

Plea Bargaining in India: A New Panorama in Criminal Court Practice

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Abstract

The objective of the paper is understanding and appreciation of different aspects of the plea bargaining scheme in India with a view to test its justifiability as to its adoption and continuance in the justice system. This paper is purely doctrinal in nature and sources referred are books, journals, and articles addressing the subject, and other corresponding sources.

Keywords: Plea Bargaining; Criminal Justice System; Judicial Reform.

Introduction

Plea bargaining was viewed conservatively by the Indian courts prior to 2005 [1]. The principle justification for this conservative approach was that a crime is a wrong committed against the society at large [2] and a system, such as plea bargaining, which allows the accused to "bargain" away his guilt should not be allowed. Plea bargaining is basically derived from the principal of *Nolo Contendere* which literal meaning is, "I do not wish to contend [3]". The Supreme Court has construed this doctrine as an implied confession, a quasi confession of guilt, a formal declaration that the accused will not contend, a query directed to the court to decide a plea guilty, a promise between the Government and the accused and a government agreement on the part of the accused that the charge of the accused must be considered as true for the purpose of a particular case only [4]. Plea Bargaining may be of one or more ranges such as:

- (i) Charge Bargain: Withdrawal of one or more charges against an accused in return for a plea of guilty.
- (ii) Sentence Bargain: Reduction of a charge from a more serious charge to a lesser charge in return for a plea of guilty, *e.g.*, murder to manslaughter.
Section 265E of the Code lays down a procedure whereby the court exercises control over the process of plea bargaining. Hence, the nomenclature of "mutually satisfactory disposition" is a misnomer to a certain extent, as the court is only bound to award the compensation to the victim as per the agreement reached between the parties [5]. As regards the sentencing, the discretion rests solely with the court.
- (iii) Fact Bargain: Recommendation by the prosecutor to sentencing judges as to leniency of sentence in lieu of plea of guilty [6].

Development of the Plea Bargaining Concept from Records The origin of Plea Bargaining can be found in the American Judicial system, it would be wrong to assume that the concept of Plea Bargaining found

favor of courts only in the recent past. In fact it is used in the American Judiciary in 19th century itself. The bill of Rights makes no mention of the practice when establishing the fair trial principle in the sixth amendment but the constitutionality of the Plea Bargaining had constantly been upheld there. In the year 1969, James Earl Ray pleaded guilty to assassinating Martin Luther King, Jr. to avoid execution sentence. He finally got an imprisonment of 99 years. In a landmark judgment *Bordenkircher Vs Hayes* [7], the United State Supreme Court held that, "the constitutional rationale for Plea Bargaining is that no element of punishment or retaliation so long as the accused is free to accept or reject the prosecution's offer. The Apex Court however upheld the life imprisonment of the accused because he rejects the 'Plea Guilty' offer of 5 years imprisonment. The Supreme Court in the same case however in a different context observed that, it is always for the interest of the party under duress to choose the lesser of the two evils. The courts have employed similar reasoning in tort disputes between private parties also. In countries such as England and Wales, Victoria, Australia, "Plea Bargaining" is allowed only to the extent that the prosecutors and defense can agree that the defendant will plead to some charges and the prosecutor shall drop the remainder.

Object of Plea Bargaining in India

The initiation of the process of plea bargaining is found in Section 206(1) and 206(3) of the Code of Criminal Procedure and Section 208 (1) of the Motor Vehicles Act, 1988. Under these provisions the accused can plead guilty of petty offences or less grave offences and settle with penalties for small offences to close the cases and some basic objects are as follows:

1. Speedy disposal of criminal cases i.e. reduction in heavy backlogs.
2. Less time consuming
3. End of uncertainty of a case
4. Saving legal expenses of both the parties i.e. accused and state.
5. Less congestion in jails
6. Under present system, 75% to 90% of the criminal cases result in acquittal, in this situation it is preferable to introduce this concept in India [8].
7. It is not fair to keep the accused with hard-core criminals because if the accused is innocent then he will accept his guilt and in this situation, it is not reasonable.

In India it has been introduced in the criminal procedure code in the chapter XXI A wide criminal law (amendment) Act 2005. Earlier the Criminal Jurisprudence of India did not recognize the concept of "plea bargaining" as such. The Government was hesitant to take a policy decision on the introduction of the plea bargaining in the criminal justice system due to opposition from the legal experts, judiciary etc⁹. The Supreme Court was very much against the concept of Plea Bargaining before its introduction. In *State of Uttar Pradesh vs. Chandrika* [10], the Supreme Court of India held that it is settled law that on the basis of Plea Bargaining court cannot dispose of the criminal cases. The court has to decide it on merit. The Hon'ble Supreme Court has criticized the concept of Plea Bargaining in its judgment namely; *Murlidhar Meghraj Loya vs. State of Maharashtra* [11], further, the Hon'ble Supreme Court in the case of *Kachhia Patel Shantilal Koderlal vs. State of Gujarat and Anr* [12] strongly disapproved the practice of plea bargain. The Apex Court held that practice of plea bargaining is unconstitutional, illegal and would tend to encourage corruption, collusion and pollute the pure fount of justice. Similarly, in *Kasambhai vs. State of Gujarat* [13], the Supreme Court had expressed an apprehension that such a provision is likely to be abused [14].

NeerajAarora, Plea Bargaining- A New Development in the Criminal Justice System.

The law commission of India advocated the introduction of Plea Bargaining in the 142th, 154th & 177th reports. The 154th report of the Law commission recommended the new XXI A to be incorporated in the criminal procedure code [15]. Based on recommendation of the Law Commission, the new chapter on plea bargaining making plea bargain in cases of offences punishable with imprisonment up to seven years has been included [16].

Despite strict opposition by the Supreme Court, the Government found it comfortable to introduce this concept. Long list of pending cases before the Criminal courts was cited as the reason for the enactment of this provision. The Law Commission in its 154th report recommended the introduction of 'plea bargaining' as an alternative method to deal with huge arrears of criminal cases. This recommendation of the Law Committee finally found a support in Malimath Committee Report [17].

Silent Features of Plea Bargaining

Following are the silent features of Plea Bargaining;

1. It is applicable in respect of those offences for which punishment is up to a period of 7 years.
2. It does not apply to cases where offence is committed against a woman or a child below the age of 14 years
3. When court passes an order in the case of plea bargaining no appeal shall lie to any court against that order.
4. It reduces the charge.
5. It drops multiple counts and press only one charge.
6. It makes recommendation to the courts about punishment or sentence.

Provision & Procedure for Plea Bargaining

As Per Section 265-A, the plea bargaining shall be available to the accused who is charged of any offence other than offences punishable with death or imprisonment or for life or of an imprisonment for a term exceeding to seven years. Section 265 A (2) of the Code gives power to notify the offences to the Central Government. The Central Government issued Notification No. SO1042 (II) dated 11-7/2006 specifying the offences affecting the socioeconomic condition of the country.

- Section 265-B contemplates an application for plea bargaining to be filed by the accused which shall contain a brief details about the case relating to which such application is filed, including the offences to which the case relates and shall be accompanied by an affidavit sworn by the accused stating therein that he has voluntarily preferred the application, the plea bargaining the nature and extent of the punishment provided under the law for the offence, the plea bargaining in his case 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 will thereafter issue notice to the public prosecutor concerned, investigating officer of the case, the victim of the case and the accused for the date fixed for the plea bargaining. When the parties appear, the court shall examine the accused in-camera wherein the other parties in the case shall not be present, with the motive to satisfy itself that the accused has filed the application voluntarily.
- Section 265-C prescribes the procedure to be followed by the court in working out a mutually satisfactory disposition. In a case instituted on a police report, the court shall issue notice to the public prosecutor concerned, investigating officer

of the case, and the victim of the case and the accused to participate in the meeting to work out a satisfactory disposition of the case. In a complaint case, the Court shall issue notice to the accused and the victim of the case.

- Section 265-D deals with the preparation of the report by the court as to the arrival of a mutually satisfactory disposition or failure of the same. If in a meeting under section 265-C, a satisfactory disposition of the case has been worked out, the Court shall prepare a report of such disposition which shall be signed by the presiding officer of the Courts and all other persons who participated in the meeting. However, if no such disposition has been worked out, the Court shall record such observation and proceed further in accordance with the provisions of this Code from the stage the application under sub-section (1) of section 265-B has been filed in such case.
- Section 265-E prescribes the procedure to be followed in disposing of the cases when a satisfactory disposition of the case is worked out. After completion of proceedings under S. 265 D, by preparing a report signed by the presiding officer of the Court and parties in the meeting, the Court has to hear the parties on the quantum of the punishment or accused entitlement of release on probation of good conduct or after admonition. Court can either release the accused on probation under the provisions of S. 360 of the Code or under the Probation of Offenders Act, 1958 or under any other legal provisions in force, or punish the accused, passing the sentence. While punishing the accused, the Court, as its discretion, can pass sentence of minimum punishment, if the law provides such minimum punishment for the offences committed by the accused or if such minimum punishment is not provided, can pass a sentence of one fourth of the punishment provided for such offence.
- Section 265-F deals with the pronouncement of judgment in terms of mutually satisfactory disposition.
- Section 265-G says that no appeal shall be against such judgment.
- Section 265-H deals with the powers of the court in plea bargaining. A court for the purposes of discharging its functions under Chapter XXI-A, shall have all the powers vested in respect of trial of offences and other matters relating to the disposal of a case in such Court under the Criminal Procedure Code.
- Section 265-I specifies that Section 428 is

applicable to the sentence awarded on plea bargaining.

- Section 265-J talks about the provisions of the chapter which shall have effect notwithstanding anything inconsistent therewith contained in any other provisions of the Code and nothing in such other provisions shall be construed to contain the meaning of any provision of chapter XXI-A.
- Section 265-K specifies 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 as mentioned in the chapter. Section 265-L makes chapter not applicable in case of any juvenile or child [18] as defined in Juvenile Justice (Care and Protection of Children) Act, 2015.

Therefore, plea bargaining is available in cases of offences which are not punishable either with death or with imprisonment for life or with imprisonment for a term exceeding seven years, the chapter contemplates a mutually satisfactory disposition of the case which may also include giving compensation to victim and other expenses.

Trial in Case of Plea Bargaining

Upon receipt of application, the trial court has to issue notice to prosecution, either to public prosecutor or to complainant in S. 190 (a) cases and also to the accused intimating the date of hearing of application. The examination of the accused shall be done in-camera, avoiding the presence of other parties. If the Court feels, after examination of the accused, the application is involuntarily submitted or the accused is not eligible for plea bargaining, the Court has to drop the proceeding but if the Court is satisfied with the application filed, will ask the Public Prosecutor and the accused to work out mutually satisfactory disposition of the case. After hearing the parties the Court shall pronounce two fold awards:

1. Compensation to the victim by the accused including the expenses incurred during the pendency of the case and releases the accused on probation of good conduct.
2. May sentence the accused to half of such minimum punishment as provided for the offence.

Thus in case of plea bargain judgment given by the Court shall be final and no appeal shall lie in any Court against such judgment except by the special leave petition under Art 136 for writ petition under Articles 226 and 227 of the Constitution to the High Court.

Limitation

The Law commission noted that the experience of United States was an evidence of plea bargaining being a means for the disposal of accumulated cases and expediting the delivery of criminal justice. Now this has changed the prospect & the face of the criminal justice system. It is not available for offences which might affect the socio-economic conditions of the country and for an offence committed against a woman or a child below fourteen years of age [19]. Once the court passes an order in the case of plea bargaining, no appeal shall lie [20] to any court against the order. If the accused has been previously convicted of a similar offence by any court, then he/she will not to be entitled to plea-bargaining [21].

Benefits to Victim

- a. They can easily get the compensation.
- b. They can save themselves from long drawn Judicial Process.
- c. Less time and money consuming.

Benefits to Accused

- a. In case of Minimum Punishment, accused will get half punishment.
- b. If no such punishment is provided, then accused will get one fourth of the punishment provided.
- c. He may release on probation or admonition.
- d. He may get the gain of period already undergone in custody under section 428 of Cr.P.C.
- e. No appeal lies against the judgment in favour of accused generally.
- f. Admission of accused cannot be used for any other purposes except for Plea-bargaining.
- g. Less time and money consuming.

Steps Forward in Judicial View and Acceptance of Plea Bargaining

Primarily government was hesitant to take a policy decision on the introduction of the plea bargaining in the criminal justice system because of the opposition from the legal experts, judiciary etc. The Hon'ble Supreme Court has criticized the concept of Plea Bargaining in its judgment namely; *Murlidhar Meghraj Loya vs. State of Maharashtra* [22], further, the Hon'ble Supreme Court in the case of *Kachhia Patel Shantilal Koderlal vs. State of Gujarat and Anr* [23] strongly disapproved the practice of plea bargain. The Apex Court held that practice of plea bargaining

is unconstitutional, illegal and would tend to encourage corruption, collusion and pollute the pure fount of justice. Similarly, in *Kasambhai vs. State of Gujarat* [24], the Supreme Court had expressed an apprehension that such a provision is likely to be abused. But Gujarat High Court has recognized the utility of this method in *State of Gujarat vs. Natwar Harchandji Thakor* [25], as an alternative measure of redressal to deal with huge arrears in criminal cases. The court reasoned the change as the very object of law is to provide easy, cheap and expeditious justice by resolution of disputes, including the trial of criminal cases and considering the present realistic profile of the pendency and delay in disposal in the administration of law and justice, fundamental reforms are inevitable. In this regard some examples are sketched below:

Vijay Moses Das vs. CBI [26], The first case of plea bargaining from Uttarakhand High Court was successful. A person who was accused of supplying substandard material to ONGC and that too at a wrong Port causing immense losses to ONGC sought the plea bargaining. The Hon'ble High Court allowed the Misc. Application by directing the trial court to accept the plea-bargaining application.

Guerrero Lugo Elvia Grissel vs The State of Maharashtra [27] a magistrate's court in Mumbai on 25th may, 2011 accepted a plea bargain application and convicted four foreign nationals who were accused of stealing diamonds worth Rs 6.6 crore at an international jewellery show 2010, to 21 months rigorous imprisonment. The maximum punishment in such cases is usually seven years.

David Headley Case [26] the move of Pakistani-American David Headley charged with conspiracy in the Mumbai terror attacks, to plead guilty before a US court to bargain for a lighter sentence. Forty nine-year-old Headley, and let operative arrested by FBI on October 2009, has moved the plea bargain at a court in Chicago. Headley faces six counts of conspiracy involving bombing public places in India, murdering and maiming persons in India and providing material support to foreign terrorist plots and let; and six counts of aiding and abetting the murder of US citizens in India.

Shortcoming of Plea-Bargaining

- Involvement of the police in plea-bargaining process would tempt coercion on innocent people.
- If once guilty application of the accused is rejected then he would face great hardship to prove himself innocent.

- Court is impartially challenged due to its involvement in plea-bargaining process.
- Involvement of the victim may lead to corruption.

Conclusion

Whether it is known or unknown but plea bargaining is being practiced in the criminal justice system from ancient time and in the present ambience it has become an inevitable component of adversarial system. Though, the introduction of 'plea bargaining in Indian judicial system' has profoundly been criticized by a group of society including intellectual and legal experts with the argument that it will demoralize the public confidence in criminal justice system but on the other hand, the concept of plea bargaining has been welcomed by some groups of society as a revolutionary judicial reform in India, there is possibility that the overburdened criminal courts will get a relief. It is also true that plea bargaining does not solve the entire problem but reduces its severity of penalty. It is undoubtedly a disputed concept since few have welcomed it while others have abandoned it. The consequences will be felt most obviously by the countless numbers of poor languishing in the country's prisons while awaiting trial. Taking into account the advantages of plea-bargaining and the recommendations of the Law Commission on plea bargaining was clearly recognized as the need of the hour and by no stretch of imagination can the taint of legalizing a crime will attach to it and can be safely said that, law is not a panacea. Therefore concept of plea bargaining should be encouraged and the litigant should be encouraged to avail the remedy of plea bargaining to settle the pending cases. For the successful implementation of plea bargaining and to achieve its objectives, the role of judiciary and the bar is very important. With the changing world scenario where all the countries are shifting to ADR from the traditional litigation process which is lengthy as well as complex, the plea bargaining may be one of the best recourse as an ADR mechanism to meet the challenges of disposal of pending cases.

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