

ANTICIPATORY BAIL: SUPREME COURT'S TIGHTROPE WALK IN BALANCING RIGHTS AND JUSTICE

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ABSTRACT

The Relief anticipatory bail aims to safeguard Individual rights from unjust treatment and harassment for non-bailable offences. The Provision for anticipatory bail is given under section 484 of Bharatiya Nagarik Suraksha Sanhita, 2023 (BNSS). Originating the Provision from the recommendation given by the Indian Law Commission in its 41st report, the Necessity of anticipatory bail to protect an Individual from arrest under fake cases or misuse of the power of arrest. The Provision for anticipatory bail introduces a balance between individual liberty and ensuring justice for the Appellant. Supreme Court balanced tightrope walks between each party by giving guidelines in his landmark judgment, including Gurbaksh Singh Sibbia V. State of Punjab 1980, Sushila Aggarwal and others v. State (NCT of Delhi) 2020, and many others.

INTRODUCTION

Justice V.R. Krishna Iyer Said in the Gudkanti Narasimhulu case 1977, "The issue of bail 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"¹. Bail is not defined under the Bharatiya Nagarik Suraksha Sanhita, 2023 (BNSS). Still, the basic understanding of bail is the right to freedom, liberty, and living with dignity until proven guilty in Court with certain conditions and with a bail bond. Police and the Court have the power to entertain bail applications to preserve the fundamental rights of both the Appellant and Respondent until the Court makes its final decision. Appellant and Respondent are equal in the eyes of the law; therefore, the Court has to ensure the rights of both parties. Bail is the right of the accused to live freely and with dignity in society until proven guilty, but with the Satisfaction of the police or Court to cooperate with the Investigation officer (I.O.) and not influence the witness or temper the evidence, admit the security amount. The concept of bail is given under section 2(b) of CRPC: "bailable offence means an offence which is shown as

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¹ Sri M. SREENU, Principal Junior Civil Judge, RayaChoti, BAIL, ANTICIPATORY BAIL, MANDATORY BAIL & BAIL AFTER CONVICTION, 1-2, 7-10.

bailable in the First Schedule, or which is made bailable by any other law for the time being in force; non-bailable offence means any other offence" Bailable offence is not serious in Nature and are imprisonment not more than three years or with fine only. i.e. theft, causing hurt, defamation, mischief and normal assault. The non-bailable offence that is serious in Nature is punishment, which goes up to death or life imprisonment. i.e. robbery, rape, murder, terrorism etc. An anticipatory bail application (ABA) is filed under Section 438 of the Bharatiya Nagarik Suraksha Sanhita, 2023. 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.

BACKGROUND

Under the old code, "The Code of Criminal Procedure, 1898 (C.Cr.P.) was no provision related to Anticipatory bail. At that time, there were different opinions among various high courts on whether they could approve these types (anticipatory bail) of applications or bail under their inherent power.² Courts did not have the power to grant anticipatory bail before 1973³. The case, *Amir Chand v Crown* 1949, raises an important and interesting question related to the power of the High Court to grant bail to persons who have not yet been arrested on any actual charge of any offence or even on suspicious of their complicity with any offences but who apprehended that they may be harassed by being arrested on unfounded suspicion or a false charge. At the end of that judgment, the Court gives an answer to this question. The Court contains no such provision whereby what is being termed "anticipatory bail" can be given. Court said in the case *Juber mal v State of Rajasthan* court observed Neither the High Court nor subordinate Court have the power to grant bail if he has not been arrested or detained in custody or brought before them or no warrant of arrest or even an order in writing for his arrest under section 56 of the old code. That mere fact if an individual is charged with a cognizable offence, a police officer arrests him without a warrant for investigation, and the Court does not have the power to grant bail in these circumstances.

The need for anticipatory bail was recommended by the Indian Law Commission in its 41st report under para 39.9 of volume I. "*We carefully considered the suggestion for directing the release of a person on bail prior to his arrest (commonly known as 'anticipatory bail').*" The

² Prof. (Dr.) Mukund Sarada, *ANTICIPATORY BAIL – A CRITICAL STUDY IN THE LIGHT OF SUPREME COURT'S DECISION IN SIDDHARAM SATLINGAPPA MHETRE'S CASE*, *A.L.T. (Criminal)* XLVI [2012(1)]

³ *Gurbaksh Singh Sibbia v. State of Punjab* (1980) 2 SCC 565 [4].

Necessity for granting anticipatory bail arises mainly because sometimes influential person tries to implicate their rival in false cases for the purpose of disgracing them or for other reasons by getting them detained in the Jail for some period. Commission also observed in recent times the accentuation of political rivalry, and this tendency is showing signs of a steady increase. Aside from the fake case, where there are reasonable grounds for holding that person accused of an offence not likely to abscond or otherwise misuse his liberty while on bail, there is no justification to require him to be in custody, remain in prison for some days and then apply for bail.

The Central government accepted the law commission recommendation on anticipatory bail and introduced clause 447 in the draft bill of the code Criminal Procedure 1970 with the intention of conferring authority to the High Court and Session Court to grant anticipatory bail.⁴ It is further classified to prevent the misuse of anticipatory bail by dishonest petitioners. The final order granting anticipatory bail ought to be made only after giving notice to the public prosecutor, and the initial order ought to be a temporary one. The law commission further observed that the Provision must clearly state that such an order could only be passed after recording the reasons or if the Court convinced or satisfied such direction is necessary for the "interest of justice"⁵ with some of the modifications clause 447 of the Draft Bill Code of 1970 became Section 438 of the Criminal Procedure Code, 1973 Indian Legislature amend CrPC because CrPC derives from British Raj time and due to Changing time period need for the new laws and amend so old dated laws to make the judiciary more effective and productive, parliament amends old CrPC, 1973 finally anticipatory bail provision given under Section 484 of the Bharatiya Nagarik Suraksha Sanhita, 2023 (BNSS).

CASE STUDIES

Gurbaksh Singh Sibbia V. State of Punjab 1980⁶

Bench: Justice Y.V. Chandrachud, Justice P.N. Bhagwati, Justice N.L. Untwalia, Justice R.S. Pathak, and Justice O. Chinnappa Reddy.

Facts

⁴ Gurbaksh Singh Sibbia V State of Punjab (1980) 2 SCC 565 [5].

⁵ Law Commission, Some questions under the C.Cr.P., 1970 (Law Commission report No. 48, 1972)

⁶ (1980) 2 SCC 565, 1980 SCC (Cri) 465, 1980 Cri LJ 1125, AIR 1980 SC 1632.

The Appellant was the Minister of Irrigation and Power of the Punjab Government, Gurbaksh Singh Sibbia. He, along with other ministers, was accused of grave corruption. Due to fear of arrest, ministers filed anticipatory bail application (ABA) before the Hon'ble Punjab and Haryana High Court under Section 438 of the CrPC. The High Court (HC) rejected the ABA on the grounds that HC had limited power and had to be guided under section 437 of the CRPC. These powers can be exercised only under certain special circumstances. The Appellant files an application through a Special Leave petition before the Hon'ble Supreme Court under Article 136 of the Indian Constitution.

Issue raised:

- Whether the person can file ABA with reason to believe fear of arrest.
- Can the court grant AB after the arrest of a person?

SC Judgment

SC held that an Individual has an appropriate reason to get anticipatory bail, not just fear of arrest. The five-judge bench observed the Appellant must show "reason to believe" that he may be arrested for a non-bailable offence, and the High Court or Session Court must apply its own mind to decide whether a case has been made out for grant of such relief. Further, the Court said anticipatory bail could be filed by the Appellant if he is not arrested but cannot file ABA under Section 438 of CrPC 1973 after the arrest.

Amiya Kumar Sen v State of West Bengal, 1979⁷

Fact of the Case (FOC)

The Appellant challenged the Validity of the Session court rejecting the bail Where he filed the same ABA in the High Court.

Issue

Can the accused file the same application in the session court and High Court?

SC Judgment

Session court and High Court are empowered to grant anticipatory bail under Section 438, but the petition may choose one of the two courts. The Court cannot entertain an application if the

⁷ Amiya Kumar Sen v. State of west Bengal [1973] Calcutta High Court 312 [1978] 1979CRILJ288.

Appellant approaches the session court for relief under Section 438, and if his application is rejected, he will not be entitled to file the same application under Section 438 in the High Court on the same grounds.

State of MP v Rama Krishna Balothia and Anr., 1995⁸

Fact of the Case (FOC)

accused arrested under SC/ST atrocities act. Several accused file ABA, and learned counsels argue that anticipatory bail is a fundamental right of a person.

Issue

Whether anticipatory bail is a fundamental right?

Judgment

The Supreme Court delivered its judgment stating that anticipatory bail is not a fundamental right of the accused as it is a special privilege granted when it is necessary, and the Court should not grant anticipatory bail when it is contrary to the necessary condition. The Court also observed that personal liberty is granted under Article 21, but not all applications are made for the protection of personal liberty.

Sushila Aggarwal and others v State (NCT of Delhi), 2020⁹

Fact of the Case (FOC)

Applicant's Application for anticipatory bail was rejected by the session court. The applicant applied before the Hon'ble High Court of MP to challenge the Validity of the Court, bound by the time period of the bail issue by the HC of MP.

Issue

- Should the protection granted under Section 438, CRPC, be limited to a fixed period so as to enable the person to surrender before the trial court and seek regular bail?
- Whether the life of anticipatory bail should end at the time and stage when the accused is summoned by the Court.

⁸ State of M.P. & Anr v Ram Krishna Balothia & Anr [1995] SC, AIR 1198.

⁹ Sushila Aggarwal v State (NCT of Delhi) [2020] SC 831 AIR (2020) SCC 694.

Judgment

The Supreme Court held that anticipatory bail is itself not bound by time. Suppose any court grants bail under Section 438 of CRPC can impose such a condition if it requires facts of any case. The Court also observed that the bail will not be invalid when the trial starts but will be valid till the end of the trial. Apex Court also empowers the session court and High Court to limit the Validity of anticipatory bail under special circumstances as and when the Court deems fit.

HOW DOES THE SUPREME COURT ENSURE JUSTICE FOR BOTH SIDES WHILE APPROVING ANTICIPATORY BAIL APPLICATIONS (ABA)?

Relief of anticipatory bail (AB) is aimed at safeguarding individual rights under section 484 of BNSS, 2023. AB servers are a crucial tool to prevent the misuse of the power of arrest and protect innocent individuals from harassment and mental torture. However, it also presents a challenge in maintaining a delicate balance between individual rights and the interest of justice.

The tightrope we must walk lies in balancing between safeguarding individual rights and protecting the public interest. The right to liberty and presumption of innocence is vital.

Court Determined while giving Anticipatory bail Facts, Impact on Society, Circumstances and gravity of allegations made by Appellant, etc., to Approve or Disapprove Anticipatory Bail Application. If the Court approves, the Court has the responsibility to ensure the victim's rights and that a free and fair investigation is done by the Investigating officer. The Court imposes Conditions on the accused so he/she can't temper the evidence and Influence the Witness.

The following factors and parameters can be taken into consideration while dealing with an Anticipatory Bail Application (ABA).

- The Nature and gravity of the offence and the exact role of the accused must be properly comprehended before the arrest:
- Antecedents of the Appellant, including facts, such as whether the accused previously undergone imprisonment on conviction by the Court under any cognizable offence.
- Possibility of the accused to flee from justice.
- Possibility accused repeat similar or other offence.

- Where accusations have been made only with the object of injuring or humiliating the applicant by arresting him or her.
- What will the impact of approving ABA, particularly in cases of large magnitude, affect a very large number of people?

In *Sushila Aggarwal v. State (NCT of Delhi)*, the Constitutional bench reaffirmed that when considering an application for anticipatory bail, Courts should consider such factors as the Nature of the offence, the exact role of the accused, and specific facts of the case.

The Court always gives importance to the possibility of an accused of influencing the witness or otherwise tampering with evidence.¹⁰

In the case *Pratibha Manchanda & Anr. v. State of Haryana & Anr.*¹¹, Appellant owner of the land situated at village Begumpur Khatola, Tehsil Kadipur, District Gurugram. Appellants claim they never sold their land nor ever executed any power of attorney (GPA) in favour of any third party. The Appellant went to Patwar Bhawan to obtain revenue papers for the land. He discovered that a person named Bhim Singh Rathi had approached Halqa Patwari to sanction the mutation of the aforementioned land. Mutation based on forged and fabricated sale deeds. The current market value of land is 50 Cr. The sale Deed sale consideration is 6,60,62,500/-, which is significantly below its actual market value. Respondent filed an Application for Anticipatory Bail before the High Court (HC). High Court allowed the ABA. The HC observed that:

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- The dispute involves the Validity of the 1996 GPA and the Misappropriation of Sale Consideration. The suit type is civil subject ownership, and handwriting experts are crucial in determining the authenticity of the signature.
- HC also acknowledges the pendency of ongoing civil suits and suggests that the Validity of GPA could be determined by the civil Court. No need to be a determinative factor in the proceedings for AB.

In this background, to ensure that justice was done for both the Appellants and Respondent, direction was issued for them to provide their specimen signature. The handwriting expert's task is to compare the writings and signatures to assess their similarity. HC ordered no arrest

¹⁰ MD. ASFAK ALAM v. THE STATE OF JHARKHAND & ANR. [2023] SC 2207.

¹¹ *Pratibha Manchanda & Anr. v. State of Haryana & Anr.* [2022] SC 1793 [2023] INSC 612

and submitted two lakhs as surety bonds. Respondent was also instructed to cooperate with the Investigation officer (I.O.) whenever required and give an undertaking to avoid tampering with the evidence or influencing the witnesses. Furthermore, a deposit of 1,50,0000 to the Magistrate serves as Victim compensation and is disbursed based on the outcome of the trial.

In *Siddharth v. State of Uttar Pradesh and Another*¹², the question of granting anticipatory bail arises. Further, the Court underlined the centrality of personal liberty in its decision personal liberty is an important aspect of our constitutional mandate. The occasion of arrest arises when the custodial investigation is necessary, or it is a heinous crime, or where there is a possibility of influencing the witness or accused to abscond or tamper with the evidence.

CONCLUSION

Anticipatory bail is a relief provided by the session court and High Court under section 484 of BNSs to ensure justice from the accused side while imposing Conditions, Security bond, satisfy with the facts, circumstances, Nature of the offence and gravity of the offence to ensure justice for Plaintiff as well to ensure all are equal in the eyes of all that is also stated under article 14 of Indian Constitution. The Provision reflects the need to protect individuals from the potential misuse of per-arrest bail, particularly in politically or personally motivated cases. Landmark cases reflect careful consideration of multiple factors and circumstances. In the case of *Gurbaksh Singh Sibbia and Sushila Aggarwal*, the Supreme Court set clear guidelines ensuring that anticipatory bail is neither an unfettered right nor unduly restricted but a judicial tool exercised with full prudence and equity. The judiciary's role is crucial in the context of necessitating a Judicious and equitable approach to maintain the delicate equilibrium between Individual freedom and the overwhelming interest of justice. The evolving jurisprudence on anticipatory bail continues to reflect this balance while adapting to the complexities of modern legal and societal challenges.

¹² [2022] 1 SCC 676

REFERENCE

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6. RATANLAL & DHIRAJLAL *THE CODE OF CRIMINAL PROCEDURE* (YV Chandrachud, 2018) 22nd.

