National Seminar on Bail & Interlocutory Applications [P-1301]
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The National Judicial Academy organized a "National Seminar on Bail & Interlocutory Applications" on 27th – 28th August, 2022. The participants were judges from the district judiciary nominated by respective High Courts. The seminar facilitated deliberations among participant judges on Bail: Scope of Judicial Discretion; Expeditious Disposal of Bail Orders; Bail in Offences Punishable under Special Acts; Media Trial and Bail Matters & Limits and Scope of Conditional Bail; and Interlocutory Applications & Sound Exercise of Judicial Discretion.

Major Highlights and Suggestions

Session 1: Bail: Intricacies and Nuances

Speakers: Dr. Justice B.S. Chauhan & Justice Atul Sreedharan

The session was commenced with the introductory address by the Hon'ble Director, NJA. The concern was expressed on large number of bail matters in High Courts and the Supreme Court. It was emphasized that clarity of legal principles and knowledge of judgments of High Courts and the Supreme Court are essential for trial court judges in order to adjudicate bail matters effectively. The speakers discussed the historical background of the use of bail in Greece, England and India. The use of provisions relating to bail during the mughal period and the british period in India was also discussed. The necessity of granting bail was explained to the participants. It was opined that the bail was valued in these jurisdictions because the liberty of an individual was considered as the most cherished right.

The adverse impact of unnecessary detention on an individual was explained and it was opined that liberty and respect of an individual are aspects of Article 21 of the Constitution. Sections 216 and 217 of the Cr.P.C. were referred and it was opined that many petitions are filed by the party for quashing of charge under Section 482, Cr.P.C. and Article 226 of the Constitution and if charges for serious offence are quashed for the time being, he may get bail. This entire exercise is for the consideration that the liberty of the individual should not be curtailed. The speakers said that the trial may take long time to complete and in some cases undertrial prisoners serve their sentence and trial do not commence. The lack of implementation of Section 437 (6), Cr.P.C. where if the magistrate is not able to conclude the trial within six months then bail should be granted was discussed. It was opined that three fourth of the prison population are undertrial prisoners and they are in jail without final proof of their guilt by the prosecution. The conviction rate in India is very low so we have very high prison population and a very low guilty population.

The different standards of proof in civil case and in criminal case were discussed and it was opined that because personal liberty and life are at stake in criminal case, the standard of proof is of higher degree in such cases. The doctrine of innocence where a person is presumed innocent till prove guilty was referred and it was opined that the burden of proving an accused guilty is remain on prosecution but there are some exceptions such as special laws mandating reverse burden of proof which include POCSCO, NDPS, TADA and PMLA.

Regarding grounds on which the bail can be granted it was opined that first thing is to see that whether it is anticipatory bail or ordinary bail. It should be seen that the case of the prosecutor is genuine or not. State has to act fairly and according to Article 14 they cannot prosecute in arbitrary manner. The issue that why doesn't trial court presume that the prosecution is correct was discussed. Other factors that should be considered while hearing bail matters include nature and gravity of offence, severity of punishment, chance of fleeing if released on bail, likelihood of offence being repeated if released on bail, character, behavior and position of accused person. If the object of the arrest is to humiliate and injure the person then it is a fit case for anticipatory bail. The default bail under section 167 (2) was discussed and it was opined that this bail has been considered as facet of Articles 21, 20 and 22. The issues regarding participation of victim in criminal proceedings were discussed and Sections 24(8), 225, 301 and 372 of the Cr.P.C. were referred. The judgment in *Shiv Kumar v. Hukum Chand* 1999 (7) SCC 467 was referred in this regard.

Session 2: Expeditious Disposal of Bail Applications

Speakers: Dr. Justice B.S. Chauhan, Justice Joymalya Bagchi & Justice Atul Sreedharan

The speaker commenced the session by emphasizing the importance of providing reasons in bail orders. Various elements of a reasoned bail order were discussed. The judgment *Puran v. Rambilas*, (2001) 6 SCC 338 was referred. It was opined that before this judgment the bail orders used to be challenged on the ground of misuse of liberty, possibility of absconding or threat to witness and after this judgment the bail orders are challenged on the principle of perversity. For a reasoned order in a bail matter the first thing the trial court should do is to protect it from a challenge from the vice of perversity. The second element is that there should be fairness and open justice and all the stakeholders should know why the bail order is passed. That clarity comes through use of reasons in bail orders. Judges must advert to facts of the particular case and give their logic to the conclusion. The main parts of a good order include a short narration of facts and logic connecting it to conclusion. So the facts should be stated precisely, logic to be indicated and the conclusion to be articulated for a well reasoned order. Bail orders are intermediary or interlocutory orders and they are not expression of final opinion so there should not be any final opinion in the bail order. It should be tentative opinion of the bail for the purpose of disposal of bail application. Brief reasons disclosing the application of judicial mind in coming to the conclusion of the bail order should be provided.

Then the issue that whether the evidence which is inadmissible can be seen during bail application was discussed. It was opined that it depends on at what stage the bail application is

filed in the context of the factual matrix of the case. Then the issue concerning successive bail application when there is change of circumstances from the time of rejection of earlier bail application was considered. It was opined that the change in circumstances should be such that it makes the trial court taking a different point of view. If the trial court is not taking different point of view then it should reiterate that there is no change in circumstance. Then the issue of bail on parity was discussed and it was opined that it is an antithesis to arbitrariness and order passed in a particular case can be relevant to a co-accused. Bail on parity should be considered on the basis of totality of circumstances and the role of the accused persons. The rights of the victims too should be considered. The judgment *Arnab Manoranjan Goswami v. State of Maharashtra*, (2021) 2 SCC 427 was referred and it was opined that for the purpose of preserving liberty in rare cases the bail can be granted if the first information report and material collected during investigation does not disclose a prima facie cognizable and non-bailable offense.

Then the issue concerning expeditious disposal of bail applications was discussed. It was suggested that the National Judicial Data Grid [NJDG] is the repository of all data relating to judiciary which should be continuously monitored by High Courts and whenever there is an unreasonable or an unjustified delay then there should be immediate intervention. Monitoring by self is more important and judges should be master of their own roster. This will help in reducing delay in the disposal of bail application. The speakers paid emphasis on timelines prescribed by the Supreme Court for expeditious disposal of bail application.

Then the speakers discussed Fast and Secure Transmission of Electronic Records [FASTER]. The first step for FASTER implies that the orders should be signed digitally and should be watermarked and should be uploaded in the NJDG as a digital copy and not as a scanned file of hard copy. Then it can be sent to the prison immediately through the Interoperable Criminal Justice System [ICJS]. The bonds then can be furnished and received digitally. This system is effective in the expeditious implementation of the bail orders.

It was opined that ICJS is a part of bigger footprint in the criminal justice administration i.e. Crime and Criminal Tracking Network System [CCTNS]. ICJS is in work in progress right now. The speakers then explained various features and components of ICJS. It's a 360 degree digitization of every aspect of a criminal case in the digital platform accessible by everyone. The basic idea of the ICJS is to integrate the database of all stakeholders in one single digital platform. It provides all data related to the case of a particular offender, for instance his antecedents, forensic and other expert reports and case information. Judges now have a dashboard of all data on their laptops. As soon as the FIR is registered it is accessible on the dashboard for the jurisdiction court and for all the courts in India. ICJS will disclose the date relating to under trials under different Acts and the period of their incarceration. Case Information System and e-Prisons system will also be integrated with ICJS.

Then the aspect of surety was discussed and it was opined that judges have to be reasonable with regard to bail bonds. The judgment *Motiram v. State of MP* 1978 (4) SCC 47 was referred in this regard. There should not be insistence on local surety for accused persons from other states. It was suggested that wherever possible friend or relatives who can be surety should be arranged. The surety system must be effective but not onerous.

The issue of monetary conditions of bail orders in cases relating to property or cheating was discussed. It was opined that monetary condition has been held as invalid by the Supreme Court because it makes bail system unequal where rich offenders can get bail on the payment of large sum of money and poor offenders remain in prison. This condition also amounts to prejudging the case with regard to the culpability of accused person. Judges must see that where the bail condition is becoming seriously onerous the remedy should be molded according to the difficulty which is being faced by the offender in arranging for the bail.

Session 3: Bail in Offences under Special Acts

Speakers: Justice Joymalya Bagchi & Justice Subramonium Prasad

The session was commenced with discussion on restrictions on bail under special laws. It was opined that one of the main ground for restrictions in granting of bail under special laws is the concern for national security. Then changing nature of restrictions on bail from the Terrorist and Disruptive Activities (Prevention) Act, 1987 (TADA Act) and the Prevention of Terrorism Act, 2002 (POTA) to the Unlawful Activities (Prevention) Act, 1967 (UAPA) was discussed. It was opined that restrictions on bail under the TADA Act and the POTA has been brought to Section 37 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS Act) and also find place in the Prevention of Money Laundering Act, 2002, (PMLA) with slight modifications. It was further discussed that the foundational consideration for bail i.e. presumption of the innocence of accused has received some setbacks in special legislations. The reverse burden of proof exists in all special legislations. These reverse burdens are also in the nature of restrictions when court considers the bail applications for offences under special legislations.

Citing the Supreme Court judgment *NIA v. Zahoor Ahmad Shah Watali* (2019) 5 SCC 1 it was opined that the court must look into broad probabilities of the material collected by the investigating agency. It was further added that the offence under the PMLA are derivative offences which are preceded by other offences under other laws. Money or assets utilized in offence become proceeds of crime and consciously dealing with such proceeds of crime makes a person liable under the PMLA. The issue that whether the admissibility or inadmissibility of evidence can be seen at the stage of granting bail was discussed. For instance if some materials which are collected during the course of investigation but found to be per se inadmissible then whether this material can be considered as foundational material by the prosecution to show that the accusation is prima facie true. The court can see what the impact of the totality of the materials is. This is an approach which is familiar to the framing of charge. The material should be seen as a whole to see that whether the foundational facts are sufficient to give rise to a strong suspicion of the commission of an offence.

It was opined that according to the Supreme Court in *NIA v. Zahoor Ahmad Shah Watali* (2019) 5 SCC, Section 37 of the NDPS Act is a higher bar than the bar under Section 43D of UAPA. It was further added that the Supreme Court has consistently ignored the statement of the accused recorded under section 67 of the NDPS Act by saying that they are inadmissible in law. The

comparison of bail provisions under Section 37 of the NDPS Act, Section 43D of the UAPA and Section 45 of the PMLA was done. It was opined that all three provisions require notice to the public prosecutor before considering bail application. The reasonable ground to believe that the accused is not guilty of the accusation is a finding which a court must arrive in Section 37 of the NDPS Act as well as in Section 45 of the PMLA. The higher bar of onus is appeared to be on the accused to show that he is not guilty. The accused must demonstrate his innocence and not merely create doubt on the prosecution. Referring to the judgment *Ranjitsing Brahmajeetsing Sharma v. State of Maharashtra*, (2005) 5 SCC 294, it was opined that to rely on reasonable ground to believe that the accused is not guilty, there should be a tentative finding with regard to the innocence of the accused and it is not a final expression of opinion. The court at this stage should consider all legal principles and totality of evidence collected for coming to the finding of innocence of accused and for coming to the conclusion that finding at this stage is sufficient to rebut the statutory restrictions against the grant of bail under Section 37 of the NDPS Act. Further referring to *Narcotics Control Bureau v. Mohit Aggarwal* 2022 SCC OnLine SC 891 case it was added that the reasonable ground is something more than the prima facie ground and it is like a substantial probable cause which is based on the existence of facts and circumstances which by itself shows that the accused is guilty. It was opined that although the onus is on the accused, the primary responsibility with the regard to accusation continuous with the prosecution and once the primary duty is fulfilled, it is for the accused to show that prosecution material is either inadmissible or so remote to the accusation that the person of ordinary prudence cannot rely on that. These are logical grounds to come to a finding that the accused may not be guilty.

Referring to the judgment *Ranjitsing Brahmajeetsing Sharma v. State of Maharashtra*, (2005) 5 SCC 294 it was opined that other restriction considered by the Supreme Court was that the accused shall not commit any offence in future and it appears to be a vague restriction with regard to speculative conduct. It must be an offence relating to the act itself and it must be inferred from the antecedents and other relevant circumstances.

The issue relating to bail in economic offences under PMLA i.e. how to distinguish between an economic offence and offence against property was considered. It was opined that it depend on factors including the magnitude, extent and ambit of the crime, repeated occurrence of similar nature of crime by the same person, affectation of the number of victims and organised systemic activity creating an impact on the economy at large and the financial health of the nation. For instance when large number of persons is duped by a Non Banking Finance Company then it is an economic offence. It was opined that anticipatory bail is not barred under PMLA and in situation where materials are not available to the accused because of case being on the investigation stage, it does not pre-empt the court from looking into that material but the response cannot be looked into. The restrictions under PMLA will apply to all offences above a particular value.

The issue that whether restrictions put an absolute embargo on bail in some special laws was discussed and it was opined that when there is undue delay in trial the bail can be sought on the ground of breach of fundamental right under Article 21 and it can be granted. The judgment in

Union of India v. K.A. Najeeb, (2021) 3 SCC 713 was referred. It was opined that we have to understand that statutory bail has to be decided on the case to case basis. Statutory bail applies in PMLA cases and with amendments in NDPS and UAPA as well. The issue that in UAPA when there is shift of investigation from state agency to NIA under NIA Act then who has the power to file a prayer for extension was considered. The speaker referred to the judgment *Naser Bin Abu Bakr Yafai v. State of Maharashtra*, (2022) 6 SCC 308 and it was opined that mere registration of the first information report by the NIA is not enough and only when the case record are transferred then the duty to file a prayer for extension is shifted to the NIA.

Session 4- Limits and Scope of Conditional Bail & Media Trial and Bail Matters

Speakers: Justice R. Basant & Justice C.V. Karthikeyan

It was stated that primarily the grant of bail is dependent on i.e. gravity of the offence; flight risk of accused and likelihood of interference with the process of investigation by the accused. The relevant provisions of Code of Criminal Procedure, 1973 providing the conditions which can be imposed during grant of bail were also highlighted and it was opined that conditions should have a nexus with the purpose that is sought to be achieved. It was further opined that the grant of bail should always be dependent on the merits rather than public opinion. The participants were advised against imposition of unique bail conditions to garner media attention. It was highlighted that it is a fundamental facet of our criminal jurisprudence that an accused is considered innocent until proven guilty. It was therefore advised that bail conditions intending reformation of accused should not be imposed since it presupposes the guilt of the accused. However, during the grant of bail a judge has to balance liberty of the individual with the interest of society and fair investigation. It was asserted that pre-trial incarceration is not punitive in character. The cases of Jessica Lal, Sheena Bora, Nirbhaya, Neeraj Grover, Nitish Katara were highlighted which were subject to extensive media scrutiny. Thereafter, the participants were cautioned against being influenced by the print and social media or any other external pressure. The participants were reminded of their oath and it was stressed that their judgments should be delivered without fear or favor.

Session 5- Interlocutory Applications: Management & Expeditious Disposal

Speakers: Justice R. Basant , Justice S.G. Gokani & Justice C.V. Karthikeyan

It was opined that expeditious disposal of interlocutory applications is imperative and delay in addressing these applications leads to trust deficit of the public in the judiciary. The deluge of Order 7, Rule 11 (Rejection of Plaint) applications was highlighted and the method of dealing with these applications was discussed with reference to the judgments of the Supreme Court in *Arvindam v. T.V. Satyapal* [AIR 1977 SC 2421], *Dahiben v. Arvindbhai Kalyanji Bhanusali (Gajra) Dead through Legal Representatives* (2020) 7 SCC 366, *Frost International Limited v. Milan Developers and Builders (P) Limited and Another* [2022 SCC Online SC 394] and *Rajendra Bajoria v. Hemant Kumar Jalan* [2021 SCC OnLine SC 764]. It was also stated that appropriate costs should be imposed on the parties for adjournments and default. The applications relating to Striking out of pleadings (Order 6, Rule 16) and Amendment of

Pleadings (Order 6, Rule 17) and their management was also subject to discussion in the course of the session. Thereafter, the scope and manner of handling applications under Order 1, Rule 10 and Order 41, Rule 27 formed part of discussion. The statutory provisions relating to interim injunctions were also delineated and it was stated that the essential criterion i.e. prima facie case, balance of convenience, irreparable injury should be fulfilled for grant of interim injunction. It was advised that a judge while writing an order of status quo must describe the condition/status of the subject matter rather than a mere statement. The grant of ex-parte injunction was also expounded upon and the judgments of *Shiv Kumar Chadha v. Municipal Corporation of Delhi* [(1993) 3 SCC 161], *Ram Prasad Singh v. Subodh Prasad Singh* [(1983) AIR 1983 Pat 278], *F.C.I. v. Yadav Engineer & Contractor* [(1982) 2 SCC 499], *Union of India v. Era Educational Trust* [(2000) 5 SCC 57] were highlighted. The decision of the apex court in *Maria Margarida Sequeira Fernandes v. Erasmo Jack de Sequeira* [(2012) 5 SCC 370] and *Ramrameshwari Devi v. Nirmala Devi* [(2011) 8 SCC 249] were highlighted while elaborating upon the various guidelines which were laid down. It was opined that interlocutory applications can be effectively dealt if managerial techniques are deployed in the court. It was also stressed that planning and management are integral for curbing pendency and delay. It was advised that judges should refine the process of listing of cases and undertake management of roster so that cases are scheduled in such a manner that the time of litigants and other stakeholders spent in waiting unnecessarily can be reduced.
