

CHAPTER – I

INTRODUCTION

1.1 Concept of Bail:

The concept of Bail implies a form of previous restraint. The meaning of the term 'Bail' is to set free a person who is under arrest, detention or under some kind of restraint by taking security for his appearance. Section 436 of Criminal Procedure Code read with form 45 of Schedule II of that Code contemplate two kinds of security:

- (i) Security with sureties; and
- (ii) Recognizance of the principal himself.

The word 'Bail' more appropriately applies to the former and this is the meaning given to the word in practice and in the Criminal Procedure Code as distinct from the recognizance of the principal himself.

Therefore, in view of the definition of the word 'Bail' the person must be under some sort of restraint and the order of releasing a person under arrest or detention or under some kind of restraint by taking security for his appearance.

In case of Sunil Tulchand Shah vs. Union of India,¹ the Supreme Court held that the bail is a security obtained from a person arrested regarding an offence for the purpose of securing his presence during the course of trial. Though, such accused person is released on bail, still court will have hold on him by way of surety and other conditions set on the bail.

One important purpose of arrest is to secure the presence of the accused person at the time of his enquiry or trial and to ensure that he is available to receive sentence on convictions. If this purpose can be achieved without forcing detention on the accused during inquiry or trial, it would be ideal blending of two apparently conflicting claims, namely: (i) freedom of the individual and (ii) the interests of justice. The provisions relating to bail aim at such blending. They have been enacted with a view to restoring liberty to the arrested person without jeopardizing the objectives of arrest.

1. 2 Definitions of the word Bail:

As the term 'bail' is not defined in the code, the meaning as found in the dictionaries and as explained in the precedents has to be applied.

Definition of the Bail according Oxford Dictionary:

¹ 2000 Cri LJ 1444.

Bail – Money etc. required as security against the temporary release of a prisoner pending trial.

Definition of Bail according to Venkatarammaiaya's Law Lexicon 2Vols. In Vol. 1, 1971:

“To set at liberty a person arrested or imprisoned, or security being taken for his appearance on a day and at a place certain, which security is called bail, because the party arrested or imprisoned is delivered into the hands of those who bind themselves or become bail for his due appearance when required, in order that he may be safely protected from prison to which they have, if they fear his escape etc, the legal power to deliver Bail differs from main prize in that main permits are merely a person's sureties, who cannot imprison him themselves to secure his appearance, but Bail may, for they are regarded as goalers to whose custody he is committed –

Jowitt's Law dictionary, 1959 Ed. Vol. I, p.192.

(In Criminal proceedings) – An accused person is said at common law to be admitted to Bail when he is released from the custody of officers of the law and is entrusted to the custody of persons known as sureties, who are bound to produce him to answer, at a specified time and place, the charge against him and also, in default of so doing, are liable to forfeit such sum as is specified when bail is granted –

Jowitt's Law dictionary, 1959 Ed. Vol. I, pp.193-94.

In case *Champalal B. Jain vs. State of West Bengal*,² the Calcutta High Court gave a wider meaning covering almost the term. According to this decision, bail means the security taken from an accused person to appear before the court on a pre-fixed date. It may be taken from a person going on reference, revision or appeal.

It may also be taken from a person who applies for payment of fine imposed by the court in installments or from a person released on probation of good conduct. Generally, when bail is granted, the court may also require some other person to stand as surety for the accuser's appearance.

Is when a man is taken or arrested for a crime, suspicion of crime, indicated of a crime or any such case, so that he is restrained of his liberty; and being by Lawailable, offereth surety to those who have authority to bail him, which sureties are bound for him to the King's use in a certain sum of money, that he shall appear before the Justice at the next Sessions or appointed day. Then upon the Bonds of these Sureties, as is a foresaid, he is bailed, that is to say, set at liberty until the day appointed for his appearance (*Termes de la Ley* defined it).

Blackstone defines bail as "a delivery or bailment, of a person to his sureties, upon their giving (together with himself) sufficient security

² 1973 (78) Cal WN 614.

for his appearance : he being supposed to continue in their friendly custody, instead of going to goal.”

1.3 Bail as a Constitutional Right:

The right to bail is inextricably linked to the knowledge and awareness of the accused of his right to obtain release on bail. This is further linked to Article 22(1) of the Constitution which provides that no person who is arrested shall be denied the right to consult and to be defended by legal practitioner of his/her choice. However, it remains as an issue to be examined whether this provision carries with it the right to be provided the services of a legal practitioner at state cost, particularly in the light of Article 39A of the Constitution which directs the State to provide free legal aid – but is this an obligation on the part of State, enforceable in a court of law.³

Where does the right to bail fit into the constitutional scheme in the context of criminal jurisprudence contained in Article 20, 21 and 22 of the Constitution? How may of these human rights of accused as conferred by the Constitution be balanced against the growing crime rate and the need to protect society from criminals? Thus the law of bails “has to be dovetail two conflicting demands, namely, on one hand, the requirements of society for being shielded from the hazards of being

³ www.lawyersclubindia.com/right to bail and right to free legal aid/p.1 of 10. Retrieved on June 25th 2010.

exposed to the misadventures of a person alleged to have committed a crime; and on the other, the fundamental canon of criminal jurisprudence viz., the presumption of innocence of an accused till he is found guilty.”⁴

The right to bail is concomittant of the accusatorial system which favours a bail system that ordinarily enables a person to stay out of jail until a trial has found him/her guilty. In India, bail or release on personal recognizance is available as a right inailable offences not punishable with death or life imprisonment. Only to women and children, in non-bailable offences it is punishable with death or life imprisonment. The right of police to oppose bail, the absence of legal aid for the poor and the right to speedily reduce to vanishing point the classification of offences intoailable and non-ailable and make the prolonged incarceration of the poor inevitable during the pendency of investigation by the police and trial by a court.⁵

“The fact that under trails formed 80 percent of Bihar’s prison population, their period of imprisonment ranging from a few months to ten years; some cases wherein the period of imprisonment of the undertrials exceeded the period of imprisonment prescribed for the offences they were charged with these appalling outrages were brought

⁴ Superintendent and Remembrance of Legal Affairs vs. Amiya Kumar Roy Chowdary (1974).

⁵ [www.lawyersclubindia.com/right to bail and right to free legal aid/p.4 of 10](http://www.lawyersclubindia.com/right%20to%20bail%20and%20right%20to%20free%20legal%20aid/p.4%20of%2010). Retrieved on June 25th 2010.

before the Supreme Court in Hussainara Khatoon vs. State of Bihar.”⁶ Justice Bhagwati found that, these unfortunate undertrials languished in prisons not because they were guilty but because they were too poor to afford a bail. Following Maneka Gandhi vs. Union of India,⁷ he read into fair procedure envisaged by Article 21 the right of speedy trial and sublimated the bail process to the problems of the destitute. He thus ordered the release of persons whose period of imprisonment had exceeded the period of imprisonment for their offences. He brought into focus the failure of the magistrates to respect section 167(2) of Cr.P.C. which entitles an undertrial to be released from prison on expiry of 60 days of 90 days as the case may be.⁸

In Manto Majumdar vs. State of Bihar,⁹ the Apex Court once again upheld the undertrials right to personal liberty and ordered the release of the petitioners on their own bond and without sureties as they had spent six years awaiting their trial, in prison. The court deplored the delay in police investigation and the mechanical operation of the remand process by the magistrates insensitive to the personal liberty of

⁶ AIR 1979 SC 1360.

⁷ AIR 1978 SC 597.

⁸ www.lawyersclubindia.com/right to bail and right to free legal aid/p.4 of 10. Retrieved on June 25th 2010.

⁹ AIR 1980 SC 846.

undertrials, and the magistrate failure to monitor the detention of the undertrials remanded by them to prison.¹⁰

In *Kadra Pahadiya*,¹¹ the Supreme Court observed that the *Hussainara* judgment had not brought about any improvement and reiterated that –

...in *Hussainara Khatoon* it was held that the right to speedy trial is implicit, in the rights enshrined in Article 21 and the Court, at the instance of an accused, who was denied this right, is empowered to give instructions to the State Governments and to other appropriate authorities to secure this right of the accused.

In order to make this right meaningful in Bihar, the Supreme Court proceeded to pass orders to ensure institutional improvement in order to make speedy trial a meaningful reality. The Court therefore indicated the remedy in the event of denial of the accused's right to personal liberty enshrined in Article 21 namely that the Supreme Court may be approached in order to enforce the right and the Supreme Court in pursuance of its constitutional power may direct the State Government and other appropriate authorities accordingly. Thus the order requesting High Court to furnish the Supreme Court with the number of Sessions Courts in Bihar, the norms of disposals fixed by the High Court; the

¹⁰ J.N. Pandey, "Constitutional Law of India", Thirty second edition, Central Law Agency, Allahabad.

¹¹ AIR 1982 SC 1167.

steps, if any, taken to ensure compliance with those norms and considering the number of pending sessions cases, the adequacy of number of session court in Bihar. In regard to prisoners awaiting commitment, Court might suo motu consider granting of bail in accordance with the above mentioned principle laid down in Hussainara.¹²

Article 21 of the Constitution is said to enshrine the most important human rights in criminal jurisprudence. The Supreme Court had for almost 27 years after the enactment of the Constitution taken the view that this Article merely embodied a facet of the Diceyan concept of the rule of law that no one can deprive his life and personal liberty by the executive action unsupported by law. If there was a law which provided some sort of procedure, it was enough to deprive a person of his life and personal liberty. However, Maneka Gandhi vs. Union of India,¹³ marked a watershed in the history of constitutional law and Article 21 assumed a new dimension wherein the Supreme Court for the first time took the view that Article 21 affords protection also against legislation (and not just executive action) and no law can deprive a person of his/her life or personal liberty unless it prescribes a procedure which is reasonable, fair

¹² [www.lawyersclubindia.com/right to bail and right to free legal aid/p.5 of 10](http://www.lawyersclubindia.com/right%20to%20bail%20and%20right%20to%20free%20legal%20aid/p.5%20of%2010). Retrieved on June 25th 2010.

¹³ AIR 1978 SC 597.

and just it would be for the court to determine whether the procedure is reasonable, fair and just; if not, it would be struck down as invalid.¹⁴

In Hussainara Khatoon's case the Apex Court, inter alia, observed that the undertrials languishing in jail were in such a position presumably because no action application for bail had been made on their behalf either because they were not aware of their right to obtain release on bail or on account of their poverty they were unable to furnish bail. The present law of bail thus operates on what has been described as a property oriented approach. Thus the need for a comprehensive and dynamic legal service programme was left in order to revitalize the bail system and make it equitably responsive to needs of poor prisoners and not just the rich.

In the Indian Constitution there is no specifically enumerated constitutional right to legal aid for an accused person. Article 22(1) does provide that no person who is arrested shall be denied the right to consult and to be defended by legal practitioner of his choice, but according to the interpretation placed on this provision by the Supreme Court in Janardhan's case.¹⁵ This provision does not carry with it the right to be provided the services of legal practitioners at state cost. Also Article 39-A introduced in 1976 enacts a mandate that the state shall provide free

¹⁴ [www.lawyersclubindia.com/right to bail and right to free legal aid/p.6 of 10](http://www.lawyersclubindia.com/right%20to%20bail%20and%20right%20to%20free%20legal%20aid/p.6%20of%2010). Retrieved on June 25th 2010.

¹⁵ Janardhan Reddy vs. State of Hyderabad, AIR 1951 SC 227.

legal service by suitable legislations or schemes or any other way, to ensure that opportunities for justice are not denied to any citizen by reason of economic or other disabilities. This however remains a Directive Principle of State Policy which while laying down an obligation on the State does not lay down an obligation enforceable in Court of law and does not confer a constitutional right on the accused to secure free legal assistance.

Right to bail (Section 167(2) Cr.P.C.) and delay in investigation:

With the incorporation of section 167(2) Cr.P.C. the investigating agency is required to complete the job of investigation and file the charge-sheet within the time limit of either 60 or 90 days as the case may be. In case the above is not completed within the definite period, it becomes a most valuable right to the accused. The accused is, in that eventuality, entitled to be released on bail.

It would be seen that the whole object of providing for a prescribed time limit under section 167(2) Cr.P.C. to the investigation agency to complete the investigation was that the accused should receive expeditious treatments at the hands of the criminal justice system, as it is implicit in Article 21 that every accused has right to an expeditious disposal of his case. Section 167 has been criticized with respect to the fact that the prescribed time limit relates only to the investigation aspect

and does not touch other segments of the criminal-justice-system. Thus the object (of speedy trial), behind section 167 stands frustrated. Moreover section 167(2) is seen to paradoxically serve as a way of grant of liberty to some dangerous criminals who would otherwise not be able to get it under our system (for example they may not be otherwise entitled to bail by virtue of nature and gravity of offence). Thus the utility of section 167 Cr.P.C. may be thus questioned in the light of above, as to whether it really serves the purpose enshrined in Article 21 of the Constitution, particularly in the light of viewing the criminal justice system as whole not confined solely to investigation – it therefore follows that to achieve the right to speedy trial (as enshrined in section 163(2) Cr.P.C.), it is important to overhaul the system in its entirety and not parts of the system in isolation.¹⁶

1.4 Objectives of Study:

Before actually determining the place of bail within human rights framework as conferred by the Constitution, it is important to examine the object and meaning of bail, so that an analysis of these fundamental objects and change therein may reveal a change. The object detention of an accused person is primarily to secure her/his appearance at the time of trial and is available to receive sentence, in case found guilty. If his/her

¹⁶ [www.lawyersclubindia.com/right to bail and right to free legal aid/p.7 of 10](http://www.lawyersclubindia.com/right%20to%20bail%20and%20right%20to%20free%20legal%20aid/p.7%20of%2010). Retrieved on June 25th 2010.

presence at the trial could be reasonably ensured other than by his arrest or detention, it would be unjust and unfair to deprive the accused of his liberty during pendency of criminal proceedings.

Thus it is important to note the relevant provisions enshrined in the Universal Declaration of Human Rights:

Article 9: No one shall be subjected to arbitrary arrest, detention or exile.

Article 10: Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.

Article 11(1): Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.

There are thus several reasons which have been enumerated as to why bail ought to be allowed to prevent pre-trial detention.¹⁷

The specific objectives of the present study are as follows:

1. To study the evolution of law relating to bail and also different types of bails.

¹⁷ [www.lawyersclubindia.com/right to bail and right to free legal aid/p.2 of 10](http://www.lawyersclubindia.com/right%20to%20bail%20and%20right%20to%20free%20legal%20aid/p.2%20of%2010). Retrieved on June 25th 2010.

2. To examine the rules and regulations pertaining to granting of bail and cancellation of bail under the regular and special Acts.]
3. To evaluate Judicial Contribution for consideration of Law of bail in India.
4. To elucidate the various recommendations made by the Law Commission of India on Law of bail and their implementation.
5. To examine the law relating to bail and its operation in America and British legal systems with reference to Indian legal system.
6. To undertake an empirical study of the granting of bail by Session Court and Additional District Courts in Guntur, Andhra Pradesh.
7. To summarize the findings of the study and to make suggestions to the policy makes for the effective implementation of the law of bail.

1.5 Hypothesis:

Keeping in view the objectives of the following hypothesis are formulated:

1. The bail system in India is not operating satisfactorily and that it is profit and anti-poor.
2. Judicial contribution to Law of bail in India is minimal and judicial pronouncements have little impact on the granting of bail of lower courts in India.

3. The recommendations of Law Commission of India are not effectively implemented and there is lack of commitment on the part of the executive to implement the recommendations.
4. The granting of bail by the Sessions Court and Additional District Courts, Guntur is more in favour of privileged classes as compared to the under privileged classes.

1.6 The necessity for study:

A common man or a law people (who knows law) are said to be law-abiding citizens until, all of us abide by and create no problem. But, what about the people who break the law. They can claim that we do not know the law. But, there is well known maxim of criminal law that "*Ignorantia Facti Excusat, ignorantia legis neminem excusat*" it means ignorance of fact is an excuse, ignorance of law is no excuse. So, ignorance of law is not excusable.

When a person commits a crime under the heads which fall under Indian Penal Code or under any Special Act, he will be arrested and put in custody. He will brought into the court where actual trial of the case commences. It takes a longtime for all this procedure of law. Meanwhile, accused will be unnecessarily put in custody before his acquittal or conviction is decided and put in prison for number of days as a result his personal liberty will be deprived.

If we think with reasonability an accused was put in custody it may be a 'judicial' or 'police' for securing his presence at the time of trial than about his 'personal liberty' which is also a constitutional guarantee under Article 21 to every citizen of India, which becomes unconstitutional if he is put in custody.

For this purpose, under the Code of Criminal Procedure, 1973 a provision of "Bail" is inculcated to avoid such hindrances. Hence, my study focuses on the utility of those provisions under the Criminal Procedure Code.

A person accused of an offence in a case where investigation is going, if brought before court should be released on bail, if there appears reasonable grounds for his release. As we previously discussed under the head "Bail as a Constitution right" an accused is to be informed as per Article 22 of the constitutional that there is right of bail provided to him for release from custody. But, how far this constitutional right is utilized? Nobody can answer.

Whatever it is, there is need for every citizen to have knowledge about such bail provisions provided by our law. Otherwise, an accused will be put in custody or jail for number of years until the disposal of his case even though he is innocent. Of course, there are persons who may mis-utilise this provision by releasing on bail though, they really commit a crime again, but by following a basic principle of criminal law that,

“hundreds of criminals may escape but one innocent should not be punished”, a person accused of an offence if brought before court shall be provided with the ‘bail’ basing upon the merits of the case.

1.7 Methodology:

Keeping in view of the objectives of the study and hypothesis formulated, the scholar has adopted both doctrinaire and non-doctrinaire research methods. The scholar has adopted case study method to analyse the contribution of judiciary for strengthening the law of bail. The scholar also extensively referred to various statutes, reports and Law Commission of India and Judicial Pronouncements by using the services of various Libraries. The scholar has collected the data from the Sessions Court and Additional District Court, Guntur relating to granting and cancellation of bail by using social research methods such as Questionnaire, Interview method and Schedules. The data so collected is analysed in tabular form and used statistical methods to analyse the data to draw conclusions and findings so as to test the hypotheses adopted.

1.8 Treatment of the topic:

As the topic is “Law of Bails in India – A study with special reference to grant of bail by the District and Sessions Court, Guntur”, which includes 8 chapters of study.

The Chapter-I is Introduction to the topic which includes sub-heads namely; Concept of bail, Meaning and Definitions of bail, Bail as a Constitutional right, Object of granting bail and the need for study.

Chapter-II deals with the law relating to bail which includes discussion, which offences are bailable and non-bailable and in what cases Anticipatory bail is granted followed by the relevant judgments of the court on this topic.

Chapter-III deals with “Law as a procedure for cancellation of Bail and for granting of Bails under Special Acts”, which includes law of cancellation of bail followed by the relevant decisions of various courts from Magistrates to the Apex Court and Second part of this chapter includes Granting of bails under Special Acts like TADA, Essential Commodities Act, Customs Act and NDPS Act also with relevant decisions of various courts.

Chapter-IV deals with “Supreme Court on Law of Bails”. The Apex Court will not interfere with granting, rejection or cancellation of bails. Which is a purely a matter of Magistrate Court, Court of Session or a High Court, even though how Supreme Court inculcated or involved when a question of law arises is explained by citing relevant judgments of the Hon’ble Supreme Court in this chapter.

Chapter-V deals with “Recommendations of committees on law of Bails” which includes the Indian Law Commission reports on granting of bails and its recommendations and suggestions for better operation of procedure provided under the Criminal Procedure Code, 1973.

Chapter-VI deals with “Law of Bail in America and England” which includes procedure for granting of Bails in USA and England and the relevant Amendments to the provisions of bail in those countries and the judgments therein.

Chapter-VII which is a practical study of data of granting and refusing or rejection of bails in Guntur District, A.P. by Principal District Court, Guntur and I Additional District Court, Guntur for the three years i.e., 2007, 2008 and 2009, which is a sample study to come to a conclusion whether the poorer sections of people are able to avail the benefit of provision of bail as a terms of law.

Chapter-VIII which includes the concluding part of the topic and suggestions thereon.
