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Right To Anticipatory Bail

"There can be no presumption that the wealthy and the mighty will submit themselves to trial and that the humble and the poor will run away from the course of justice, any more than there can be a presumptions that the former are more likely to commit a crime and the later are more likely to commit it. In his charge to the jury salishbury assizes, 1899, (to which Krishna Iyer. J. he referred in Gudikanti A. I .R.1978Sc 129) Lord Russell of Killowen said .....it was the duty of magistrate to admit accused person to bail, when ever practicable, unless thewe strong grounds for supposing that such person would not appear to take their trial .It was not the poorer class who did not appear, for, their circumstances were such as to tie them to the place where they carried their work .They had not the golden wings with which they fly from justice[1].

The word "Anticipatory Bail" is not found in s. 438 or in its marginal note. In fact "anticipatory bail" is a misnomer as it is not bail presently granted in anticipation of arrest .When the Court grants anticipatory bail , what it does is to make an order that in the event of arrest ,a person shall be released on bail. Manifestly there is no question of release on bail unless a person is arrested, and therefore, it is only on arrest that the order granting "Anticipatory Bail" becomes operative. The Section, however, makes no distinction whether the arrest is apprehended at the hands of the police or at the instance of the magistrate. The issuance of warrant by the magistrate against a person justifiably gives right to such an apprehension and well entitled a person to make a prayer for anticipatory bail. Issuance of summons for appearance also entitled an accused to apply for anticipatory bail[2].

It has also been held that anticipatory bail cannot be granted to a person to do some thing which is likely to be interpreted as commission of crime even if the offender intended it as something in exercise of his rights[3]. The expression 'anticipatory bail' is a convenient mode of conveying that it is possible to apply for bail in anticipation of arrest[4]. The distinction between an ordering order of bail and an order of anticipatory bail is that where as the former is granted after arrest and, therefore, means release from the custody of the police, the later is granted in anticipation of arrest and is, therefore, effective at the very moment of arrest[5].

Sec 438 makes a provision enabling the Superior Court to grant anticipatory bail e.g. A direction to release a person on bail even before a person is arrested.

The Law Commission considered the need for such a provision and observed:

"The necessity for granting anticipatory bails arises mainly because some times influential persons try to implicate theirs rivals in the false cases for the purposes of disgracing them or for other purposes by getting them detained in jails for some days. In recent times, with the accentuation of political rivalry this tendency is showing signs of steady increase. Apart from false cases, where there are reasonable grounds for holding that persons accused of an offences is not likely to abscond or otherwise misuse his liberty while on bail , there seems no justification to require him first to submit to custody, remain in prison for some days and then apply for bail[6].

In its subsequent report the Law Commission expressed the view that the power to grant anticipatory bail should be exercise in very exceptional case. The Commission further observed:
"In order to ensure that the provisions is not put to abuse at the instance of unscrupulous petitioners ,the final order should be made only after notice to the public prosecutor. The initial order should only be an interim one.Further, the relevant section should make it clear that the direction can be issue only for reasons to be recorded , and if the court is ratified that such a direction is necessary in the interest of justice"

According to s.438(1) on the application for anticipatory bail can be made to the High Court or Court of Sessions, however, normally it is to be presumed that the court of session would be first approached for the grant of anticipatory bail unless an adequate case is made out straightway approaching the High Court directly without first coming before the court of session.The full bench of the Allahabad High Court has however taken the view that a bail application under s.438 may be moved in the High Court without the applicant taking recourse to the Court of Session[7] for anticipatory bail is rejected , the applicant can again approach the High Court under s.438(1) as there is no bar to do so[8]. As bails are against arrest and detention, an appropriate court within whose jurisdiction the arrest takes place or is apprehended or is contemplate will also have jurisdiction to grant bail to the person concerned .Therefore ,the High Court or the Court of Session having jurisdiction over the place where the arrest is apprehended by the applicant has jurisdiction to entertain application for anticipatory bail even though the F.I.R. might have been registered at a place within the jurisdiction of another High Court or Court o Session .The opinion express by the Supreme Court in some cases seems to favour the view that the question of granting anticipatory bail to any person who allegedly concerned with the offence must for all practical purposes considered by the courts within whose territorial jurisdiction offence could have been perpetrated ……the fact that a court has either taken cognizance of the complaint or the investigating agency has filed a charge sheet , would not by itself _, in our opinion, prevent the concerned courts from granting anticipatory bail in appropriate cases. The gravity of the offence is an important factor to be taken into consideration while granting such anticipatory bail so also the need for custodial interrogation ,but these are also only factors that be born in mind by the concerned Courts while entertaining a petition for grant of anticipatory bail and the fact of taking cognizance of filing of charge-sheet can not by themselves be construed as a prohibition against the grant of anticipatory bail ……. we respectfully agree with the observations of this Court in the said Case that duration of anticipatory bail should be normally limited till the trial Court has the necessary material before it to pass such orders and it thinks fit on the material available before it . that is only a restriction in regard to blanket anticipatory bail for an unspecified period . This judgement in our opinion does not support the extreme argument addressed on behalf of the learned counsel for the respondent State the Courts specified in s. 438.of Cr.P.C. are denude of their power under the said section where either the cognizance is taken by the concerned Court or charge-sheet is filed before the appropriate Court .As stated above this would only amount to defeat the very object for which s. 438.was introduced in Cr.P.C. in the year 1973.[9]

Section 437and s.439 of,Cr.P.C 1974 made provision for grant of bail In the Cr. P.C 1898 there was no provision corresponding to s. 438, which may be conveniently described as a provision for the of anticipatory bail .Under the 1898 Code there was a conflict of judicial opinion whether Courts had power to grant anticipatory bail, but the majority view was that court had no such power The Law Commission in its 41th report dated 24 Sept.1969 pointed out the necessity of introducing the provision and it annex draft of the proposed section to its report . In principle the Central Govt. accepted the recommendations of the Law Commission and embodied it in the draft bill to the Cr P.C, The Law Commission in Para 91 of its 48th report(1973) made certain comments on the Bill,[10]
" It was urged before the Full Bench that the appellant were men of substance and position and were not likely to abscond. The Full Bench rejected the contention "The possession of high status, according to the Full Bench, is not only an irrelevant consideration for granting anticipatory bail but is ,if any thing, an aggravating circumstances" Since the sub clause agreed with the Full Bench proposition No 2, it would be convenient to deal with it first : Proposition(2) was niethers.438 nor any other provision of the Code authorise the grant of blanket anticipatory bail for offences not yet committed or with regard to accusation not so far leveled". In Gurbax Singh v/s State of Panjab[11] ,Chandra Chud C.J.I observed "We agree that the 'blanket order ' of anticipatory bail should not generally be passed.. This flows from the very language of the section.

Which……requires the applicant to show that he has reason to believe that he may be arrested ……That is why , normally, a direction should not issue under s.438(1) to the effect that the applicant shall be released on bail whenever arrested for whichever offence whatsoever. That is why, normally, a direction should not issue under s.438 (1) to the effect that the applicant shall be released on bail 'whenever arrested for whichever offence whatsoever. That is ment by a 'blanket order of anticipatory bail. But specific event and facts must be disclosed by the applicant in order to enable the court to judge of the reasonableness of his belief, the existence of which is the sine qua non of the exercise of power conferred by s.438. A Blanket order of anticipatory bail is bound to cause serious interference with both and the duty of the police in matter of investigation because regardless of what kind of offences is alleged to have been committed by the applicant and when order of bail which comprehend allegedly unlawful activity of any description whatsoever ,will prevent

the police from arresting the applicant even if he commit ,say a murder in the presence of the public .Such an order can then become a Charter of Lawlessness and a weapon to stifle prompt investigation into offences which couldn't possibly be predicted when the order was passed. Therefore ,the Court which grant anticipatory bail must take care to specify the offence or offences in respect of which alone the order will be effective .the power should not be exercise in vacuum''[12]

The main controversy centered round the question whether the wide discretion conferred on the Court by s. 438 should be cut down by reference to s. 437 and 439. The Full Bench proposition no.3 observed:
"The said power is not unguided or unchenalised but all the limitations imposed in the preceding s. 437, are implicit therein must be read in to s. 438."

Rejecting this view Chandra Chud C.J.I observed
"Arrest for a non bailable offence involved the question of personal liberty, and the Supreme Court had held when dealing with Art21. That no person can be deprived of his liberty except by procedure which was fair, just and reasonable. S. 438 .provide a procedure to protect the personal liberty by a procedure which is fair, just and reasonable''

Parliament when enacted s. 438, had before it the provisions of s. 437, and if it was desired to incorporate those provisions into s.438, parliament would have done so. It was inadmissible read into s.438, when parliament could have, but did not incorporate these. The distinction between provisions in s.438. ordinarily order of bail and an order of anticipatory bail is that whereas the former is granted after arrest , the latter is granted in anticipation of arrest ,and is , therefore effective at the very moment of arrest the power to grant anticipatory bail was found necessary because:
" When the event flow life becomes turbid, the police can be called upon to inquire into charges arising out of political antagonism. The powerful process of criminal law can then be perverted for achieving extraneous ends. Attendant upon such investigation, when the police are not free agent within their sphere of duty is a great amount of inconvenience, harassment and humiliation .That can even take the form the parading of a respectable in handcuffs, apparently on way to court of justice. The foul deed is done when an adversary is exposed to social ridicule obloquy, no matter when and whether a conviction is secured or is at all possible. It is in order to meet such situations, though not limited to these contingencies, that the power to grant anticipatory bail was introduced into the Code of 1973."

The above passage show that the position or status of a person may be relevant if a threatened arrest is the result of political vendetta or revenge. However Chandrachud C.J. thought necessary to sound note of caution:
" There can be no presumption that the wealthy and the mighty will submit themselves to trial and that the humble and poor will run away from the course of justice , any more than there can be a presumption that the former are not likely to commit it . In his charge to the grand jury at Salihury Assize ,1899,(to which Krishna Iyer. J. has referred to in GudiKanti A.I.R.1978.Sc.429.) Lord Russell of Killowen said .....it was the duty of magistrate to admit accused person to bail , when ever practicable ,unless there were strong ground for supporting that such persons would not appear to take their trial .It was not the poorer class who did not appear ,for their circumstances were such as to tie them to the place where they carried their work they had not golden wings with which they fly from Justice ."

Chandrachud gave 5 cogent reasons for not laying down rules as to circumstances in which anticipatory bail shall or should not be granted. Each case had to be judged on its merits and the circumstances so that it was best to leave the grant of anticipatory bail to the discretion of the Court .The discretion has to be judiciously exercised and is subject to correction by appeal or revision.

This view is supported by the fact that arrest interferes. The provisions of s. 438 cannot be invoked after the arrest of the accused. The grant of anticipatory bail to an accused that is under arrest involved a contradictory in terms, in so far as the offences for which he is arrested are concerned.

After the arrest, the accused must seek remedy under s. 437. or s. 439. of the Code, if he wants to be released on bail in respect of the offence or offences for which he is arrested[13].

Learned counsel further submits that in any circumstances, at present two of the appellants may be permitted to leave abroad and stringent conditions may be imposed by their Court. He also submitted that one of the appellants, namely, Mr.Prakash P. Hinduja who has filed criminal Appeal No.

2001@S.L.P. (Cr.A.) No1868. of . 2001. would remain in this country till further order ……..considering the facts and circumstances ,for the time being as an intrerim measure , the appellants namely, Mr. Srichand . P . Hinduja . (in Cr. Appeal No. 2001.@SLP (Cr.)No.1829.of 2001)and Mr.Gopi Chand . Hiduja (in Cr.appeal.No….of 2001.@ SLPNo 1829. of 2001.) are permitted to go abroad on the following conditions: 1. Both the Appellants would execute a Bond for a sum of Rs. 15 crore 9Rupees fifteen crores) each with Bank Guartee for the like amount to the satisfaction of the special Judge[14].

After pursuing the orders of the Additional Sessions Judge dated 9. 4. 2001. and 5.6. 2001.and records, we do not get any impression that the judicial discretion in grating anticipatory bail was exercised are erroneously or on any irrelevant consideration . The serious contention advanced before us by the learned public prosecutor is that for further investigation of the case ,custodial interrogation of the appellant is very much required .While stating the facts in the beginning , we have noticed that the appellant joined investigation whenever required as a mater of fact they were interrogated on the occasions sufficient time . The appellants were named as accused for committing offence under s.120B,I.P.C.almost after a period of four and half months from the date of the murder ,that too based on the discloser statement of hardened criminal ,the statement of Kishan on whose statement the appellants were involved in the offence was proved to be false and police got him discharged .The submission of the learned public prosecutor that earlier investigation made by the police officer and scrutinized by the superior officers was faulty and mollified , is not a ground to put against the appellants at this stage . The appellant No.1.has also alleged that he is falsely involved in the case because of political rivalry and was threatened for extracting money ; in that regard he had also made complaint to the police seeking protection .Unfortunately the High Court in the impugned order dated 21.12.2001.,canclling the anticipatory bail granted to the appellants and in the subsequent order dated 22.2.2002.,did not consider the contentions raised on behalf of the parties objectively and in proper perspective and did not deal with the reasons recorded and consideration made by the learned Additional Session Judge in the order dated 9.4.2001.in granting anticipatory Bail. High Court simply observed in the order dated 21.12.2001. that Additional Session Judge Rewari has not taken all facts into account and that he granted anticipatory bail to the appellant on 9.4.2001.when the case was at investigation stage."

The Court further observed:
……Thus in our view ,the High Court committed manifest and serious error in passing the impugned orders setting aside the anticipatory bail granted to the appellants by the order dated 9.4.2001. as confirmed by the dated 5.6.2001.of the learned Add. Session Judge .The impugned orders of the High Court under the circumstances are unsustainable. It is needless to state that observation made either by the learned Add. Sessions Judge or the High Court or this Court in dealing with the matter relating to grant of anticipatory bail do not impair or injured the prosecution case or prejudice the defense at the trial. Further nothing said or observed by the High Court or this Court shall be taken as any expression of opinion on the merit of the case[15].

There is nothing in s.438 to suggest that the order of anticipatory bail shall be effective up to a particular stage or till the filing of the challan. As soon as a person is enlarge on bail on the directions of anticipatory bail order, It would be deemed by implication as if the bail was granted under s.437.(1). Consequently , the bail shall be effective till the conclusion of the trial , unless it is cancelled by the court taking action under s.437(5) or under s.439(2) of the Code on the grounds known to law and filing of the challan in the court is by it self no ground to cancel the bail[16].

Anticipatory bail in the absence of s. 348, so for as the state of U.P. is concerned, s.438.has been omitted from the code by s.9.of the U.P. Cr.P.C. (Amendment) Act1976. The S.438. coupled with the delay in the disposal of bail application in U.P. has prompt the bar to come up with the plea for stay of arrest or granting interim bail.

Cancellation of anticipatory bail : Neither s.438.nor any other section in the code makes any clear provision as to whether the order granting anticipatory bail can be cancelled even before the regular bail is actually granted . However, it has been held that when s.438 permits the making of an order and the order is made for granting anticipatory bail .It is implicit that the court making such an order is entitled upon appropriate consideration to cancel recall the same[17]. Anticipatory bail granted to a husband in a case allegedly involving dowry death came to be cancelled by the M.P. High Court[18]. Following the Supreme Court decision not to grant anticipatory bail in dowry death cases as a matter of course[19].

A committing magistrate is not permitted to cancel anticipatory bail on an accused at the time of committing the case to Session Court for trial , if he has been granted anticipatory bail by an order of the Session Court or of the High Court unless the order passed by the Session Court or the High Court is of temporary nature[20]. Also s.12.A.A. of the Essential Commodities Act enacts a complete Code in matter of grant of bail to an accused and he can be released only in accordance with the provisions of s.12.A.A. The High Court does not have any power or authority or jurisdiction to grant anticipatory bail under s.438. to an accused under the Essential Commodities Act[21]. Sub section (4) of s. 12.A.A. of the Essential Commodities Act does not exclude the operation of s. 438. and special court or the High Court can release a person accused or suspected of commission of offence under the Essential Commodities Act, under s.438[22]."Anticipatory bail" falls within the category of "bail". The Court of Session has a power to grant anticipatory bail under s.438. to a person accused of or suspected of the commission of an offence under the Essential Commodities Act .Such p;ower , however, may be exercised by the Special Court in view of the provisions to cl.(d),s..12.A.A. of the Act[23]..

Anticipatory Bail in the absence of s.438: So far as the state of U .P. is concerned ,s. 438. has been omitted from the Code by s. 9 of the U.P. Cr. P C. (Amendment) Act1976. The repealing of s.438. coupled with the delay in the disposal of bail application in U.P. has prompted the bar to come up with the plan for stay of arrest or granting interim bail .

It was argued that since the courts of magistrate and the court of sessions have the jurisdiction to grant ultimate relief of bail, they also have jurisdiction to grant limited relief short of grant of bail by way of releasing offenders on personal bond for short periods as immediate relief ,As soon as a person surrenders before the court , the police loss the right to arrest . When in such cases the court releases him he is in the custody of the court. According to this view the release on personal bond is nothing but release on temporary bail .The power to do this was located by the court in s.437. and s.439. This view was , however, overturned by the full Bench decision in Vinod Narain v/s State of U.P.2.,Wherein the Allahabad High Court , categorically ruled that the courts can not be asked to dispose of bail applications on the same day of their presentation in the court . Some other States were also think on similar amendment. So far as the State of J&K is concerned the Code does not extend to the State at all. The Jammu and Kashmir State has its own State Code similar to the Code of Cr. P.C.1998 which does not contain any specific provision like s.438.for grant of anticipatory bail.

High Court of Jammu and Kashmir seems to take the view that it is possible to do so[24]. The High Court read into the provisions of the State Code such a power to grant anticipatory bail. According to the High Court ,a person who is not actually arrested by the police but apprehends arrest may "appear" in court and ask for bail in such a case the person ,according to the High Court, in fact surrenders to the custody of the court and there by there would be notional detention of the person .In such a situation ,the requirement of "appearing" envisaged by s.437&438.of the Code of 1973. is satisfied ,and in the absence of any specific provision for granting anticipatory bail the High Court of Jammu &Kashmir has in a way succeeded in achieving the result aims at by the provision for anticipatory bail .The question whether an application for anticipatory bail rejected by the Session Court can be entertained by the J&K High Court has been answer in the affirmative[25]..

The provision for granting anticipatory bail are not applicable to the offences under Scheduled Caste &Scheduled Tribes (prevention of Atrocities, Act 1989). Vide S.18 thereof This has been held to be constitutional[26].However, the potential for its abuse came to be discussed by the then Rajasthan High Court[27].

It is submitted with respect that the object of Sec 438 (1) is to grant anticipatory bail in anticipation or apprehension of the arrest. But the honourable Supreme Court and the High Court in their respective judgements mentioned above have absevered that anticipatory bail can also be granted after arrest . Also the court absevered that the petioner must surrender before the court before granting anticipatory bail. It is submitted with respect that observations defeat the very purpose of Sect 438 Going throw the report of the Law Commission it seems that the anticipatory bail is granted to save the haves from the oppression of the opponents. Further seeing the report of the Law Commission it can be presumed that Sec only says that have will appear before the court whenever required and the poor will run away from the court .Which is against the concept of social justice.

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