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# **PRE-ARREST BAIL (ANTICIPATORY BAIL)**

AUTHORED BY - ANU JAISWAL

## **• PRE-ARREST BAIL:**

Pre-Arrest Bail, also commonly known as **Anticipatory Bail**, is sought when there is a mere apprehension of arrest on the accusation that the applicant has committed a non-bailable offence. When the court grants 'anticipatory bail', it makes an order that in case a person is arrested, he shall be enlarged on bail. The question of release on bail does not arise unless a person is arrested and it is only when the person is arrested that the order granting "anticipatory bail" becomes effective."

## **PURPOSE:**

The basic purpose of the pre-arrest or anticipatory bail is to prevent false implication of the person and his consequent humiliation. It is to "prevent undue harassment of the accused persons by pre-trial arrest and detention.

**DISTINCTION BETWEEN REGULAR BAIL & ANTICIPATORY BAIL** The former is granted after arrest and therefore means release from the custody of the police, the latter is granted in anticipation of arrest and is therefore effective at the very moment of arrest.

**Section 482 BNSS (Section 438 Cr.P.C.)** deals with the provision of **Direction for grant of bail to person apprehending arrest**. It provides that "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; and that Court may, if it thinks fit, direct that in the event of such arrest, he shall be released on bail."

## **CONDITIONS FOR ANTICIPATORY BAIL**

**Section 482(2) BNSS** provides for the court, while granting anticipatory bail, may impose certain conditions, such as:

- (i) a condition that the person shall make himself available for interrogation by a police officer as and when required;

- (ii) a condition that the person shall not, directly or indirectly, make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to any police officer;
- (iii) (iii) a condition that the person shall not leave India without the previous permission of the Court;
- (iv) such other condition as may be imposed under sub-section (3) of section 480, as if the bail were granted under that section.

### **BAIL ON ARREST**

**As per Section 482(3) BNSS**, if the person is arrested without a warrant after the Court has directed anticipatory bail, they should be released on bail when they offer it. If a Magistrate decides a warrant should be issued, he shall issue aailable warrant in conformity with the direction of the Court under sub-section (1).

### **EXCEPTIONS**

**Section 482(4) BNSS**, this section does not apply to cases involving offenses under Section 65 or Section 70(2) of the Bharatiya Nyaya Sanhita, 2023.

### **NOTE: •**

Section 65 BNS pertains to Punishment for rape in certain cases (rape of a woman under sixteen years of age and rape of a woman under twelve years of age).

Section 70(2) BNS relates to Punishment for Gang Rape of a woman under eighteen years of age.

### **ANALYSIS:**

“Reason to believe”

Section 438(1) lays down a condition, which has to be satisfied before anticipatory bail can be granted. The applicant must show that he has "reason to believe" that he may be arrested for a non-bailable offence.

**The Supreme Court in Gurbaksh Singh Sibbia v State of Punjab AIR 1980 SC 1632, 5 Judges bench held that “Mere 'fear' is not 'belief', for which reason it is not enough for the**

applicant to show that he has some sort of a vague apprehension that someone is going to make an accusation against him, in pursuance of which he may be arrested. The use of the **expression "reason to believe" shows that the belief that the applicant may be so arrested must be founded on reasonable grounds."**

**Therefore**, the grounds on which the belief of the applicant is based that he may be arrested for a non-bailable offence, must be capable of being examined by the court objectively, because it is then alone that the court can determine whether the applicant has reason to believe that he may be so arrested. Therefore, **this provision cannot be invoked on the basis of vague and general allegations**, as if to arm oneself in perpetuity against a possible arrest.

### **Whether registration of FIR is necessary for seeking Anticipatory Bail?**

The Apex Court in the **case of Gurbaksh Singh Sibbi's**, had further laid down that the filing of a First Information Report is not a condition precedent to the exercise of the power under Section 438 Cr.P.C. The imminence of a likely arrest founded on a reasonable belief can be shown to exist even if an F.I.R. is not yet filed. Anticipatory bail can be granted even after an F.I.R. is filed, so long as the applicant has not been arrested.

**No Blanket Order** Another important aspect clarified by the SC in **Gurbaksh Singh Sibbia's Case** was that a "blanket order" of anticipatory bail should not generally be passed. •

- A blanket order is to the effect that the applicant shall be released on bail "whenever arrested for which ever offence whatsoever". It is basically an order which serves as a blanket to cover or protect any and every kind of allegedly unlawful activity, in fact any eventuality, likely or unlikely regarding which, no concrete information can possibly be had.
- The appellant seeking an anticipatory bail has to show that he has "reason to believe" that he may be arrested. A belief can be said to be founded on reasonable grounds only if there is something tangible to go by on the basis of which it can be said that the applicant's apprehension that he may be arrested is genuine.
- Thus, specific events and facts must be disclosed by the applicant in order to enable the court to judge of the reasonableness of his belief, the existence of which is the sine qua non of the exercise of power conferred by the section.



## CAN ANTICIPATORY BAIL BE GRANTED FOR A LIMITED PERIOD?

In **Sushila Aggarwal and Others v. State (NCT of Delhi) 2020 SC: 5 Judges Bench**, the Court framed two important questions that required to be answered to settle the law on the issue:

- i. **“Whether the protection granted to a person under Section 438 of the CrPC should be limited to a fixed period so as to enable the person to surrender before the Trial Court and seek regular bail?”**

As far as the first question was concerned, the five-judge bench of the SC held that the **protection under section 438 should not invariably be limited to a fixed period; it should inure in favour of accused without any restriction on time.** Normal restrictions under section 437(3) read with section 438(2) ought not to be imposed unless the specificity of the case required imposition of special conditions.

- ii. **“Whether the life of an anticipatory bail should end at the time and stage when the accused is summoned to the court?”**

With respect to the second question, the court held that the life of an anticipatory bail order would normally continue till the end of the trial. **Ordinarily anticipatory bail would continue after the filing of the charge sheet till the end of the trial.** The Court also held that the life of the order granting bail under section 438 cannot be curtailed, **though the Court which has granted such a bail, has a right to cancel it.**

## Supreme Court Directs All High Courts To Expediently Decide Bail Applications

In **Rajanti Devi vs. The Union of India 2024 LiveLaw (SC) 50**, delay caused by the Patna High Court in rendering a judgment on an anticipatory bail application came into light. The bail application was heard by a single-judge bench of the High Court and was reserved for orders on 07.04.2022. However, the bench released the judgment almost after one year.

The Supreme Court in a recent order directed all the courts to scrupulously follow the directions/guidelines issued by it for the expeditious delivery of judgments and disposal of the bail applications.

The Court further took reference of its judgment of **Anil Rai Vs. State of Bihar, 2001, SC** where the Court had **issued directions for the expeditious delivery of judgments**, which are as under:

- **Mention of Dates:** Chief Justices may issue appropriate instruction the Registry to include, on the first page of judgments, the dates of reserving and date of pronouncing the judgment.
- **Monthly Reports:** Court Officers/Readers must submit monthly reports listing cases where judgments were reserved but not pronounced within that month.
- **Action after Two Months:** If a judgment is not pronounced within two months of concluding arguments, the Chief Justice should notify the concerned Bench and may circulate a list of delayed cases to the Judges confidentially.
- **Application after Three Months:** If the judgment is delayed beyond three months, any party can file an application for an early pronouncement, and it should be listed before the concerned Bench within two days.
- **Transfer after Six Months:** If the judgment is still pending after six months, parties can request the Chief Justice to transfer the case to another Bench for fresh arguments. It is open to the Chief Justice to grant the said prayer or to pass any other order as he deems fit.

Moreover, the court has referred to its another decision in the **case of Satendra Kumar Antil Vs. Central Bureau of Investigation and Anr 2023 LiveLaw (SC) 233**, wherein the court directed that bail applications should generally be resolved within two weeks unless specific provisions require otherwise. Similarly, **anticipatory bail applications should be disposed of within six weeks, barring any intervening applications.**

### **Bail Condition Enabling Police To Constantly Track Movement of Accused Can't Be Imposed**

In **Frank Vitus vs. Narcotics Control Bureau 2024 LiveLaw (SC) 441**, a bench of Justice Abhay S Oka and Justice Ujjal Bhuyan was examining whether a bail condition requiring an accused to drop a pin on Google Maps for the investigating officer to access his location violates a person's right to privacy.

In 2022, the High Court had ordered the accused and a co-accused to place a pin on Google Maps so their whereabouts would be visible to the Investigating Officer. Additionally, the High Court had directed the accused to obtain a certificate from the Nigerian High Commission confirming they would not leave India and would appear before the trial court.

While hearing the matter, the **Supreme Court held** that there cannot be a bail condition that enables the police to constantly track the movements of the accused and virtually peep into the privacy of the accused. The object of the bail condition cannot be to keep a constant vigil on the movements of the accused enlarged on bail. The investigating agency cannot be permitted to continuously peep into the private life of the accused enlarged on bail, by imposing arbitrary conditions since that will violate the right of privacy of the accused, as guaranteed by Article 21. If a constant vigil is kept on every movement of the accused released on bail by the use of technology or otherwise, it will infringe the rights of the accused guaranteed under Article 21, including the right to privacy.

#### **ISSUE-**

**Whether anticipatory bail can be granted when the accused is arrested in another case?-**

**YES**

**In Dhanraj Aswani vs. Amar S. Mulchandani & Anr. (2024) SC**, the Supreme Court held that an accused already in custody in connection with one case can apply for anticipatory bail in connection with another case.

No restriction can be read into Section 482 of BNSS (Section 438 of the CrPC) to preclude an accused from applying for anticipatory bail in relation to an offence while he is custody in a different offence, as that would be against the purport of the provision and the intent of the legislature. While a person already in custody in a particular offence apprehends arrest in a different offence, then the subsequent offence is a separate offence for all practical purposes. Then it would necessarily imply that all rights conferred by the statute on the accused as well as the investigating agency in relation to the subsequent offence are independently protected. Therefore, an accused is entitled to seek anticipatory bail in connection with an offence, so long as he is not arrested in relation to that offence. Once he is arrested, the only remedy available to him is to apply for regular bail.

#### **ISSUE-**

**Can Anticipatory Bail Be Granted To Proclaimed Offender?**

**In State of Haryana v. Dharamraj, (2023) SC** held that anticipatory bail can be granted to a person to a proclaimed offender only in an exceptional and rare case.

**Referring to Mahipal v. Rajesh Kumar alias Polia (2020) SCC 118**, the court observed that “the considerations that guide the power of an appellate court in assessing the correctness of an order granting bail stand on a different footing from an assessment of an application for the cancellation of bail. The correctness of an order granting bail is tested on the anvil of whether there was an improper or arbitrary exercise of the discretion in the grant of bail. The test is whether the order granting bail is perverse, illegal or unjustified. On the other hand, an application for cancellation of bail is generally examined on the anvil of the existence of supervening circumstances or violations of the conditions of bail by a person to whom bail has been granted.”

**In State of Madhya Pradesh v. Pradeep Sharma (2014) 2 SCC 171**, the SC had clearly held that a proclaimed offender would not be entitled to anticipatory bail. Of course, in an exceptional and rare case, this Court or the High Courts can consider a plea seeking anticipatory bail, despite the applicant being a proclaimed offender, given that the Supreme Court and High Courts are Constitutional Courts.

**Recently, in Srikant Upadhyay & Ors. Vs. State of Bihar & Anr. (2024)**, the SC reiterated that an accused would not be entitled to pre-arrest bail if the nonbailable warrant and the proclamation under Section 82(1) Cr.P.C. is pending against him.

#### References:-

- **Durga Das Basu's Crpc**
- **RatanLal & Dhirajlal Crpc**
- **Bare Act by Professionals**
- **SC Sarkar's Code of Criminal Procedure**
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