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IJLRA

# Anticipatory Bail In India

*Authored By- Sayani Pal*

## INTRODUCTION

Our right to liberty, which is a fundamental and inherent right, gives us the power to request bail. When the Code of Criminal Procedure was revised in 1973, Section 438<sup>1</sup> provision for anticipatory bail was added. In its 41st report, the Law Commission of India suggested including a provision for anticipatory bail.

According to the report, "The need for anticipatory bail arises mostly because occasionally powerful people try to incriminate their competitors in fabricated cases in order to disgrace them or for other goals by getting them imprisoned in jail for a few days... Except for blatant cases, it doesn't seem justified to compel someone facing charges to first submit to custody, spend some time in jail, and then seek bail if there are good reasons to believe they won't flee or otherwise abuse their freedom while out on bail.

### What is Anticipatory bail ?

Section 438(1)<sup>2</sup> of the Code of Criminal Procedure, 1973, reads: "When any person has reason to believe that he may be arrested on an accusation of having committed a non-bailable offense, 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."

A procedural rule called Section 438<sup>3</sup> is concerned with protecting each person's personal freedom. As opposed to standard bail, anticipatory bail allows a person to be freed on bond even before they are arrested. In *Gurbaksh Singh Sibia vs the State of Punjab*,<sup>4</sup> a five-judge Supreme Court bench led by then Chief Justice Y V Chandrachud ruled that S. 438 (1) is to be interpreted

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<sup>1</sup> Code of Criminal Procedure ,section 438.

<sup>2</sup> Section 438(1) of the Code of Criminal Procedure, 1973.

<sup>3</sup> *Supra* note 1.

<sup>4</sup> *Gurbaksh Singh Sibia vs State Of Punjab* on 13 September, 1977.

in the light of Article 21 of the Constitution (protection of life and personal liberty). It was observed by the Hon'ble Court, "It may perhaps be right to describe the power (of anticipatory bail) as of an extraordinary character. But this does not justify the conclusion that the power must be exercised in exceptional cases only, because it is extraordinary. We will be saying once too often that all discretion has to be exercised with care and circumspection depending on circumstances justifying its exercise."

## EMPOWERMENT OF COURTS

When an arrest occurs, the High Courts and Court of Sessions ("Courts") in India have the authority to issue an Order granting anticipatory bail. If unusual circumstances warrant applying for anticipatory bail in the High Court, the applicant must often first go before the Court of Sessions.

If the applicant has already been arrested for the same charge or has voluntarily surrendered to the trial court concerning the same charge, the application for anticipatory bail cannot be maintained. The applicant is free to go to the courts under whose authority he anticipates being arrested. The fact that the alleged offense was committed outside of these courts' purview is irrelevant. Even if the courts lack the necessary geographical jurisdiction, they may nonetheless grant anticipatory bail for a brief period with proper safeguards for filing a claim with the court that has the authority to hear the application after taking all relevant facts and circumstances into account.<sup>5</sup>

## DISCRETION OF COURTS TO GRANT ANTICIPATORY BAIL

In India, anticipatory bail is typically used sparingly and carefully in the right situations. Some situations when anticipatory bail may be granted include:

- A special case has been established, indicating that there are good grounds to suspect that the applicant may be detained without justification.
- The claims have been made with the desire to harm or humiliate the applicant and have him detained, or with dishonest intent.
- The claims against the Applicant are of vague or generic nature.

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<sup>5</sup> Code of Criminal Procedure , 1973.

- The name of the accused is not mentioned in the First Information Report
- The applicant provides evidence to the court granting anticipatory bail that he comes from a reputable family, has strong ties to the community and is unlikely to flee or evade the court's process or hinder the investigation in any manner.
- If a complaint is brought against a political competitor, the complainant is a powerful person as opposed to the accused, who is a weak person.

## **REFUSAL OF ANTICIPATORY BAIL**

A Some instances under which Anticipatory Bail may be rejected are:

- The potential for the applicant to elude capture if the trial court grants cognizance or issues an arrest warrant.
- If the prima facie case with which the Applicant has been charged can be made out.
- The Applicant has previously undergone imprisonment on conviction in respect of any cognizable offence.
- Where a case can be made out that the Applicant is capable of influencing investigation to his advantage.
- When a case for a reasonable claim to secure incriminating material

The Hon'ble Supreme Court has laid out a detailed and exhaustive list of considerations, building on those in Section 438(1), relevant to determining whether to grant anticipatory bail. They are as follows: -

- The nature and gravity of the accusation and the exact role of the accused must be properly comprehended before making the arrest.
- The antecedents of the applicant include the fact as to whether the accused has previously undergone imprisonment on conviction by a court in respect of any cognizable offense.
- The possibility of the applicant fleeing from justice.
- The possibility of the accused's likelihood to repeat similar or other offenses.
- Where the accusations have been made only with the object of injuring or humiliating the applicant by arresting him or her.
- Impact of grant of anticipatory bail particularly in cases of high magnitude affecting a large number of people.

The court must also clearly comprehend the exact role of the accused in the case. The

responsibility on the court increases manifold in those cases in which the accusations have been made u/s 34 and 149 of the IPC<sup>6</sup>. While hearing the pleadings for the grant of anticipatory bail, a balance has to be maintained between two factors. Firstly, the courts need to ensure that the grant of anticipatory bail doesn't come at the expense of a free, fair, and full investigation of the matter at hand. Secondly, the courts must ensure that the accused doesn't undergo harassment, humiliation, and unjust detention.

The complainant's fear of being threatened or a reasonable suspicion that witnesses or pieces of evidence are being tampered with will both be taken into consideration by the court.

The prosecution must always be taken seriously, and the only factor that must be taken into account when deciding whether to grant bail is authenticity. If there is any remaining doubt regarding the veracity of the prosecution, the accused is normally entitled to a bail order.

## **CONDITIONS WHILE GRANTING ANTICIPATORY BAIL**

While granting anticipatory bail, the Sessions Court or High Court can impose the conditions laid down in sub-section (2), which are as follows -

The accused must be available for questioning by a police officer whenever necessary; the Accused must not, directly or indirectly, use any inducement, threat, or promise to convince a witness not to reveal the case's details to the court or to any police officer; Accused must not leave India without the court's prior approval; and any other conditions the judge deems appropriate.

## **SOME IMPORTANT ANTICIPATORY BAIL LANDMARK CASES**

Below are some important and latest case laws on anticipatory bail In *re Digendra Sarkar*,<sup>7</sup> it was held that the provision for the anticipatory bail in Section 438 of the Code applies even when there is no "First Information Report" and no case for the commission of a non-bailable offence has been registered against a person. Therefore, the filing of a "First Information Report" is not a condition precedent to the application for anticipatory bail and in such a case, the person having

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<sup>6</sup> Section 34 & 149 of Indian Penal Code .

<sup>7</sup> Re: Digendra Sarkar and Others , Decided On, 01 September 1982 , High Court of Judicature at Calcutta.

reason to believe that he may be arrested on an accusation of non-bailable offence may appear before the High Court or the Court of Session.

In *Suresh Vasudeva v. State*,<sup>8</sup> it was held that S. 438(1) of Cr.P.C. applies only to non-bailable offenses.

In *Sushila Aggarwal vs State*,<sup>9</sup> a five-judge Bench of the Supreme Court cleared the confusion over whether the protection given to a person through anticipatory bail should exist for a fixed period. The Supreme Court has held that anticipatory bail should not invariably be limited to a fixed period. But if there are any special or peculiar features necessitating the court to limit the tenure of anticipatory bail, it is open for it to do so.

Reiterating the law laid down by a Constitution Bench of the Court back in 1980 in the case of *Gurbaksh Singh Sibbia and others v. State of Punjab* (Sibbia case)<sup>10</sup>, the Supreme Court has clarified:

There is nothing in the Code of Criminal Procedure (CrPC) to indicate that the grant of pre-arrest/anticipatory bail should be time-bound.

Yet, depending on the stage at which the application for anticipatory bail is submitted, the concerned court has the authority to impose conditions for the grant of anticipatory bail, including a short period of protection.

Pre-arrest protection should often not have a time restriction attached to it.

An anticipatory bail order often lasts until the accused is called before the court. But, if there are unusual circumstances that call for them, the Court is free to impose further limitations.

## **DISTINCTION BETWEEN ORDINARY BAIL AND ANTICIPATORY BAIL**

In *Gurbaksh Singh Sibbia v. State of Punjab*,<sup>11</sup> the Supreme Court held that:-

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<sup>8</sup> Suresh Vasudeva vs State And Anr. on 5 September, 1977.

<sup>9</sup> Sushila Aggarwal vs State (Nct Of Delhi) on 29 January, 2020.

<sup>10</sup> Gurbaksh Singh Sibbia & Others. V. State Of Punjab , (1980 AIR 1632 , 1980 SCR (3) 383).

<sup>11</sup> Supra note 9.

Ordinary bail orders and anticipatory bail orders are different in that the former are given after an arrest and result in a release from police custody, whereas the latter are given before an arrest and take effect at the time of the arrest. When someone is arrested for an offense that doesn't allow for bail, police custody is a given.

An order for anticipatory bail is essentially insurance against being taken into custody by the police after being arrested for the offense or offenses for which the order is issued. To put it another way, it is a pre-arrest legal procedure that stipulates that, in contrast to a post-arrest order of bail, if the person in whose favour it is issued is subsequently arrested on the charge for which the directive is issued, he shall be released on bond.<sup>12</sup>

## CANCELLATION OF ANTICIPATORY BAIL

Although Section 439(13) does not contain an explicit clause addressing bail cancellation, it is implied that the court that granted anticipatory bail has the right to do so after giving it due consideration. Anticipatory Bail is a unique privilege given to the individual anticipating arrest and should never be misused. The High Court's inherent overriding powers give it the authority to cancel bail even in the absence of an express provision in the Code. This authority can only be used in exceptional circumstances when the High Court is convinced that the ends of justice will be compromised without taking the accused into custody.

## CONCLUSION

To avoid a person's liberty being violated, anticipatory bail was added to the Code. No one has the right to be deprived of their freedom or held without cause. Yet, the Courts should award it with the utmost caution to guard against misuse of this unique privilege. Through a string of decisions, the Hon'ble Supreme Court of India has emphasized this fact numerous times. Anticipatory bail is a tool to ensure a person's freedom; it is not a license to commit crimes or defense against any accusations, likely or improbable.

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<sup>12</sup> *Supra* note 9.

<sup>13</sup> Section 439 of CrPC .