

## **RIGHT TO BAIL: A JURISPRUDENTIAL APPROACH**

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**ABSTRACT:** A Bail is a judicial process that has to be conducted impartially and judicially and in accordance with statutory and constitutional precepts. Bail in its essence is a fine balance between the right to liberty of the person accused of an offence and the interests of society at large. In general parlance, bail refers to release from custody, whether it is on personal bond or with sureties. In the present moments, bail in India is a highly debatable issue. There are number of reports that shed light on the state of the criminal justice system in India

**KEYWORDS:** Bail, Deprived, Personal Liberty & Economic Condition.

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### **MEANING AND DEFINITION OF BAIL:**

The term bail has not been defined in the Criminal Procedure code 1973<sup>2</sup>, nevertheless, but the word 'bail' has been used in the Criminal Procedure code 1973, through the terms 'bail', 'bailable' and 'non-bailable' have been collectively been used approximately 102 times in Criminal procedure Code, 1973. Section 2(a) of Criminal procedure code defines Bailable Offence as an offence which is shown as bailable in the first schedule, or which is made bailable in the first schedule, or which is made bailable by any other law for the time being in the force.

Literally the expression 'bail' denotes a security for appearance of a prisoner for his release.<sup>3</sup> Etymologically, the word is derived from old French verb "bailer" which means to "give" to "Deliver"<sup>4</sup> although another view is that its derivation is from the Latin term 'bajulare' meaning "to bear a burden"<sup>5</sup>. In general parlance, bail refers to release from custody, whether it is on personal bond or with sureties.

According to **Supreme Court of India**, Bail is devised as a technique for affecting a synthesis of two basic concepts of human values, namely the right of accused person to enjoy his personal freedom and the public interest, subject to which, the release is conditional on the surety to produce the accused person in court to stand the trial.<sup>6</sup>

In **Moti Ram V. State of Madhya Pradesh**<sup>7</sup> the Supreme Court clarified that the definition of the term bail includes both release on personal bond as well as with sureties. It is to be noted that even under this expanded definition, bail refers only to release on the basis of monetary assurance-either one's own assurance or third parties sureties.

### **HISTORY OF BAIL:**

The concept of Bail can trace back to 399 BC, when Plato tried to create a bond for the release of Socrates. The modern bail system evolved from a series of Laws originating in the middle ages in England.<sup>8</sup> During the Mughal rule, the Indian legal system is recorded to have an institution of bail with the system of releasing an arrested person on his furnishing a surety. The use of this system finds reference in the 17<sup>th</sup> Century travelogue of Italian traveler Manucci who himself was restored to his freedom bail from imprisonment for a false charge of theft. He was granted bail by the then ruler of Punjab, but the kotwal released him only after he furnished a surety. Under Mughal law an interim release could possibly be actuated by the

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<sup>2</sup>. Vaman Nairain Ghiya V. State of Rajasthan, 2009, 2 SCC 281

<sup>3</sup>. Oxford dictionary, chambers 21 century dictionary.

<sup>4</sup>. Webster's New International Dictionary.

<sup>5</sup>. Stround's judicial dictionary, Vol. 1, 244 (1971).

<sup>6</sup>. Kamalapati Trivedi v. State of West Bengal, AIR 1979 SC 777.

<sup>7</sup>. AIR 1978 SC 1594

<sup>8</sup>. www.legalserviceindia.com, dated .19.10.2019, at.11.04.p.m.

consideration that if dispensation of justice got delayed in ones case then compensatory claim could be made on the judge himself for losses sustained by the aggrieved party.<sup>9</sup> During the British Raj in India criminal courts were using two well understood and well defined forms of bail for release of person held on custody. These were known as Zamanat and Muchalka.<sup>10</sup> Its latest reflection is the improved version of the provisions relating to bail in the code of criminal procedure, 1973 which were preceded by the adoption of the constitution 1950.

#### **METHODOLOGY:**

The author following the doctrinal methodology for prepare of this article.

#### **OBJECTIVES:**

The basic objectives usually recognized to the institution of bail, is to ensure the presence of the person accused of an offence at trial while maximizing personal liberty in accordance with the principles of the Constitution. The Crpc 1973 and other legislation must be amending to reflect these constitutional mandates while ensuring that justice and initiatives to prevent crime are not diluted.

#### **HYPOTHESIS:**

- ❖ Large numbers of Indian population is illiterate and also the rate of legal literacy and awareness is negligible. Ignorance of the general public as well as the victims regarding their rights prevails over their awareness.
- ❖ Misuse of power by the police, prison authorities leads to torture mankind, to destroy lives and properties, to oppress and intimidate the weak and squash the constitutional rights of the community as well.
- ❖ The judiciary is not only custodian of rights of citizen but also Justice Provider to every citizen of India who is deprived by the state arbitrary action.

#### **BAIL PROVISION UNDER CRIMINAL PROCEDURE, 1973:**

The code of criminal Procedure, 1973 has defined the term bailable offence<sup>11</sup> by stating that an offence which is shown as bailable in the first schedule, or which is made bailable by any other law for the time being in force; and the term non-bailable offence states the meaning that any other law for the time being in force; and the term non-bailable offence states the meaning that any other offence other than bailable offence. The distinction between bailable and non –bailable offences is based on the gravity of the offence, danger of accused absconding, tampering of evidence, previous conduct, health, age and sex of the accused person. Non-bailable offence, it is mostly the offences which are punishable with imprisonment for not less than 3 years.

A Bail is a judicial process that has to be conducted impartially and judicially and in accordance with statutory and constitutional precepts. Presumption of innocence and the duty of the prosecution to prove the guilt of the person accused of an offence is golden thread in criminal law jurisprudence.<sup>12</sup> Every individual charged with a crime has a light to be presumed innocent until proven guilty.<sup>13</sup>

#### **TYPES OF BAIL:**

There are generally 3 types of bail in India which a person can apply depending upon the stage of the criminal matter:

- 1. Regular Bail:** A regular bail can be granted to a person who has already been arrested and kept in police custody. A person can file a bail application for regular bail.<sup>14</sup>
- 2. Interim Bail:** Interim Bail is a bail granted for a short period of time. Interim bail is granted to an accused before the hearing for the grant of regular bail or anticipatory bail.
- 3. Anticipatory bail:** People, who discern that he may be arrested by the police for a non-bailable offence, can file an application for anticipatory bail<sup>15</sup>. It is like an advance bail obtained under **Section 438** of Cr.pc. A bail under **Section 438** is a bail before arrested and a person cannot be arrested by the police if anticipatory bail has been granted by the court.

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<sup>9</sup> .J.N.Sarkar, *Mughal Administration in India* ,108(1920)

<sup>10</sup> . *The concept and system of bail, Indian Law Institute, pages.5.*

<sup>11</sup> . *Section 2(a) of Criminal Procedure Code 1973*

<sup>12</sup> . *woolmington v.DP(1935): see also Golbar Husain & ors. V. State of Assam &Anr.(2015)11 SCC242 and Vinod Kumar v. State of Haryana (2015) 3 SCC 138*

<sup>13</sup> . *Smirnova V. Russia, Application Nos .46133/99 and 48183/99(2003)*

<sup>14</sup> . *Under Section 437 & 439 of the Criminal procedure code 1973*

<sup>15</sup> . *Under Section 438 of the Criminal procedure code 1973*

The law of bail like any other branch of law has its own philosophy and occupies an important place in the administration of justice and the concept of bail emerges from the conflict between the police power to restrict liberty of a man who is alleged to have committed a crime, and the presumption of innocence in favour of alleged criminal. An accused is not detained in custody with the object of punishing him on the assumption of guilt. The court in this case, dealt with the difference between bail under sections 438 and 439 pointing out that section 439 can be invoked only when the accused is in custody.

The court has authority to refuse bail if it has apprehends that the accused may not be available for trial. This is so even when the accused is entitled for bail on the ground of non-submission of charge-sheet within the statutory period.<sup>16</sup>

In **Brij Nandan Jaiswal v. Meena Jaiswal**<sup>17</sup> the petitioner was charged with murder. He was refused bail by the session's court. However, the High court granted him bail under Section 437, Crpc. It was questioned by the complaint. Upholding the right of the complaint; The S.C. declared that 'it was now a settled law that the complaint can always question the order granting bail if the said order is not validity passed. It is not as if once a bail is granted by any court, the only way is to get it cancelled on account of its misuse. The bail order can be tested on merits also'<sup>18</sup> in this case the court found that the High Court granted bail mechanically and hence it was reversed by the supreme court. SC observed, in P. Chidambaram case "It is not a rule that bail should be denied in every case. Delhi High Court was justified in denying bail relating to gravity of the offence. However, we disapprove of the Delhi High Court making observations on the merits of the case."<sup>19</sup> The purpose of the bail is ensuring the appearance of accused before the court when ever required but in certain cases, granting bail is not required.

#### **THE BASIC RULES OF GRANT OR DENIAL OF BAIL MAY SIMPLY BE SUMMARIZED AS:**

1. There are only two kinds of offences bailable and non bailable offences
2. In case of bailable offences section 436 Cr.P.C. it is the right of accused to demand and be granted bail.
3. The certain basic criteria while exercising his judicial discretion for grant or denial of bail in case of non-bailable offences has been laid down in section 437 Cr.P.C. in the cases related to non-bailable offences. Some of these criteria include the nature of offence, past criminal records and probability of guilt.
4. Section 438 Cr.P.C. deals with anticipatory bail in cases where there is an apprehension to arrest. Anticipatory bail as universally known cannot be granted in cases where only bailable offences are involved even if the accused apprehends arrest. Considerations for granting anticipatory bail are different from those for granting bail under section 437 or 439.<sup>20</sup> It has been pointed out by the kerala High Court that Lok Adalts cannot grant anticipatory bail as they are engaged in "Compromise" or "Conciliation" and not adjudication.<sup>21</sup> If a person who was granted anticipatory bail does not appear before the court, he can be cancelled by non-bailable warrant.<sup>22</sup>

In **Ravi@Ravi Prakash v. State**<sup>23</sup> the Madras High Court pointed out that the incorporation of sub-section (IB) to section 438 makes it obligatory for the applicant to be present before the court dealing with his application if such a direction would be issued on application made to the court by the public prosecutor.

#### **CONSTITUTIONAL PERSPECTIVE:**

**Article 21** of our Constitution provides that "No person shall be deprived of life and personal liberty except according to procedure established by law". The commission of Inquiry Act, 1952, it must be recommended that if any procedure for depriving a person of his life is not fair, just and reasonable, then that procedure would be void as violating **Article 21**.

In **Menaka Gandhi V. Union of India**,<sup>24</sup> it was held that the procedure under **Article 21** must be just, fair and equitable. Before a person is deprived of his life and personal liberty, the procedure established by law

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<sup>16</sup> .See *Mittan Hagjer & Action Dismasa V. State of Assam*, 2009 Cri LJ 4370(Gau); *Prasant kumar v. C.I. of police, Hill palace* Cri LJ 4793 on Proviso Section 167(2) Crpc.

<sup>17</sup> .2009 ISCC(Cri)594.

<sup>18</sup> .Id.at 596.

<sup>19</sup> . <http://www.indiatoday.in/india/story/supreme-court-grants-bail-to-chidamabram-in-inx-meia-case1624960-04.12.2019>

<sup>20</sup> .*Rajeevan S/O late Balasubramanian V. State of Kerala*, 2009 Cri.L.J. 1031(Ker).

<sup>21</sup> .*Sreedharan v. S.I. of Police, Balussery*, 2009 CriLJ 1249(Ker.)

<sup>22</sup> .*Bhimsingh Bahaddredya v. state of MP*, 2009 Cri Lj 3697(MP)

<sup>23</sup> .2009 2 SCC (Cri)330

<sup>24</sup> . AIR 1978 SC 597.

must be strictly followed, and must not be departed from to the disadvantage of the person affected.<sup>25</sup> In the case of **Joginder Kumar v. State of Uttar Pradesh**,<sup>26</sup> the Supreme court has given directions on the rights of the arrested persons in the light of **Articles 21 and 22**. The Supreme Court of India in the case of **Gudikanti Narasimhulu v. Public Prosecutor, High Court of Andhra Pradesh**<sup>27</sup> observed that the personal liberty, deprived when bail is refused, is too precious a value of our constitutional system recognized under **Article 21** that the fundamental power to negate it is great trust exercisable, not causally but judicially, with lively concern for the cost to the individual and the community. In **Rajesh Ranjan Yadav v. C.B.I.**<sup>28</sup> Court remarked that while **Article 21** is of great importance, a balance must be struck between the right of liberty of the person accused of an offence and the interest of the society.<sup>29</sup> No right can be absolute and reasonable restrictions can be placed on the exercise of the rights. The grant of bail due to prolonged confinement cannot be said to be an absolute rule because the grounds of bail must depend upon the contextual facts and circumstances.

Bail in its essence is a fine balance between the right to liberty of the person accused of an offence and the interests of society at large. The grant or refusal of bail on economic conditions i.e. monetary surety violates **Article 14 and 15** of the constitution of India and runs contrary to the constitutional ethos. Personal liberty and the rule of law find its rightful place in the constitution in **Article 22** which includes measures against the arbitrary and indefinite detention.

In **Worldwide the UDHR in Article 2** states that every person is entitled to all the right and freedom in the declaration without any discrimination. **Article 2(I) of ICCPR** also reiterate the same and further obligates each state party to respect and ensure to all persons within its jurisdiction the rights in the covenant without.<sup>30</sup> More importantly, **Article 26** not only provides for equality before the law but also equal protection of the law. Thus it prohibits any discrimination based on capricious factors such as race, colour, sex, language, and religion, political or national origin.<sup>31</sup>

The **UDHR**<sup>32</sup> along with **ICCPR in Article 9 (I)** stated that the fundamental rights to liberty, security and protection against arbitrary detention. By Virtue of the fundamental right the state is placed under an obligation to protect and preserve the liberty and the security of the citizens against arbitrary arrest and detention. In order for the detention to be lawful and not arbitrary, it must be consistent with the substantive rules of national and international laws as well as the principles and guidelines preserving fundamental rights.

#### **JUDICIAL VERDICT ON BAIL:**

In **Babu Singh v State of U.P.**<sup>33</sup> it was held that refusal to grant bail in a murder case without reasonable ground would amount to deprivation of personal liberty under Article 21. In that case the court held that refusal to grant bail amounted to deprivation of personal liberty of accused persons. Personal liberty of an accused or convict is fundamental and can be taken away only in accordance with procedure established by law. So, deprivation of personal liberty must be founded on the most serious consideration relevant to the welfare objectives of the society specified in the constitution. In the circumstances of in the case, the court held that subject to certain safeguards, the appellants were entitled to be released on bail.

In **Sanjay Chandra v C.B.I.**<sup>34</sup> well known as 2G Scam , the appellants ,facing charges under sections **420-B ,458,471 and 109 of IPC and Section 13(1) (D) of prevention corruption Act 1988**,were denied bail by the special judge ,C.B.I. and also by the High Court ,The S.C. directed the appellants to be released on bail subjected to certain conditions and held that In determining whether to grant bail both the seriousness of the charge and severity of punishment should be taken into consideration. Bail is not to be denied merely because of the sentiments of community against the accused. The detention of under trial prisoners in jail custody to an indefinite period violates **Article 21**. Every person detained or arrested is entitled to speedy trial. It looks that the applicants have to remain in jail longer then the period of detention, if they are convicted.

<sup>25</sup> . *Bashira V. state of Uttat Pradesh*,AIR 1968 SC 1313,see also *Narendra Purshotam Umarao v. B.B. Gujural* AIR 1979 SC 420

<sup>26</sup> . AIR 1994 SC 1349

<sup>27</sup> AIR 1978 SCR (2) 371

<sup>28</sup> . AIR 2007 SC 451

<sup>29</sup> .*M.R.Mallick, "bail: Law and Practice" 8 (Eastern low House Kolkota,2009)*

<sup>30</sup> .*Un human rights committee(HRC),ICCPR general Comment NO 18: Nondiscrimination,10 November 1989*

<sup>31</sup> .*id, see also principle 5(1), UN Body of Principles for the protection of all persons ..., Rules 6(i),Standard Minimum Rules for treatment of Prisoners.*

<sup>32</sup> .*Article 3 reads "Everyone has the right to life, liberty and security of person..."*

<sup>33</sup> . AIR 1978 S.C.527

<sup>34</sup> . AIR 2012SC 830

The apex court of India in the case *State of Maharashtra Vs. Sitaram Popat Vital*<sup>35</sup> held that few factors to be taken into consideration, before granting bail, these are

1. The nature of accusation and the severity of punishment in case of conviction and the nature of supporting evidence;
2. Reasonable apprehension of threat to the complaint
3. Prima facie satisfaction of the court in support of the charge.

At the certain matters require investigation for the Court to effectively decide upon the bail application, like:

1. Whether there is or is not a reasonable ground for believing that the applicant has committed the offence alleged against him,
2. The nature and gravity of charges,
3. The severity of the punishment which might fall in the particular circumstances in case of a conviction;
4. The likelihood of the applicant absconding, if released on bail,
5. The character, means, standing and status of the applicant,
6. The likelihood of the offence being continued or repeated on the assumption that the accused is guilty of having committed that offence in the past;
7. Opportunity of the applicant to prepare his defense on merits.

The Apex Court of India in the case *Prahalad Singh Bhati vs. N.C.T. Delhi and others*<sup>36</sup> held that, ‘The condition of not releasing the person on bail charged with an offence punishable with death or imprisonment for life shall not be applicable if such person is under the age of 16 years or is a woman or is sick or infirm, subject to such conditions as may be imposed.’

#### **LAW COMMISSION REPORT REGARDING BAIL IN INDIA:**

Based on the recommendations of the Law Commission in its 41st Report on the Code of Criminal Procedure<sup>37</sup> – the law relating to bail got suitably modified, in tune with the constitutional objectives and sought to strike a fine equilibrium between the ‘Freedom of Person’ and ‘Interest of Social Order’. The provisions namely sections 436, 437 and 439 of Chapter XXXIII Cr.P.C. were streamlined in 1973. In last few decades, the societal contexts, its relations, are changing pattern of crimes, arbitrariness in exercising judicial discretion while granting bail are compelling reasons to examine the issue of bail and to chart a roadmap for further reform.

The Department of Legal Affairs, Ministry of Law and Justice, Government of India, vide its letter dated 11.09.2015 forwarded a note from the Minister of Law and Justice dated 01.09.2015, on the need for a Bail Act in India. The Department made a reference to the Law Commission “to examine the desirability of having a separate Bail Act, keeping in view the similar provisions in the United Kingdom and other countries.” Later however, the Law Commission vide letter dated 21.12.2016 was referred to achieve the objective by bringing necessary changes in the existing provisions of the Cr.P.C.

#### **STATISTICAL DATA AND ANALYSIS ON BAIL IN INDIA:**

The data collected regarding prison population in India represents a grim scenario. It indicates that 67 per cent of the prison population is awaiting trial in India. Inconsistency in bail system may be one of the reasons for the over-crowding of prisons across the country and giving rise to another set of challenges to the Prison Administration and ‘State’ thereto. Freedoms as guaranteed under Part III of the Constitution has a unique relation with the ideas and objectives enshrined in the Preamble of the Constitution of India i.e. Justice – economic, social and political. It remains one of the solemn duties of the republic and its realisation in its full sense is one of the cherished goals. It has become a norm than an aberration in most jurisdictions including India that the powerful, rich and influential obtain bail promptly and with ease, whereas the mass/ common / the poor languishes in jails.<sup>38</sup> Thus, it is one of the malaises which are affecting the common citizens and family thereto, which not only deny the basic tenet of ‘justice’ but even human dignity is at stake. A majority of under-trials (70.6 per cent) are illiterate or semiliterate<sup>39</sup>. In the absence of data regarding economic status of prisoners,

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<sup>35</sup> . *AIR 2004 SC4258*,

<sup>36</sup> . *AIR 2001 SC1444*

<sup>37</sup> . *41st Law Commission Report, 1969, The Code Criminal Procedure, 1898, Vol. I.*

<sup>38</sup> . Jason Gilbert, “Blame our bail system for overcrowded Ottawa jail” *The Ottawa Sun* (Jan. 14, 2016) available at: <http://www.ottawasun.com/2016/01/14/blame-our-bailsystem-for-over-crowded-ottawa-jail> (last visited on Jan. 25, 2017)

<sup>39</sup> . *National Crime Records Bureau, Prisons Statistics (Ministry of Home Affairs, 21st Edition, 2015).*

‘literacy’ serves as a useful proxy to appreciate that, the majority of under trials belong to the socio-economically marginalized groups.

Various reports from the Ministry of Home Affairs show that a total of 2,31,340 under-trial prisoners from various States and Union Territories were lodged in jails for committing crimes under Indian Penal Code (IPC), and 50,457 were under-trials under special laws, e.g. Customs Act of 1962, Narcotic Drugs and Psychotropic Substances Act of 1985, Excise Act of 1944, etc.<sup>40</sup>. A large number of 12,92,357 under-trials were released during 2015 out of which 11,57,581 were released on bail.<sup>41</sup>

The right of a fair trial requires moderation not only to the person accused of an offence, but also consideration of the public and society at large as represented by the State. It must also instill public confidence in the criminal justice system, including those close to the accused person, and those affected by the crime.<sup>42</sup>. An imprisonment rate widely varies around the world; for instance, the incarceration rate in US is 707 per 100,000 of the national population, while in India it is 33 per 100,000 of the national population.<sup>43</sup>

**Table: 1 Comparison of Prison Population<sup>44</sup>**

	Total Population*	Prison Population*	Percentage of Population In Prison	Percentage of World Population	Percentage of World Population
United States	296	2.19	0.74	23.68	4.36
United Kingdom	54	0.08	0.15	0.86	0.8
China	1554	1.55	0.1	16.76	22.89
Russia	142	0.87	0.61	9.14	2.09
India	1092	0.33	0.03	3.57	16.08
Brazil	361	0.19	0.05	2.05	5.32

\*. Population in Millions.

In quantitative comparative indices, India ranks higher than many countries of the world in terms of its low incarceration rates. There may be various reasons for the findings. Despite low incarceration rates, it is reflected from Table 2 below that the percentage of bail being granted is far lower than ideal, it shows that a mere 28 percent of the person accused of an offence have been granted bail. Special Laws IPC

**Table 2: Tabular Representation of Disposal of Cases<sup>45</sup>**

	Special Laws	Indian Penal Code
Total Number of Persons Arrested	4,8,57,230	3,6,36,596
Total Number of Persons Charge-Sheeted	4,7,27,419	3,2,99,161
Total Number of Persons In Custody	74,139 2,94,857	31 33 455 581
Total Number of Persons Granted Bail	3,20,392	1,0,18,760

It certainly remains one of the vexed questions to map the socioeconomic impact of the ‘Right to Bail – its grant or Refusal’ by the appropriate authority. However, the certain inalienable guidelines and streamlining certain procedures would further make the legal process more humane and subservient to the idea of fundamental liberty, justice and good governance. Statistical information provided by the National Crime Records Bureau (hereinafter NCRB) recognizes the importance of questioning the operations of the bail system in India.

**FINDINGS:**

- ❖ The present system of bail is heavily influenced by economic status and discriminates against the impoverished and the illiterate.
- ❖ The suspected accused, under trial prisoners and convicts have certain rights more or less contains in the criminal laws of India, Constitution, Jail Manual, International Covenants and Judicial Pronouncement. But the real challenge is regarding failure in implementation by the state machinery.

<sup>40</sup> . *ibid*

<sup>41</sup> . *National Crime Records Bureau, Prisons Statistics (Ministry of Home Affairs, 21st Edition, 2015).*

<sup>42</sup> . *South African Supreme Court in Zanner v. Director of Public Prosecutions [2006] 2 AllSA 588.*

<sup>43</sup> . *Institute for Criminal Policy Research , “World Prison Brief” , available at : <http://www.prisonstudies.org/country/india> (last visited on Dec. 23, 2016).*

<sup>44</sup> . *Source: World Prison Brief, Institute for Criminal Policy*

<sup>45</sup> .*Source: National Crime Records Bureau*

**CONCLUSION:**

The right of a bail and fair trial required moderation not only to the person accused of an offence, but also consideration of the public and society at large as represented by the state. The accused should not be subjected to undue or unnecessary detention prior to his conviction. Every citizen of India has basic fundamental right to freedom guaranteed Article 21 of the Indian constitution, which specifically states, “No person shall be deprived of his life or personal liberty except according to procedure established by law.” Article 21 provides right to life and personal liberty to the citizen and the same time a balance has required to be struck between the right to individual liberty and interest of the society at large. If any of the individual, who commit such types of acts which that is forbidden by the law of the land , he or she is bound to face the consequences as per the law and in that situation, his or her freedom may be restricted depending upon the gravity of offence as such committed.