light of the best international practices and changing times. However its recommendations are not binding on the government.

Headed by Justice B.S Chauhan, a former Supreme Court Judge, the Law Commission in its 268threport highlighted the fact that it had become a norm for the rich and Powerful to get bail with ease, while others languished in the prison. While making recommendations to make it easier for all those awaiting trial to obtain bail, the commission grimly observed that the existing system of bail in India is inadequate and inefficient to accomplish its purpose.

The Commission observed that one of the very first duties of those administering criminal justice must be that bail practices were fair and evidence based. Decisions about custody or release should

⁷ Report of the Expert Committee on Legal Aid —Processual Justice to the People, May 1973

not be influenced to the detriment of the person accused of an offence by factors such as gender, race, ethnicity, financial conditions or social status.

The Law commission urged the government to amend the Criminal Procedure Code to make it easier for the poor and illiterate accused to secure bail. According to it the present system of bail was heavily influenced by economic status and discriminated against the oppressed, poor and illiterate.

The Commission noted that that 67% of the current population in jails was made up of undertrials which reflected great inconsistency in the grant of bail. Even when the bail is granted most of the accused were unable to meet the onerous financial conditions to avail it.

Often the criteria for setting bail amounts fail to take into account, the accused person's ability to pay, hence the loss of liberty is imminent in the pre-trial detention. As per 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. The Supreme Court has several times reaffirmed the maxim that "bail should be the rule and jail the exception.

The commission also cited the apex court's observation in *Gudikanti Narasimhulu vs Public Prosecutor, High court of Andhra Pradesh*⁸, "Personal liberty, deprived when bail is refused, is too precious a value of our constitutional system recognised under Article 21 that the curial power to negate it is a great trust exercisable, not casually but judicially, with lively concern for the cost to the individual and the community."

The Commission also sought to improve upon a provision introduced in 2005 to grant relief to thousands of prisoners languishing without trial and to decongest India's overcrowded prisons. Section 436A of the Code of Criminal Procedure stipulates that a prisoner shall be released on bail on personal bond if he or she has undergone detention of half the maximum period of imprisonment specified for that offence. The Law Commission recommended that those detained for an offence that would attract up to seven years' imprisonment be released on completing one-third of that period, and those charged with offences attracting a longer jail term, after they complete half of that period. For those who had spent the whole period as undertrials, the period undergone be

⁸ (1978) 1 SCC 240 para 1

considered for remission. In general terms, the Commission cautioned the police against needless arrests and magistrates against mechanical remand orders.

It gave an illustrative list of conditions that could be imposed in lieu of sureties or financial bonds. It advocated the need to impose the “least restrictive conditions”. However, as the report warned that bail law reform was not the solution for all problems of the criminal justice system. Be it overcrowded prisons or unjust incarceration of the poor, the solution lied in expediting the trial process. For instance, in our Justice system, delay remained the primary source of injustice.

Right to life and Inability of poor to furnish surety

The constitution of India contains Fundamental Rights under Chapter III. These rights are guaranteed by the Indian Constitution, one of which is Article 21 i.e. right to life and personal liberty. This article states that no person shall be deprived of his life or personal liberty except according to procedure established by law. It is the only article in the Indian Constitution that has received the widest possible interpretation.

The Indian judicial system believes in the principle that a person is considered to be innocent until tried and duly proven guilty. When undertrial prisoners are detained in custody for an indefinite period, Article 21 of the Constitution is violated and every person In India, detained and arrested is entitled to a fair and speedy trial. The object of bail is neither punitive nor preventive. Deprivation of liberty must be considered as a punishment, unless it can be required to ensure that an accused person will be available when called upon for trial.

It would be quite contrary to the concept of personal liberty that any person should be arrested and put behind bars in respect to any matter upon which he has not been convicted yet. The denial of bail to the accused as a preventive measure to ensure free trial in the case has to be balanced by the principle that such denial of bail also has a punitive aspect which under law only begins after conviction.

The other questionable aspect of the bail system remains the bail bond system or the need of surety specifically when one third of the population remains in poverty. An accused with insufficient financial resources would find it difficult to arrange for sureties and also to pay the reasonable bail amount to the court. Hence, it would become difficult for him/her to come out on bail. Therefore,

this whole process leads to denial of bail to the poor. Thus it is a clear deprivation of liberty and freedom and a clear violation of Article 21

Right to freely move across India and non-acceptance of surety who is not the resident of that very state

Article 19(1)(d) and (e) of the Indian Constitution guarantees to every citizen of India, the right to move freely across the territory of India and to reside and settle in any Part of the of the Territory of India.

Article 19 (1) (d) of the Constitution provides the citizens a right to go wherever they like in Indian Territory without any kind of restriction whatsoever. They can move from one State to other and also from one place to another place within any State of India. This freedom cannot be curtailed by any law except within the limits of Article 19 (5). In this way Constitution stresses that the entire country is one unit so far the citizens are concerned. The object is to create the sense of nationality in the minds of the citizens.

According to clause (5) of Article 19 of Indian Constitution State may impose reasonable restrictions on the Freedom of movement on two grounds:

- 1) In the Interest of General Public
- 2) For the Protection of Scheduled Tribes

With respect to the bail system this Article also becomes relevant in view of the practices of Courts to the effect that a person who is not a resident of a particular state or the local area, is not accepted as a surety in case in which the accused is arrested. According to the Code of Criminal Procedure, court demands a local surety to ensure the proper and timely appearance of the accused at the pending trial. This makes it very difficult for an individual, not resident of local area or the State, accused of a certain crime, to get out on bail. The non acceptance of surety, who is not the resident of that very particular state, gets questionable, as the arrested person would have minimal chances of arranging a local surety who would ensure his timely presence in the concerned court. Thus, it makes it nearly impossible for an arrested individual to get out on bail and therefore, breaches the fundamental right of right to life (Article 21) and Freedom of movement (Article 19(1)(d)).

Suggestions

Aadhaar may replace surety bond for bail

Aadhaar may replace surety bond as a means of getting bail because his identity has been established and with the personal data secured with the UIDAI, it will not be difficult to track down the accused in case of his fleeing from justice. It seems much important and a much crucial reform to liberalise bail laws in India. After the introduction of Aadhar, solely generated by UIDAI,(Unique Identification Authority Of India) which is a unique identification proof of an individual, the need of surety for granting bail becomes debatable.

The Law Commission of India in it's 268th report recommended replacement of surety bonds with voter ID cards in case of minor offences. If the recommendation is adopted by the government and necessary legislation is brought in, many undertrial prisoners will be able to walk out of jails.

In the meantime till this happens the legislation may take care of that the bail bond amount and surety bond amount should be determined strictly in accordance with the financial condition of the accused. It is also very important that the courts should not insist on a local surety for out-of-town accused persons.