

Plea bargaining: a means to an end

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This article tries to explore the origins and concept of plea bargaining and the present state of the remedy in India post the Criminal Law (Amendment) Act, 2005. It goes on to critically analyze Chapter XXIA of the Code by raising certain issues of concern with respect to the applicability and scope of certain incorporated provisions and its consequences on concerned parties. Further it brings in suggestions for a better implementation of the Amendment. The Article concludes that the amendment has been implemented in an extremely cautious manner and it is time to explore the wide possibilities that plea bargaining has to offer.

Introduction

From time immemorial, one of the primary functions of the state has been to maintain law and order and ensure that justice prevails. This has been a function that remained unchanged even when the state was evolving from a police state to a welfare state. The citizens pay taxes every year to the state and the officials for the smooth functioning of all the three organs of the state. Prolonged pre trials and back log in cases resulting in undue delay in justice will affect the credibility and reliability of the judiciary which is the corner stone of a legal system. With the introduction of sections 265A-256 L to the Code of Criminal Procedure, 1973 by the Criminal Law (Amendment) Act of 2005¹ the legislature has officially induced plea bargaining into the Indian Legal system to curb the problem of back logging of cases in the Indian Courts and to alleviate the suffering of under trial prisoners. The induction of plea bargaining will be beneficial in contributing to reforming our criminal justice system.

Origin of Plea Bargaining

Plea bargaining is a concept that originated in the United States and it has evolved over the ages to become a prominent feature of the American Criminal Justice system.² Plea bargaining is the pre trial negotiation between the defendant and prosecution during which accused pleads guilty in exchange for certain concession by the prosecutor. This usually involves negotiations to reduce either the sentence or the seriousness of the charge. In the US, more than 75 percent of criminal cases end in guilty pleas, almost all resulting from plea bargaining. In federal courts, virtually all defendants who plead guilty qualify for a 20 percent reduction in the length of their sentence.³ The constitutional validity of plea bargaining was considered by the US courts in the Landmark decision in *Brady v United States*⁴ where the Court upheld the constitutionality of plea bargaining. The court then continued to hold that plea bargaining is constitutional through its decisions in various subsequent cases.⁵

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² Wanna make a deal? The introduction of plea bargaining in India by Sulabh Rewari and Tanya Aggarwal (2006) 2 SCC (Cri) J-12

³ Gale Encyclopedia of US history

⁴ 397 U.S 742

⁵ *Corbitt v New Jersey* 439 U.S 212; *Bordenkircher v Hayes* 434 U.S. 357

Concept of Plea Bargaining in India

In the United States, the accused has three options with respect to pleas; guilty, not guilty or plea of *nolo contendere*⁶. In plea of *nolo contendere* the defendant answers the charges made in the indictment by declining to dispute or admit the fact of his or her guilt. The defendant who pleads *nolo contendere* submits for a judgment fixing a fine or sentences the same as if he or she had pleaded guilty. The difference is that a plea of *nolo contendere* cannot later be used to prove wrongdoing in a civil suit for monetary damages, but a plea of guilty can.⁷

A plea bargain is a contractual agreement between the prosecution and the accused concerning the disposition of a criminal charge. However, unlike most contractual agreements, it is not enforceable until a judge approves it.⁸

The Indian concept of plea bargaining is inspired from the Doctrine of *Nolo Contendere*. It has been incorporated by the legislature after several law commission recommendations. This doctrine has been considered and implemented in a manner that takes into account the social and economic conditions prevailing in our country.⁹ There are three types of plea bargaining; i) charge bargaining; ii) sentence bargaining; and iii) Fact bargaining. Negotiating for dropping some charges in a case of multiple charge or settling for a less grave charge is called charge bargaining. Where the accused has an option of admitting guilt and settling for a lesser punishment it is sentence bargaining. Lastly, negotiation which involves an admission to certain facts in return for an agreement not to introduce certain other facts is fact bargaining.¹⁰

Reasons for Introduction of Plea Bargaining

The Law commission in its 142nd report had outlined a scheme for plea bargaining in India .In its report the commission pointed out that in several cases the time spent by the accused in jail before commencement of trial exceeds the maximum punishment which can be awarded to them if found guilty,¹¹ there is unavailability of statistical data regarding under trial prisoners etc., resulting in a denial of justice. The report brought out the urgency for an improved version of the scheme to be implemented.¹² There were some reservations with respect to introduction of plea bargaining in India, mainly, issues like illiteracy, prosecution pressure on innocent persons, incidence of higher crime rates, criminals may escape due punishment to which the commission stated that the pros and cons should be weighed before implementation. The commission in its 154th Report, the Law Commission reiterated the need for remedial legislative measures to reduce the delays in the disposal of criminal trials and appeals and also to alleviate the suffering of under trial prisoners. The 177th Report of the Law Commission, 2001 also sought to incorporate the concept of plea-bargaining as suggested in the 154th report.¹³ The Report of the Committee on Reforms of the Criminal Justice System, 2003¹⁴ stated that plea-bargaining being a means for the disposal of accumulated cases and expediting the

⁶ Latin term which means "I do not wish to contest".

⁷ West's Encyclopedia of American Law

⁸ *Supra* n 3

⁹ Plea Bargaining - A Practical Solution by Sowmya Suman

¹⁰ Plea Bargaining : A Revelation by Dr Abraham P. Meachinkara 2010 (4) klt jrl

¹¹ *Rudul Shah v. State of Bihar* AIR 1981 SC 928

¹² The subject of the 142nd Report of the Law Commission of India was on the concessional treatment for offenders who on their own initiative plead guilty without bargaining. See <http://lawcommissionofindia.nic.in/101-169/Report142.pdf>

¹³ See <http://lawcommissionofindia.nic.in/reports/Annexure%20III%20of%20177th%20report.pdf>

¹⁴ Headed by Justice V.S.Malimath, former Chief Justice of Karnataka and Kerala High Courts. The first time that the State has constituted such a Committee for a thorough and comprehensive review of the entire Criminal Justice System so that necessary and effective systematic reforms can be made to improve the health of the system.

delivery of criminal justice should be introduced. The Committee thus reaffirmed the recommendations of the Law Commission of India in its 142nd, 154th and 177th Reports.¹⁵

Indian Judiciary's Approach towards Plea Bargaining

The Indian judiciary has been reluctant in applying this concept prior to the 2005 amendment and has on various occasions rejected the concept of plea bargaining even after several recommendations of the Law Commission of India.¹⁶ This was evident since the courts continued giving decisions unfavorable to plea bargaining even after such recommendations. The earliest cases in which the concept of plea bargaining was considered by the Hon'ble Court was *Madanlal Ramachander Daga v. State of Maharashtra*¹⁷ in which it observed:

“In our opinion, it is very wrong for a court to enter into a bargain of this character. Offences should be tried and punished according to the guilt of the accused. If the Court thinks that leniency can be shown on the facts of the case it may impose a lighter sentence.”

In *Muralidhar Megh Raj v. State of Maharashtra*¹⁸ the Apex Court continued to disapprove the concept of plea bargaining when the appellants pleaded guilty to the charge where-upon the trial Magistrate, sentenced them each to a piffling fine. The Court observed:

“To begin with, we are free to confess to a hunch that the appellants had hastened with their pleas of guilty hopefully, induced by an informal, tripartite understanding of light sentence in lieu of *nolo contendere* stance.”

In *Ganeshmal Jasraj v. Government of Gujarat and another*¹⁹ the Apex Court considered the effect of plea bargaining on evidence and order of conviction when it observed:

“There can be no doubt that when there is an admission of guilt made by the accused as a result of plea bargaining or otherwise, the evaluation of the evidence by the Court is likely to become a little superficial and perfunctory and the Court may be disposed to refer to the evidence not critically with a view to assessing its credibility but mechanically as a matter of formality in support of the admission of guilt. The entire approach of the Court to the assessment of the evidence would be likely to be different when there is an admission of guilt by the accused....In the instant case, it is true that the learned magistrate did not base his order of conviction solely on the admission of guilt made by the appellant, but it is clear from his judgment that his conclusion was not unaffected by the admission of guilt on the part of the appellant and in the circumstances, it would not be right to sustain the conviction of the appellant.”

Subsequently in *Kasambhai Ardul Rehmanbhai Shaikh v. State of Gujrat*²⁰ the Hon'ble Court held:

“It would be contrary to public policy to allow a conviction to be recorded against an accused by inducing him to confess to a plea of guilty on an allurement being held out to him that if he enters a plea of guilty, he will be let off very lightly. Such a procedure would be clearly unreasonable, unfair and unjust and would be violative of Art. 21 of the Constitution. It would have the effect of polluting the pure fount of justice because it

¹⁵ See http://www.mha.nic.in/pdfs/criminal_justice_system.pdf

¹⁶ *Supra* n 15

¹⁷ AIR 1968 SC 1267

¹⁸ AIR 1976 SC 1929

¹⁹ AIR 1980 SC 264

²⁰ AIR 1980 SC 854

might induce an innocent accused to plead guilty to suffer a light and inconsequential punishment rather than go through a long and arduous criminal trial.”

In *Kachhia Patel Shantilal Koderlal v. State of Gujarat and another*²¹. The Court held that practice of plea bargaining is unconstitutional, illegal and would tend to encourage corruption, collusion and pollute the pure fount of justice.

In *State of U.P v. Chandrika*²² The Hon’ble Apex Court observed:

“Mere acceptance or admission of the guilt should not be a ground for reduction of sentence. Nor can the accused bargain with the Court that as he is pleading guilty sentence be reduced.”

After the amendment, the concept of plea bargaining has found recognition in the Indian Courts since the court is left with no option but to interpret the law and not make laws. The courts have held that criminals who admit their guilt and repent upon, a lenient view should be taken, while awarding punishment.²³

Critical Analysis of Chapter XXI-A

Chapter XXI-A of Code of Criminal Procedure, 1973 deals with plea bargaining. This chapter consists of 12 sections from Section 265A to 265 L.

S. 265 A lays out the applicability of plea bargaining. It states that this remedy is available only in respect of offences for which the punishment is less than seven years of imprisonment. 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. Sub- section (2) of section 265 A confers 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).

This section loses out on the very objective of introducing plea bargaining. One of the reasons for the introduction of plea bargaining was due to the back logging in cases which resulted in delay in justice. The applicability of this section is restricted to offences for which punishment is less than seven years. Socio economic offences cover many of the legislations starting from Dowry Prohibition Act, 1961 to recent Acts like Protection of Women from Domestic Violence Act, 2005.²⁴ When plea bargaining is not applicable to a large number of statutes, the very purpose of the Amendment in reducing the case load is lost.

Another concern is about those offences where a minimum sentence is prescribed by the law. The Supreme Court has held that neither the trial court nor the high court has the jurisdiction to bypass the minimum sentence prescribed by law.²⁵ Here too the applicability of plea bargaining is very much restricted since a person who has committed an offence for which the punishment is lesser than seven years cannot take recourse to plea bargaining if the minimum punishment is prescribed by law.

²¹ [1980] 3 SCC 120

²² AIR 2000 SC 164

²³ *state of Gujarat v. Natwar Harcharji Thankor* 2005 Cr.L.J. 2957 (Guj)

²⁴ *Supra* n 10

²⁵ *Kirpal v. state of Haryana* 1999 Cr. L.J. 503 1 (SC)

Also, this sub-section (2) of section 265A confers arbitrary power to the government to decide those offences which constitute socio economic offences. There are no guidelines in the chapter laying down the basis for classifying offences as socio economic offences. This could later result in violation of Article 14 in case an accused feels that the classification is arbitrary and discriminatory.

S. 265 B permits the accused to file for application for plea bargaining in the court where the case is pending. The application is to be accompanied by an affidavit sworn by the accused stating therein that he has voluntarily preferred, after understanding the nature and extent of punishment provided under the law for the offence, the plea bargaining in his case and that he has not previously been convicted by a Court in a case in which he had been charged with 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*. If the court is satisfied that the application is voluntary then it will provide to work out a mutual satisfactory disposition of the case. If the court feels otherwise, the case will be from the stage where such application has been filed for plea bargaining.

The courts in most cases are left to determine whether or not an application is voluntary on the basis of the facts and circumstances of each case. But there will always be an element of pressure on the accused since he is being offered a lesser charge or reduced sentence. No person would want to undergo a long trial and may agree to such concession in some cases. Will such grounds be considered as a voluntary act by the Courts?

Sub-section (4) of this section states that the court shall provide time for the parties to come to a mutually satisfactory disposition. But, it does not provide a specific time frame with respect to mutually satisfactory disposition which is of grave concern since the purpose of plea bargaining is for speedy justice and disposal of cases.

In addition, the section does not permit a person who has been convicted of the same offence to apply for plea bargaining. Here again, the law makers failed to consider the severity of the offence and has yet again restricted the scope for plea bargaining. There may be a situation in the future where a person may take recourse to plea bargaining for a less severe offence but the mutually satisfactory disposition may not work out and it may result in his conviction. The section fails to consider such a situation while barring persons convicted of same offence from using plea bargaining

Further, in case the court feels the application has been filed involuntarily, then it is required to continue from the stage where the application was filed. Entrusting the duty on the Courts to decide on whether a case is fit for plea bargaining or not also will take up time of the courts. Instead, this process may be more time consuming since the courts will have to first determine whether the application is voluntary or not and accordingly decide after that.

S.256 C lays down the guidelines for mutually satisfactory disposition. The section requires that the Court shall issue notice to the concerned parties and also the duty is entrusted on the courts to ensure that the process of working out a satisfactory disposition of the case is voluntary. The court is not involved in the satisfactory disposition process but the section still requires that it should ensure that the process is voluntary. The section in fact doesn't lay down any guiding principle for the court to make sure that there is transparency and the accused is not coerced at any stage of the process.

Under S. 265 D, the Court has to prepare a report, if a mutual satisfactory disposition of the case has been worked out and such report shall be signed by the presiding officer of the Court and the parties in the Joint Meeting. If no satisfactory disposition is made out, the Court has to proceed with the case, by dropping the proceedings in plea bargain and start the proceedings from the stage, wherein the application is entertained. An accused, while disposal of his

application under plea bargaining, is entitled for setting off the period of detention from the sentence of imprisonment imposed under S.265E.

Once the court delivers judgment under S. 265 F then the subsequent S.265 G states it is final and no appeal will lie against such Judgment. However such Judgments are subject to challenge under Articles 226 and 227 of the Constitution before the High Court by filing Writ Petition and Article 136 of the Constitution before the Supreme Court by filing Special Leave Petition. Under S. 265H, Court shall have, for the purposes of discharging its functions under this Chapter, all the powers vested in respect of bail, trial of offences and other matters relating to the disposal of a case. S.265 I entitles the accused to set off the period of detention, he had already undergone in the same case, during the investigation, inquiry or trial, but before the date of conviction, in compliance of the provisions of S. 428 only. S.265 J contains the *non obstante* clause. S. 256 K states that the statements or facts stated by the accused in an application for plea bargaining shall not be used for any other purpose except for the purpose of the chapter and lastly, S. 265 L makes the chapter not applicable in case of any juvenile or child as defined in Section 2(k) of Juvenile Justice (Care and Protection of Children) Act, 2000.

Other Causes of Concern

Plea bargaining is at its budding stage in our country and there are other causes of concern that the law makers need to consider while making further amendments. Plea bargaining may lead to poor police investigations and cases may not given enough time and proper attention and for this reason cases may not be prepared well. This may happen if instead of pursuing justice there becomes a tendency for the investigating officers and others concerned to rely on plea bargaining.

Recommendations

Even though 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. Then Section 12 of the said Act provides that it shall not cast any stigma on the offender. Sec 265 I also Section 428 applicable to the sentence awarded on plea bargaining. But there is lack of awareness amongst under trial prisoners. Provisions should be incorporated in the chapter making the probation officers and jail superintendents duty bound to conduct sessions in prisons informing the under trial prisoners of such a benefit which can be availed by them.

A specified time should be laid down within which if a trial hasn't commenced the under trial prisoner should be let free. Police, prosecution, and judiciary should be made accountable for delays in their respective spheres, not the under trial prisoners.

The accused in cases that are at appeal stage prior to the 2005 Amendment should be allowed to avail this alternative remedy.

There should be more clarity on the offences which come under socio economic offences. There should be guidelines given to the government as to what basis an offence should be classified as socio economic offence. This can act as a safeguard against using this power arbitrarily.

The applicability of the section should be widened and classification for the benefit of plea bargaining should not be merely based on the number of years of punishment for a particular offence but it should also consider the severity of the crime.

A parallel system should be set to consider cases dealing with plea bargaining. Only if the forum feels that a satisfactory disposition cannot be worked out it should send the case back to

the court which should proceed from the stage where such application has been filed for plea bargaining.

A time frame should be stipulated for working out a mutually satisfactory disposition.

Conclusion

The inclusion of Chapter XXI-A of the Code has been introduced rather cautiously by our law makers. They have limited the applicability to a large extent and also restricted the scope of plea bargaining. It should be understood that when a concept is being implemented into a legal system, it should be done in a manner, foreseeing the hindrances that may be faced at the experimental stage. The provisions as such don't show any tendency of reducing case load. If citizens are to be encouraged to use the alternative remedy of plea bargaining then there is an urgency to bring in more clarity and predictability in the provisions.

It is agreed that there should be a balance between a rampant use of this remedy and the possibilities that plea bargaining offers in order for it to be an effective and efficient alternative remedy. But, we are unable to appreciate plea bargaining to the extent it deserves to be appreciated because of the extremely cautious approach in restricting its scope. It cannot be denied that the Amendment is a sincere attempt at resolving the stated issues but it can be better appreciated only if the reins are loosened a little more.