



# EVOLUTION OF ANTICIPATORY BAIL INDIAN PERSPECTIVE

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## Abstract

*“To deprive a man of his natural liberty and to deny him the ordinary amenities of his life is worse than starving the body; it is starvation of the soul, the dweller in the body.”*

*-Mahatma Gandhi.*

*Personal liberty is fundamental to each individual, which is protected by Article 21 as an inherent and essential right. ‘Anticipatory bail’ is a very important element of this basic right even though it is not mentioned specifically in the 1973 Code of Criminal Procedure (CrPC), this clause was created with the intention to prevent unjustified incarceration and upholding the notion that ‘someone is innocent until proven guilty’, this allows a person to apply for bail even before they are placed under arrest. And because it is a provision that has in the past been abused by those who were accused of grave crimes, it can be said that anticipatory bail developed through many difficulties. The paper wants to explore the origins of anticipatory bail, contradictory verdicts by courts that led it to its current status, and the intended as well as adverse effects of the practice. It aims to give a thorough understanding of anticipatory bail's development and its effects on people's rights and the judicial system.*

**Keywords** : Personal Liberty, Anticipatory Bail, Code of Criminal Procedure, Judiciary, Constitutional Rights, Police, Freedom, Accused, Human Rights, Criminal Justice System.

## Introduction

As stated in Article 21<sup>1</sup>, personal liberty is the cornerstone of legal jurisprudence. This beloved right is protected by anticipatory bail, which enables a person to request protection from arrest in the event that they are accused of committing an offence for which they are not eligible for bail. Even though CrPC does not specifically define the idea, the Supreme Court has defined it as “a bail in anticipation of arrest.”<sup>2</sup> This clause was included to protect the accused from unwarranted harassment and to guarantee their appearance at trial without putting them in jail or custody prior to the trial.

<sup>1</sup> India Const., Art. 21

<sup>2</sup> Balchand Jain v. State of M.P, AIR 1977 SC 2447.

Arresting and holding an accused person is mostly done to guarantee their attendance at the trial and to secure their presence in order to receive a potential penalty, should they be found guilty.<sup>3</sup> The goal of bail is to “secure the release of an individual from legal custody, by undertaking that he shall appear at the time and place designated and submit himself to the jurisdiction and judgement of the court.”<sup>4</sup> Bail is a method that may be used to accomplish this goal. The CrPC does not specifically define “bail,” but it does define ‘non-bailable offence’ and ‘bailable offence.’ The designation of an item as either bailable or non-bailable is subject to its inclusion in the First Schedule of CrPC.<sup>5</sup>

Despite being often used in legalese, the phrase “anticipatory bail” is not derived from any particular legislation. It is a practical way of saying that one may request bail before being taken into custody. Even though the literal meaning suggests otherwise, anticipatory bail is not issued in advance; rather, it guarantees that the person will be freed on bail ‘after’ being arrested. Such a clause was required due to the divergent legal opinions about the inherent jurisdiction of Courts to grant bail when arrest is still pending and to prevent influential individuals from unjustly accusing their rivals.

This paper explores the complex nature of anticipatory bail and study its evolution. The challenges caused due to the abuse of this provision and its impact on legal system as well as freedom of individual. By examining the complexities surrounding this legal provision, the study seeks to provide a comprehensive understanding to ensure the effective and responsible implementation of anticipatory bail, thereby protecting the fundamental constitutional right to personal freedom. History of the development of law on anticipatory bail

### **I. Law commission reports-**

The concept of anticipatory bail did not exist in India from beginning, it was introduced through amendments. . Anticipatory bail was not authorized by CrPC 1898, and courts were not empowered to set such bail.<sup>6</sup> It was after the enactment of the CrPC 1973 that anticipatory bail became a part of the legal system

In its 1969 report, ‘41<sup>st</sup> Law Commission of India’ acknowledged that to prevent influential personalities who may attempt to disregard or for a short term jail their rivals by fake allegations against them, it is necessary to establish a mechanism for anticipatory bail. To prevent prejudging the case, commission recommended that High Courts and the sessions courts have the authority to issue anticipatory bail and the discretion over the terms of granting anticipatory bail.

Government inserted clause 447 to the Draft Bill of CrPC 1970 in response to the Law Commission's suggestions. This was carried out in an effort to provide High Courts and the sessions courts the authority to issue anticipatory bail. The Commission observed in the 1972, 48<sup>th</sup> report from that the Bill's provision for anticipatory bail was consistent with previous recommendations. The commission emphasized that this power should only be exercised in extreme situations and recommended that Public Prosecutor be notified

<sup>3</sup> RV Kelkar, Criminal Procedure (6th ed., Eastern Book Company 2014) 289.

<sup>4</sup> Black's Law Dictionary 3rd edn., 1933.

<sup>5</sup> Code of Criminal Procedure 1973, Act 2 of 1974, Acts of parliament, Sec. 2 Cl. a

<sup>6</sup> Gurbaksh Singh Sibbia v State of Punjab (1980) 2 SCC 565 [4].

before issuing the final decree, and that it be supported by documented justifications to guarantee that the guidance is required in the interests of justice<sup>7</sup>.

After a few changes, section 438 of CrPC 1973 was eventually approved, which replaced the previous clause in the bill of 1970. This exceptional authority was given to the highest levels of the legal profession—a Sessions court and High Court. Its purpose was to grant conditional immunity from arrest, guaranteeing a release of that person on bail if they were taken in police custody on the charge for which the directive was issued (a pre-arrest legal process).

## II. Judicial precedents-

In India, the legal landscape has extensively changed over time regarding the concept of anticipatory bail. The 1898 version of CrPC omitted any provision for anticipatory bail, and the prevailing position among judges was that courts were not authorized to grant it. <sup>8</sup>This was made clear in the ruling in *Amir Chand v. Crown*<sup>9</sup>, wherein the court ruled that 1898 CrPC did not contain any provision for the granting of “anticipatory bail.”

Identifying the possibility of abuse by influential people, 41st Law Commission of India proposed anticipatory bail, and gave jurisdictional power exclusively to the High Court and Court of Session <sup>10</sup>. In response, the parliament incorporated section 438 of CrPC.

The Supreme Court delivered numerous significant rulings that have shaped the legislation concerning anticipatory bail. The important judgement that established guiding principles and a blueprint for current legislation on anticipatory bail is, *Gurbaksh Singh Sibbia v. State of Punjab*<sup>11</sup>. Court stressed that personal freedom, which is guaranteed by Article 21 as a basic right, should not be unnecessarily constrained, particularly by clauses that are not included in the statute.<sup>12</sup> The Court further laid guidelines i.e the person filing the application need to have “reason to believe” that they may be arrested, that there shall be no time limit to an anticipatory bail, submitting an FIR is not a requirement and After the accused is arrested, Section 438 cannot be used.

The resulting ruling in *Salauddin Abdulsamad Shaikh v. State of Maharashtra*<sup>13</sup>, overruled 1980 ruling and stated that there would be limitation of time on an anticipatory bail it would last when the investigations are still ongoing. This ruling was criticised for being ‘per incuriam’ with rules established by the constitution bench.

In the end, the Apex Court overturned conflicting rulings in *Sushila Aggarwal v. State (NCT of Delhi)*<sup>14</sup> and decide that a duration for anticipatory bail should not be imposed always. The Court reiterated the tenets laid

<sup>7</sup> Law Commission of India 48<sup>th</sup> Report, July 1972, ‘Some question under the Code of Criminal Procedure Bill, 1970’

<sup>8</sup> Supra

<sup>9</sup> ILR (1949) 1 P&H 515.

<sup>10</sup> Ibid

<sup>11</sup> (1980) 2 SCC 565 [4].

<sup>12</sup> Para 26 note 3-Supra

<sup>13</sup>(1996) 1 SCC 667

<sup>14</sup> 2018 SCC Online SC 531

down in the 1980 judgement. It further laid down instructions such as the courts should weigh the accused's role, the gravity of the offence, the potential to sway the outcome of the inquiry, and the potential to temper the evidence, or escape when determining the appropriate amount of bond. In light of this, the court may impose restrictive orders. In addition, if the terms of anticipatory bail are broken, the police may ask competent court for permission to make an arrest and may carry out further investigation into the charges against the bail applicant.

### 1. Conflicting opinions on the scope of anticipatory bail

In India, the scope of anticipatory bail has been the subject of extensive judicial study and interpretation for many decades. The concept of anticipatory bail was discussed by Bhagwati, J. in the *Balchand Jain v. State of MP*<sup>15</sup> wherein he clarified that when a judge sets "anticipatory bail, it basically means that if someone is taken into custody, they must be released on bail. This demonstrates that the anticipatory bail order only takes effect at the time of arrest."

*Gurbaksh Singh Sibbia v. State of Punjab*<sup>16</sup> further defined anticipatory bail. The Apex Court distinguished between anticipatory bail and normal bail, characterising the latter as a judicial procedure that occurs 'prior to an arrest'. It decided that a person granted anticipatory bail will be released on bail upon their 'apprehension for the specified offence'. The court further explained that although anticipatory bail is an extraordinary power granted to superior courts and is supposed to be used carefully, it may be granted without any limitations.

Nevertheless, later rulings brought disparities in the parameters and utilisation of anticipatory bail. In a departure from the 1980 decision, the Apex Court proposed a time limit for anticipatory bail i.e. during the pendency of investigation, in *Salauddin Abdulsamad Shaikh v. State of Maharashtra*<sup>17</sup>. As a result, the logic of this case was applied in a number of decisions, including *HDFC Bank Limited vs. J.J. Mannan*<sup>18</sup> and *Sunita Devi vs. State of Bihar*<sup>19</sup>. In these cases, the concept of a time limit for anticipatory bail was presented. It was suggested that the accused should only be granted bail until a summon from competent court according to their charge sheet, after which they shall move an application for ordinary bail under section 439.<sup>20</sup>

The Apex Court upheld the guiding principles of Sibbia case in *SS Mhetre*<sup>21</sup>, stressing firstly, that the previous smaller bench judgements are per incuriam to the 1980 case and secondly, the discretion whether to grant or deny relief is wholly subjective. The Court further decided that anticipatory bail is to be given and kept in effect until the trial's conclusion.

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<sup>15</sup>(1976) 4 SCC 572 [2].

<sup>16</sup> supra

<sup>17</sup> supra

<sup>18</sup> (2010) 1 SCC 679

<sup>19</sup> (2005) 1 SCC 608

<sup>20</sup> supra

<sup>21</sup> (2011) 1 SCC 694.

This back and forth between the contrary verdicts continued for several cases until *Sushila Aggarwal v. State (NCT of Delhi)*<sup>22</sup> that ultimately resolved the uncertainty and inconsistencies. The Apex Court affirmed that anticipatory bail should not be barred by limitation of time and should last until trial is concluded, upholding the principles set down in the *Sibbia* case.<sup>23</sup>

Additionally, the nature and gravity of alleged offence were considered while determining the extent of anticipatory bail. According to Section 437 CrPC, if there is reasonable suspicion that defendant is guilty of an offence carrying a life sentence or the death penalty, a bail cannot be granted. When determining whether to give permission, it is crucial to consider how serious is the offence and how heinous is the crime. Jurisdiction and Discretion of courts.

In India, the authority to grant anticipatory bail is subject to judicial interpretation. In order to award anticipatory bail, the High Court and the Sessions courts have identical jurisdiction. Nonetheless, 'a major problem occurs when the offence is committed in one jurisdiction and the arrest is made in another one.'<sup>24</sup>The Court of Rajasthan agreed that 'the court in whose territory the offence was committed has the authority to grant anticipatory bail.'<sup>25</sup>The Bombay Court adopted a different position, ruling that 'the High Court of the state where the arrest is anticipated even though the offence was committed in another state, may grant the application for anticipatory relief.'<sup>26</sup> Yet another interpretation was offered by the High Courts of Gujarat and Karnataka, ruling that 'the court whose jurisdiction the petitioner normally dwells within may grant anticipatory bail, with a directive to the petitioner to seek a final decision from the court in question.'<sup>27</sup>

Since the decision to give bail is case-specific and discretionary, when using their power to provide anticipatory relief, the courts must consider a number of variables. According to Section 438(1)<sup>28</sup> of CrPC the applicant must have a "reason to believe"—based on reasonable grounds—that they could be arrested for an offence for which there is no possibility of bail. The foundations of the belief must be impartially examined by the courts.

The kind and severity of the proposed charges, the circumstances surrounding the incident, and the probability that the applicant would be present at the trial are some of the factors that impact decision of court. But, choice of granting or denying bail is not predicated on a rigid guideline. One cannot assume that an applicant's social standing or level of money will indicate how likely they are to escape.

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<sup>22</sup> supra

<sup>23</sup> Shah, Malika; Chadha, Vaibhav (2021). Evolution of Law on Anticipatory Bail in India. Janus.net, e-journal of international relations. Vol12, No. 1, May-October 2021. Consulted [online] at date of last visit, <https://doi.org/10.26619/1647-7251.12.1.14>

<sup>24</sup> Akshay Maheshwari & Anjali Bhatt, UPES, College of Legal Studies. (2015, January 30). Anticipatory Bail in India : A Critical Analysis. Academike Articles on Legal Issues. Retrieved April 25, 2024, from [https://www.lawctopus.com/academike/anticipatory-bail-india-critical-analysis/#\\_edn20](https://www.lawctopus.com/academike/anticipatory-bail-india-critical-analysis/#_edn20)

<sup>25</sup> Jodha Ram vs State of Rajasthan, 1994 Cr.L.J 1962 (raj);

<sup>26</sup> N.K Nayar vs State of Maharashtra, 1985 Cr.L.J. 1887 (Bom)

<sup>27</sup> Neela Shah vs State of Gujarat 1998 Cri LJ 228 (Guj)

<sup>28</sup> Code of Criminal Procedure, 1973, act 2 of 1974, Acts of Parliament, sec. 438 cl 1

The court must make sure that no harm is done to the ongoing investigation when awarding anticipatory bail. It is the court's responsibility to carefully consider the evidence and to stop harassment and unwarranted imprisonment. Conditions placed on anticipatory bail must be reasonable and should not undermine the goal of the bail—that is, to keep someone from being deprived of their freedom.

## 2. Limitation on anticipatory bail

### A. Blanket bail

Certain restrictions extend to the anticipatory bail provision under Section 438 CrPC in order to guard against its abuse. In order for the court to use this section's jurisdiction, two prerequisites must be fulfilled at the same time. First, the petitioner needs to be charged under a 'non-bailable' offence i.e. no option of bail is available to him. This charge needs to be current or grounded in established facts. Second, there must be a legitimate fear or belief on the part of the petitioner that they will be taken into custody as a result of the accusation.

Section 438 authority can only be used in limited circumstances, as determined by the ruling in *Onkar Nath Agrawai v. State*<sup>29</sup>. In other words, "the authority is not to be exercised in vacuum but only on satisfaction of the conditions outlined in the section."<sup>30</sup>

In *Shyam Sunder Beriwal v. State*<sup>31</sup>, J. of the Calcutta High Court expounded on the concept of "reasonable apprehension." According to him, even in the absence of a formal complaint being filed against them, a person requesting anticipatory bail requires a legitimate 'fear of being apprehended for an offence' for which there is no possibility of bail. It is insufficient to say that threatening to file a new lawsuit against the petitioner constitutes a legitimate fear. The fear needs to be grounded in specifics rather than just hypothetical scenarios or threats.<sup>32</sup>

When *Gurbaksh Singh v. State of Punjab*<sup>33</sup>, was decided in high court, the concept of "blanket bail" was discussed. The power under Section 438 was ruled to be exclusive to a specific allegation and could not be broadly construed to encompass all conceivable offences the petitioner may be accused of. According to J. Sandhawalia, anticipatory bail will not be given for an offence or accusation that has not yet been made<sup>34</sup>.

The requirement for specific allegations and reasonable fear places restrictions on the authority to grant anticipatory bail. For crimes that have not yet been committed or charges that have not yet been made, courts are not authorised to provide "blanket anticipatory bail." Since the main goals of anticipatory bail are to protect individual liberties and avoid unwarranted arrests, the court must carefully utilize its discretion to ensure that the provision is not abused.

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<sup>29</sup> 1976 Cr. L.J. 1142 (All.)

<sup>30</sup> Sharma, Sudesh Kumar. "DIMENSIONS OF JUDICIAL DISCRETION IN BAIL MATTERS." Journal of the Indian Law Institute, vol. 22, no. 3, 1980, pp. 351–70. JSTOR, <http://www.jstor.org/stable/43950699>. Accessed 23 Apr. 2024.

<sup>31</sup> 82 C.W.N. 428 (1977-78).

<sup>32</sup> supra

<sup>33</sup> 978 Cr. L.J. 20 (P. & H.) (F.B.)

<sup>34</sup> supra

## Conclusion

“Bail is the rule and jail is the exception”

-Justice P.N. Bhagwati

In the above principle, Justice P.N. Bhagwati highlighted the importance of individual liberty and the innate right to freedom. Anticipatory bail is seen as the essential safeguard of this basic right. The addition of this provision in the criminal legal framework is evidence of India's determination to protect the rights of its citizens. From its inception to its official entry into the legal system the provision has protected individual freedom against the changing social and legal landscape.

Significant court rulings and recommendations of Law Commissions are responsible for evolution of anticipatory bail, it is their aim to reach a middle ground between safeguarding people's rights and preventing potential abuse of these rights. Looking at the development of concept of anticipatory bail, it had become extremely complex due to multiple contradictory decisions regarding its scope. Finally clarity was provided by the Supreme Court's rulings in cases such as *Gurbaksh Singh Sibbia v. State of Punjab*<sup>35</sup> and *Sushila Aggarwal v. State (NCT of Delhi)*<sup>36</sup>, which emphasised that there shall be no restriction of time on anticipatory bail and that it shall last for the whole duration of the trial.

Certain restrictions are imposed on anticipatory bail to make sure it is not misused or abused, these restrictions include the existence of charges on the accused/ arrested person and a reasonable fear of arrest. When the court is given the task to decide whether or not to award anticipatory bail to a person, consideration should be given to factors such as the probability of the applicant appearing at trial when summoned, the specific circumstance of the incident, the seriousness of the alleged offence, and other criteria.

The evolution of anticipatory bail in India is reflective of necessity to balance between protecting the individual freedom and preventing abuse of this right. Anticipatory bail is an essential legal tool which has its roots in the principle that “a person is innocent until and unless proven guilty”, without considering the complex and difficult nature of the provision and its implementation. As the legal system evolves, it is vital to ensure that anticipatory bail is applied fairly and effectively to ensure that the fundamental rights that are guaranteed to each citizen of India by the constitution are upheld. Evolution of this concept is a watershed moment in Indian legal history and acts as a guardian to the right to individual liberty.

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<sup>35</sup> supra

<sup>36</sup> supra