

**ANTICIPATORY BAIL AND ITS APPLICATION IN INDIA UNDER CRIMINAL PROCEDURE
CODE**

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ABSTRACT

‘Anticipatory Bail’ a word widely used in parlance of litigation but which does not owe its origin to a statute. Neither section 438 of Cr.P.C nor its marginal note so describes it but, the expression ‘anticipatory bail’ is a convenient mode of conveying that it is possible to apply for bail in anticipation of arrest. In fact ‘anticipatory bail’ is a misnomer. It is not a bail presently granted by the Court in anticipation of arrest. When the court grants anticipatory bail it means is that in event of arrest the person shall be released on bail. The conflict of judicial opinion whether a High Court had inherent powers to make an order of bail in anticipation of arrest and the need to curb the acts of, influential persons trying 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 days were the necessities, carved out by Law Commission of India in its 41st Report to introduce provision relating to Anticipatory bail. The Law Commission in its 48th Report in the year 1972 recommended acceptance of suggestion. The object of Section 438 is to prevent undue harassment of the accused persons by pre-trial arrest and detention.

Keywords: *Anticipatory Bail, Criminal Procedure Code (Cr.P.C), Commission, Discharge, Orders.*

INTRODUCTION

The expression 'anticipatory bail' has not been defined in the Code and is a misnomer inasmuch as, it is not as if bail presently granted in anticipation of arrest. Where a competent court grants 'anticipatory bail', it makes an order that in the event of arrest, a person shall be released on bail. The power of granting 'anticipatory bail' is extraordinary in character and only in exceptional cases where it appears that a person is falsely implicated or a frivolous case is launched against him or "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", such power is exercised. Therefore, the power being 'unusual in nature' is entrusted only to the higher echelons of judicial service, i.e. a Court of Session and a High Court.

An order of anticipatory bail constitutes, an insurance against police custody following upon arrest for offence or offences in respect of which the order is issued. In other words, unlike a post-arrest order of bail, it is a pre-arrest legal process which directs that if the person in whose favor it is issued is thereafter arrested on the accusation in respect of which the direction is issued, he shall be released on bail. Section 46(1) of the Code of Criminal Procedure which deals with how arrests are to be made, provides that in making the arrest, the police officer or other person making the arrest "shall actually touch or confine the body of the person to be arrested, unless there be a submission to the custody by word or action". A direction under section 438 is intended to confer conditional immunity from this 'touch' or confinement.

The distinction between an ordinary order of bail and an order of anticipatory bail is that whereas the former is granted after arrest and thus 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. Police custody is an inevitable concomitant of arrest for non-bailable offences. The grant of "anticipatory bail" to an accused who is under arrest involves a contradiction in terms, in so far as the offence or offences for which he is arrested, are concerned. After arrest, the accused must seek his remedy under Section 437 or Section 439 of the Code, if he wants to be released on bail in respect of the offence or offences for which he is arrested.

AIM OF THE STUDY

The Researchers in this research note make a humble attempt to study about Sec 438 of Cr.P.C implemented in India in the course of granting anticipatory bail. To interpret Sec 438 of Cr.P.C and that of Right to personal liberty. To examine the reasons for granting anticipatory bail to even criminals who perpetrated heinous crimes. To examine the question of Right to personal liberty v/s. Right to victim in deciding anticipatory bail in India.

METHODOLOGY

The researcher has used the descriptive and analytical methodology. Secondary sources such as books, articles and various e-sources have been referred for this study.

JURISDICTION

The High Court and a Court of Session, have concurrent jurisdiction to grant anticipatory bail. There has been a judicial conflict as regards to the Court competent to grant anticipatory bail, when the place of commission of offence and the place of apprehension of arrest lie within two different states but the dictum accepted by majority of the High Courts is that that, a court of Session or the High Court having jurisdiction over the local commission of offence can only grant anticipatory bail. The High Courts of Rajasthan, Madhya Pradesh, Gujarat and Delhi have been firm on the legal position that a court within whose jurisdiction a person apprehends arrest for a non-bailable offence is competent court to grant anticipatory bail and a court has no jurisdiction to grant anticipatory bail to the petitioner against whom a case has been registered in another state. The Kerala High Court has also held that an arrest made outside the State will not be protected by an order under Section 438 unless the offence itself is alleged to have committed within the state'. Whereas on the other hand, the Bombay High Court has taken a contrary view and held that if the offence is committed in one state but arrest is expected in another State, the High Court in the latter state can entertain application for anticipatory bail. The unique stand taken by the High Court of Karnataka and Gujarat regarding the same appears to be more suitable interpretation wherein it was held that: "Sec 438 Cr.P.C. provides relief to the person apprehending arrest even though the court may not have jurisdiction to deal with the offence. He can seek relief in the court within whose jurisdiction he ordinarily resides. Anticipatory bail of limited duration can be granted with a direction to the petitioner to approach the court concerned. Thus an application under Sec 438 should be finally decided by only the court within whose jurisdiction the alleged offence has been committed."

CONSIDERATIONS TO EXERCISE DISCRETION

The Courts have felt that wide discretionary power conferred by the Legislature on the higher echelons in the criminal justice delivery system cannot be put in the form of strait-jacket rules for universal application as the question whether to grant bail or not depends, for its answer upon a variety of circumstances, the cumulative effect of which must enter into the judicial verdict. A circumstance which, in a given case, turns out to be conclusive, may or may not have any significance in another case. Nonetheless, the discretion under the Section has to be exercised with due care and circumspection depending on circumstances justifying its exercise.

Section 438(1) of the Code 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 use of the expression “reason to believe” shows that the belief that the applicant may be so arrested must be founded on reasonable grounds. 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 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. Sec 438(1) cannot be invoked on the basis of vague and general allegations, as if to arm oneself in perpetuity against a possible arrest. Moreover if an application for anticipatory bail is made to the High Court or the Court of Session, it becomes imperative for the court to apply its own mind to the question and decide whether a case has been made out for granting such relief. It cannot leave the question for the decision of the Magistrate concerned under Section 437 of the Code, as and when an occasion arises. Such a course defeats the object of Section 438.

In regard to anticipatory bail, if the proposed accusation appears to stem not from motives of furthering the ends of justice but from some ulterior emotive, the object being to injure and humiliate the applicant by having him arrested, a direction for the release of the applicant on bail in the event of his arrest is generally made. On the other hand, if it appears likely considering the antecedents of the applicant, that taking advantage of the order of anticipatory bail he will flee from justice, such an order is not made. But the converse of these propositions is not necessarily true. It cannot be laid down as an inexorable rule that anticipatory bail cannot be granted unless the proposed accusation appears to be actuated by mala fides; and equally, that anticipatory bail must be granted if there is no fear that the applicant will abscond.’ The nature and seriousness of the proposed charges, the context of the events likely to lead to the making of the charges, a reasonable possibility of the applicant’s presence not being secured at the trial, a reasonable apprehension, that witnesses will be tampered with and “the larger interests of the public or the State”, are some of the considerations which the court’s keep in mind while deciding an application for anticipatory bail.’ In evaluation of the consideration whether the applicant is likely to abscond, there can be no presumption that the wealthy and the mighty will submit themselves to trial and that the humble and the poor will run away from the course of justice, and more than there can be a presumption that the former are not likely to commit a crime and the latter are more’

In considering a petition for grant of bail necessarily, if public interest requires, detention of citizen in custody for purpose of investigation could be considered and rejected, as otherwise there could

be hurdles in investigation even resulting in tempering of evidence. The Apex Court has held that anticipatory bail cannot be granted as a matter of right. It is essentially a statutory right conferred long after the coming into force of the Constitution and that it cannot be considered as an essential ingredient of Article 21 of the Constitution. Therefore its non-application to a certain special category of offences cannot be considered as violative of Art 21.

A duty has been thrust on the courts, to examine the facts carefully and to ensure that no prejudice is caused to investigation. It is a delicate balance whereby the liberty of citizen and the operation of criminal justice system have both to be safeguarded. Custodial interrogation of such accused is indispensable necessary for the investigating agency to unearth all the links involved in the criminal conspiracies committed by the persons which ultimately led to capital tragedy Where it is pointed out that the action is malafide or tainted the courts are required to reach out the conclusion and do justice by preventing harassment and unjustified detention. 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.

The High Court or a Court of Session exercise their discretion upon examination of the facts and circumstances to grant anticipatory bail "if it thinks fit" since denial of bail amounts to deprivation of personal liberty, they lean against the imposition of unnecessary restrictions on the scope of Section 438, especially when no such restrictions have been imposed by the legislature in the terms of that section. An over- generous infusion of constraints and conditions which are not to be found in Section 438 can make its provisions constitutionally vulnerable since the right to personal freedom cannot be made to depend on compliance with unreasonable restrictions. The beneficent provision contained in Section 438 must be saved, not jettisoned. But, while granting such anticipatory bail, the Court may impose such conditions as it thinks fit, but the object of putting conditions should be to avoid the possibility of the person hampering investigation. Harsh, onerous and excessive conditions which frustrate the very object of anticipatory bail cannot to be imposed. Subjecting an accused to any condition other than conditions mentioned in the Section is beyond the jurisdiction of the court.

Filing of F.I.R is not a condition precedent to the exercise of the power under Section 438 and 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. The provision cannot be invoked after the arrest of an accused. Moreover the salutary provision contained in Section 438 Cr.P.C. were introduced to enable the Court to prevent the deprivation

of personal liberty. It cannot be permitted to be jettisoned on technicalities such as “the challan having been presented anticipatory bail cannot be granted”

DURATION OF ORDERS

A Single Judge of Supreme Court in regard to length of the time for which the order of anticipatory bails stay operative, in the case of *KL Verma v State*[1] held that ‘Anticipatory bail granted in anticipation of arrest in non-bailable cases, does not mean that the regular court, which is to try the offender, is sought to be bypassed. That is the correct procedure to follow because it must be realized that the Court of Sessions or the High Court is grants anticipatory bail at a stage when the investigation is incomplete and, therefore, it is not informed about the nature of evidence against the alleged offender. Therefore it was necessary that such anticipatory bail orders should be of a limited duration only and ordinarily on the expiry of that duration or extended duration the court granting anticipatory bail should leave it to the regular court to deal with the matter on an appreciation of evidence placed before it after the investigation has made progress or the charge-sheet is submitted.

By this, the Court desired to convey that an order of anticipatory bail does not ensure till the end of trial but it must be of limited duration as the regular court cannot be bypassed. The limited duration must be determined having regard to the facts of the case and the need to give the accused sufficient time to move the regular court for bail and to give the regular court sufficient time to determine the bail application. In other words, till the bail application is disposed of one way or the other the court may allow the accused to remain on anticipatory bail. To put it differently, anticipatory bail may be granted for a duration which may extend to the date on which the bail application is disposed of or even a few days thereafter to enable the accused persons to move the higher court, if they so desire

The dictum laid in K.L. Verma’s case was upheld in the case of *Salauddin Abdulsamad Shaikh v The State Of Maharashtra*[2] and *Sunita Devi V State of Bihar*[3] and it was held that the Anticipatory bail orders should be of a limited duration only and ordinarily on the expiry of that duration or extended duration’ the Court granting anticipatory bail should leave it to the regular Court to deal with the matter on an appreciation of evidence placed before it after the investigation has made progress or the charge-sheet is submitted. Though it was not necessary that the operation of an order passed under Section 438(1) of the Code be limited in point of time but the Courts could, if there were reasons for doing so, limit the operation of the order to a short period, until after the filing of FIR in respect of the matter covered by the order. The applicant, in such cases were required to obtain an order of bail under Section 437 or 439 of the Code within a reasonable short period after the filing of the FIR. In another case it was

reiterated that the provisions of Section 438 Cr.P.C. cannot also be invoked to exempt the accused from surrendering to the Court after the investigation is complete and if charge-sheet is filed against him. Such an interpretation amounted to violence to the provisions of Section 438 Cr.P.C., since even though a charge-sheet may be filed against an accused and charge is framed against him, he may still not appear before the Court at all even during the trial. Section 438 Cr.P.C. contemplates arrest at the stage of investigation and provides a mechanism for an accused to be released on bail should he be arrested during the period of investigation. Once the investigation makes out a case against him and he is included as an accused in the charge- sheet, the accused has to surrender to the custody of the Court and pray for regular bail. On the strength of an order granting Anticipatory Bail, an accused against whom charge has been framed, cannot avoid appearing before the trial court.

Sec 438 does not mention anything about the duration to which a direction for release on bail in the event of 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 fully justified in imposing conditions including direction of joining investigation. In pursuance to the order of the Court of Sessions or the High Court, once the accused is released on bail by the trial court, then it would be unreasonable to compel the accused to surrender before the trial court and again apply for regular bail. The Supreme Court declared the law laid down in the cases of *K.L. Verma v State*[4], *Salauddin Abdul samad Shaikh v The State Of Maharashtra*[5] and *Sunita Devi V State of Bihar*[6] as per incurium and held that

“The validity of the restrictions that the accused released on anticipatory bail must submit himself to custody and only thereafter can apply for regular bail is contrary to the basic intention and spirit of section 438 Cr.P.C. It is also contrary to Article 21 of the Constitution. The test of fairness and reasonableness is implicit under Article 21 of the Constitution of India. Directing the accused to surrender to custody after the limited period amounts to deprivation of his personal liberty. It is unreasonable to lay down strict, inflexible and rigid rules for exercise of such discretion by limiting the period of which an order under this section could be granted. Once the anticipatory bail is granted then the protection should ordinarily be available till the end of the trial unless the interim protection by way of the grant of anticipatory bail is curtailed when the anticipatory bail granted by the court is cancelled by the court on finding fresh material or circumstances or on the ground of abuse of the indulgence by the accused.

In view of the clear declaration of law laid down by the Constitution Bench in *Sibbia's* case it would not be proper to limit the life of anticipatory bail. When the court observed that the anticipatory bail is for limited duration and thereafter the accused should apply to the regular court for bail that means

the life of section 438 Cr.P.C. would come to an end after that limited duration. This limitation has not been envisaged by the legislature. The Constitution Bench in Sibbia's case clearly observed that it is not necessary to re-write section 438 Cr.P.C. Therefore, in view of the clear declaration of the law by the Constitution Bench, the life of the order under section 438 Cr.P.C. granting bail cannot be curtailed."

CONCLUSION

Section 438 is a procedural provision which is concerned with personal liberty of an individual, 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. Although the power to release on anticipatory bail can be described as of an "extraordinary" character this would "not justify the conclusion that the power must be exercised in exceptional cases only." It is not necessary that the accused must make out a "special case" for the exercise of the power to grant anticipatory bail.

No straight jacket formula can be prescribed for universal application in cases of anticipatory bail as each case has to be considered on its own merits and in its facts and circumstances. Personal liberty being a very precious fundamental right should be curtailed only when it becomes imperative according to the peculiar facts and circumstances of the case.

It is an established principle that discretion vested in the court, in all matters should be exercised with care and circumspection depending upon the facts and circumstances justifying its exercise. Similarly, the jurisdiction under section 438 Cr.P.C. should be exercised by the court in a wise and careful manner which by their long training and experience they are ideally suited to do. There is no justification for reading into section 438 Cr.P.C. the limitations mentioned in section 437 Cr.P.C. The plenitude of the section must be given its full play.

The provisions of Section 438 should not be suspected as containing something volatile or incendiary, which needs to be handled with the greatest care and caution imaginable. A wise exercise of judicial power inevitably takes care of the evil consequences which are likely to flow out of its intemperate use. Neither inflexible guidelines can be provided for grant or refusal of anticipatory bail nor should any attempt be made to provide rigid and inflexible guidelines in this respect because all circumstances and situations of future cannot be clearly visualized for the grant or refusal of anticipatory bail. In any event, this is the legislative mandate which the Courts are bound to respect and honor. Anticipatory bail is a device to secure the individual's liberty; it is neither a passport to the commission of crimes nor a shield against any and all kinds of accusation, likely or unlikely.

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