



## In Depth- Anticipatory Bail

The [Supreme Court \(SC\)](#) in *Sushila Aggarwal v. State of NCT of Delhi (2020)* case delivered a significant verdict, ruling that **no time limit can be set** while granting anticipatory Bail and it can continue even until the end of the trial. The Court made reference of India's **freedom movement** claiming that **arbitrary arrests, indefinite detentions, and lack of institutional safeguards** played an important role in rallying the people to raise the demand for Independence.

### Bail and its Types

- **Definition:** Bail is the conditional/provisional release of a person held under legal custody (in matters which are yet to be pronounced by the Court), by undertaking a promise to appear in the Court as and when required. It signifies a **security/collateral deposited** before the Court for release.
- In *Supt. and Remembrancer of Legal Affairs v. Amiya Kumar Roy Choudhry (1973)* case, the Calcutta High Court explained the **principle behind giving Bail**.
- **Types of Bail in India:**
  - **Regular Bail:** It is a direction given by the Court (any Court within the country) to release a person who is **already under arrest** and kept in police custody. For such Bail, a person can file an application under **Section 437 and 439** of the CrPC.
  - **Interim Bail:** Bail granted for a **temporary and short period** by the Court till the application seeking Anticipatory Bail or Regular Bail is **pending** before a Court.
  - **Anticipatory Bail:** A direction issued to release a person on Bail even **before** the person is **arrested**. In this situation, there is **apprehension of arrest** and the person is not arrested before the Bail is granted. For such Bail, a person can file an application under **Sec. 438 of the [Code of Criminal Procedure \(CrPC\)](#)**. It is **issued only** by the **Sessions Court and High Court**.

### Note

- **Section 438** of the CrPC lays down the provisions on anticipatory Bail:
  - **Sec. 438(1):** When any person anticipates that he/she may get arrested on an accusation of having committed a **non-bailable offence**, he/she may apply to the High Court or the Court of Session for a direction under this Section. The Court may direct (if it thinks fit) that in the event of such arrests, he/she shall be released on Bail even before an arrest is made without subjecting him/her to further restraints.
  - **Sec. 438(2):** When the High Court or the Session Court makes a direction under Sec. 438(1), it may **lay down certain conditions** in the light of the facts of the particular case, as it may think fit.

### Historical Background

- Anticipatory Bail became part of the CrPC in 1973 after the **41<sup>st</sup> [Law Commission Report](#)** (1969) recommended for the inclusion of such provision. It was included to protect the arbitrary violation

of the right to personal liberty of the person.

▪ **Necessity:**

- Sometimes influential persons try to implicate their rivals in false cases for the purpose of disgracing them or for other purposes by getting them detained in jail.
- Apart from false cases, when there are reasonable grounds for believing that a person accused of an offence is **not likely to abscond or misuse his liberty** while on Bail, then there is no need to first submit him to custody, make him/her remain in prison and then apply for Bail. In such cases, Bail could be granted earlier.
- As arbitrary arrests (often leading to harassment and humiliation of citizens) continue to be a **pervasive phenomenon** in the country, therefore, the protection to people should be given. And this was the underlying reason for the enactment of Sec. 438 in the CrPC, which even received the **Parliamentary acceptance** as **“crucial underpinning to shield individual’s personal liberty in a free and democratic country.”**

## Related Cases

- **Gurbaksh Singh Sibbia vs State of Punjab (1980) case:** SC ruled that “Sec. 438(1) should be interpreted in the light of **Article 21** (protection of life and personal liberty) of the Constitution.”
  - Granting of anticipatory Bail as a matter of right of an individual **should not** be limited by time.
  - The Court **could impose appropriate restrictions** on a case-by-case basis.
- **Salauddin Abdulsamad Shaikh vs State of Maharashtra (1995) case:** SC overruled its earlier judgment and held that “granting of anticipatory Bail **should be limited by time.**”
- **SS Mhetre vs State of Maharashtra & Ors (2010) case:** SC held that **“life/duration** of an order granting anticipatory Bail **could not be curtailed.**”
- Due to such divergent views, the Court had to decide on **two questions** in the recent **Sushila Aggarwal (2020) case-**
  - Should there be a **fixed time period to seek** anticipatory Bail, so as to enable a person to surrender before the Trial Court and seek for regular Bail? Also, should the **life of anticipatory Bail** end at the time of summoning by the Court?
  - Can Courts **impose any conditions** while granting such Bail or not?
- Also, recently the SC in the **Prathvi Raj Chauhan vs Union of India (2020) case**, observed that **provisions of anticipatory Bail (Sec. 438) shall not apply to the cases** under **Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act 2018.**

## Sushila Aggarwal (2020) Case Judgment

- There is **nothing in CrPC** that indicates the grant of anticipatory Bail should be **time-bound**.
  - However, under CrPC, it is **discretionary power** of the Court to **decide** on a case-to-case basis (depending upon the **stage** at which the Bail application has moved or prevalence of any **peculiar circumstances** necessitating to limit the tenure) **and impose a time limit** while **granting** pre-arrest Bail.
  - Also, this duration primarily does **not end after first summoning** by the Court and can continue till the end of the trial period.
- If any Court wants to limit the Bail, it **can attach special features or circumstances** warranting the same.
  - The Court while granting anticipatory Bail, should **examine the seriousness** and **gravity** of the **offence** (like nature of the crime, material placed on records, etc.) to **impose any condition on the petitioner**, if necessary.
  - The police can reach the Court seeking permission for arrest **in case of breach of such imposed conditions.**
- **Application** for anticipatory Bail could be **filed** by a person **before the FIR** (First Information Report) as soon as the facts make clear there is a substantial reason for the arrest.
- **Appellate jurisdiction** to check the correctness of the granted Bail lies with the **superior Court** on the request of the investigating agency or the State.
- The Court remarked that “when Parliament has not thought it appropriate to curtail the rights of the citizens and the power of Courts in granting anticipatory Bails, hence, it is **not in larger societal interest** to curtail such powers & limit the liberty of citizens. The rights of the citizens are fundamental and not the restrictions.”

## Offences and Anticipatory Bail

- An application for anticipatory Bail **can be filed** in cases of both **bailable and non-bailable offences**. While in the former situation, the Bail is granted as a **matter of right**, the grant of Bail in the latter situation is **not a matter of right but a privilege** & is at the behest of the discretionary power of the Court.
- **Bailable Offence: Sec. 436 of the CrPC** lays down provision for granting Bail to a person accused of any **bailable offence** under the IPC.
  - Bailable offences are offences or crimes that are **not very serious** in nature and include: **unlawful assembly** (Sec. 144 of CrPC), payment of bribe during elections, fabrication of false evidence, participation in riots, furnishing false information, **causing death by negligence** (Sec. 304A), stalking, criminal defamation, etc.
- **Non-bailable Offence: Sec. 437 of the CrPC** lays down the power of court to grant Bail to a person accused of committing a non-bailable offence under the IPC.
  - Non-bailable offences are **grave and serious offences** which include: **sedition**, waging or attempting to wage war against the government, counterfeiting of Indian currency, **murder** (Sec. 302), **dowry death** (Sec. 304B), abetment of suicide, trafficking of a person, **rape** (Sec. 376), etc.

## Factors & Conditions for Granting Anticipatory Bail

- The anticipatory Bail is granted on the basis of the following **factors**:
  - Nature and gravity of the accusation.
  - Applicant's possibility of fleeing from justice.
  - Previous cases against the applicant including any previous convictions or cases of a cognizable offence.
- **Cases of Bailable Offence:**
  - If there are sufficient reasons to believe that the **accused has not committed** the offence.
  - As per the Court, if there are sufficient reasons **to conduct further enquiry** into the matter.
  - If the **person is not accused of a crime** which is **punishable** by death, life imprisonment, or imprisonment up to 10 years or more.
- **Cases of Non-bailable Offence:**
  - If the accused is a woman or child,
  - If there is a lack of adequate evidence,
  - If there is a delay in registering the FIR by the complainant,
  - If the accused is physically or gravely sick,
  - If there is corroboration about personal animosity between accused and complainant.

## Conditions Imposed by Court

- Person **shall not leave the country and travel abroad** without the prior permission of the Court.
- If a Court **rejects the anticipatory Bail** a person, he/she can be **arrested** by the police **without a warrant**.
- Person shall **make himself available for interrogation** by a police officer (as and when required).
- Person shall **not** (directly or indirectly) **make any inducement, interference, threat or promise** to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to any police officer.

## Cancellation of Anticipatory Bail

- **Sec. 437(5) & Sec. 439** of CrPC deal with the cancellation of anticipatory Bail. They imply that a Court which has the power to grant anticipatory Bail is also **empowered to cancel the Bail or recall the order** related to Bail upon appropriate consideration of facts.
- A High Court or Court of Session may direct that any person who has been released on Bail by it-

be arrested, and brought under custody after filing of an application by the complainant or the prosecution.

- However, a Court does **not have the power** to cancel the **Bail granted by the police officer**.

Over the years, anticipatory Bail has acted as the protection (granted under **Sec. 438** of CrPC) to safeguard a person against whom false accusation or charges have been made. It ensures the release of such falsely accused person even before they are arrested.

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