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Dimensions of Anticipatory Bail in India with Special Reference to Judicial Discretion

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ABSTRACT

The provision of anticipatory bail is one which does not exist within statutes, but rather within judicial practice. The idea for this originated in the 41st Report of the Law Commission. The reason for an accused to be detained is due to the harm they might cause or that they might try to escape. It is without reason to keep an accused in jail, who has little to no chance of escaping the country and causing any harm. Another major reason for the granting of anticipatory bail is due to false allegations that may be levied to important members of society. This is done to undermine them using the stigma around being sent to jail. This provision acts in a manner that it is valid during the time of the arrest.

This paper looks into the different facets of anticipatory bail. The paper looks into the relevant legal provisions regarding anticipatory bail and analyses the statutory authority. The recent judgement of the Supreme Court and the developing jurisprudence on the subject has been analyzed.

I. INTRODUCTION

“The subject of bail belongs to the blurred area of the criminal justice system and largely hinges on the hunch of the bench, otherwise called judicial discretion. The Code is cryptic on this topic, and the court prefers to be tacit, be the order custodial or not. However, the issue is one of liberty, justice, public safety, and burden of the public treasury, all of which insist that a developed jurisprudence of bail is integral to a socially sensitized judicial process.”²

- Krishna Iyer J

It is worth remembering that there is no concept of "anticipatory bail." Generally, a bail-in advance of an arrest is understood to be a bail.³ No mention of this provision can be found in the previous Code.⁴ In 1969, the Indian Law Commission⁵ recommended that this provision

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² Gudikranti Narasumhulu And Ors. V. Public Prosecutor, High Court Of Andhra Pradesh, 1978 S.C.R. (2) 371.

³ Siddharam Satlingappa Mhetre v. State of Maharashtra & Ors., (2011) 1 SCC 694.

⁴ The Code of Criminal Procedure, 1898, Act No. 5 of 1898.

⁵ 41st Report, the Law Commission of India.

be included to ensure that innocent people were not harassed. It recommended it to be left to the court's discretion and did not wish this to be enshrined in the statutory provision itself. He relied on the higher court and believed that he was going to use his discretion correctly and that he was not making any comments that would prejudice fair trials of the accused.

The Decision has allowed the Courts of Session and the High Court to issue such a bail under Section 438 of the Code of Criminal Procedure⁶. If they consider it appropriate to grant bail on the particular facts and circumstance of the case and such terms as the case may take, they shall be left free to exercise their judicial discharge.⁷

Black's Law Dictionary (4th edition) describes bail as "procuring release from the legal custody of an individual, undertaking to appear in the designated place and place and present him/herself to the court's jurisdiction and judgment."

In 1973 the anticipatory bail was introduced in the current Criminal Procedure Code (when the latter substituted the existing 1898 code); following the 1969 study of the 41st Law Commission, the incorporation of it was suggested.

The study says: "The requirement to issue an anticipatory bail occurs primarily as a consequence of persons often motivated by intimidation trying to get their competitors embroiled in bogus cases for embarrassment, or certain reasons, by holding them in jail for a duration of a maximum of several days..."⁸

An anticipatory bail order shall, upon arrest for crimes or crimes for which the agreement is given, constitutes protection against police custody. In other terms, it is not a pre-arrest court procedure that orders the person to whom he or she is issued to be eventually detained on the offense on which the instruction is given, but is released on bail. In other terms, the bail is not post-arrest provided. Under Section 46(1) of the Code of Criminal Procedure, which deals with the way investigations are performed, the police officer or other individual "may directly affect, involve or touch the body of the individual to be detained in the process of the arrest, unless there is a custody request by word or action." In compliance with section 438, a guideline seeks to give this 'contact' or restraint conditional immunity⁹.

The difference between an ordinary bail order and an anticipatory bail order was that while the former would be issued upon arrest and thus would entail freeing from police detention; the latter would be given in anticipation of the arrest and thus would be valid at the time of

⁶ Act No. 2 of 1974.

⁷ Gurbaksh Singh Sibbia v. State of Punjab, A.I.R. (1980) SC 1632

⁸ Ibid note 3

⁹ Ibid para 32

the arrest¹⁰. Judicial detention with non-leasable crimes is an eventual parallel of incarceration. The granting of an "anticipative bail" despite the crime or crimes in which the prisoner is charged entails a paradox. Upon arrest, if an accused intends to be released on bail in respect of his offense or crimes, the defendant shall seek remedy under section 437 or section 439 of the Code.

Section 438 is widely spelled out and does not limit the powers of the court in the event of a person who can be believed to have been arrested on charges of a non-leaseable offense, and applies the power of the court to grant an advance bail. Nevertheless, the authority must be exercised judgmentally to be able to escape the underlying hazards of the case while fulfilling the intent of the contract. The nature of our investigation now involves an explicit dissection of the limitations of paragraph 437, which control and regulate the exercise of power according to Article 438. Section 437 contains a ban on bail where reasonable grounds exist to believe that the offender is guilty of a death penalty or life imprisonment. Consequently, the nature and gravity of the charge are vital to the fact that an accused is not released on bail. True, the gravity of the crime involved and the level of the heinous crime involved will likely induce the petitioner to avoid the path of justice. When considering the question of an advance bail, that must weigh up with the court.

(A) Research Objective

The Objective of this research shall be to understand the concept and history of Anticipatory bail and the judicial discretion set forth by India.

(B) Research Question

- What is the new judgment by the Supreme Court on Anticipatory bail?
- What is the Judicial Discretion of India on Anticipatory Bail?
- How is Anticipatory Bail different from other bails?

(C) Research Methodology

The methodology that has been undertaken herein to conduct this research will be doctrinal and primarily analytical and descriptive. The reference material that will be used in the research will be mainly secondary in the nature examination of reports, bills, consultation papers, reviews, legislation, books, and analysis of various thinkers and their books. The research will be qualitative as it will try to analyze the principles that have already been established by law and suggest better alternatives if any, available.

¹⁰ Sunita Devi v State of Bihar 2005 S.C.C. (Cri) 435

(D) Literature Review

In *Bhagirathi Mahapatra v. State*¹¹, it was stated that the court was not justified in granting anticipatory bail simply because the petitioner was supposed to arrest on a false accusation and because such an arrest was a cause of dishonor and disgrace. The courts have both a right to prove themselves to be reasonable in their apprehension. If, without applying the judgment and without examining the available evidence with the police, the court decides to accept the allegations made in the petition, the court fails.

The woman registered a case against her husband on charges of harmfulness for dowry demands, according to section 498a of the Indian Penal Code, on *Satish Vasant Salvi v. State of Maharashtra & Anr*¹². The husband was detained and subjected to a humiliating examination to determine his strength. The court instead ruled that, according to Section 41 of the Criminal Procedure Code, his detention and medical examinations against his will were unconstitutional, and his constitutional right to life and independence was breached according to Article 21 of the constitution of India. Because of these scenarios, anticipatory bail provisions were introduced. The husband may effectively have requested Anticipatory Bail if he had had an expectation of his detention on the charges as mentioned above.

In the case of *Jaswantbhai Sheth v. Anand Nagarsheth*¹³, in which the plaintiff requested an advance bail on the grounds of being imprisoned, despite not being identified in the F.I.R. The court found the claim for anticipatory bail not to be sufficiently valid or reasonable.

The petitioner's manager of the Bank Branch and the other petitioners who were directors of a company in the plot were indictable in *Ramesh Gandhi v. the State of Jharkhand*¹⁴. Under 420, 120B, and S.13 of the Corruption Promotion Act, the bank guarantee issued by the petitioner's Branch Manager, over financial limitations and credit facilities outside his authority and banking standards, was a matter of pure irregularity and no loss to the bank.

It was held in *Shyam Sunder Beriwala v. State*¹⁵. An advanced charge must concern a particular case, and it cannot be exercised by power according to Sec. 438 of the Code as the person anticipates the police may arrest him for a case yet to be started, without reasonable grounds of advance. No person giving him a blanket license to do whatever he or she wishes under cover of this order can be granted a blanket bail order by this court.

¹¹ 1975 Cr. L.J. 1681 at 1683 (Orissa)

¹² (2015) Cri.W.P. No. 725/14

¹³ (2000) 10 SC 7

¹⁴ 2004 CrLJ 1034 (Jhr)

¹⁵ 82 C.W.N. 428(1977-78).

There is also a sharp observation in the case of Balchand¹⁶, J.Fazl Ali has pointed out that it could never have been the intention of the legislature, by approaching the court according to Section 438 and bypassing Section 437, that individuals who are accused of serious charges, such as murder, be easily bailed out. According to such rulings, as then, Sandhawalia, J. of the Gurbaksh Singh v. State High Court of Punjab and Haryana observed: we also find the power in S. 438, Code of Criminal Procedures, for offenses punishable by death, or life imprisonment, should not be exercised unless at that point the court is satisfied that the charge is false or unfounded.

II. CHAPTER 1

There would also be a significant question of how the exercise of anticipatory bail power would contradict the statutory powers granted to the police by the Code. The Code grants the police a statutory authority without penalty of any judicial authority to investigate the cognizable crime. Chapter X.I.T. of the Code may be referred to. Section 151 authorizes a member of the police to apprehend someone to avoid a cognizable crime from being committed. Assume that if a person awaiting an expected bail has threatened or committed a cognizable crime seriously, the police authority should be allowed to pursue some action against him. Section 154 provides for a formal reduction of the details about the execution of a cognizable crime, which prescribes the method for reporting the crime. Unless the magistrate orders, Section 156 authorizes a police officer to investigate such a recognizable case.

In addition to setting out an investigative protocol, section 157 authorizes the police to identify the suspect and detain him. Section 57 also empowers an official of the police, without seeking any sanction from a court or magistrate, to detain a person arrested for 24 hours except the time needed for the journey to the magistrate's court from the place where the person was arrested. In fact, under Article 22(2) of the Constitution of India, which speaks in similar terms, the right of police seems to be constitutional. If an investigation cannot be completed within 24 hours by the police officer, the Code provides specific provisions for such cases, and section 167(2)41 addresses that in detail.

III. CHAPTER 2

The length and expiration of the Anticipatory Bail are chosen mainly by the court to permit it. In most cases, a once-allowed Anticipatory Bail must be deemed to have been an agent until the end of the process unless the Court gratuities it. The court allowing the Anticipatory Bail

¹⁶ 1978 Cr. L.J. 20 (P. & H.) (F.B.)

may extend the length for it after the period, without doubt, has expired. In some circumstances, the Anticipatory Bail applications will have a fixed time limit, and the court approving Anticipatory Bail might drop them upon expiry of that term or the extended amount. After the expiry of the term or the extended length of Anticipatory Bail, the trial court is obliged to take the appropriate steps. The High Court and the Court of Sessions may request an application to Anticipative Bail, but it shall typically be submitted to the court first if the case is not immediately submitted to the High Court.

After a cognizable case has been filed, and before the arrest, you can apply for anticipatory bail.

Regarding the validity period of anticipatory bail, the court's will to allow the period of validity of the pre-emptive bail. If the court does not settle, it usually remains valid until your case is ultimately settled.

Usually, the court issues a 30-day anticipatory bail, so one has to ask for a normal bail within 30 days. However, if the individual is charged, the Anticipatory Bail must be created and periodically bailed within the anticipatory Bail period. When the specified time ends, the individual must either file or re-submit the extension of Anticipatory Bail. The preliminary bail is granted until the charges are filed, but you must go for regular bail when the charges are filed.

IV. CHAPTER 3

The cancellation of bail may only be enforced on more substantial grounds, that is, a bail order given on incorrect account of the truth, on the appointment of a bench or insufficient judicial discernment or on proof that the defendant interferes with an investigation or court.

For the following reasons, Bail may be canceled:

- (1) Where, in the process of the prosecution or the jury, an individual in bail is considered modified by the facts.
- (2) When the bailer performs a common crime or other felonies during the bail time.
- (3) The individual who escaped on bail and is deferred on that account for the trial of the case.
- (4) Where a person under assault is claimed to be terrified, and acts of abuse against the police are perpetrated.
- (5) When a bailer creates serious social problems of law and order and is a threat to a

peaceful people's lives.

(6) Where the resulting events are established as a non-leasing offense or a grave offense.

(7) Unless the court finds that the judicial authority for awarding the convicted bail has not been adequately practiced.

(8) The justification for canceling the bail is adequate if it has been shown that the conditions have affected his independence.

(9) If there is a risk to the life of the accused under bail.

Before a standard bail is finally issued, the anticipatory bail will still be canceled.

V. CONCLUSION

Section 438 is a proceeding concerning an individual's rights to a presumption of innocence as he is not convicted of the offense for which he seeks bail on the date of his request for anticipatory bail. Although the power to release under an anticipatory bail can be considered "extraordinary," it is not necessary for the accused to "special case" in the exercise of the power to grant the anticipatory bail to be exercised only in extraordinary cases.

In the case of anticipatory bail, there should be no uniformly valid straight jacket rule because each case needs to be regarded in its own right and in its conditions. Personal freedom as an extremely precious fundamental right should be limited only when the particular facts and circumstances of the case make it imperative.

The principle that the discretion of the courts, depending on the facts and circumnutation, justifying their exercise should be exercised with care and circumstance in all matters. The integrity in compliance with Article 438 Cr. P.C. is also valid. The court should be exercised wisely and carefully, which is ideally suitable for them through their long training and experience. Reading Section 438 of the Cr. P.C. is not warranted. The limitations alluded to in section 437 Cr. P.C. There must be complete play in the full spectrum of the segment.

The provisions containing something volatile or arsonic, which has to be treated with the highest possible attention and precaution should not be suspected under Section 438. A wise practice of the judiciary inevitably deals with the adverse consequences of its untimely use. There can neither be unflexible guidelines for granting or refusing an anticipatory bail nor any attempt to lay down rigid and inflexible guidelines for grant and refusal because, for the grant of anticipatory bail, all future circumstances or situations are not visible. In either situation, the courts are obligated to uphold and obey this statutory provision. Anticipatory bail is a means to safeguard the freedom of the individual; it is either a crime commission

passport or a shield, likely or unlikely to be used against any accusations.

VI. BIBLIOGRAPHY AND REFERENCES

- K.K. Jivah V Union Territory A.I.R. 1988 SC 1934; (1998) 4 S.C.C. 80
- State of M.P. v Ram Kishna Balothia A.I.R. 1995 SC 1198; (1995) 3 SCC 221 at para 8
- Muraleedharan V State of Kerala A.I.R. 2001 SC 1699 (1700); (2001)4 SCC 638
- Nancy Jamshed Adajaina V State 1993 Cr LJ 3465(Bom)
- Gurbaksh Sibbia V State of Punjab 1980 AIR 1632, 1980 S.C.R. (3) 383
- Ravindra Saxena V State of Rajasthan (2010) 1 SCC 684; (2010) 1 SCC Cri 884
- M. Sreenivasulu Reddy vs. State Of Tamil Nadu 2000(6) Scale 580; J.T. 2005 (51) SC 585
- Munish Bhasin V NCT of Delhi (2009) 2 SCC (cri) 56; AIR 2009 SC 2072s
