

## Anticipatory Bail

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## INTRODUCTION

The rationale of the whole concept of bail and the end that it sought to achieve ever since its inception in the Criminal Procedure Code, 1973 has been aptly remarked by Justice Krishna Iyer in the following words:

*"law of bails has to dovetail two conflicting demands.. society's requirement of being shielded from misadventures of a person alleged to have committed a crime, and on the other hand upholding the fundamental canon of criminal jurisprudence i.e. The presumption of innocence of accused till he is proved guilty. The issue of bail is one of liberty, justice, public safety and burden on public treasury; thus a developed jurisprudence of bail is integral to a socially sensitized judicial process."*<sup>1</sup>

*"If public justice is to be promoted, mechanical detention should be demoted".*<sup>2</sup>

India sought to follow a liberal bail philosophy. It was the accepted proposition that as long as an applicant for bail posed no threat to the lives and property of others, his liberty deserved a lot of consideration.<sup>3</sup> Thus the initial version of bail i.e. ordinary bail gained firm rooting in CrPC. But such bail application was made invariably after the accused had been arrested or charge-sheeted.

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<sup>1</sup> Gudikanti Narasimhulu v. State AIR 1978 SC 429, 433

<sup>2</sup> *Id.*

<sup>3</sup> R.K. Raghavan, *Bail and Discretion*, 28(12) FRONTLINE (June 2011)

But as notions of individual liberty increased, necessity to move the court on mere apprehension of arrest was conceived of. Thus came the concept of anticipatory bail, incorporated in Sec 438 of CrPC, 1973 about which Y.V. Chandrachud C.J observed in *Gurbaksh case*<sup>4</sup> as:

*“A person who has yet to lose his freedom by being arrested asks for freedom in the event of arrest. That is the stage at which it is imperative to protect his freedom so to give full play to the presumption that he is innocent.”*<sup>5</sup>

Plethora of case laws upheld that anticipatory bail as a weighty concept that courts could use with great care to protect innocent individuals from shame and ignominy at the hands of unscrupulous members of society. Given the vast discretion and lack of statutory guidelines, lots of inconsistencies and ambiguities have developed leading to the erosion of objective of anticipatory bail. Moreover various statutes have impeded significance of anticipatory bail. This study looks into the concept of anticipatory bail, the practice of courts while granting them and the ramifications of such legislations fettering anticipatory bail. Anticipatory Bail: History, Rationale and Statutory Provision

## **HISTORY**

The provisions concerning granting of bail were conspicuous by their presence through sections 496, 497 and 498 of CrPC, 1898. But there was no provision specially dealing with the grant of anticipatory bail. Thus judicial opinion of High Courts were conflicting on the issue whether a person can apply for release on bail in anticipation of arrest or detention as many HCs have upheld the view that anticipatory bail is repugnant to the provisions of CrPC, 1898 while others held that a person against whom an FIR has been lodged being ‘a person accused of an offence’<sup>6</sup> is entitled to bail if he appears before the court and applies for bail.

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<sup>4</sup> *Gurbaksh Singh v. State* (1980) 2 SCC 565

<sup>5</sup> *Id.* at 574

<sup>6</sup> *M.P. Sharma v. Satish Chandra* AIR 1954 SC 300

In the midst of these conflicting judicial opinions, the Code of Criminal Procedure Bill, 1970 was drafted in which Clause 447 provided for anticipatory bail. It conferred on the HC and Sessions Court a wholly new and independent power for granting anticipatory bail in the following terms

“.. enabling the superior courts to grant anticipatory bail i.e. a direction to release a person on bail issued even before the person is arrested... special provision is being made that the court granting anticipatory bail may impose such condition as it thinks fit..”

The genesis of this code can be found in the 41<sup>st</sup> Report of the Law Commission<sup>7</sup> which lays down the rationale for the necessity of anticipatory bail as

“..because sometimes influential person try to implicate their rivals in false case for the purpose of disgracing them or getting them detained in jail for some days. In recent times, with the accentuation of political rivalry, this tendency is showing signs of steady increase. Apart from false cases, where there are reasonable grounds for holding that a person accused of an offence is not likely to abscond or otherwise misuse his liberty while on bail, there seems no justification for him to stay in prison for some days and then apply for bail.”

### **POST INCORPORATION OF ANTICIPATORY BAIL IN CrPC, 1973**

Section 438 of CrPC deals with anticipatory bail and has undergone many amendments, latest being in 2005.<sup>8</sup> It exhaustively lays down the procedural guidelines and considerations to be taken by Court<sup>9</sup> while granting Anticipatory bail and conditions it can impose after granting it.<sup>10</sup>

The considerations are nature/gravity of accusation, previous criminal records/antecedents of the accused, possibility of the applicant fleeing from justice, malafide intention behind the accusation. The conditions which can be imposed are (i) imposing compulsory attendance as and

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<sup>7</sup> Law Commission of India, REPORT NO 41: The Code of Criminal Procedure, 1898.

<sup>8</sup> CrPC (Amendment) Act, 2005

<sup>9</sup> CrP.C., 1973 § 438(1), 438(1A), 438(1B)

<sup>10</sup> CrP.C., 1973 § 438(2)

when required by the police officer, (ii) the applicant would not make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from making any disclosures, (iii) Not leave India without permission of court, (iv) any other condition as laid down in Sec 437(3)

## **RATIONALE**

The object of anticipatory bail is ensuring freedom till the regular bail application is decided.<sup>11</sup> It is an issuance of a direction that the moment a person is arrested, if he has already obtained an order from the sessions judge or the High Court, he would be released immediately without having to undergo the rigors of jail even for a few days that would otherwise be inevitable if he has to apply for bail after arrest.

The legislative intention in instituting this provision has been to see that in non-bailable offences liberty of the subject is not put to jeopardy on frivolous grounds at the instance of unscrupulous, irresponsible persons or officers. In *Gurbaksh Singh case*<sup>12</sup> it has been laid down that a person seeking anticipatory bail is still a free man entitled to the presumption of innocence. Preserving the freedom of an individual and sanctity of Article 20(2), 21 are of cardinal importance.<sup>13</sup> It is only when public interest is at stake that application should be refused.

Thus anticipatory bail is a great departure from ordinary bail as it is a pre-arrest legal process which confers conditional immunity from arrest while the later is a post-arrest order.<sup>14</sup> It is only on arrest that the order granting ‘anticipatory bail’ becomes operative.<sup>15</sup>

The provisions of Anticipatory bail are applicable to non-bailable offence, whether cognizable or non-cognizable, in apprehension of an arrest.<sup>16</sup> The section makes it incumbent that there must be an existing accusation of a person having already committed a non-bailable offence and also a

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<sup>11</sup> K.L. Verma v. State (1998) 9 SCC 348

<sup>12</sup> *Supra* note 4

<sup>13</sup> *Id.* at 579

<sup>14</sup> Pokar Mal v. State AIR 1985 SC 969

<sup>15</sup> Balchand Jain v. State AIR 1977 SC 366

<sup>16</sup> Suresh Vandeva v. State 1978 CrLJ 677 (Del)

reasonable apprehension based on existing facts that he may be arrested.<sup>17</sup> However filing of an FIR is not a condition precedent for grant of anticipatory bail as it can be applied anytime till the applicant has not been arrested, provided the court is satisfied of its necessity.<sup>18</sup> But after warrant of arrest has been issued, anticipatory bail should not be granted.<sup>19</sup>

But Section 438 does not give any jurisdiction to the judiciary to direct the police not to arrest at all, especially if his application is pending under s.438 CrPC, as that would amount to hampering the investigation itself.<sup>20</sup> Applicants cannot use anticipatory bail to be blanket immunity from arrest and so courts must be careful while granting it so that its sanctity doesn't diminish.

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<sup>17</sup> Gurnam Singh v. State 1985 Cr LJ 1462 (P&H)

<sup>18</sup> *Supra* note 4 at 673.

<sup>19</sup> Ram Lal v. State of Punjab 1976

<sup>20</sup> State of Haryana v. Bhajanlal AIR 1992 SC 604

## **CHAPTER II – PRACTICE RELATING TO GRANT OF ANTICIPATORY BAIL**

The practices of court while granting anticipatory are subject to the following:

Before court can grant anticipatory bail u/s 438 CrPC, applicant must show that there has been an accusation and he has 'reason to believe' and not just 'reason to suspect' that he may be arrested of a non-bailable offence by a competent person.<sup>21</sup> Thus the consideration is from the outlook of an ordinary prudent man, which is to be examined by the court objectively since the section doesn't contemplate giving blanket immunity. Court, after overall consideration of facts and circumstances of the case, may accept/reject the prayer on merits.<sup>22</sup> Court should not leave it to the magistrate to decide since Duty is cast not to prejudice investigation and at the same time not to jeopardize individual liberty.<sup>23</sup>

The Constitution bench in *Gurbaksh Singh case* has correctly made the observation that Legislature has conferred wide discretion on the High Court and Court of sessions that "if it thinks fit, it can direct that the applicant be released on anticipatory bail" as it would be difficult for the legislature to enumerate the conditions under which anticipatory bail could be granted.<sup>24</sup> It is also of the opinion that the wide and explicit words used in S. 438 must be given their full effect and the beneficent provisions must be saved and not jettisoned.<sup>25</sup> Thus while granting anticipatory bail, in the light of facts and circumstances in the case, court may include such conditions as laid down in clauses (i) to (iv) of sub-section (2) as it may think fit.

While passing order of anticipatory bail, court has to consider the nature of accusation, the nature of evidence based on which conviction will entail, the character, behavior means and standing of the accused, the circumstances peculiar to the accused, the possibility of securing the presence of the accused at the trial, reasonable apprehension of prosecution evidence being tampered with,

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<sup>21</sup> Nandram v. State of Rajasthan 1979 CrLR 399

<sup>22</sup> Puran Singh v. Ajit Singh 1985 Cr LJ 897 (P&H)

<sup>23</sup> D.C. Pande, Criminal Law and Procedure, 15 ANNUAL SURVEY OF INDIAN LAW 169, 184(1973)

<sup>24</sup> *Supra* note 4.

<sup>25</sup> *Id.* at 678.

the larger interest of the public or the state<sup>26</sup>, likelihood of repeating similar offence, severity of likely punishment in case prosecution succeeds.<sup>27</sup>

Supreme Court in unmistakable terms has laid down that from various sections of CrPC, grant of bail is the rule and refusal is the exception.<sup>28</sup> However Public interest, though it sounds vague, has been held to be a yardstick in refusing to grant bail.<sup>29</sup> In *Samunder Singh v. State of Rajasthan*<sup>30</sup> it was observed that High Courts should not grant anticipatory bail in dowry death cases. In *Murali Dharan v. State*<sup>31</sup> bail was not granted in an accusation of death of large number of persons due to spurious liquor distilled by him.

In *Kiran Devi v. State of Rajasthan*<sup>32</sup>, *State v. Sanjay Gandhi*<sup>33</sup> it has been held that anticipatory bail should not be granted in murder case when investigation is still pending. But RL Jalappa v. Delhi Police Establishment by citing *Gurbaksh Singh case* has held to the contrary. The mere heinous nature of the offence is no ground for refusing the anticipatory bail. The higher echelons of judiciary must apply its own mind to the question and decide whether the relief can be granted or not.<sup>34</sup>

As regards procedural aspects, the jurisdiction of a court arises with reference to a non-bailable offence where the person apprehends arrest and not the court within his domicile. But a court has no jurisdiction to grant anticipatory bail to a person against whom case has been registered in another state.<sup>35</sup> Anticipatory bail application can be moved either in HC or court of sessions as both have concurrent jurisdiction. But ordinary practice is lower court should first be moved; HC can be moved in first instance only in exceptional circumstances, which petitioner must establish.<sup>36</sup>

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<sup>26</sup> Prahlad Singh v. NCT Delhi (2001) 2 LRI 636, Pokar Ram v. State of Rajasthan 1985 CrLJ 1175

<sup>27</sup> Jagannath v. State 1981 CrLJ 1808 (Bom)

<sup>28</sup> State v. Jagjit Singh AIR 1962 SC 253

<sup>29</sup> KK Jerath v. UT (Chandigarh) AIR 1998 SC 1934

<sup>30</sup> AIR 1987 SC 737

<sup>31</sup> [2001] 2 LRI 1136

<sup>32</sup> 1988 SCC (Cri) 106

<sup>33</sup> AIR 1978 SC 961

<sup>34</sup> PV RAMAKRISHNA, LAW OF BAILS 294(7<sup>th</sup> Ed., 2008)

<sup>35</sup> R.V. KELKAR, CRIMINAL PROCEDURE CODE 310(5<sup>th</sup> Ed., 2008)

<sup>36</sup> Chanda Erafpa v. State 1989 CrLJ 2045 (Kant)

Earlier judicial practice involved serving notice to Public Prosecutor before passing a final order of anticipatory bail even though ex-parte order can be passed.<sup>37</sup> Similarly there was divergence regarding presence of applicant during final hearing.

These conditions and/or practices though initiated in first instance in individual cases, being based on sound reason, logic, and rationale, have developed into customary practices before crystallizing into binding precedents many of which the amendment of 2005 has formally included in the section.<sup>38</sup> The 203rd Law Commission report's principal objection is against Sec 438(1B), where apprehension is that the suspect, present during final hearing, could be arrested as soon as Sessions Court rejects his anticipatory bail application thus denying him the right to move higher courts for relief/appeal. The Commission considers this as erosion of sanctity of anticipatory bail; similarly statutory provisions have also caused erosion which will be dealt in next chapter.

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<sup>37</sup> Balchand Jain v. State, 1977 Cr LJ 225 (SC)

<sup>38</sup> CrPC 438 (1A)(1B)



### **CHAPTER III – ROLE OF STATUTES IN RESTRAINING ANTICIPATORY BAIL**

In this chapter we look into the statutes which restrain applicability of s.438.

#### **S.C. & S.T. (PREVENTION OF ATROCITIES) ACT<sup>39</sup>**

Section 18<sup>40</sup> of the act excludes the operation of section 438 of CrPC in relation to the offence made punishable under section 3 of the Act. The constitutionality of section 18 of the Act was challenged<sup>41</sup> on the ground that it violated article 21 of the Constitution. The Court held that no violation of article 21 was involved since section 438 of CrPC was not an integral part of article 21 and the offences enumerated in section 3 of the Act are of distinct and separate class requiring different enforcement laws. The issue has to be examined in the context of social conditions prevailing and if the anticipatory bail was made available to the persons alleged to have committed such offences, there was every likelihood of misusing their liberty while on anticipatory bail to terrorize victims and to prevent a proper investigation. However even if prima facie offence is not made out, anticipatory bail can be granted<sup>42</sup>. Despite the bar of section 18, application for anticipatory bail can be entertained only when it is shown from a plain reading of F.I.R. that facts do not constitute offence under S.C. and S.T. (Prevention of Atrocities) Act.<sup>43</sup>

#### **BAIL TO ACCUSED CHARGED UNDER TADA<sup>44</sup>.**

When an accused is charged with scheduled offence under the Terrorist Affected Areas (Special Courts) Act, the High Court has no jurisdiction to grant anticipatory bail to such a person in view of section 15(4) of the Terrorist Affected Areas (Special Courts) Act.<sup>45</sup> Section 20(7) of TADA is intra vires article 14 of the Constitution in that the persons charged with the commission of Terrorist Act fall under a category which is distinct from the class of persons charged with

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<sup>39</sup> Act No. 33 of 1989

<sup>40</sup> *Id.* § 18

<sup>41</sup> State v. Ram Kishna 1995 SCC (Cri) 439

<sup>42</sup> Tharam v. State 1998 (1) Crimes 310 (Mad).

<sup>43</sup> Virendra Singh v. State 2000 Cr LJ 2899 (Raj-FB)

<sup>44</sup> Terrorist and Disruptive Activities (Prevention) Act, 1985

<sup>45</sup> Terrorist Affected Areas (Special Courts). Act, 1992

commission of offences under the I.P.C. or other statutes. Anticipatory bail can be denied in such a case. Providing the benefit of anticipatory bail to “terrorists and disruptionists” would defeat the purpose for which the provision on anticipatory bail was recommended by the law commission as crime of terrorism cannot be treated in the same way as other crimes.<sup>46</sup>

Section 438 does not apply to enable grant of anticipatory bail to a person apprehending arrest for a contravention of the Defence of India Rules, 1971 or orders made therein, because section 438 is superseded by rule 184 of the D.I.R.<sup>47</sup> The conditions required by rule 184 must be impliedly imported in section 438 while the court exercises its power under section 438 in offences contemplated by rule 184.

#### **OMISSION OF S.438 IN UTTAR PRADESH**

The state Legislature repealed Section 438 through an amending act in 1976 during the Emergency.<sup>48</sup> The reason for omitting the provision was that the High Court had been interfering in the FIR and the arrest procedures of the police.<sup>49</sup> The Supreme Court in *Som Mittal v State*<sup>50</sup> has said that in the absence of a provision for anticipatory bail, the Allahabad High Court has to deal with a large number of writ petitions for stay or arrest or quashing of complaints under the extraordinary jurisdiction of High Courts under section 482 of the CrPC which is unnecessarily increasing the work load of court and adding to the arrears, apart from the hardship to the public, and overcrowding in jails.

The West Bengal CrPC Act<sup>51</sup> lays down special guidelines with respect of anticipatory bail, that the court has to dispose of application within thirty days and final order would not be given without giving seven days notice to State to present its case.

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<sup>46</sup> Kartar Singh v. State of Punjab 1994 (3) SCC 567

<sup>47</sup> State v. Shantilal, 1976 Cr LJ 256 (MP).

<sup>48</sup> U.P. Act No. 16 of 1976.

<sup>49</sup> Law Commission of India, REPORT NO 154(II): The Code of Criminal Procedure, 1973.

<sup>50</sup> AIR 2008 SC 1126

<sup>51</sup> W.B. Act 25 of 1990

The recent Communal Violence bill<sup>52</sup> drafted with the aim to check communal violence has made no provision for anticipatory bail and is being criticized for the same as there would be false FIRs.

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<sup>52</sup> Prevention Of Communal And Targeted Violence (Access To Justice And Reparations) Bill, 2011

## CONCLUSION

The discretion which has been wisely conferred on the courts in matters of granting of anticipatory bail is indeed wide and it cannot be reduced to straitjacket formula. “..no hard and fast rules can be laid down in discretionary matters like the grant or refusal of bail.”<sup>53</sup>

Thus there are varying standards, ambiguities and loopholes in the law which results in misuse of its advantage by undeserving persons. At the same time there has been erosion of its sanctity by some inconsistent judgements and legislations having a deleterious impact on justice. The balance of personal liberty and societal impact has always been tough which courts should strive to achieve

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<sup>53</sup> *Supra* note 4 at 580

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