

“Anticipatory Bail: A Potpourri of Perplexities”

**Jyoti Prakash Dutta
University Law College,
Utkal University,
Bhubaneswar, Odisha*

***Rajalaxmi Mohanty
University Law College,
Utkal University,
Bhubaneswar, Odisha*

ABSTRACT:

It is a well-settled position that the graver the offence, the greater should be the care taken to see that neither an innocent person is penalised, whatever may be the form of such punishment, nor a guilty allowed to evade the rigours of justice delivery system. The ‘bail jurisprudence’ in India is evolving with unexpected speed. With the initiation and hearing of plethora of cases involving the subject matter, the different Benches of the Court tend to tilt towards separate views. However, the common constitutional principles are, nevertheless, adhered to by every such Bench. Right to life doesn’t mean mere animal existence rather it embraces all such modalities which makes a life worth of dignity and respect. The State should avoid unnecessary and extravagant harassment of the innocent people and instruct its investigating agencies to eschew from taking harsh steps. There is no scope for any preconceived notion. The role of the Courts is that of a watchdog and not of a bloodhound. It must be their effort to see that an innocent person is not made to suffer on account of unfounded, baseless and malicious allegations. Arrest may be justified only if there is ‘credible information’ or ‘reasonable suspicion’ and if arrest is necessary to prevent further offence or for proper investigation or to check interference with the evidence. Similarly, Court should not only see that no innocent person is punished but should also see that no guilty person escapes unpunished. Accused should not be given undue leverage. No doubt, grant of bail is within the jurisdiction of the Courts, however, the Courts must not gullibly dismiss the possibility of accused intimidating the witnesses in a fleecy manner. Inquiry must be carried out with due alacrity irrespective of the strata from which the accused belongs. This paper endeavours to highlight the applicability of this bail provision and the need for striking a balance between individual liberties and societal interests.

A. INTRODUCTION:

The legal mandates essentially give scope to everyone to safeguard one's personal liberty. A person can never be allowed to suffer on the basis of whimsical suspicions and assumptions as law reprobates the tendency to make an innocent to languish for the want of proof. One cannot be devoid of his pristine rights without the command of justice. The State must realise the need for making an equilibrium between the maintenance of law and order and individual freedoms. It being the guardian of collective conscience can never let sinister modalities to deprive a person of his lawful entitlements. It is a cherished fact that reasonable constrictions of liberties are the prerequisites of a vibrant society as Plato observes, "we shall need laws to regulate the disciplines of adults as well, and in fact the whole life of the people generally; for many more amenable to compulsion and punishment than to reason and moral ideas".¹ And Aristotle may be followed when he held that, "while it is proper for the lawgiver to encourage and exhort men to virtue on moral grounds, in the expectation that those who have the virtuous moral upbringing will respond, yet he is bound to impose penalties on the disobedient and ill-conditioned".² However, capricious and arbitrary chastisements may lead to the debacle of constitutional values. This being the position, the State is under an obligation to appreciate the prophylactic measures resorted to by individuals to defend their privileges.

B. MEANING AND BRIEF HISTORY OF ANTICIPATORY BAIL:

It is interesting to note that the definition of 'anticipatory bail' has not been given anywhere. It is generally understood to be a bail which is applied in anticipation of arrest.³ This provision doesn't find any mention in the preceding Code.⁴ In the 1969,⁵ the Law Commission of India recommended for the inclusion of the provision to ensure less harassment of innocent accused persons. It advised to leave it to the discretion of the Court and preferred not to fetter such discretion in the statutory provision itself. It reposed faith on the higher judiciary and believed that they will use their discretion properly and will not make any observation which will have a tendency to prejudice fair trial of accused persons. Consequent upon the recommendation, under Section 438 of the Code of Criminal Procedure,

¹ Plato, *The Laws*, Penguin edn., 1970: 797.

² Aristotle, *Nicomachean Ethics*.

³ Siddharam Satlingappa Mhetre v. State of Maharashtra & Ors., (2011) 1 SCC 694: 2011 Cri LJ 3905: AIR 2011 SC 312.

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

⁵ 41st Report, the Law Commission of India.

1973,⁶ the Courts of Session and the High Court were empowered to grant such bail. They are left free in the exercise of their judicial discretion to grant bail if they consider it fit so to do on the particular facts and circumstances of the case and on such conditions as the case may warrant.⁷

C. WHETHER ANTICIPATORY BAIL IS A SEGMENT OF ARTICLE 21?:

The grant of bail under Section 438(1), the Code of Criminal Procedure, 1973 is hooked up on the factual merits and circumstances of a particular case. The provision is based upon the concept of personal liberty. As the law presumes an accused to be innocent till his guilt is proved,⁸ he is entitled to all the cherished fundamental rights including the right to life and liberty protected under Article 21 of the Constitution. A person should not be humiliated in order to satisfy the acrimony of complainant.⁹ While conceding to the anticipatory bail application, the Courts are anticipated to ponder and keep in mind the nature and enormity of indictment, antecedents of the applicant, *i.e.*, about his earlier engrossments in such offences and the likelihood of the accused to abscond from justice delivery system.

This issue was coherently discussed by the Hon'ble Highest Court in **P. Chidambaram v. Directorate of Enforcement**,¹⁰ wherein the Court took the view that anticipatory bail can never be considered as a constitutional or fundamental right. While observing the aforesaid view, the Court succinctly relied upon a precedent, *i.e.*, **State of Madhya Pradesh & Anr. v. Ram Kishna Balothia & Anr.**,¹¹ where it was 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. It cannot be considered as an indispensable component of Article 21 of the Constitution. And its application to a certain special category of offences can be barred and that would not amount to violation of Article 21.

D. ANTICIPATORY BAIL VIS-À-VIS CUSTODIAL INTERROGATION:

When contentious allegations are levelled against the accused and further, if it is felt that the investigation is held up as custodial interrogation of the accused cannot be done due to grant

⁶ Act No. 2 of 1974.

⁷ Gurbaksh Singh Sibbia v. State of Punjab, AIR 1980 SC 1632: (1980) 3 SCR 383.

⁸ Ghurey Lal v. State of Uttar Pradesh, (2008) 10 SCC 450: (2009) 1 SCC (Cri) 60; Chaluvegowda v. State, (2012) 13 SCC 538.

⁹ Sumit Mehta v. State (NCT Delhi), (2013) 15 SCC 570: (2014) 6 SCC (Cri) 560.

¹⁰ Criminal Appeal No. 1340 of 2019.

¹¹ (1995) 3 SCC 221.

of anticipatory bail, in such circumstances the appellate Court would be justified if it cancels the aforesaid bail.¹² The Hon'ble Apex Court has held that custodial interrogation is qualitatively more elicitation-oriented than questioning a suspect who is well ensconced with a favourable order under Section 438, Cr.P.C. Effective interrogation of a suspected person is of tremendous benefit in disinterring useful information and materials which would have been concealed. Success in such interrogation would elude if the suspected person knows that he is protected and cloistered by a pre-arrest bail.¹³

Besides that, during interim protection, accused may misuse his liberty to scuttle investigation and intimidate witnesses.¹⁴ The apprehension that an applicant is in a position to influence, induce or coerce witnesses to desist from furnishing relevant information cannot be considered to be a fantasy and Court must take these aspects in utmost momentousness.¹⁵ It is a settled position of law that where an accused has been declared as an absconder and has not liaised with investigation, he should not be granted anticipatory bail.¹⁶ The discretion under Section 438 should be guided by law and cannot be arbitrary, fanciful or vague. The Court must not yield to spasmodic sentiment of unregulated benevolence.¹⁷

The Court in **Jonathan Nitin Brady v. State of West Bengal**,¹⁸ *per contra*, held that if on the *prima facie* scrutiny of the materials on record, if the Court is of the view that the accused is entitled for the pre-arrest bail and there is no satisfactory reason for custodial interrogation for the alleged offence, he should be enlarged on anticipatory bail. On such occasion the investigating officer may interrogate him without taking him to custody and in the event of his arrest, he shall be released on bail subject to the prescribed conditions. Further, the Court reiterated this view in **Siddharam Satlingappa Mhetre v. State of Maharashtra**,¹⁹ opined that a great ignominy, humiliation and disgrace is attached to arrest. In cases where Court is of considered view that accused has joined investigation and he is fully cooperating with the investigating agency and is not likely to abscond, in that event, custodial interrogation should be avoided.

¹² Sudhir v. State of Maharashtra, (2016) 1 SCC 146: AIR 2015 SC 3665.

¹³ State v. Anil Sharma, (1997) 7 SCC 187: AIR 1997 SC 3806.

¹⁴ Maruti Nivrutti Navale v. State of Maharashtra, (2012) 9 SCC 235: (2013) 1 SCC (Cri) 982.

¹⁵ State of Gujarat v. Narendra K. Amin, (2008) 13 SCC 594: AIR 2007 SC 2876: (2009) 2 SCC (Cri) 237.

¹⁶ State of Madhya Pradesh v. Pradeep Sharma, (2014) 2 SCC 171: AIR 2014 SC 626.

¹⁷ Jai Prakash Singh v. State of Bihar, (2012) 4 SCC 379: AIR 2012 SC 1676.

¹⁸ (2008) 8 SCC 660: (2008) 3 SCC (Cri) 627.

¹⁹ (2011) 1 SCC 694: 2011 Cri LJ 3905: AIR 2011 SC 312.

E. PRE-ARREST BAIL IN OFFENCES RELATED TO THE SCHEDULED CASTE AND SCHEDULED TRIBE (PREVENTION OF ATROCITIES) ACT, 1989:

Section 18 of the Scheduled Caste and Scheduled Tribe (Prevention of Atrocities) Act, 1989 provides a prohibition for invoking Section 438, Cr.P.C. However, a duty is imposed upon the Court to verify the averments made in complaint and to find out whether offence under Section 3(1) of the Act has been *prima facie* made out. If there is a specific mention in the complaint, *i.e.*, insult or intimidation with intent to humiliate by the only fact that a person belongs to SC/ST community, no Court shall entertain an application for anticipatory bail, unless it *prima facie* finds that such an offence is not made out.²⁰ In **R. Madhusudhan v. State of Karnataka**, the Supreme Court held that trial Court should not incline to release an accused under the Act on anticipatory bail.²¹ This approach has been embraced so as to ensure that no person belonging to the aforesaid community is harassed or beleaguered.²²

Nevertheless, the Apex Court in **Subhash Kashinath Mahajan v. State of Maharashtra**,²³ contentiously opined that Section 18 of the Act cannot be read as being applicable to cases where individuals are falsely implicated for superfluous reasons. Thus, exclusion of Section 438, Cr.P.C. can be applied to genuine cases and not to false one. Arrest may be justified only if there is 'credible information' or 'reasonable suspicion' and if arrest is necessary to prevent further offence or for proper investigation or to check interference with the evidence. The Courts, *i.e.*, the Courts of Session, High Courts or Supreme Court have the necessary authority vested in them to grant anticipatory bail in non-bailable offences under Section 438, Cr.P.C. even when cognizance is taken or a charge-sheet is filed provided that situations require the Court to do so.²⁴

F. ANTICIPATORY BAIL IN CASES OF ECONOMIC OFFENCES:

In India, the judicial trend is to discourage the grant of anticipatory bail to economic offenders. In **Directorate of Enforcement v. Ashok Kumar Jain**,²⁵ it was held that in

²⁰ Vilas Pandurang Pawar v. State of Maharashtra, (2012) 8 SCC 795: AIR 2012 SC 3316; Manju Devi v. Onkarjit Singh Ahluwalia, (2017) 13 SCC 439: AIR 2017 SC 1583.

²¹ (2017) 14 SCC 233.

²² National Campaign on Dalit Human Rights v. Union of India, (2017) 2 SCC 432: AIR 2017 SC 132.

²³ (2018) 6 SCC 454: AIR 2018 SC 1498.

²⁴ Bharat Chaudhury v. State of Bihar, (2003) 8 SCC 77: 2003 SCC (Cri) 1953: AIR 2003 SC 4662.

²⁵ (1998) 2 SCC 105.

offences relating to economy and matters involving finance, accused is not entitled to anticipatory bail. A disregard for the interest of the community can be manifested only at the cost of forfeiting the trust of the community in the system to administer justice in an even-handed manner without fear of criticism from the quarters which view white collar crimes with a permissive eye unmindful of the damage done to the national economy and national interest.²⁶ The Supreme Court in **Y.S. Jagan Mohan Reddy v. Central Bureau of Investigation**,²⁷ sternly observed that economic offences constitute a class apart and need to be visited with a different approach in the matter of bail. The economic offences having deep-rooted conspiracies and involving huge loss of public funds need to be viewed seriously.²⁸ This proposition was recently reiterated by the Supreme Court in **P. Chidambaram v. Directorate of Enforcement**.²⁹

G. NEED FOR A BALANCE BETWEEN INDIVIDUAL LIBERTY AND SOCIETAL ORDER:

The 'bail jurisprudence' in India is evolving with unexpected velocity. With the initiation and hearing of plethora of cases involving the subject matter, the different Benches of the Court tend to tilt towards separate views. However, the common constitutional principles are, nevertheless, adhered to by every such Bench. The Apex Court has held that in view of Article 21 of the Constitution, a person should not be compelled to go to jail if he can *prima facie* establish that in the facts of the case he is innocent.³⁰ It is a well-settled position that the graver the offence, the greater should be the care taken to see that neither an innocent person is penalised, whatever may be the form of such punishment, nor a guilty allowed to evade the rigours of justice delivery system.³¹ Mere heinous or gruesome nature of the crime is not enough to presuppose the guilt or character of the accused.³² It is a trite state that suspicion, howsoever grave, cannot substitute proof.³³

The State, be it Union or State Government should avoid unnecessary and extravagant harassment of the innocent people and instruct its investigating agencies to eschew from

²⁶ State of Gujarat v. Mohanlal Jitmalji Porwal & Ors., (1987) 2 SCC 364.

²⁷ (2013) 7 SCC 439.

²⁸ Dukhishyam Benupani, Assistant Director, Enforcement Directorate (FERA) v. Arun Kumar Bajoria, (1998) 1 SCC 52.

²⁹ Criminal Appeal No. 1340 of 2019.

³⁰ Mukesh Kishanpuria v. State of West Bengal, (2010) 15 SCC 154.

³¹ State of Karnataka v. Ramanjanappa, (2001) 8 SCC 387; 2002 SCC (Cri) 59; AIR 2001 SC 3515.

³² Ashish Batham v. State of Madhya Pradesh, (2002) 7 SCC 317; 2002 SCC (Cri) 1718; AIR 2002 SC 3206.

³³ Devi Lal v. State of Rajasthan, 2019 SCC OnLine SC 39; Criminal Appeal No. 148 of 2010.

taking crude steps.³⁴ It is essential in a society which recognises human rights and is based on values such as freedom, rule of law, democracy and openness.³⁵ The provision of anticipatory bail has been rightly prescribed to ensure that none of the innocent persons is castigated before the completion of a fair investigation.³⁶ Arrest may be justified only if there is 'credible information' or 'reasonable suspicion' and if arrest is necessary to prevent further offence or for proper investigation or to check interference with the evidence.³⁷ The Courts must adjudge each of these matters judiciously so as to avoid suspicions, conjectures and surmises to influence their respective orders.³⁸ There is no scope for any preconceived notion. The role of the Courts is that of a watchdog and not of a bloodhound. It must be their effort to see that an innocent person is not made to suffer on account of unfounded, baseless and malicious allegations.³⁹ Where there is a huge probability of roping in innocent persons, Court's approach should be more cautious.⁴⁰ As the object of criminal justice system is to mete out justice, convict the guilty and to protect the innocent, there should be search for truth and not a bout over technicalities.⁴¹

On the other hand, Court should not only see that no innocent person is punished but should also see that no guilty person escapes unpunished.⁴² Our jurisprudential avidity for presumed credulity must be moderated by the pragmatic need to make criminal justice potent and realistic. A balance has to be struck between chasing chance possibilities as good enough to set delinquent free.⁴³ Accused should not be given undue leverage. No doubt, grant of bail is within the jurisdiction of the Courts, however, the Courts must not gullibly dismiss the

³⁴ Afzal v. State of Haryana, 1995 Supp (2) SCC 388; 1995 SCC (Cri) 677 Budhwa v. State of Madhya Pradesh, 1991 Supp (1) SCC 9; 1991 SCC (Cri) 237; AIR 1991 SC 4.

³⁵ Suresh Chandra Jana v. State of West Bengal, (2017) 16 SCC 466; (2018) 2 SCC (Cri) 187.

³⁶ Bijoy Singh v. State of Bihar, (2002) 9 SCC 147; 2002 Cri LJ 2623; AIR 2002 SC 1949.

³⁷ Subhash Kashinath Mahajan v. State of Maharashtra, (2018) 6 SCC 454; AIR 2018 SC 1498.

³⁸ S. Gopal Reddy v. State of Andhra Pradesh, (1996) 4 SCC 596; AIR 1996 SC 2184; 1996 SCC (Cri) 792.

³⁹ Sushil Kumar Sharma v. Union of India, (2005) 6 SCC 281; AIR 2005 SC 3100; Social Action Forum for Manav Adhikar v. Union of India, (2018) 10 SCC 443.

⁴⁰ Mayappa Dhondanna Padeade v. State of Maharashtra, (1981) 3 SCC 669; 1981 SCC (Cri) 790; AIR 1981 SC 173; Janardan Singh v. State of Bihar, (2009) 16 SCC 269; (2010) 3 SCC (Cri) 253.

⁴¹ Zahira Habibullah Sheikh (5) v. State of Gujarat, (2006) 3 SCC 374; AIR 2006 SC 1367.

⁴² Ambika Prasad v. State (Delhi Administration), (2000) 2 SCC 646; AIR 2000 SC 718; Paras Yadav v. State of Bihar, (1999) 2 SCC 126; Ram Bihari Yadav v. State of Bihar, (1998) 4 SCC 517; 1998 SCC (Cri) 1085; Karnel Singh v. State of Madhya Pradesh, (1995) 5 SCC 518.

⁴³ Shivaji Sahabrao Bobade v. State of Maharashtra, (1973) 2 SCC 793; AIR 1973 SC 2622; Vinubhai Ranchhodhbhai Patel v. Rajivbhai Dudabhai Patel, (2018) 7 SCC 743; State of Karnataka v. J. Jayalalitha, (2017) 6 SCC 263; Yogesh Singh v. Mahabeer Singh, (2017) 11 SCC 195; Ramesh Harijan v. State of Uttar Pradesh, (2012) 5 SCC 777.

possibility of accused intimidating the witnesses in a fleecy manner.⁴⁴ Inquiry must be carried out with due alacrity irrespective of the strata from which the accused belongs.⁴⁵

H. CONCLUSION:

From the above discussion, it is evident that the provision for anticipatory bail still remains a grey area in the administration of law and order. This has been discussed manifold times by different constitutional Courts. A satisfactory equilibrium must be made between individual freedoms and societal order. Being a contentious and controversial provision, it ought main it rigours according to the ‘majesty of law’ and must dispense justice in such a manner which not only be deemed to be done, rather would apparently be seen to be done.

⁴⁴ Niranjan Singh v. Prabhakar Rajaram Kharote, (1980) 2 SCC 559: AIR 1980 SC 785.

⁴⁵ Karan Singh v. State of Haryana, (2013) 12 SCC 529: AIR 2013 SC 2348.