



GRANTING ANTICIPATORY BAIL IS DISCRETION OF THE COURT OR A RULE OF LAW: A CRITICAL STUDY

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Generally, an ordinary order of bail is granted after arrest of the person by the police. Therefore, it means release from the police custody, whereas an anticipatory bail order is granted in anticipation of arrest of the accused and is, therefore effective at the very moment of arrest.¹ An anticipatory bail application of the accused can be considered by the court concerned where the arrest is likely to be made.²

The Court to Which Application may be Made: The Court of Sessions and the High Court have been empowered to act under this section. The application for anticipatory bail should generally be made before the Court of Sessions. It is only a rare case that application for anticipatory bail is made before the High Court.³ The Sessions Court, within whose territorial jurisdiction the accused person has a genuine apprehension of his arrest, shall have concurrent jurisdiction to grant anticipatory bail.⁴

Whether the High Court can be directly Approached?- By going through the section 438 Cr.P.C, it is clear that under this section, the powers of the High Court and the Court of Sessions are concurrent. It has been held that an application under section 438 may be moved direct in the High Court.⁵ To the contrary it has been held that before moving the High Court under this section the petitioner should first approach the Court of Sessions.⁶

But the Delhi High Court held that a person after unsuccessfully moving the Court of Sessions for anticipatory bail under section 438 of the Criminal Procedure Code can again approach the High Court under this section.⁷

Discretionary Powers to Grant Anticipatory Bail: It is mentioned in the Law Commission report that the necessity for granting anticipatory bail arises mainly because some time persons having influence try to implicate their own rivals in some false cases just to disgrace them or for any other purpose whatsoever it may be, getting them detained in jail for some period. As a matter of fact, now-a-days, the trend of political rivalry is increasing and as such this tendency is showing sign of increase day by day. Besides, some false cases if having reasonable grounds for holding that a person who is accused of an offence is not likely to abscond, or otherwise misuse his liberty while on bail. It is not justified requiring a person to submit to custody just to keep him in prison for some days and thereafter go for

¹ Gurbaksh singh sibia v/s State of Punjab, 1980 Cri.LJ 1125 : AIR 1980 SC 1632.

² Ram Shankar Prasad v/s State, 1988 Cri.LJ 1926 (Sik.).

³ Ramesh Chandra Kashiram vora v/s State of Gujarat 1988 Cri.Lj 210 (Gujarat).

⁴ Capt. Satish Kumar Sharma v/s Delhi Administration, 1991 Cri.LJ 954.

⁵ Onkar Nath v/s State, 1976 Cri.LJ 1142.

⁶ Chhajju Ram v/s State of Haryana, 1978 Cri.LJ 608.

⁷ Arun Madan v/s State, 1993 Cri.LJ 1493 at 1495 (Delhi) : 1993 (1) Crimes 599.



applying for bail. It is clear from this that there are two sorts of cases which attract the provisions of this Section:

(I) when some person has been falsely implicated by an influential person for the purpose of disgracing him by keeping him in jail for some times the accused should be granted anticipatory bail.

(II) If there are reasonable grounds to believe that he will neither abscond nor misuse the bail.

The Court should not make any observation while granting bail, which may affect the fair trail of the case. By reading the Law Commission Report it may be argued that powers conferred under section 438 Cr.P.C. to grant anticipatory bail is limited to the various cases where the applicant has been falsely implicated by influential person for the purpose of disgracing him. But that is not so. The language of section 438 does not impose any restriction on the power of High Court or the Court of Session. It is correct to say that if malafide intensions are shown, anticipatory bail should be granted keeping in view the generality of cases. On the other hand, it may not be correct to say that an application for anticipatory bail must be rejected if the accusation is found not to be malafide.

This Section has given a wide discretionary power to the High Court or the Sessions Court. The words “if it thinks so fit” are clear to show that there is no restriction on the discretion of the courts.

Direction to Statutory Authority in Connection with order for Anticipatory Bail – Not permissible in Law: The summons were issued to one Padam Narain Agrawal and another person for preparing fake shipping bills and obtains expert benefits under section 80 HHC of the income tax Act, 1961, in a proceeding initiated by the customs department under the customs Act, 1961.

In view of non-cooperation of Padam Narain Agrawal, the complaint was filed against him by the customs officer for commission of offences punishable under sections 174 and 175 of IPC. In this individual case, the application for anticipatory bail was turned down by the Sessions Court. On filing an appeal against this, the High Court held that the anticipatory bail was premature as Padam Narain Agrawal was summoned under section 108 of the custom Act, 1961 to give evidence in an enquiry. The High Court directed Padam Narain Agrawal to appear before the customs officer and further direction was given to the customs officer that if any non-bailable offence was found against the accused, he would not arrest without giving prior notice of ten days. This order of the High Court was challenged before the Supreme Court by way of appeal.

By allowing the appeal in part and by setting aside the direction given by the High Court, it is held by the Supreme Court that the order passed by the High Court was a blanket order of anticipatory bail, which is beyond the scope and ambit of section 438 of Cr.p.c. Moreover, the order of the High Court illegally obstructed, interfered and curtailed the authority of the customs officers from exercising their statutory power of arrest by imposing a condition of giving prior notice of ten days, which is not warranted by law. It is further held by Supreme Court that is no question of releasing a person on bail unless he is arrested and order of granting of anticipatory bail becomes operative only on arrest of a person. A person called upon to make a statement before the customs authorities cannot be said to be an accused of an offence. If the condition precedent lay down in section 438 (1) of Cr.P.C. is not specified and there is no reason to believe that the applicant is likely to be arrested for commission of a non-bailable offence, the court has no power to grant anticipatory bail. The Supreme Court lay down that an order for anticipatory bail under Section 438 of Cr.P.C. should not to be treated as a passport to



the commission of crime, and even should not be treated as a shield against all kinds of accusations supposed to be leveled against the persons apprehending arrest.⁸

Anticipatory Bail not to be Granted when custodial interrogation of the accused required for investigation: On further appeal, the Supreme Court affirmed the decision of the High Court. It is held by the Supreme Court that the Sessions Judge has adopted inane reasoning to grant anticipatory bail in cases regarding offences for which the legislature has imposed stringent restrictions regarding grant of regular bail. The custodial interrogation of such an accused is certainly necessary for the investigating officer to find out all the link connections involved in the criminal conspiracy committed by the persons, which finally caused to the capital tragedy. It is beyond understand what would have prompted the Sessions Judge to finalize, at an early stage, that the investigating agency would be unable to collect any kind of material liable to connect the accused with the crime.⁹

The Supreme Court held that many useful information's and materials which has been concealed is disinterring by effective interrogation of suspected person. If it is known to the suspected person that he is protected by the order of pre-arrest bail during investigation then Success in such interrogation would elude. The argument that the investigation during custody is full of danger of the arrested person being subjected to third degree methods do not require to be contended, for such an argument can led to advance prediction by the accused in all such criminal cases. The court may presume that the police officers concerned would behave themselves in a responsible manner and would not subject the arrested persons to third degree methods.¹⁰

No Anticipatory Bail for offences under S.C and S.T. (prevention of Atrocities) Act, 1989: It is held by the Supreme Court that Section 18 of the 1989 Act, which makes the provisions of Section 438, Cr.p.c. (Provision for anticipatory bail) non application, as it is not violative of Art.14 and 21 of the Constitution.¹¹

Guidelines of the Apex Court in case of grant of anticipatory bail: The Supreme Court laid down the principles¹² for grant of anticipatory bail, which are as follows:-

- (i) The applicant on whom the belief is based must be capable to be examined by the court for determining objectively if the applicant has sufficient reasons to believe for likely arrest.
- (ii) If an anticipatory bail application is made to the Court to decide as if the same has been made out for grant of some relief. This question cannot be left by the Court for the decision of the magistrate concerned under Section 437 Cr.P.C. if such an occasion arises at any time.
- (iii) If the applicant has not been arrested, the anticipatory bail can be granted even after filing an FIR.
- (iv) The accused in question has no right to go to the court for anticipatory bail once he is arrested, because he has some protection under section 437 and 439 of Cr.P.C.
- (v) As a matter of fact, a covering order of anticipatory bail should not be passed in a general way. Generally, under Section 438(1) Cr.P.C. no directions should be issued presuming that the applicant shall be released on bail as and when arrested for any offence. An order for anticipatory bail in a general way may cause serious interference by the police in the

⁸ Union of India v/s Padam Narayan Agrawal (2009) 1 SCC (Cri.) 1 : AIR 2009 SC 254.

⁹ Muraleedharan v/s State of Kerala, 2001 SCC (Cri.) 795 : AIR 2001 SC 1699.

¹⁰ State represented by CBI v/s Anil Sharma J.T. 1997 (7) SC 651.

¹¹ State of M.P. v/s Ram Krishana Balothia, AIR 1985 SC 1198 : 1985 SCC (Cri.) 439.

¹² Gurubaksh Singh v/s State of Punjab, AIR 1980 SC 1632, 1980 Cri.LJ. 1125 SC.



investigation. For granting anticipatory bail, it is necessary for the court to take care while specifying the offence for which alone the order will be effective.

- (vi) If there are reasons for doing so, the Court may put a limit to the operation of the order for a short span of period, until after the FIR has been filed in respect of matter covered by such an order. After filing the FIR as stated above within a reasonable short period, the accused applicant may be directed to get an order of bail under Section 437 or 439 of Cr.P.C. In a normal way, there is no general rule to limit the operation of the order regarding the time period.

REFERENCES

- [1] Abhay, Duhan Prasad, Glossary of Criminal Law, 2008, All India Reporter Pvt. Ltd.
- [2] AIR's, Criminal Major Acts, All India Reporter Pvt. Ltd. Nagpur.
- [3] Arora, C.P. Criminal Major Acts, Diglot Edition, 2013.
- [4] Bakshi, P.M. The Constitution of India, Ninth Edition, 2009.
- [5] Basu, D.D. Introduction to the Constitution of India, 20th Edition, 2008.
- [6] Basu, D.D. Criminal Procedure Code, 1973, 3rd Edition (1).
- [7] Chauhan, B.S. Law References, Second Edition, 2011.
- [8] Dhamija, Ashok, Law of Bail, Bonds, Arrest and Custody, First Edition, 2009, Lexis Butterworths Wadhwa, Nagpur
- [9] Kelkar, R.V. Criminal Procedure Code, Fifth Edition, 2008.
- [10] Mishra, S.N. The Code of Criminal Procedure, 1973.