



RESTORATIVE JUSTICE UNDER THE CRIMINAL JUSTICE SYSTEM WITH SPECIAL REFERENCE TO PLEA BARGAINING

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ABSTRACT

Dissatisfaction with the traditional justice practices resulting in pendency of cases have led to calls for alternatives which provide the parties involved to resolve it and mitigate the negative consequences. Sec 320 of Code of Criminal Procedure provides for compounding of offences and its Chapter XXI A allows plea bargaining in criminal cases. While some criticize it on the ground that it violates fundamental rights of the accused, others hail it as instrumental in ensuring speedy disposal of cases. The paper throws light on the relevant provisions relating to Plea Bargaining in Indian criminal law exploring the position of law in other countries and several recommendations are made for incorporation in our criminal procedure.

KEYWORDS:- Alternative Dispute Resolution, Criminal law, Justice, Criminal Procedure, Settlement, Plea Bargaining, speedy disposal, pending cases.

1. INTRODUCTION

Man lives in a society. To lead a harmonious life in society, human being undertakes their social interaction, through the different forms of social process-cooperation, competition and conflict. Conflict results into suits and cases. Due to fact that pendency of court cases and suits have gone through roofs, Alternate Dispute Resolution has gained paramount significance in almost every



civilized dispensation.¹ Nani Palkhiwala opined that: “Justice in common parlance is considered as blind but in India it is lame too and hobbles on crutches”.²

The criminal jurisprudence is quite different from the ADR mechanism, as in the case of a criminal dispute, penal provision is sought after to place a benchmark. In the case of ADR, some kind of settlement that may not result into court proceeding is sought after.

A recent trend that can be noticed in the sphere of ADR is its applicability to the criminal matters. But there is some doubt upon the application of ADR in criminal justice. In reference to the criminal justice, the term ADR encompasses a number of practices which are not considered part of traditional criminal justice such as victim/offender mediation; family group conferencing; victim offender-panels; victim assistance programs; community crime prevention programs; sentencing circles; ex-offender assistance; community service; plea bargaining; school programs.³

Around 38.3 lakh cases are pending for more than five years but less than 10 years — 17.5 per cent of the total number of cases. Therefore, more than one-fourth of cases pending across district courts in the country are pending for at least five years. And 29.5 per cent of total cases, or 64.5 lakh cases, have been pending for more than two years, said the Supreme Court’s E-Committee.⁴ The reason behind huge increase in the number of pending cases in the High Courts and the trial courts is the vacancies for the post of judges.

The constitutional guarantee of speedy trial is an important safeguard to prevent undue and oppressive incarceration prior to trial; to minimize concern accompanying public accusation and to limit the possibilities that long delays will impair the ability of an accused to defend him.

¹ Md. Alamin, *Introducing Alternative Dispute Resolution in Criminal Litigation: An Overview*, available at <http://www.questjournals.org/jrhss/papers/vol3-issue11/I3116882.pdf> (last visited 02/02/2017)

² K V K Santhy, *Plea Bargaining in US and Indian Criminal Law Confessions for concessions*, NALSAR Law Review, Volume 7: No. 1, 2013

³ Anoop Kumar, *Applicability of ADR IN Criminal cases*, available at <http://www.manupatrafast.com/articles/PopOpenArticle.aspx?ID=5ff4acc7-53ef-4d12-a0a8-1b41ab12beba&txtsearch=Subject:%20Arbitration> (last visited 04/02/2017)

⁴ The Indian Express, *More than 2 crore cases pending in India’s District Courts:Report*, dated June 9,2016



The fundamental cause for delay in providing of justice in our country is poor judge population ratio. Law Commission of India in its 120th report on man power planning in judiciary (July 1987), had a conscience that in spite of Article 39A added as a directive principle in the Constitution, obliging the state to secure such operation of legal system as it promotes justice and to ensure that opportunities for securing justice are not denied to any citizen. The judge-population- ratio in India (based on 1971 census) was only 10.5 judges per million population. The Law Commission suggested that India required 107 judges per million of Indian population; however to begin with the judge strength needed to be raised to five fold. i.e. 50 judges per million population in a period of five years but in any case not going beyond ten years.⁵

2. CRIMINAL CASE MANAGEMENT

In order to ensure fair, speedy and inexpensive justice, the J. Jagannadha Rao Committee has suggested a model Case Flow Management System in which a judge or an officer of the court would be required to set a time-table and monitor a particular case from its initiation to its disposal.⁶

Under the plan, which has yet to be passed into law by the Parliament, Track I cases are to comprise of crimes punishable with death. The endeavour is to complete the Track I cases within a period of nine months. Other criminal cases where the accused have been denied bail and kept in jail custody are to be Track II cases and are to be decided within a year. The 12 month deadline is to apply to Track III cases, which relate to mass cheating, economic offences, illicit liquor tragedy and food adulteration. Terrorism-related cases under special laws like (the now revoked) Prevention of Terrorism Act, as well as drugs and corruption cases, are to be on Track IV, with a 15-month deadline. All other criminal cases will be on Track V and must be disposed off in 15 months. In cases where the prisoners are illiterate, they have to be allowed services of state legal aid counsel. Not only trial courts but each High court, too, classifies criminal appeals pending before it into different tracks on the same lines.

⁵ P. Ramachandra Rao v. State of Karnataka JT 2002 (4) SC 92.

⁶ NCMS Baseline Report on Case Management System available at <http://www.sci.nic.in/Case%20Management%20System.pdf>



2.1 TWO MODELS OF CRIMINAL MEDIATION

Two phenomenal mediation models, the restorative justice model and the case- management evaluative model have come out in the backdrop of criminal cases, each with different focus, different outlook, and a different settlement scheme. Just as perpetuity prevails in the ADR spectrum, one also prevails between restorative and retributive justice.⁷ VOM (Victim Offender Mediation) programs historically have focused on a restorative justice approach, while traditional criminal law focuses on retributive justice.⁸ Under the retributive model, crime is a violation of the laws of the state, and the state is viewed as the victim, to whom the offender owes an obligation to suffer punishment. Retributive justice looks into what laws were broken, who broke them and how the lawbreaker should be punished but the objective of restorative justice is to repair the loss that crime causes.

I. RESTORATIVE JUSTICE MODEL: VICTIM OFFENDER MEDIATION

The restorative justice model is 'relationship-driven', focusing on healing and attaining closure.⁹ Also referred to as victim-offender reconciliation programs (VORP) or victim reparation programs or restorative justice dialogue, in most cases, its purpose is to promote direct communication between victim and offender.¹⁰ The meeting is facilitated by a trained mediator with the goal to hold offenders directly accountable while providing important support and assistance to victims. The victims who participate are provided with an opportunity to ask questions, address the emotional trauma caused by the crime and its aftermath, and seek reparations and the wrongdoer has an opportunity to take responsibility for what they have done and to understand the harm they have caused.¹¹ If appropriate, a plan may be developed that reflects their joint decisions about how to make things right and it may include apology,

⁷ Mark S. Umbreit, *Guidelines for Victim-Sensitive Victim-Offender Mediation: Restorative Justice Through Dialogue*, Centre for Restorative Justice & Peacemaking, U.S. Department of Justice, April 2000

⁸ Mark S. Umbreit, Robert B. Coates, Betty Vos, *Victim-offender mediation: Three decades of practice and research* at p. 280

⁹ Mark S. Umbreit, *Victim Offender Mediation training manual*, Center for Restorative Justice & Peacemaking, University of Minnesota, 2015 at p.91.

¹⁰ Rathna N. Koman, *Balancing the Force in Criminal Mediation*. Beijing Law Review, 2016, 07 at p.171-180

¹¹ Maureen E. Laflin, *Remarks on Case Management Criminal Mediation*, Idaho Law Review 571(2003-2004) at p. 581.



restitution, and community service. Restorative justice, however, provides a very different framework for understanding and responding to crime and victimization. Moving beyond the offender-driven focus, restorative justice identifies restoration of the emotional and material losses resulting from crime.

II. VOLUNTARY SETTLEMENT CONFERENCING/CASE-MANAGEMENT MEDIATION

While Case Management Mediations are largely “settlement-driven”, Victim Offender Mediation is primarily “dialogue-driven” with emphasis upon victim empowerment, offender accountability and restoration of losses. Judicial mediation, or ‘muscle mediation,’ is a case management instrument that facilitates the parties in the risk examination procedure. The case management model emphasizes on cultivating reconciliation, safeguarding government’s money, and minimizing expanding dockets.¹² In disparity to the VOM process where offenders must confess their culpability and attempt to make amends, the case-management model requires none of these. Under the case-management model, a neutral third party usually intercedes in the procedure at the desire of the parties and the court after the parties' embryonic efforts at negotiation or plea-bargaining have failed.

3. CONCEPT OF PLEA BARGAINING

The definition of 'plea bargaining' varies depending on the jurisdiction. The shortest possible meaning of Plea Bargaining is “*Plead guilty and ensure lesser Sentence*”.¹³ Plea bargaining, plea negotiation, compromising criminal cases, trading out-whatever one chooses to label it-the disposition of criminal charges short of trial is as old as the criminal law itself, as pervasive as the number of this country's juridical jurisdictions, and as diverse in form as the countless types of criminal misconduct.¹⁴ Even our various Dharmashastras and Smritis propounded Plea

¹² Arthur W. Rovine, *Contemporary Issues in International Arbitration and Mediation*, Martinus Nijhoff Publishers at p. 191

¹³ Shalin, *Plea bargaining: An Indian Approach*, available at <http://legalsutra.com/2027/plea-bargaining-an-indian-approach/> (last accessed on 13/01/2017).

¹⁴ United States v. Ford, 99 U.S. 594 (1878).



Bargaining as a means of self purification by reducing or removing the effects of sin of committing offence. In nutshell the Shastras and Smritis prescribed that irrespective of punishment by the King, an individual who wanted to purify himself had to get himself purged of sin of committing offence by restoring to the austerities (probation/admonition) or to repentance for wrong doing.¹⁵ In plea bargaining we have also followed the Manu's dictum i.e. to inflict just punishment on those who act unjustly by means of bargain between the parties. It is sum and substance of the philosophy of punishment in cases to be resolved through plea bargaining.

Plea bargaining as the term implies is an active negotiation between the prosecution and the accused whereby the accused by confessing his guilt in a court may get the benefit of a lighter punishment than what is provided for the offence in question. It is the pre-trial negotiations whereby the accused and the prosecutor in a criminal case work out a mutually satisfactory disposition of the case subject to court approval.¹⁶ It usually involves the defendant's pleading guilty to a lesser offence or to only one or some of the counts of a multi count indictment in return for a lighter sentence than that possible for the graver charge. Generally, a plea bargain allows the parties to agree on the outcome and settle the pending charges there are two kinds of plea bargaining, as endorsed in International jurisprudence. i.e., Express and implicit plea bargaining.¹⁷ Express bargaining occurs when an accused or his lawyer negotiates directly with a prosecutor or a trial judge concerning the benefits that may follow the entry of a plea of guilty. Implicit bargaining, on the other hand, occurs without face-to face negotiations.

There are three primary types of pleas of guilt. The first is an open plea, in which a defendant pleads guilty in return for no specific promise from the prosecution, but in the hopes of leniency from the court at sentencing because of a willingness to confess and accept responsibility for his or her actions. The second is a charge bargain, in which the defendant pleads guilty in return for an agreement from the prosecution to drop particular charges, especially charges that carry

¹⁵ Dalbir Bharti, *The Constitution and Criminal Justice Administration*, APH Publishing Corporation at p.42.

¹⁶ Speech on National conference on Plea Bargaining & sentencing by Hon'ble Mr. Justice A. K. Patnaik, Judge, Supreme Court of India at Orissa Judicial Academy on 30th November, 2013.

¹⁷ Speech on National conference on Plea Bargaining & sentencing by Hon'ble Mr. Justice V. Gopala Gowda, Judge, Supreme Court of India at Orissa Judicial Academy on 30th November, 2013



mandatory minimum sentences. The third is a sentence bargain, in which the defendant pleads guilty in return for an agreement from the prosecution to recommend, or, at least, to not oppose, a particular sentence in the case. In each of the above pleas, the court retains the discretion to make the final sentencing decision, though the courts encourage plea bargaining by following the recommended or agreed upon disposition in the vast majority of cases.

3.1 INTRODUCING ADR MECHANISM IN CRIMINAL JUSTICE SYSTEM IN THE FORM OF PLEA BARGAINING

The process of plea bargaining was brought in as a result of criminal law reforms introduced in 2005.¹⁸ The Amendment Act introduced Chapter XXIA to the Code having sections 265 A to 265 L which came into effect on 5th July, 2006. It is a device which ensures that victims receive acceptable justice in reasonable time without risking the prospects of hostile witness, inordinate delay and non-affordable costs.

The Cr.P.C. Chapter XXIA, allows plea bargaining to be used in criminal cases where Plea-bargaining can be claimed only for offences that are penalized by imprisonment below seven years (265 A) and it does not apply to serious cases wherein the punishment is death or life imprisonment or a term exceeding seven years or offences committed against a woman or a child below the age of 14 years.¹⁹ The Act further provides that the accused can file an application for plea-bargaining in the court where the trial is pending and then the court must examine the accused in camera to ascertain whether the application has been filed voluntarily. On being convinced the court then calls upon the Public Prosecutor or the complainant to work out a mutually satisfactory disposition of the case. The negotiation is left to the free will of the parties and if a settlement is reached, the court can award compensation based on it to the victim and then hear the parties on the issue of punishment. After hearing the accused on the quantum of punishment the court can decide upon releasing the accused under S.360 of the Code or under the provisions of The Probation of Offenders Act, 1958; if a minimum sentence is provided for

¹⁸ The Criminal Law (Amendment) Act, 2005 (Act 2 of 2006)

¹⁹ Section 265 L of Code of Criminal Procedure, 1973



the offence committed, the accused may be sentenced to half of such minimum punishment; if the offence committed does not fall within the scope of the above, then the accused may be sentenced to one-fourth of the punishment provided or extendable for such offence. The accused may also avail of the benefit under Section 428 of the Code which allows setting off the period of the detention undergone by the accused against the sentence of imprisonment in Plea bargained settlements. The statement or facts stated by an accused in an application for Plea bargaining shall not be used for any other purpose other than for plea bargaining. The court must deliver the judgment in open court according to the terms of the mutually agreed disposition. The judgment is final and no appeal lies against the decision of the court apart from a writ petition to the State High Court under Articles 226 of the Constitution or a special leave petition to the Supreme Court under Article 136 of the Constitution.²⁰ Also if the accused has been previously convicted of a similar offence by any court, then he/she will not be entitled to plea bargaining.

Examining possible plus points of Plea bargaining in India, it will help in cutting short the delay, backlogs of cases and speedy disposal of criminal cases, saving the courts time, which can be used for hearing the serious criminal cases, saving money and energy of the accused and the state, reducing the congestion in prisons, raising the number of convictions from its present low to a fair level to create some sort of credibility to the system. The accused might be benefitted as he might get half of minimum prescribed punishment. If no such minimum is prescribed, accused might get one-fourth of punishment prescribed, or released on probation or after admonition or get concession of considering the period of undergone in custody as suffering the sentence under section 428 of Code of Criminal Procedure. Accused is also benefitted even when plea bargaining fails as his admission cannot be used for any other purpose.

4. CRITICAL ANALYSIS OF CHAPTER XXI-A

The first and foremost attack on the scheme of plea bargaining is made on the ground that the practice subverts many of the basic values of jurisprudence relating to criminal justice. Plea

²⁰ Justice A.K. SIKRI, Judge, Delhi High Court supported by Ms. Shreya Arora, *Plea Bargaining*, Nyaya Deep, The official Journal of NALSA, Vol. VII, Issue 3, July, 2006



bargaining programs do not set precedent, define legal norms, or establish board community or national standards, nor do they promote a consistent application of legal rules.

Another potent criticism is that S. 265A restricts its applicability to offences for which punishment is less than seven years, thereby losing out on the very object of its introduction. One of the main reasons for the introduction of plea bargaining was the backlogging in the cases resulting in delay in justice. The section excludes offences for which punishment of death or of imprisonment for life or of imprisonment for a term exceeding seven years has been provided under the law for the time being in force and those affecting socio- economic conditions and offences committed against a woman or child less than fourteen years. Socio- economic offences cover a substantial number of legislations like Dowry Prohibition Act 1961, Protection of Women from Domestic Violence Act 2005, The Commission of Sati Prevention Act, 1987, The Immoral Traffic (Prevention) Act, 1956, The Army Act, 1950, The Explosives Act, 1884 etc. Further, Sec. 265-A(2) confers discretionary power on the Central Government to determine those offences under the law for the time being in force that affect the socio- economic condition of the country and notify the same for the purpose of sub section (1). There are no guidelines in the chapter laying down the basis for classifying offences as socio–economic one.

S. 265B allows the accused to file an application for plea bargaining along with an affidavit sworn in by the accused in the court where the case is pending. The affidavit shall state that he has voluntarily preferred, after understanding the nature and extent of punishment provided for the offence, plea bargaining by him and that he has not been previously convicted of the same offence. The court then issues notice to the Public Prosecutor or the complainant of the case and the accused shall be examined in camera. The court on being satisfied that the application is voluntary will provide to work out a mutual disposition of the case, otherwise the case will continue from the stage where such application for plea bargaining was filed. This process may become more time consuming as the courts will first have to determine whether the application is voluntary or not and accordingly decide. Moreover, no specific time frame is required for mutual disposition of the case which is of grave concern as the purpose of plea bargaining is speedy justice and disposal of cases.



S. 265 entrusts a duty on the court to ensure that the mutual satisfactory disposition of the case is voluntary. The section does not lay down any canon for the court to make sure that there is transparency and the accused is not coerced at any stage of the proceedings.

Plea bargaining undercuts the requirement of proof beyond reasonable doubt and that plea negotiation is substantially more likely than trial to result in the conviction of innocent. Innocent accused may be paid by the actual perpetrators of crime in return to their guilty plea with assured reduction in penalty.

In addition, the law makers have restricted the scope of plea bargaining as it does not permit a person who has been convicted of the same offence without considering the gravity of the offence.

5. RECOMMENDATIONS

Although the amendment has tried to address the problems of under trial prisoners by mandating the court to give accused the benefit of Probation of Offenders Act where so ever it is permissible but there is lack of awareness among under trial prisoners.

- This section should mandate the probation officers and jail superintendants to conduct sessions in prisons for informing the under trial prisoners of the benefits of plea bargaining.
- Proper guidelines should be given to the government about the basis on which an offence should be classified as socio economic one.
- The basis of applicability of the doctrine should not be merely the number of years of punishment for a particular offence but the severity of the crime.
- Defending Advocates should encourage the litigant to opt for the plea bargaining rather than to treat the plea bargaining as threat to their profession.
- A time frame should be stipulated for working out a mutually satisfactory disposition.



- An independent judicial authority may be established to receive and evaluate the application of plea-bargaining to ensure a greater transparency and to avoid any kind of biases.

6. CONCLUSION

Speedy trial is the essence of criminal justice and there is no doubt that delays in trial itself constitutes denial of justice. Indian jails have capacity of 2.56 lakh prisoners but there are more than five lakh prisoners behind bars. The State governments spend more than Rs 55 per day on each prisoner and annual expenditure comes up to Rs 361 crore. This huge amount is being spent by our Indian government to maintain these prisoners just because of delayed criminal justice system.²¹ It would be healthy to state at this phase that 'Law is not a Panacea. It cannot solve all problems, but it can reduce the severity'. Plea bargaining in India undertakes to attend to the same, which despite its drawbacks can go a long way in speeding the caseload disposal and ascribing efficiency and credibility to Indian Criminal Justice. Concisely while implementing the plea-bargaining there must be a balance between efficiency and speed on the one side and justice and dignity of court on the other side. We will have to keep in mind the out of the ordinary fabric and economic condition of our country in light of this practice. This is a beginning of a new era started in India to which horizon is the limit of practice; let us accept it with hopes for the best and positive results on the society.

²¹ Hitesh, *Plea Bargaining: Present status in India* available at <http://www.legalservicesindia.com/article/article/plea-bargaining-present-status-in-india-658-1.html> (last visited 24/02/2017)