

A brief note on Section-437A CrPC: by Rakesh Kumar Singh

Facing a typical syndrome in criminal justice dispensation system that the State machinery is largely unable to ensure service of appeal notice on acquitted accused persons whenever their acquittal are challenged, the Law Commission of India chosen to recommend to the Government that a provision should be inserted in the CrPC requiring the courts to take bonds from the accused persons which may remain valid for a period of 12 months so that appearance of accused can be properly ensured before the appellate courts. The Government in principle agreed though with a rider that the validity of the bonds should be only for 6 months and it introduced Section-437A in CrPC 1973.

History:

2. Before proceeding any further however, we need to understand the foundation of the recommendation made by the Law Commission. Law Commission of India considered the insertion of Section 437-A CrPC in Chapter VII of its 154th report on the recommendation of the division bench order dated 13.01.1994 of the Gujarat High Court in criminal appeal no. 51 of 1991 titled as **State of Gujarat vs. Harish Laxman Solanki** (1994) 35(1) Guj LR 581 wherein it was observed as “*While accepting the bail and bail-bonds for securing attendance before the Officer in-charge of the Police Station or Court, as provided in Form No. 45 in Schedule-11 of the Code, all the Criminal Courts shall also take the same covering the appellate as well as revisional stage.....the same should be taken for a further period of 12 months from the date of order of acquittal*”.

3. In pursuance of the directions in the Solanki case, the bail was asked from those, who were acquitted. This was challenged and the question regarding validity of the aforesaid directions was referred to the full bench of the Gujrat High Court. The Full bench in **Omprakash Tekchand Batra vs State of Gujarat** 1998 (3) GLR 2031 overruled the directions issued in the Solanki case.

Future:

4. Recently, the Law Commission of India in its Report No.-268 itself has recommended some amendment in Section-437A to the effect that it shall govern the acquittal only and Courts shall obtain only personal bond from the accused under the said section.

Present day:

5. Be that as it may. We have to presently deal with the provision as is available in the CrPC and the same reads as under:

“437A. Bail to require accused to appear before next appellate Court.- (1) Before conclusion of the trial and before disposal of the appeal, the Court trying the offence or the Appellate Court, as the case may be, shall require the accused to execute bail bonds with sureties, to appear before the higher Court as and when such Court issues notice in respect of any appeal or petition filed against the judgment of the respective Court and such bail bonds shall be in force for six months.

(2) If such accused fails to appear, the bond stand forfeited and the procedure under section 446 shall apply”.

6. A textual reading of the aforesaid provision will show that the courts have to ask for the bonds before the conclusion of the matter. However, we have to understand the intention of the Legislature behind the enactment of the provision. An instance of bad drafting cannot give raise to an interpretation which can in some situation become absurd. It is to be noted that the provision was inserted on the recommendation of the Law Commission. The report makes it clear that the only reason for the recommendation had been that it becomes difficult to serve the notice of appeal in case the appellate court wants to examine the judgment of acquittal and the appeal remains pending after admission, as the presence of the person so acquitted is not secured inspite the issuance of non-bailable warrant. Even the basis of the Report was a judgment of division bench of Hon’ble Gujarat High Court and the same was also simply concerned with acquittal cases. It is clear that the intention behind the enactment of the Section-437A was to take care of accused of acquittal cases.

7. Apart from the above, some additional reason may also be provided. A trial will result either in conviction or in acquittal. If accused is convicted, he will have to be dealt with under Section-389(3) CrPC which talks about bail by trial court in case of conviction. If the case does not fall under the Section-389(3) CrPC, the accused then has to go to jail. There can therefore be no question of taking any bond from the accused except in accordance with Section-389(3) CrPC. It would also be interesting to note that Section-437A does not talk about the bail. It only requires the accused to execute bail bonds with surety. It neither entitles nor deprives the accused in respect of

bail. Similarly, if an appellate court is dealing with an appeal against conviction/acquittal and upholds the conviction or reverse the acquittal, the accused has to go to jail unless Section-389(3) applies to his case and therefore, again there is no scope for the applicability of Section-437A.

8. It is clear that neither before the trial court nor before the appellate court there is any applicability of Section-437A CrPC in cases where the accused is convicted. As such, the only time when the court is required to ask the accused to execute bonds is the time when the court acquits the accused. Simple.

9. Division bench of Hon'ble High Court of Delhi in **Gaya Prasad Pal vs State** dated 09.12.2016 has observed as *"Inexplicably, the Additional Sessions Judge passing the order on sentence while directing the appellant to be sent to prison under the conviction warrant also observed that he was accepting the personal bond ("PB") that had been furnished under Section 437A Cr. PC.....The learned trial judge erred in recording concluding directions as well. The appellant was arrested on 18.10.2013. He has remained in custody ever since. He was sentenced to life imprisonment and directed to be sent to prison under the conviction warrant. Yet, the order also states he was called upon to furnish personal bond which had even been "accepted" in terms of Section 437-A Cr.P.C. Obviously, there was no occasion for Section 437-A to be applied"*.

10. Division bench of Hon'ble High Court of Delhi in **State vs Virender Yadav** dated 22.10.2013 has observed as *"Thus the said section was introduced by the Legislature with the solemn object that till the order of acquittal passed by the learned trial court attains finality the accused is legally bound to appear before the next appellate court..... The situation which we are confronted with in the present criminal leave to appeal and in various such other leave petitions preferred by the State is that invariably in all such state appeals the State is not able to serve the respondent mainly because the respondent is not found at his last address or has shifted to some new address. After an order of acquittal is passed in favour of such an accused, whether intentionally or unintentionally, he moves out from his residence where he lastly resided. To deal with this malady, the legislature had introduced Section 437A Cr.P.C. on the statute book"*.

11. A single judge bench of Hon'ble High Court of Delhi in **Praveen Agarwal vs CBI** dated 19.09.2014 has observed as *"Section 437A Cr.P.C. nowhere speaks of releasing the accused on bail. The object of Section 437A Cr.P.C. is to secure the attendance of an accused in cases where appeal are likely to be filed against the verdict of acquittal"*.

12. A division bench of Hon'ble Bombay High Court in **Farooq Abdul Gani Surve vs the State Of Maharashtra** dated 17.10.2011 has observed as "*From the language of Section 437-A, it is apparent that the said provision is applicable only in cases where the Trial Court acquits the accused and it would not be applicable on conviction of the accused. All the Sessions Court are, therefore, directed not to release the convicted accused on bail under this provision*".

Practical difficulty:

13. Now the court has acquitted the accused. The practical question is as to how the court will proceed further. It would be appropriate if the court through the judgment itself asks the accused to execute bond with surety. The court then should proceed with its daily order in respect of the case about the circumstances of furnishing of the bonds. If bonds are furnished, nothing survives. If however bonds are not furnished and the accused shows his inability to produce any surety, then the court will face difficulty.

Personal bond concept:

14. The court will have to adopt some practical approach. The court should then ask the accused to execute a personal bond. The court should accept it for some days (preferably 7 days) and should adjourn the matter giving time to the accused to arrange the surety. On the adjourn date, if the accused furnishes the surety, the matter will be closed simply. If however, he is unable to arrange the surety, the court should through a purposive interpretation of Proviso & Explanation appended to Section-436(1) CrPC, deem the accused as an indigent person and should accept a personal bond. We will discuss the concept in some other paper as to how Proviso & Explanation appended to Section-436(1) CrPC can be made applicable even to non-bailable offences though the same are the part of provisions related to bailable offences.

15. Personal bond can be treated as sufficient compliance of Section-437A even through other interpretation. We know that even Section-437 read with Section-441 requires that surety must be there before release of accused on bail. Despite that several judgments of constitutional courts have taken a view that even without execution of a surety bond, the accused can be released. The famous foundational decision may be referred as **Moti Ram vs State of MP** AIR 1978 SC 1594 rendered by a three judges bench of Hon'ble Supreme Court.

16. In terms of Section-389(1) a court of appeal may release a convict on his own bond without sureties. Surely, it cannot be that an under-trial is worse of than a convict or that the power of the court to release increases when the guilt is established. It is not the court's status but the applicant's guilt status that is germane. That a guilty man may claim judicial liberation pro tempore without sureties while an undertrial cannot is a reductio ad absurdum. Then if we say that an acquitted accused cannot be released on personal bond, the same will be more absurd. It is important to note that the Supreme Court has stated time and again that once a person is acquitted of an offence the presumption of innocence is strengthened and makes a strong case to be released from confinement.

17. Even further, we may take analogical help from Section-437(7) CrPC which says "*If, at any time, after the conclusion of the trial of a person accused of a non-bailable offence and before judgment is delivered, the Court is of opinion that there are reasonable grounds for believing that the accused is not guilty of any such offence, it shall release the accused, if he is in custody, on the execution by him of a bond without sureties for his appearance to hear judgment delivered*". It is clear that accused even before delivering the judgment can be released on personal bond if the court finds that there are reasonable grounds for believing that he was not guilty. It then would be absurd to think that the same accused after getting a clear acquittal cannot be released on personal bond.

Alternate practical way:

18. The heading of form 45 of CrPC has been amended by section 32 of the Amending Act to include section 437-A in its heading. Notes on clause 41, by which it has been introduced, states this amendment is consequential to the insertion of a new section 437-A. However, the text in the body of form-45 has not been amended to accommodate the terms of section 437-A. It appears to be incomplete.

19. A division bench of Hon'ble Allahabad High Court in **Nannu vs State of UP** dated 13.02.2012 has dealt with Section-437A CrPC in a very practical manner and has obligated the courts to use the Form-45 of CrPC after some addition showing the necessary requirements of Section-437A also and as such, only one time bond could suffice.

20. This can certainly be done because Section-476 CrPC talks about the forms to be used and reads as "*476. Forms.- Subject to the power conferred by article 227 of the Constitution, the forms set forth in the Second Schedule, with such variations as the circumstances of each case require, may be used for the respective purposes therein mentioned, and if used shall be sufficient*". What comes to the notice at once is that the forms are to be used with such variations as the circumstances of the case require. Clearly, the Form-45 can be varied. If properly varied, the Form-45 can be used

and accused may be asked to execute the bond with surety during trial and the same may contain the varied terms which will include the fact that he will appear in the appellate court whenever called upon within a period of 6 months from the date of judgment of trial court.

21. This practical approach will certainly be more beneficial for the system and also for the general litigating public. As such, this approach should be adopted by the courts. For proper appreciation, the varied Form-45 is provided as under:

Appendix-4

(The words added are in italics)

Form No. 45

Bail and bail-bond for attendance before officer in charge police station or Court See Section 436, 436A, 437,437A,438 [3] & 441

I [name], of [place] having been arrested or detained without warrant by officer in charge of police station [or having been brought before the Court of) charged with the offence of and required to give security for my attendance before such officer or Court on condition that I shall attend such officer or Court on everyday on which any investigation or trial is held with regard to such charge *and after conclusion of the trial and delivery of the judgement shall attend the higher Court as and when such a higher Court issues notice within a period of 6 months from the date of judgement on any appeal or Petition filed against the judgement* and in case of my making default herein I bind myself to forfeit the Government the sum of Rs.

Dated, this day.....of.....20....

Signature

I hereby declare myself [or we jointly & severally declare ourselves & each of us] surety [or sureties] for the above said [name] that he shall attend the officer in charge of Police station or the Court of on every day on which any investigation into the charge is made or any trial on such charge is held, that he shall be , and appear, before such officer or Court for the purpose of such investigation or to answer the charge against him [as the case may be] *and after the conclusion of the trial and delivery of the judgement shall attend the higher Court as and when such a higher Court issues notice within a period of 6 months from the date of judgement on any appeal or Petition filed against the judgement* and in case of his making default herein I hereby bind myself [or we hereby bind ourselves] to forfeit to Government the sum of Rs.

Dated, this day.....of.....20....

Signature

22. In view of the aforesaid analysis, it can safely be said that Section-437A CrPC is applicable only to the cases of acquittal and the bonds therefore have to be taken after pronouncing the accused not guilty. Further, there is nothing to prohibit the court from accepting personal bond from the accused in deserving cases where the accused is unable to arrange surety as the Liberty in terms of Article-21 is the prime consideration and acquittal always strengthen the presumption of innocence. Even further, a practical approach can be adopted and Form-45 can be used with variation with a view to include the terms of Section-437A and accused can be asked to execute the bonds during the trial at one time which will remain valid for 6 months from the pronouncement of judgment.
