

THE CONCEPT OF ANTICIPATORY BAIL IN
INDIA: WHETHER RIGHT OF AN ACCUSED OR DISCRETION
OF THE COURT

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Abstract

The concept of anticipatory bail is based on the proverb of “Prevention is better than cure”, which can be interpreted in case of anticipatory bail as, “an opportunity of taking prior measures to save oneself” from any undesirable legal proceedings. Anticipatory bail is a right given to an individual keeping in mind Article 21 of the Constitution of India, which talks about the fundamental right to “life and personal liberty”. The purpose of the study is to know whether the grant of anticipatory bail is a right of an accused or it is a matter of discretion of court. The Code of Criminal Procedure provides emphasis on anticipatory bail because, it has provided by the court in case of non-bailable offences to the person apprehended of an arrest, believing that the accused has been falsely implicated. The benefit on anticipatory bail can be availed by any person after making an application for the same in any Court of Session or in the High Court. The anticipatory bail is granted by competent court for limited period of time, which protects the fundamental right of an accused on being wrongly harassed or humiliated against the grudges and disputes of the complainant. The author is of the view that, anticipatory bail is a matter of both Constitutional and criminal procedural law where the accused is governed by Article 21 of the Constitution of India for enjoying his rights and on the other hand it is the discretionary power of the court whether they deemed the application of the person accused to be acceptable or not, for the sake of natural justice.

KEYWORDS - Anticipatory bail, Right of accused, Liberty of Individual, Power of court.

Introduction

The Code of Criminal Procedure signifies bail, as a process of releasing any person from custody, who is an accused for some offence after taking of security or surety, ensuring the future presence of that person before the court, whenever required. The basic presumption of the court before granting the bail is that the accused person will be present for the trial and will remain within the jurisdiction of the court till the final disposal of the case. Section 436 of CrPC provides that the bail is the right of an accused in case of bailable offences whereas Section 437 ensures the provision of bail in case of non-bailable offences. The granting of bail is based on the will of the court after analysing the nature and conditions during the commission of an offence. Section 438 provides bail in case of non-bailable offences on apprehension of arrest and termed it as, Anticipatory bail. At the time of enactment of code of criminal procedure, 1898, there was no specific provision related to anticipatory bail in it. The concept of anticipatory bail is synonymous with the principles of fundamental right and provides right to life and personal liberty to every citizen irrespective of the fact that the person is an accused. Thus, anticipatory bail take cares of an accused person from unnecessary detention or restraint and spares the person of undue strains on his personal freedom and reputation.

Evolution of concept of bail in India

The concept of bail can be traced back to 399 B.C., when the Greece Philosopher Plato filled an application of bail for his teacher Socrates and created a bond for release of his teacher. The modern system of bail evolved from England. In the circuit courts structural system, the number of cases was very high due to which, the accused has to wait for months for their trial in unhygienic and unhealthy conditions due to which government was compelled to release the accused persons by securing surety, which remain forfeited in case of non-availability of the accused.

During the Mughal rule, traces have found regarding the institution of anticipatory bail. Under Mughal law, the principle of 'justice delayed is justice denied' can be seen where an interim release could be initiated by the

consideration that if justice is denied in any case then the judge himself needs to bear the losses sustained by the aggrieved party due to such delay.

The British common law system has also shown the practice of bail. In that system of law, two forms of bails was prevailed for release of a person in custody, known as muchalka and zamanat. After the changed status of British India to an Independent Republic India, administrators of law and justice are mandated to function in a manner that the constitutional equilibrium between the 'freedom of person' and the 'interests of social order' are maintained effectively¹.

The Code of Criminal Procedure, 1898 had not mentioned anything in regards to anticipatory bail and there was no provision corresponding to section 438 of the code but the law commission in its 41st report, introduced the concept of anticipatory bail, enabling the High Court and Court of Session to grant the anticipatory bail.

Need for anticipatory bail

The concept of anticipatory bail has closely connected with the Human rights and due to these connections, the law enforcement agencies are facing one of the biggest challenges i.e., non-confinement or detainment of a person till his guilt has not proved. The bail mechanism has therefore, introduced a new dimension in it, known as anticipatory bail. The Law Commission when introduced the provision of anticipatory bail viewed that "the necessity for granting anticipatory bail arises mainly because sometimes influential persons try to implicate their rivals in false cases for the purpose of disgracing them or for other purposes by getting them detained in jail for some days². The commission's view is based on the principle that the anticipatory bail could be an answer to situation which correspond to tortious wrong of malicious prosecution, abuse of legal process, false imprisonment and the like³. The growth of the law of torts in India was unable to provide remedial actions

¹ D. C. Pandey, *The bail system*, available at <http://14.139.60.114:8080/jspui/bitstream/123456789/671/9/The%20Bail%20System.pdf>, visited on 23/06/2018.

² S. K. Verma, *Anticipatory Bail: A necessity or Anomaly*, available at <http://14.139.60.114:8080/jspui/bitstream/123456789/673/8/Anticipatory%20Bail%20a%20Necessity.pdf>, visited on 25/06/2018.

³ Ibid.

particularly in the wake of accentuated political rivalry, which has been increasing steadily putting an unnecessary strain on the machinery of criminal justice system.

Recommendations of Law Commission on anticipatory bail

The Code of Criminal Procedure, 1898, did not contain any specific provision similar to present Section 438 due to which there were different opinions of different High Courts of States on the question as to whether Courts had the inherent power to pass an order of bail in anticipation of arrest or not.

The history of the provision reveals that the Joint Select Committee of Parliament had initiated a thought, that bail should be made available in anticipation of arrest so that liberty of an individual may not be unnecessarily jeopardized⁴. The matter when referred to the Law Commission for consideration, it was enthused and formulated a draft provision to provide bail in anticipation of arrest which ultimately got enacted as Section 438 of the code and also said that it could be a useful contribution for the protection of rights of a person accused.

The Law Commissioners in its 41st Report dated 24th, September, 1969 pointed out the necessity of introducing the provision of anticipatory bail by High Courts and Court of Session for granting of bail. The commission in its report in Para 39.9(Volume I) observed – The suggestion for directing the release of a person on bail prior to his arrest, commonly known as anticipatory bail was carefully considered by them. Though there is conflict of judicial opinion about the power of a Court to grant anticipatory bail, the majority view is that there is no such power under the existing provisions of the Code.

The necessity for granting anticipatory bail arises mainly because sometimes-influential persons try to implicate their rivals in false cases for disgracing them or for other purposes by 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

⁴ Ibid.

justification to require him first to submit to custody, remain in prison for some days and then apply for bail”.⁵

The 203rd report of the law commission on Section 438 of the Code of Criminal Procedure, 1973 makes some amendment in the code and amended as the Code of Criminal Procedure (Amendment) Act, 2005.⁶ The amendments made under the code, provided factors under sub-section(1), which the court may take into consideration at the time of granting of bail⁷;

- (i) The nature and gravity of the accusation;
- (ii) The antecedents of the applicant including the fact as to whether he has previously undergone imprisonment on conviction by a Court in respect of any cognizable offence;
- (iii) The possibility of the applicant to flee from justice; and
- (iv) Where the accusation has been made with the object of injuring or humiliating the applicant by having him so arrested⁸;

Either reject the application forthwith or issue an interim order for the grant of anticipatory bail: Provided that, where the High Court or, as the case may be, the Court of Session, has not passed any interim order under this sub-section or has rejected the application for grant of anticipatory bail, it shall be open to an officer in-charge of a police station to arrest, without warrant the applicant on the basis of the accusation apprehended in such application⁹.

(1) (A) Where the Court grants an interim order under sub-section (1), it shall forthwith cause a notice being not less than seven days' notice, together with a copy of such order to be served on the Public Prosecutor and the Superintendent of Police, with a view to give the Public Prosecutor a reasonable opportunity of being heard when the application shall be finally heard by the Court.¹⁰

(1) (B) The presence of the applicant seeking anticipatory bail shall be obligatory at the time of final hearing of the application and passing of final order by the Court, if on an

⁵ *Why was the provision of anticipatory bail introduced? – Historical perspective*, the legal highness, available at <http://thelegalthighness.com/blog-post/why-was-the-provision-of-anticipatory-bail-introduced-historical-perspective/>, visited on 26/06/2018.

⁶ Law Commission of India, government of India, *annual report 2007*, available at <https://indiankanoon.org/doc/166978629/>, visited on 26/06/2018.

⁷ The Code of Criminal Procedure (Amendment) Act, 2005, available at <https://indiankanoon.org/doc/1233094/>, visited on 26/06/2018.

⁸ Section 438 of the Code of Criminal Procedure, 2005.

⁹ Ibid.

¹⁰ Ibid.

application made to it by the Public Prosecutor, the Court considers such presence necessary in the interest of justice.

Limiting the granting of anticipatory bail in India

The power of the court to grant anticipatory bail is very wide and can be exercised at any stage of investigation. The person cannot exercise his power of Section 438 only on the filing of First Information Report but can also make an application after the FIR or as long as the person is not arrested. The officer-in-charge can exercise it even after the submission of the charge sheet. In other words, as long as the person having a reasonable belief that, he might be arrested with reference to any non-bailable offence, his application for anticipatory bail can be entertained¹¹. The power of the court to grant anticipatory bail is very wide in nature and not limited by the parliament in regards the duration of the anticipatory bail. It is of a transient nature until regular bail has obtained.¹²

In *Shri Gurbaksh Singh Sibbia and others v. State of Punjab*,¹³ to hold that anticipatory bail should not be for a limited period of time but in case of *Salauddin Abdulsamad Shaikh v. State of Maharashtra*,¹⁴ the constitutional bench judgment was disregarded and had observed that orders of anticipatory bail should be of a limited duration,¹⁵ and this view is followed in a series of judgment after this case.

Acceptance of provision of anticipatory bail in India

The courts are of the view that the power to grant anticipatory bail is of exceptional nature and should be exercised only in exceptional cases and not in general cases¹⁶. It should not be granted as a matter of rule but granted only in special cases, where the Court is convinced that the person is of such a status that he would not misuse his liberty.

Due to above circumstances, some State governments have made local amendments to the code of Criminal Procedure:

¹¹ Asim Pandhya, *Practice Of Limiting The Duration Of Anticipatory Bail & Obtaining Regular Bail Within The Said Duration Uniformly In All Cases- Not Supported By Law*, available at <https://www.linkedin.com/pulse/practice-limiting-duration-anticipatory-bail-obtaining-asim-pandya>, visited on 29/06/2018.

¹² Ibid.

¹³ AIR 1980 2SCC 565.

¹⁴ 1996 AIR 1042.

¹⁵ K. M. Ashok, *Should Anticipatory Bail Be Granted For Limited Period Of Time: Issue Referred To Constitution Bench*, Blog Livelaw, available at <http://www.livelaw.in/breaking-should-anticipatory-bail-be-granted-for-limited-period-of-time-issue-referred-to-constitution-bench/>, visited on 29/06/2018.

¹⁶ *Balchand Jain vs. State of M.P.* AIR 1977 SC 366.

In the State of Uttar Pradesh, the provision of anticipatory bail is not applicable by inserting Section 9 of the criminal procedure (Uttar Pradesh) Amendment Act, 1976.

In state of Maharashtra, by the judgment of Siddharam Satilingappa¹⁷, Supreme Court has finally held and observed that Section 438 CrPC does not mention any thing about any duration to which direction on release of bail in the event of his arrest can be granted. The order granting anticipatory bail is a direction, specifically to release the accused on bail in the event of his arrest. Once such a direction of anticipatory bail is executed by the accused and he is released on bail, the concerned court would be justified in imposing conditions on him, including direction to join investigation. Once the accused is released on bail by the trial court, then it could be unreasonable to compel the accused to surrender before trial court and again apply for anticipatory bail¹⁸.

In the State of West Bengal, the substitution was made in sub-section (1) of section 438:-

(1) (a) When any person has reason to believe that he may be arrested on an accusation of having committed a non-bailable offence, he may apply to the High Court or the Court of Session for a direction under this section that in the event of such arrest, he shall be released on bail:

Provided that the mere fact that a person has applied to the High Court or the Court of Session for a direction under this section shall not, in the absence of any order by that court, be a bar to the apprehension of such person or the detention of such person in custody, by an officer-in-charge of a police station.

(b) The appropriate court shall dispose of an application for a direction under this sub-section within thirty days of the date of such application and, no final order shall be made on offence punishable with death, imprisonment for life or imprisonment for a term of not less than seven years without giving the State not less than seven days' notice to present its case.

(c) If any person is arrested and detained in custody by an officer-in-charge of a police station before the disposal of the application of such person for a direction under this subsection, the release of such person on bail by a court having jurisdiction, pending such disposal shall be subject to the provisions of section 437.

¹⁷ (2011) 1SCC 694.

¹⁸ Suresh C. Gupta, *Personal Liberty and Grant of Anticipatory Bail*, Legal India Legal news & law resource portal, available at <https://www.legalindia.com/personal-liberty-and-grant-of-anticipatory-bail/>, visited on 28/06/2018.

(1) (A) the provisions of sub-section (1) shall have effect notwithstanding anything to the contrary contained elsewhere in this Act or in any judgment, decree or order of any court, tribunal or other authority¹⁹.

In the State of Andhra Pradesh, Anticipatory bail is a misnomer as it is not bail presently granted in anticipation of arrest. When the Court grants

Anticipatory bail what it does is to make an order in the event of arrest, a person shall be released on bail²⁰.

In the State of Orissa, the proviso shall be added to sub-section (1) of section 438, which says that where the apprehended accusation relates to an offence punishable with death, imprisonment for life or imprisonment for a term of not less than seven years, no final order shall be made on such application without giving the State notice to present its case²¹.

Anticipatory Bail: Whether right under Article 21 of the Constitution of India

The purpose of incorporating Section 438 in Code of Criminal Procedure, 1973 is clear from its statement of objects and reason that it was to recognize the importance of personal liberty and freedom in a free and democratic country. The legislature was keen to ensure respect for the personal liberty and also pressed in service the age-old principle that an individual is presumed to be innocent till he is found guilty by the court²². Therefore, while determining the scope of Section 438, the court should not impose any unfair and unreasonable restriction on the individual's right to obtain an order of anticipatory bail. Therefore, it can be said that anticipatory bail cannot be claimed as a matter of right, it is essentially a statutory right conferred long after the coming into force of the Constitution. It is not an essential ingredient of Article 21 of the Constitution.²³

The Supreme Court considered the scope, power and jurisdiction to grant anticipatory bail by the High Court or the Court of Sessions first time in case

¹⁹ *Sec 438-Direction for grant of bail to person apprehending arrest*, Blog Legal services India, available at <http://www.legalserviceindia.com/issues/topic1087-sec-438-direction-for-grant-of-bail-to-person-apprehending-arrest.html>, visited on 30/06/2018.

²⁰ Madhubala, *Anticipatory Bail*, available at <http://www.legalserviceindia.com/legal/article-41-anticipatory-bail.html>, visited on 28/06/2018.

²¹ Ibid 19.

²² Justice Dalveer Bhandari, *Anticipatory Bail: scope, ambit and purpose*, Legal Blog, available at <http://www.legalblog.in/2011/12/anticipatory-bail-scope-ambit-and.html>, visited on 27/06/2018.

²³ *Anticipatory Bail: Legal provisions*, available at http://shodhganga.inflibnet.ac.in/bitstream/10603/7790/12/12_chapter%206.pdf, visited on 27/06/2018.

of Gurbaksh Singh Sibbia VS. State of Punjab²⁴ and said that Section 438 is a procedural provision which is concerned with the personal liberty of the individual, who is entitled to the benefit of the presumption of innocence since he is not, on the date of his application for anticipatory bail, convicted of the offence in respect of which he seeks bail. In the case of Rajendra Singh vs. State, the court reiterated the solemn object of Section 438 CrPC i.e., to prevent undue harassment of accused persons by pre-trial arrest and detention. In case of Manoj Agrawal vs. State of Chhattisgarh²⁵, the court held that anticipatory bail cannot be granted as a matter of right nor should it be lightly granted. In offences like murder, dowry death, for example, which are punishable with death or imprisonment for life and for imprisonment which may extend to life, anticipatory bail ought not to be granted unless some very compelling circumstances are made out.

The balance between rights to liberty as defined under the Constitution of India as well as the principles of law in so far as commission of Non-Bailable offences is concerned. The Hon'ble Supreme Court in a matter²⁶ has observed that "Liberty is to be secured through process of law, which is administered keeping in mind the interests of the accused, the near and dear one's of the victim who lost his life and who feel helpless and believe that there is no justice in the world as also the collective interest of the community so that parties do not lose faith in the institutions and indulge in private retribution".

Inherent power of high court at the time of granting of bail

Inherent powers are those powers which are not subject to being taken away from courts and may be used by a court to do complete and satisfied justice between the parties before it²⁷.

Section 482 of CrPc provides inherent power to the High Court for three purposes:

- i. To give effect to any order, given under this Code.
- ii. To prevent abuse of the process of any Court.

²⁴ Supra 13.

²⁵ 2003 Cri LJ 3519 at p. 3522 (Chhattisgarh).

²⁶ Shahzad Hasan Khan v. Ishtiaq Hasan Khan(1987 2SCC 684).

²⁷ Anubhav Pandey, *Inherent powers of Supreme Court, High Court, Civil Court and Criminal Court*, Blog ipleader, <https://blog.ipleaders.in/inherent-powers-supreme-court-high-court-civil-court-criminal-court/>, visited on 02/07/2018.

- iii. To secure the ends of justice
- iv. According to the Section 482, it does not confer new powers on the High Court but only provides those powers which the Court already inherently possessed are preserved. The basic purpose of the inherent powers of High Court has designed to achieve a public purpose, which through Court proceedings, ought not to be permitted to degenerate into a weapon of harassment or persecution²⁸.
- v. For the granting of bail in cases of non-bailable offences also, the person is entitled to his liberty as a matter of his right, which cannot be infringed or taken away by the court in a superficial manner. The code of Criminal Procedure provides the provision of further investigation in the cases where there will be changes to prove the guilt of the accused and such person should be enlarged on bail for that period of time. It is an acceptable principle that, on the basis of reasonable grounds for believing that the accused person is guilty of commission of a Non-Bailable offence, in such case the accused person should be released on Bail²⁹.
- vi. In the Criminal justice system, it is necessary to appreciate that there is no specific rule as to when Bail should be granted or where it should not be granted. It has been the view of the courts that where a Non-Bailable offence is not punishable with life imprisonment or with death sentence, Bail should generally be granted and liberty of an accused should not be compromised with³⁰.

Case law

Gurubaksh Singh Sibbia vs. State of Punjab

In this case, the court laid down the following clarifications on certain points, which had given rise to misgivings:-

- (i) Mere fear of arrest cannot amount to reasonable belief. The person applying for anticipatory bail should have reason to believe that, he will be arrested.
- (ii) The High Court and the Court of Session must apply their mind with care and circumspection and determine whether the case for anticipatory bail is made out or not.
- (iii) Filing of FIR is not a condition precedent to the exercise of power under Section 438.

²⁸ Someshwar Sawale, *Inherent Powers of the High Court under section 482 of Code of Criminal Procedure*, <http://www.shareyouressays.com/knowledge/inherent-powers-of-the-high-court-under-section-482-of-code-of-criminal-procedure/117954>, visited on 03/07/2018.

²⁹ Jayashree Shukla Dasgupta & Swati Sharma, *India: Power Of Courts To Grant Bail In Non-Bailable Offences*, <http://www.mondaq.com/india/x/684312/Crime/Power+of+Courts+to+Grant+Bail+in+NonBailable+Offences>, visited on 03/07/2018.

³⁰ Ibid.

- (iv) Anticipatory bail can be granted even after the filing of FIR.
- (v) Section 438 cannot be applied after arrest.
- (vi) No blanket order of anticipatory bail can be passed by any Court.

In respect of non-bailable offences, to successfully invoke the jurisdiction under section 438, the applicant while satisfying the conditions under section 437 must prove that the charge leveled against him is malafide and stems from ulterior motive.

Conclusion

The word 'anticipatory bail' is neither found in Section 438 nor in the marginal note of the Code of Criminal Procedure. When the court grants anticipatory bail, what it does is to make an order that in the event of arrest a person shall be released on bail. Manifestly, there is no question of release on bail unless a person is arrested and, therefore, it is only upon arrest that an order granting anticipatory bail becomes operational. The expression of anticipatory bail is a convenient mode of conveying that it is possible to apply for bail in anticipation of arrest³¹.

The Statement of Objects and Reasons given under CrPC, made the purpose of incorporating Section 438 and the wisdom of legislature clear, that the section has inserted to recognize the importance of personal liberty and freedom in a free and democratic country and also pressed in service the age-old principle that an individual is presumed to be innocent till he is found guilty by the court³². The working of section 438 has been criticized in the way that it may hamper effective investigation of serious crimes. The anticipatory bail is mainly granted against the false accusation but there are conditions where the person lodges true complaints and on granting of anticipatory bail, the accused may misuse their freedom to criminally intimidate and even assault the witnesses and tamper with valuable evidence.

According to this research, the author reached on the conclusion that bail in case of non-bailable offences is both, a matter of right and liberty of individual and also a discretion of the court as different cases have been found, where it has been held that the granting of bail in case of non-bailable offences is a matter of right but instances are there which says that it is a settled principle of discretionary power of the court.

³¹ *Anticipatory bail*, available on http://shodhganga.inflibnet.ac.in/bitstream/10603/132496/12/12_chapter%206.pdf, visited on 25/06/2018.

³² Ibid 5.

Anticipatory bail is a device to secure the individual's liberty and it is neither a passport to the commission of crimes nor a shield against any kinds of accusation. So, it should be granted only to the people who actually deserve it and keeping in mind the various guidelines laid down by Supreme Court in different cases³³.



³³ Ajay Thakur, *what are the laws relating to anticipatory bail in India*, Blog iPleaders, available at <https://blog.ipleaders.in/laws-related-anticipatory-bail-india/>, visited on 28/06/2018.