The Tyranny of Bail Bonds

By Sarfraz Nawaz,
Judicial Magistrate First Class, Kamrup (M)

Aayat Hussain (name is changed) was arrested for allegedly stealing Rs.12,000/- from her employer. Hatigaon P.S. Case No. 1245 of 2018 (case number is changed) was registered under section 381, Indian Penal Code and she was forwarded to the jurisdictional Magistrate. Finding her arrest justified and to ensure a thorough investigation, she was remanded to judicial custody. AsAayat could not afford a counsel, a legal aid counsel was appointed for her by the court. But even after 40 days of detention, no bail prayer was moved by the legal aid counsel. Eventually, her elder sister came from Baksa and engaged a private counsel for her. On the counsel's prayer for bail, the jurisdictional Magistrate gave an order for her to be released on bail subject to submitting a bond of Rs 10,000/- with a suitable surety of the like amount.

Aayat'ssister was jubilant. Even Aayat could not stop her tears when she heard that she was going to be released. But it seems her ordeals were not over. There was no one in Aayat's family who had any immovable property in his name. There were no land documents which could be put up with the bail bonds. None of their family members were employed; so no one with a salary certificate could be made a surety.

And so a fortnight passed. Finding no alternative, Aayat's family members approached Fazir Ali (again name is changed). For a sum of Rs.1500/-, he agreed to stand as a surety for Aayat. Somehow, they managed the money and on the next day, bail bonds were submitted. Unfortunately for Aayat, Fazir was a known face in the Chief Judicial Magistrate's establishment of Kamrup (M). He was a notorious professional bailor and his bail bonds were rejected.

In the meantime, Aayat's lawyer also put in a prayer for releasing Aayat on her personal recognisance bond without a surety but the same was rejected by the court.

Finding themselves in a *cul de sac*, Aayat's sister and brother-in-law borrowed Rs.10,000/- on interest and put up the bail bond money in cash and got Aayat home. By the time of her release, Aayat had spent 95 days in jail.

Aayat is just one example out of the many who continue to languish in prison because they are too poor to raise the surety amount or they do not have anyone in their families with the requisite documentation to make them eligible to be a surety.

The Tyranny of Bail Bonds

By Sarfraz Nawaz,
Judicial Magistrate First Class, Kamrup (M)

It is no longer a secret that the rich, the affluent, the *crème de la crème*, when they get arrested, do not stand on the same footing as the marginalized dregs of our society who find themselves on the wrong side of the law. Without commenting on the quality of the legal representation that the poor get (most have to settle with free legal aid provided by the Legal Services Authorities), the rich spent much less time in prison than the poor for the same offence. A reputed television channel which ran a programme called 'Fear and Loathing in Tihar' has slammed the Indian jails as purgatory for the poor.

And if and when the poor inmates do get the benefit of bail, their family members have to run from pillar to post to find a surety who can get them out of jail. In most cases, these family members have valid residential proofs and are the most ideal persons to produce the accused before the court once the trial commences. However, as they do not have government jobs or do not own immovable properties in their names, they cannot stand as sureties. As a result, either they engage touts or the accused keep rotting in jail.

This brings me to the issue in hand today. Does the Criminal Procedure Code (hereinafter called CrPC) envisage that property or salary documents have to be submitted by the surety? Or is it mandated by the law that the surety has to deposit the bail bond money in court?

To answer that question, the first thing that one needs to understand is the object behind insisting on a surety. Well, it is very simple actually. The surety must ensure the availability of the accused before the court whenever the dates of trial are fixed.

Chapter XXXIII, CrPC deals with bails and bonds. For the purpose of this article, I will stick with non-bailable offences as bailable offences do not pose much of a problem *vis a vis* custodial detention. After all, even if a person is detained for a bailable offence and he is unable to furnish a surety, he will have to be released on a personal bond without sureties after one week[1].But it is in case of non-bailable offences that the complications pertaining to bail bond amounts and sureties actually arise.

Now, Section 440 CrPC deals with the amount of bail bond. Section 440 of CrPCis reproduced below.

[1]Explanation to Section 436, CrPC

> "Amount of bond and reduction thereof
>
> (1) The amount of every bond executed under this Chapter shall be fixed with due regard to the circumstances of the case and shall not be excessive.
>
> (2) The High Court or Court of Session may direct that the bail required by a police officer or Magistrate be reduced."

It is apparent that the statute itself has mandated that the bail bond amount should not be arduous and excessive.

In the case of **Hussainara Khatoon (I) v. Home Secretary, State of Bihar**[2]**,** the Hon'ble Supreme Court has observed that the bail system, as it operates today, is a source of great hardship to the poor and if one really wants to eliminate the evil effects of poverty and assure a fair and just treatment to the poor in the administration of justice, it is imperative that the bail system should be thoroughly reformed so that it should be possible for the poor, as easily as the rich, to obtain pre-trial release without jeopardizing the interest of justice.

In the case of **Moti Ram v. State of M.P.**[3], the Hon'ble Supreme Court has disapproved of harsh conditions being imposed for sureties. In this case, for releasing the petitioner on bail, the Magistrate demanded sureties from his own district, rejecting the suretyship of the petitioner's brother because he and his assets were in another district. The Apex Court tookexception to such a demand, holding that it was not within the power of the court to reject a surety because he or his estate was situate in a different district or state.

There are judgments which clearly lay down that imposing harsh and onerous conditions including imposing hefty amounts for grant of bail is not permissible under law[4].

This brings me to the main issue behind this article. There is, in my opinion, an inherent flaw in the way the surety bond system seems to be functioning today and how it has become an encumbrance to the enjoyment of the right to personal liberty of a person.

The statute itself is, however, clear and unambiguous. Section 441, CrPC has succinctly laid down the procedure pertaining to thefurnishing of a surety bond.

[2] AIR 1979 SC 1360
[3] AIR 1978 SC 1594
[4] Sandeep Jain *v.* NCT of Delhi, (2000) 2 SCC 66**;** Ramathal & Ors. v..Inspector of Police & Another, CDJ 2009 SC 443

Section 441 CrPC runs as under:

> Bond of accused and sureties –
>
> (1) Before any person is released on bail or released on his own bond, a bond for such sum of money as the police officer or Court, as the case may be, thinks sufficient 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.
>
> (2) Where any condition is imposed for the release of any person on bail, the bond shall also contain that condition.
>
> (3) If the case so requires, the bond shall also bind the person released on bail to appear when called upon at the High Court, Court of Session or other Court to answer the charge.
>
> (4). For the purpose of determining whether the sureties are fit or sufficient, the Court may accept affidavits in proof of the facts contained therein relating to the sufficiency or fitness of the sureties, or, if it considers necessary, may either hold enquiry itself or causean inquiry to be made by a Magistrate subordinate to the Court, as to such sufficiency or fitness.'

Section 441, CrPC does provide that an accused can be released on his personal bond without a surety. But that is seldom done and hardly ever in serious offences.After all, if the accused is released on a personal bond without a surety, there is every possibility that he may not turn up during trial. Already a plethora of cases are pending in criminal courts which have not proceeded beyond the stage of appearance wherein the accused were released on such bonds. Ergo, the insistence on surety bonds.

The surety guarantees the appearance of the accused in the court. It is his responsibility to produce the accused in court. If the accused fails to appear, the surety amount given by him could be forfeited to the State.

Now, when a person proposes to stand as a surety for an accused, he must fill up Form No.45 appended to Schedule II of the CrPC and submit it in court.

Interestingly, while Form No. 45 contains a column for the bail bond amount, it does not mention the annexing of property documents or salary certificates.

Chapter XXXIII itself is conspicuously silent on any such requirement. The Legislature has in its immense wisdom chosen not to put in such onerous conditions on sureties. It is only legal fiction that is to be blamed for it. But then again legal fiction ought to be employed to erase difficulties not to create new ones.

Let us take a couple of hypothetical situations. What happens if a beggar is arrested for the offence of house breaking and theft and put in jail? Or what happens if an orphan with no immediate family member finds himself in jail for a similar offence? It is highly unlikely that either of them will be released on personal bond without sureties? Now, how will either of them find a surety who has property documents or title deeds or a salary slip in his name?

Can it be said that Chapter XXXIIIwas drafted overlookingsuch situations? Surely that cannot be the case.

So, how to solve this problem? The answer lies in Section 441, CrPC itself. A closer look reveals that what is contemplated by Section 441(4), CrPC read with section 447, CrPC, is that the bailor must be fit. Fitness does imply financial solvency here. But that does not necessarily imply that he has to be employed in the public sector or have immovable property in his name. Financial solvency and employment/ownership of property are not co-extensive.

If that were what the Legislature had really intended, then a rich man wouldeasily go out of the jail on bail while a man who has no money, no property, who is unable to produce such a surety would go on suffering in jail.

In the case of **Sagayam v. State**[5], the Hon'ble Madras High Court has held that a court cannot demand production of property documents from the accused or surety. Nowhere in Section 436 or 437 or 439 or 438 CrPC or in Form No. 45 appended to Schedule II to the Code of Criminal Procedure, 1973, has the production of property document, title deeds, etc. either by surety or by the accused been contemplated. It was further held that

> "So a Magistrate or a Sessions Judge or any Court, demanding production of property documents or R.C. book or any other document to show proof of property either movable or immovable with respect to the bail bond or surety bond amount is against law. It is against Article 21 of Constitution of India. It

[5] 2017SCC OnLine Mad 1653

> is against the dictum of the Hon'ble Supreme Court judgment laid down in *Maneka Gandhi* v. *Union of India* (supra).
>
> The Courts demanding production of V.A.O. certificate, Residence certificate, Solvency Certificate or Tahsildar Certificate are not mentioned in the Code of Criminal Procedure. These are all creations and inventions of certain Courts. It is clear that these are all not out of any judicial thinking. It is out of a useless thinking curbing the liberty of the individual.
>
> A surety should have a genuine address. He may be asked to produce residential proof. He should not be a vagabond. He should establish his identity. A poor man can be a voter. Likewise, a poor man can be a surety. A surety can be a person without having own house. He can be a tenant. Even a person living in a platform, living in a slum having an acceptable address proof can also stand as a surety.
>
> It cannot be denied that a bogus person should not be accepted as a surety. A person who is offering surety must have acceptable residential proof. He may be a tenant, licensee. A beggar can also stand as surety provided he should have some acceptable residential proof."

I hasten to add herethat notwithstanding the observations made in **Sagayam(supra)** in certain cases the court can ask the surety to produce relevant documents to prove his solvency as per the inquiry under section 441(4), CrPC. The Hon'ble Madras High Court has not considered the option of the inquiry into solvency. But it must be understood here that the inquiry under section 441(4), CrPC cannot be made the norm in all cases. It must be used sparingly and only when the court has *prima facie* reason to doubt the solvency or fitness of the surety. Otherwise, the affidavit sworn by the surety will suffice. The language used in the statute makes the same very clear.

Moreover, solvency of the surety may be a criterion for ascertaining the fitness of the surety- but it is not the sole criterion. A surety who is otherwise fit to produce the accused during trial cannot be rejected outright just because he is indigent or does not have the requisite documentation to prove his solvency in court. Doing so will be antithetical to the constitutional values of equality and dignity.

What the court considering the bail bond is statutorily expected to do is to ascertain the genuineness of the sureties. What the court really needs to see is if the surety has a proper identity and a genuine address proof and whether he is in a position to produce the accused in

court. All citizens have voter identity cards. Unlike property documents, voter cards are harder to forge. So, insistence on a voter card should suffice for the first part. As for the latter part, the court has to see how the surety is related to the accused and whether he has some form of authority or control over the accused so that he can ensure his future appearance in court. Property documents and salary slips do not help either case.

The surety will have to swear an affidavit as to the nature of his relationship with the accused and also as to his financial capacity. But insisting on property documents as collateral is neither statutorily prescribed nor is it reasonable.

And despite these safeguards, if the accused fails to appear before the court and the surety too cannot cause his appearance, the bond executed by the surety will be forfeited.

It can be argued that if there are property documents and salary certificates at the disposal of the court, then the bail amount can be easily recovered from the surety. However, this line of argument is fallacious. First of all, forfeiture of bail bonds, though statutorily allowed, is not a goal in itself. The prime consideration for the court remains the production or appearance of the accused during trial. And as far as forfeiture goes, a peek into section 446, CrPC shows that if and when the bail bond has been forfeited, the bailor shall be called upon to pay the bail bond money as penalty or show cause as to why it should not be paid. Now, calling the bailor for this purpose only requires his valid residential address. It does not require his property documents or salary slips. Subsection (2) provides that if no sufficient cause is shown and the penalty is not paid, the court can recover the same as if it were a fine. This is where the real argument for production of property documents comes in. It can be contended that if the surety's property documents are with the court, the proceedings under section 421, CrPC become quite easy. It seems like a valid point. But then again in most of the proceedings that are initiated under section 421, CrPC, the court does not have property documents of the defaulter before it. That does not render the proceedingsfutile. Moreover, section 446, CrPC clearly provides that if a surety does not pay the penalty or the penalty amount cannot be recovered, he may be ordered to undergo civil imprisonment for a term which may extend to 6 months.So, a surety who cannot produce the accused and does not have property in his name can be sent to civil jail if his bail bonds are forfeited. This negates the necessity of property documents.

I want to add here that when a person who is directed to execute a bond either with surety or without surety is not able to furnish the sureties, then under Section 445 CrPC, he has the option to offer cash security. However, that option has been given to the person who is seeking bail. It has not been statutorily ordained that a surety who does not have property documents but is otherwise capable of ensuring that the accused is produced during the trial will have to deposit the bail bond money in cash.

Judicial custody is not a punitive measure. Till conclusion of trial, the accused enjoys the presumption of innocence and all the benefits that come with it. Bail as a general rule and detention an exception is one such benefit. And yet out of the total 4,19,623 inmates in various jails across the country, 2,82,076 or 67.2% are undertrials prisoners. Most of them are from the marginalized sections of society who despite being granted bail are unable to furnish bail bonds[6].

The poverty of anaccused is an extremely sensitive factor.Even the Legislature hastaken notice of it by incorporating an explanation to Section 436, CrPC and by inserting Section 436A inthe Code.However, as neither of these provisions is all encompassing, it has become necessary that a hyper technical approach towards the provisions pertaining to bail bonds be discarded especially when the same has not even been statutorily prescribed. A radical interpretation of the law is not being advocated here. Rather a strict and literal interpretation will do the trick.

The insistence on property documents and title deeds as the rule and not the exception has only bred a horde of touts and professional bailers out to deceive the courts. Instead if a family member or a close friend with a proper address proof comes and stands as a surety, he will be in a far better person to guarantee that the accused turns up in court when called upon. It will also ensure that no person remains in jail because of his poverty.

A significant portion of the Indian population still lives in the thrall of poverty and destitution. And yet if any such person gets arrested for an offence and is put in jail, he is expected to put up a surety bond accompanied by property documents or salary certificates. It is reflective of the anti-poor bias that has crept up into our criminal justice system. Though

[6]As per the Prison Statistics of 2015

statutorily, money may not be a concomitant to the bail system, by and large, the bail system has become discriminatory to the poor. Even the Law Commission of India has acknowledged that a major overhaul and reform of the bail system has become the need of the hour.

****