

SUSHILA AGGARWAL and others Vs. STATE (NCT OF DELHI) and another

ABSTRACT:

Sushila Aggarwal v. NCT of Delhi is a landmark judgement of the Supreme Court as it made crystal clear that there is no provision of time restriction in the applicability of an anticipatory bail, granted under Section 438 of the Code of Criminal Procedure (Cr.P.C), 1973. In other words, it implies that no time limit could be fixed while granting anticipatory bail and that the protection under section 438 can continue till the end of the trial.

CASE DETAILS:

- **Case Name:** Sushila Aggarwal and others Vs. State (NCT of Delhi) and another
- **Case Number:** Special Leave Petition (Criminal) Nos.7281-7282 of 2017
- **Court:** The Supreme Court of India
- **Petitioner(s):** Sushila Aggarwal and Ors.
- **Respondent(s):** State (NCT of Delhi) and Anr.
- **Date of Judgement:** 29th January, 2020
- **Bench:** Justice Arun Mishra, Justice Indira Banerjee, Justice Vineet Saran, Justice MR Shah and Justice S. Ravindra Bhat

FACTS OF THE CASE:

In the light of the conflicting views of the different Benches of varying strength regarding the scope of Section 438 of the CrPC, which provides for grant of anticipatory bail and its limitations, a Special Leave Petition was filed before the Supreme Court. The question that was put forth before the Supreme Court by way of a Special Leave Petition was heard by a constitutional bench headed by Justice Kurian Joseph as it noted contradictory views in earlier judgments as to whether an anticipatory bail should be for a limited period of time or not.

PROCEDURAL HISTORY:

The provision concerned with the grant of anticipatory bail in India finds its mention in Section 438 of the Criminal Procedure Code, 1973.

438. Direction for grant of bail to person apprehending arrest.¹

(1) "When any person has reason to believe that he may be arrested on an accusation of having committed a non-bailable offence, he may apply to the High Court or the Court of Session for a direction under this section; and that Court may, if it thinks fit, direct that in the event of such arrest, he shall be released on bail."

This implies that anticipatory bail is a form of bail granted to a person apprehending arrest. This provision allows a person to seek bail in anticipation of an arrest on accusation of having committed a non-bailable offence. It must be noted that the power to grant anticipatory bail is given concurrently to the Court of Session and the High Court. Thus, a person can approach either of the courts to get this relief. Further, when a competent court grants anticipatory bail, it makes an order that in the event of arrest, a person shall be released on bail. Thus, we can say that anticipatory bail is an order of the court to the investigation agency to release the accused on bail in the event of his arrest.

It must be noted that the earlier criminal code, i.e., Code of Criminal Procedure, 1898 did not contain any provision regarding the pre-arrest bail, also known as anticipatory bail. It is only in 1973 that the Anticipatory Bail became part of the Cr.P.C, on the recommendation of the 41st Law Commission Report (1969). The Commission underlined the necessity of introducing a new section concerning pre-arrest bail and recommended for the inclusion of such provision. It was observed that many cases are instigated against a person just because of political motivation or personal vendetta. They lack enough evidence and are meant to harass a person by getting him arrested. As arbitrary arrests (often leading to harassment and humiliation of citizens) continue to be a pervasive phenomenon in the country, therefore, protection should be given to the people. This was the underlying reason for the enactment of Sec. 438 in the CrPC. Thus, the provision of anticipatory bail was included to protect the arbitrary violation of the right to personal liberty of an individual² so that no person can be confined or detained in any manner unless he has been held guilty. Further, it was observed that 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.

The confusion relating to the provision of anticipatory bail started and increased when different courts expressed different and contradictory views regarding its scope as to whether the same could be time bound or not. Some of the major judgements in this regard are-

- **Gurbaksh Singh Sibbia v. State of Punjab³** :

It was in this case only that a Constitution bench, for the first time, laid down the scope of section 438. In the present case, Gurbaksh Singh, a minister of Irrigation and Power in the government of Punjab, was involved in the allegations of corruption

¹Section 438 of the Code of Criminal Procedure

² <https://www.drishtiiias.com/loksabha-rajyasabha-discussions/in-depth-anticipatory-bail>

³ (1980) 2 SCC 565

and thus sought anticipatory bail under section 438 of the Cr.P.C. The Supreme Court, in this case held that section 438(1) should be interpreted in the light of Article 21, i.e., protection of life and personal liberty of the constitution. The court held that there is no time restriction as regard to the grant of anticipatory bail and that the court has absolute discretion to direct the duration of the same which can vary from a few weeks to the time of filing of the First Information Report, and can even continue till the end of the trial. Further, it was observed that the sole consideration for time duration must be with a view to balance the two competing interests, viz., protecting the liberty of the accused and the sovereign power of the police to conduct a fair investigation⁴. Thus, it was finally held that the grant of anticipatory bail should not be limited by time. Also, the court has wide discretion to impose appropriate conditions on a case to case basis.

- **Siddharam Satlingappa Mhetre v. State Of Maharashtra And Ors**⁵:

The Supreme Court in this case rejected the notion that anticipatory bail could be for a limited time and opined that there can be no time limit as to the life of an anticipatory bail. The court took the view that once the order of anticipatory bail is granted; it ordinarily subsists during the entire duration of the trial. The court further held that the discretion of the Sessions Court or a High Court is wide enough to limit as well as specify the duration of the anticipatory bail. The idea that the anticipatory bail is for a limited time and on the expiry of which the accused must surrender and apply for regular bail was also rejected. The court noted that - directing the accused to surrender to custody after the limited period amounts to deprivation of his personal liberty, and effectively makes the 'remedy worse than the ailment'. Thus, the Court held that, in the conspicuous absence of any time constraint within Section 438, the life of an order granting anticipatory bail should not be curtailed⁶. They also directed that the provision of anticipatory bail can also be granted if the accused is willing to co-operate with the investigation and not willing to flee the trial before its completion.

The Supreme Court analyzed Section 438 with 'personal liberty' firmly at the center of its approach and chose to prioritize it over anything else. The Supreme Court in the case of **Badresh Bipinbai Seth v. State of Gujarat**⁷ was pleased to hold that "The provision of anticipatory bail enshrined in Section 438 of the Code is conceptualised under Article 21 of the Constitution which relates to personal liberty. Therefore, such a provision calls for liberal interpretation of Section 438 of the Code in light of Article 21 of the Constitution". The apex court while observing the above celebrates the two provisions and related them together. The court was pleased to observe that Section 438 and Article 21 goes hand in hand and that by enacting the provision for grant on Anticipatory Bail the legislature has upheld the fundamental right of the citizen.

⁴ <https://indiankanoon.org/doc/123660783/>

⁵ (2011) 1 SCC 694

⁶ <https://www.mondaq.com/india/trials-appeals-compensation/732212/the-meandering-law-on-the-duration-of-an-anticipatory-bail-order>

⁷ (2016) 1 SCC 152

- **Salauddin Abdulsamad Shaikh vs State of Maharashtra**⁸:

In this case, the Supreme Court overruled its earlier judgement in *Sibbia* and held that granting of anticipatory bail should be limited by time. It was observed in this case that when the Court of Sessions or a High Court grants anticipatory bail to an accused, it is generally granted at the stage when the investigation is not complete and at that time, the court does not have enough evidence with it and is therefore, incapacitated in making an informed decision on the matter. It is for this reason the court held that the order granting anticipatory bail must for a limited time because an unfettered bail can be considered only on the completion of the investigation. What the court meant by this is that when the limited duration or the extended duration by the court granting anticipatory bail expires, then the regular court trying the applicant would deal with the matter of granting bail on the appreciation of evidence placed before it after the investigation has made progress or the charge-sheet is submitted⁹. In other words, the matter should be left for the regular court to deal with it and the court granting anticipatory bail should not substitute itself for the original court. Further, it should be realised that an order of anticipatory bail could even be obtained in cases of serious nature as for example murder and, therefore, it is essential that the duration of that order should be limited.

- **Prashant Kishore Mehta vs. State of Maharashtra**¹⁰:

In this case, the High Court held that the contrasting views in *Sibbia* and *Salauddin* are reconcilable and are not in conflict with each other. It further observed that the *Sibbia* judgment laid down the general law on anticipatory bail, whereas judgments in *Salauddin* have been passed with respect to peculiar facts of that case and that the pronouncement in *Salauddin* on anticipatory bail being limited in time is directory and not mandatory in nature. This effectively makes the tenure of anticipatory bail in a given case, to be a fact-dependant exercise, which is to be determined on a case to case basis. Further, it does provide discretion to the judge to limit the operation of an anticipatory bail order till a particular time, without providing much guidance in terms of how that discretion is to be exercised.

- **HDFC Bank Limited v. J.J. Mannan**¹¹:

In this case, the court is of the view that the protection guaranteed under section 438 is only till the investigation is completed and the charge sheet is filed. On inclusion of his name in the charge-sheet, the accused that was under the protection of anticipatory bail has to surrender and pray for regular bail. It must be noted that in any case, grant of the pre-arrest bail under Section 438 Cr.P.C. shall not affect the right of the investigating agency to seek custodial interrogation and in conducting further investigation.

The same view was laid down by the court in **Satpal Singh v. the State of Punjab**¹². The court held that “the protection under section 438 is available to the accused till the court summons the accused based on the charge sheet. On such appearance, the

⁸ (1996) 1 SCC 667

⁹ <https://indiankanoon.org/doc/772627/>

¹⁰ 2008(5) Mh.L.J 824

¹¹ (2010) 1 SCC 679

¹² (2018) SCC Online SC415

accused has to seek regular bail under Section 439 Cr.P.C. and that application has to be considered by the court on its own merits.

- **In Naresh Kumar Yadav v. Ravindra Kumar**¹³, a two-Judge Bench of this Court observed: “the power exercisable under Section 438 CrPC is somewhat extraordinary in character and it [should be exercised] only in exceptional cases.” A person under the protection of anticipatory bail was ordered to surrender his liberty and seek regular bail by way of judgment rendered in this case.
- In the case of **Uday Mohanlal Acharya V. State of Maharashtra**¹⁴, the court held that even when the accused is found to be on bail at stage of committal proceedings, the Magistrate has the power to cancel the bail and commit him to custody, if he considers it necessary to do so.
- In **Vinod Kumar v. State of U.P. & Another**¹⁵, the court has mandated that interim bail would continue only till submission of charge sheet before the court.
- A new aspect was added in 1998 by the case **K.L. Verma v. State**¹⁶ stating that anticipatory bail does not end as soon as the accused is produced before regular court but he may continue to enjoy the protection until the regular bail application is decided.

From the various judgements mentioned above, one thing is clear that there is a great deal of confusion with regard to the scope of anticipatory bail. The burning question was premised on the duration of an order granting anticipatory bail. One side contends that the anticipatory bail cannot be time bound while the other side argues the opposite.

ISSUES BEFORE THE COURT:

A Constitution Bench of the Supreme Court decided a reference made in **Sushila Aggarwal & Ors. v. State (NCT of Delhi) & Anr.**, where two questions had been posed for consideration:

(1) Whether the protection granted to a person under Section 438 Cr.P.C. should be limited to a fixed period so as to enable the person to surrender before the Trial Court and seek regular bail?

(2) Whether the life of anticipatory bail should end at the time and stage when the accused is summoned by the court?

RATIO OF THE COURT:

- As regard to the first issue, the court held that the protection granted under section 438 cannot be limited to a fixed period of time and should be in favour of the accused

¹³ 2008 (1) SCC 632.

¹⁴ (2001) 5 SCC 453

¹⁵ 2019 (12) ADJ 495

¹⁶ 1998 (9) SCC 348.

without any restrictions on time. Normal conditions under Section 437(3) read with Section 438 (2) should be imposed. At the same time, it was also recognised that it is always open to the court to impose conditions owing to circumstances which are peculiar in nature. However, it must be noted that the need to impose restrictive conditions would have to be judged on a case to case basis, depending upon the materials produced by the state or the investigating agency.

- The court while answering the second issue held that the life or duration of anticipatory bail order does not normally end at the time and stage when the accused is summoned by the court, or when the charges are framed, but can continue till the end of the trial. It further added that if there are any special or peculiar features necessitating the Court to limit the tenure of anticipatory bail, it is open to do so.

Thus, it is clear from above that there is nothing in section 438 Cr.P.C that indicates the grant of anticipatory bail should be time-bound. Further, it is discretionary power of the Court to decide on a case-to-case basis and impose a time limit while granting pre-arrest Bail.

DECISION OF THE COURT:

- On 29th January, 2020, the five judge bench of the Supreme Court in the **Sushila Aggarwal and others Vs. State (NCT of Delhi) and another** unanimously held that anticipatory bail should not be time bound and can be granted to an accused till the conclusion of the trial.
- The court finally settled the controversy by concluding that there is no limitation on the life of the anticipatory bail as long as the court does not put the same down while granting the said anticipatory bail. The court has to look at it from the facts of case to case, should have reasons to believe that there is an apprehension of an arrest of the concerned person and put the conditions, it deems fit to be applied to, while granting the said anticipatory bail.
- There is no such limitation on the anticipatory bail as per the statute but the same entirely lies on the discretion of the court. If the court issuing the order of the anticipatory bail has any reason to believe the inclusion of such conditions is necessary, it may put them in while granting the said order of anticipatory bail. Thus, this means that any limitations or conditions which are not specifically mentioned in the statute are completely at the broad discretion of the court issuing the said order.
- The judgments, rendered in *Salauddin Abdulsamad Shaikh, Siddharam Satlingappa Mhetre, K.L. Verma, Sunita Devi*¹⁷, *Adri Dharan Das*¹⁸, *Nirmal Jeet Kaur*¹⁹, *HDFC Bank Limited, Satpal Singh, Naresh Kumar Yadav* including other decisions that followed these decisions, were expressly overruled.
- The court laid down following **points**²⁰ **that has to be kept in mind by the courts while dealing with applications under section 438** of the Cr.P.C.:-
 - a) When a person complains of apprehension of arrest and approaches for order, the application should be based on concrete facts such as relating to the

¹⁷ Sunita Devi v. State of Bihar, 2005 (1) SCC 608

¹⁸ Adri Dharan Das v. State of West Bengal, 2005 (4) SCC 303.

¹⁹ Nirmal Jeet Kaur v. State of M.P., 2004 (7) SCC 558.

²⁰ <https://districts.ecourts.gov.in/sites/default/files/SLP-7281-82%20of%202017.pdf>

offence, and why the applicant reasonably apprehends arrest, as well as his side of the story, and not vague or general allegations, relating to one or other specific offence.

- b) 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.
- c) Depending on the seriousness of the threat of arrest, the Court should issue notice to the Public Prosecutor and obtain facts, even while granting limited interim anticipatory bail.
- d) The Court held that nothing in Section 438 of Cr.P.C. compels or obliges the Court to impose conditions limiting relief in terms of time or upon filing of FIR or recording of statement of witness. 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.
- e) Anticipatory bail can be continued after filing of charge sheet till the end of the trial.
- f) An order granting anticipatory bail cannot operate in respect of a future incident that involves commission of an offence and thus, should not be 'blanket' order.
- g) The anticipatory bail does not in any manner restrict or limit the rights or duties of police or investigating agencies. It also laid down that it is open for the police or investigating agency under Section 439(2) to move to the court to arrest the accused in certain cases
- h) The correctness of an anticipatory bail order is open to be considered by an appellate or superior court on the request of the investigating agency or the state and the order may be set aside on the ground of non-consideration of material facts and crucial circumstances, doing so does not amount to cancellation of the order but is rather equivalent to setting it aside.

The Supreme Court rightly held that section 438 cannot be time bound and thus, gave rest to a long standing question on the time period of an order granting anticipatory bail.

ANALYSIS OF THE CASE:

Thus having discussed about the several judicial pronouncements of the apex court, it can be rightly said that there is no such hard and fast rule in the grant of anticipatory bail. In reality, the discretion is of the court which is adjudicating the anticipatory bail application. The court, while granting anticipatory bail, should follow the fundamental canon of criminal jurisprudence that every individual is presumed to be innocent till he or she is found guilty.

The main purpose for incorporating Section 438 in Cr.P.C. was that the liberty of an individual should not be unnecessarily jeopardised. Right to life and personal liberty are one of the important fundamental rights guaranteed by the constitution and therefore, no person should be confined or detained in any manner unless he has been held guilty.

Anticipatory bail is one of the foremost hotly debated subjects within the Indian criminal justice system²¹. While, on one hand, it is said to be the custodian of the basic right of life and liberty of an individual, it is also seen as a burden in some way to waste judicial time. In a country that already battles with extreme pendency of cases, the cases are increasing at a

²¹ <https://thedailyguardian.com/analysis-of-the-legal-aspects-of-anticipatory-bail-law-and-reality/>

higher rate as some 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. This increases the court's burden making the justice delivery system slow and passive.

Submitted by-
GARIMA JAIN
NEF LAW COLLEGE