

Baillywood Exploring the Dynamics of section 41A and anticipatory Bail: Evolution, Judicial Discretion and Legal Reform

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Abstract:

The Indian criminal justice system faces challenges in both investigation procedures and pre-arrest safeguards. This paper addresses two such issues. Firstly, the current method for summoning people for investigations, reliant on Sections 160 and 41A of the CrPC, is susceptible to misuse by police. Particularly Section 41A, which allows notices beyond jurisdictional limits, is often abused. This paper proposes a reformed system based on practices in other countries: considering the magistrate's jurisdiction instead of police stations, implementing fines for those who don't have a valid reason for disobeying notices, and requiring warrants for arrests under 41A notices. These reforms would prevent misuse of power, lessen apprehension of arrest, and create a more efficient system for summoning people outside jurisdictional limits.

Secondly, the paper examines the concept of anticipatory bail in India. Often portrayed in popular media as a tool for the wealthy to evade justice, anticipatory bail was introduced to protect innocent people from harassment. However, the provision's reliance on judicial discretion has led to inconsistencies in application. This paper analyses the jurisprudence surrounding anticipatory bail, from its introduction to the recent *Bhartiya Nagarik Suraksha Sanhita (BNSS)* of 2023. It explores the evolution of the concept, the legal framework in Section 438 of the CrPC, judicial interpretations, and the impact of the BNSS on judicial discretion in granting anticipatory bail. By addressing both investigative procedures and pre-arrest safeguards, this paper aims to contribute to a more balanced and effective criminal justice system in India.



Introduction:

Being summoned by Indian police? It's like dodgeball... you never know if you'll get hit (or arrested). This paper throws in some wacky ideas to fix it: ditch confusing police zones, fine the no-shows, and make

those "maybe-arrests" require a warrant! Oh, and we also explore the hilarious world of anticipatory bail in India - where Bollywood meets legal loopholes. Get ready to chuckle (and maybe learn something)! The Indian criminal justice system faces challenges in both investigation procedures and pre-arrest safeguards. This paper addresses two such issues. Firstly, the current method for summoning people for investigations, reliant on Sections 160 and 41A of the CrPC, is susceptible to misuse by police. Particularly Section 41A, which allows notices beyond jurisdictional limits, is often abused. This paper proposes a reformed system based on practices in other countries: considering the magistrate's jurisdiction instead of police stations, implementing fines for those who don't have a valid reason for disobeying notices, and requiring warrants for arrests under 41A notices. These reforms would prevent misuse of power, lessen apprehension of arrest, and create a more efficient system for summoning people outside jurisdictional limits.

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Introduction to Section 41A of Code of Criminal Procedure of 1973

In India, the criminal justice system is set in motion after the registration of an FIR under section 154 CrPC. The next natural step in the criminal justice system is to ascertain by investigation whether a particular offence has actually taken place. Investigation is conducted by the police and the judiciary does not usually interfere with the investigation process. The judiciary plays an active role in the criminal justice only after a charge-sheet has been filed. Thus, the burden of investigating the crime, discovering and apprehending the accused and collecting evidence for a successful prosecution is borne by the State police departments. During the process of discovering and apprehending the witness, the police need to gather information about a particular offence from a large number of people.

Police stations function within well-defined territorial jurisdictions with a well-established and entrenched hierarchy. Generally speaking, a police officer can only operate within the limits of his own police station. However, this rule proves to be a hindrance when the police require the attendance of any person who happens to be outside the territorial jurisdiction of a police station. The police can require the attendance of both, the witnesses and the accused who happens to be within the limits of the police station. Section 160 expressly states that the police can only require the attendance of witnesses who are within the limits of the police station or any adjacent police station. However, there is no express section in the CrPC dealing with the power of the *police* to summon beyond territorial jurisdiction. The *Courts* can compel the attendance of any person before it by issuing summons as per procedures provided under Chapter VI of the CrPC. Section 67 CrPC states that if a magistrate wants to summon a person outside his jurisdiction, he shall send a copy of the summons in duplicate to the nearest magistrate in whose jurisdiction the person to be summoned is located. However, it seems antithetical that the police can summon only within their territorial limits. Recently, the police departments of all the states have adapted the practice of compelling attendance before them by issuing notices to concerned persons under Section 41A, CrPC. This trend is

apparent in dowry death and matrimonial violence cases. Recently the tendency of the Police to abuse section 41A received media attention because a large number of inter-state 41A notices were issued during the Corona virus pandemic when people inadvertently violated lockdown regulations. The tendency to abuse 41A is also clearly visible when controversial social media posts lead to registration of multiple FIRs in multiple police stations throughout India. The Apex Court has also taken note of this tendency to abuse 41A in the recent case of *Roshni Biswas Vs State of West Bengal (2020)*¹. In the recent case of *Ranjit Kumar De Vs State of West Bengal (2020)*², the Calcutta High Court heavily criticized the police officials who issued 41A notice to the Petitioner when there was nothing to connect him to the crime of forgery. The Court clearly noted that this was a clear case of harassment and intimidation by the police and that the petitioner should not be disturbed in connection with the crime. Thus, it cannot be doubted that the police do tend to abuse section 41A.

This research project will examine the legislative of sections 160 and 41A in the first chapter. The second chapter highlights with the help of numerous examples how the police tend to lure persons into appearing before them and then proceed to arrest them citing Section 41A (3) thus defeating the whole purpose of section 41A. The third chapter contains a comparative analysis of other jurisdictions. The fourth and concluding chapter suggests a replacement for the current section 41A and how the new section shall operate.

Legislative intent behind section 160 and section 41A-

Section 160 of Code of Criminal Procedure, 1973 has been largely adapted from section 160 of the Code of Criminal Procedure, 1898. The purpose of section 160 is to empower a police officer to require attendance of witness and to record their statements under section 164. There have been safeguards in case of senior citizens through the Criminal Law (Amendment) Act, 2013³ according to the suggestions made by Justice Verma Committee Report⁴. However, the Committee had also recommended the introduction of safeguards in case of mentally disabled people which was also taken up by the 2013 amendment, but this leads to a danger that witnesses will not obey summons to appear before the police citing mental disability when none exists. It is also unclear how the police can satisfy themselves whether or not a person actually suffers from a mental illness. Will a certificate from a mental health institution be sufficient? The Supreme Court must clarify the position with respect to section 160 and people suffering from mental illness when an appropriate case is presented before it. Apart from the veracity of mental disability, the wording and functioning of section 160 is largely unproblematic.

The Apex Court and various High Courts have made it amply clear that the police cannot summon persons situated outside the state under section 160 CrPC. In the recent case of *Jamshed Ali Khan vs Union Territory of Jammu and Kashmir*⁵, the Hon'ble Delhi High Court held that since the petitioners were residents of Delhi, they could not be summoned to Pampore, Jammu and Kashmir by the J&K police. The legislative intent of section 160 was elaborated upon by the Delhi High Court in the case of *Enforcement*

¹ *Roshni Biswas Vs State of West Bengal (2020) Spl. Leave to Appeal 4937/2020*

² *Ranjit Kumar De Vs State of West Bengal CRM 8507/2020 Calcutta High Court*

³ *A brief synopsis of new offences/procedures recommended by Justice Verma Committee On Amendments to Criminal Law, Mrinal Satish and Swetasree Majumder, pg 184*

⁴ *Justice Verma Committee On Amendments to Criminal Law, pp 65 – 68*

⁵ *Jamshed Adil Khan & anr. vs. Union Territory of Jammu and Kashmir & anr. 'W.P. (CrI.) 976/2022, CrI. M.A. 8240/22 and CrI. M.A. 10543/22*

*Directorate Vs State of West Bengal*⁶. At para. 27, the High Court clearly explained that power of police under section 160 is not a pan-India power. If that was the intention of the legislature, it would have used the words ‘anywhere in the country’ or ‘anywhere in the state’. Clear use of the words ‘within the limits of his own jurisdiction or any adjoining police station’ indicates that the legislature wanted to limit the jurisdiction of police stations within their own limits. The reasoning adapted by the Delhi High Court in the case of *Ravinder Singh Vs State (2010)* was adapted by the High Court in the above case.

Section 41A was inserted by the Criminal Amendment Act of 2013 after observing the growing abuse of arrest powers by the police, the apex court issued 11 directions with respect to arrest in the landmark case of DK BASU until the CrPC was suitably amended. Section 41A to 41D were accordingly inserted into the CrPC. The landmark case of *Arnesh Kumar v State of Bihar* highlighted that the police had found a way of circumventing valid arrest requirements even after the introduction of 41A - 41D and hence a checklist system was introduced which the magistrate was required to verify before authorising remand. In case of *Joginder Kumar v State of U.P* the court issued certain requirements to not violate article 21 and 22(1) of the Constitution and enforce fundamental rights of the citizens Section 41A describes the power of police to compel appearance in case of cognizable offences where arrest of persons is not required.

The legislative intent behind 41A must be examined from two perspectives. From the citizen’s perspective, the intended function of 41A is to ensure that person summoned under 41A notice is not arrested if he complies with all the directions of the notice. From the perspective of police, the function of 41A is to ensure the attendance of the notice in case of cognizable offence where arrest is not necessary and to also allow for arrest if the police officer thinks fit. Thus, it is clear that 41A was intended to act as a safeguard against arrest if all the directions of the 41A notice were complied with. On the other hand, 41A also allows for arrest in case directions are not complied with and also if the police officer thinks it fit to arrest. Thus, 41A seeks to achieve two contradictory and mutually exclusive objectives.

Tendency of the police to abuse section 41A, CrPC –

The language of 41A does not contain any territorial element. As a result, the Police Departments all over India have begun the practice of issuing 41A notices to compel appearance where they cannot compel appearance under section 160. In reality, an action that is prohibited directly must not be allowed to be done indirectly. 41A notices are issued mostly in case of section 498A cases and other matrimonial dispute cases. Recently, the police all over the country diligently issued 41A notices to violators of Covid protocol. In the latest case of *Decathlon Sports India vs State NCT of Delhi (2022)*⁷, The Delhi High Court has disapproved of the use of 41A notices against protocol violators and held that they should have been directed to appear before the concerned magistrate itself instead of wasting public resources and time on 41A notices. The Calcutta High Court recently observed in the case of *Ranjit De Vs State of West Bengal* that issuance of 41A notice to the petitioner when there was no information at all linking him to the crime amounted to abuse of power and unnecessary harassment of the petitioner and that no action shall be taken on the 41A notice against the petitioner. The Apex Court also expressly stated in the case of *Roshni Biswas vs State of West Bengal* that ‘there is a need to ensure that power under section 41A is not used to intimidate, threaten and harass.’ Thus, the original legislative intent behind insertion of 41A was to prevent

⁶ *Enforcement Directorate Vs State of West Bengal*

⁷ *Decathlon Sports India vs State NCT of Delhi (2022)*

unnecessary arrest if the attendance of person can be secured by sending a notice in case of cognizable offences. The police have instead been using 41A notices to achieve the opposite end, that is, arresting a person by luring him to the police station under the pretext of obeying a 41A notice. Thus, what was designed to prevent unnecessary arrests in being used to procure more arrests! Thus, there is not a shadow of a doubt that the police are abusing the powers under section 41A.

Comparative analysis from other jurisdictions –

The dilemma of how to procure attendance of persons outside the limits of a police station is not a unique Indian phenomenon. All police departments in every large country face this dilemma from time to time. Needless to say, various mechanisms have been adapted in different countries to compel the attendance of persons who may be beyond the limits of the police station. Examining various provisions related to securing the attendance of persons before police can shed a light on the problems and lacunas faced in the functioning of CrPC. We shall examine the legal provisions in two jurisdictions related to securing attendance of persons who reside outside jurisdiction before the police, namely, the state of Texas in the USA and Japan.

Texas

Before delving into the detailed provisions regarding summons outside jurisdiction by the police, we must understand the terminology used in American criminal law. Under Texas law, offences are categorized into two, namely, misdemeanour offences and felony offences. The words ‘summons’ used in the Indian context is identical to the American term ‘subpoena’. According to Article 24.01 of the Texas Criminal Procedure Code, a subpoena may summon a person to:

1. Testify in court on a designated day and time in a criminal case; or
2. Appear before the court, a grand jury, or a coroner's inquest on a designated day.
(Parenthesis supplied) In a habeas corpus petition; In any other process (such as a police investigation) when the requirements of this rule would need testimony.

Article 24.05 describes the consequences of disobeying a subpoena. As per this article, the person may be fined 500 dollars in case of felony case and 100 dollars in a misdemeanour case at the discretion of the Court. Article 24.16 deals with issue of subpoena outside the jurisdictional county. It states that in felony cases and in misdemeanour cases where confinement is permissible, the state or the defendant may issue a subpoena to a person who resides outside the county where prosecution is pending, on application to the ‘proper clerk and magistrate’⁸. The expression ‘proper clerk and magistrate’ means the magistrate in whose jurisdiction the accused is located.

Thus, the relevant Texas statute makes a clear provision in the contingency of a witness residing outside the jurisdictional county. Thus, it is clear that in Texas a subpoena can be issued to a person residing outside a jurisdictional county after applying to the concerned clerk and magistrate.

Relevant observations of Texas

1. It must be noted that territorial jurisdiction of a police station does not play any role in issue of subpoenas. The territorial jurisdiction of the *magistrate* becomes relevant.
2. A person may be arrested at the discretion of the police in India under section 41A (3) if he does not

⁸ *Texas Code of Criminal Procedure*

obey the conditions of 41A notice. However, in contrast, Texas law only provides for a small fine in case of disobedience of subpoenas.

3. A subpoena under the Texas law can compel attendance before a coroner and a grand jury in addition to compelling appearance before a court and the Police (known as *Peace officers* in Texas). There is no analogous provision in the CrPC to compel appearance before a doctor conducting post mortem.

Japan

At the outset, it must be noted that Japanese criminal procedural law follows the ‘Warrant principle’. Under the Warrant Principle, an arrest is prohibited except under warrant and certain special circumstances. Thus, the apprehension of arrest experienced by the common people in India after receiving summons (41A) notice is an unknown phenomenon in Japan.

Conclusion from the analysis of other jurisdictions

1. The practice of levying fines in case of disobedience of subpoenas in Texas-

As per earlier discussion, Texas law provides for levying fines on the person disobeying subpoenas ranging from 100 – 500 \$ as against the Indian system of arresting in case of violation of the 41A notice conditions. It is suggested that this system of levying fines can be extremely effective in the Indian context for summoning persons outside the jurisdiction of the police concerned. Levying fines ranging from Rs. 10,000/- to Rs. 20,000/- in case of violation of 41A conditions, particularly the direction to appear before the concerned police station, will be much more effective in compelling attendance especially for persons located outside the jurisdiction of the police. Alternatively, the persons located outside jurisdictions should be allowed to show cause citing genuine illness or mental/physical disability or old age or in case of women, pregnancy or other illnesses. The option of showing cause must be in the alternative to the levy of fines. If not, allowing the practice of levying fines in case of violation of 41A conditions will be tantamount to legalising extortion by the police.

2. The practice of taking into account the territorial jurisdiction of the magistrate rather than the police station when considering the question of extra-territorial summons.

As mentioned above, there exists a detailed procedure laid down by Texas law for the issue of subpoena to persons situated outside the county in which prosecution is pending. If a similar approach is adapted for India, it will be much easier for all the police stations falling under the jurisdiction of a particular magistrate to compel attendance before them by issuing notices under section 160.

3. The warrant principle –

The warrant principle can prove to be very effective if implemented for the limited scenario of notices under section 41A issued to persons situated outside the jurisdiction of police stations. A condition should be introduced into section 41A, sub-section 3 providing that no arrest shall take place where notice has been issued under this section unless under a warrant duly obtained from the concerned magistrate.

All of these key takeaways will be extremely useful in drafting a model replacement for the redundant section 160 and section 41A.

The model sections which shall replace the current section 160 shall be as follows –

‘(1) any police officer making an investigation under this chapter, may, by order in writing require the attendance before himself of any person within the limits of the district in which the prosecution is pending or any adjacent district, who, from the information given or otherwise, appears to be acquainted with the facts and circumstances of the case; and such person shall attend as so required ...’

As mentioned earlier, section 41A seeks to achieve two contradictory and mutually exclusive aims, that is, to ensure that a person is not arrested if he appears before a police station and follows certain conditions mentioned in the 41A notice and also to keep alive the power of police if they deem it necessary to do so. Hence, it makes more sense to have two sections to fulfil two purposes.

The following section should replace section 41A CrPC –

‘41A Notice to appear before the concerned police station –

1. The police officer shall, in all cases where the arrest of a person is not required under the provisions of sub-section (1) of section 41, issue a notice directing the person against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists that he has committed a cognizable offence, to appear before him or at such other place as may be specified in the notice.
2. Where such a notice is issued to any person, it shall be the duty of that person to comply with the terms of the notice.
3. Where such person complies and continues to comply with the notice, he shall not be arrested in respect of the offence referred to in the notice unless, the concerned magistrate authorises the arrest of such a person upon application by the concerned police officer in case of cognizable offences also.
4. Where a person, at any time, fails to comply with the terms of the notice or is unable to identify himself, the police officer, may, subject to such orders as may be passed by a competent magistrate in this behalf, including the arrest warrant as contemplated in the above sub-section, levy a fine not exceeding Rs. 500 per day for each day of violation or Rs. 10,000/- or both.
5. Provided that no person shall be fined if he shows sufficient cause for non-compliance with the conditions of notice issued under section 41A citing only genuine illness, mental/physical disability, old age and in case of women, pregnancy and other illnesses.’

Thus, it can be seen from the model draft of the two sections sought to be replaced that all the three essential features of foreign criminal justice systems discussed above have been incorporated. Thus, the new section 160 has been modelled after the analogous provision found in Texas law which makes provisions according to the territorial limits of the Court or the Magistrate instead of the territorial limits of a police station. The Japanese idea of Warrant principle has been incorporated into sub-section 3 of the section 41A. However, this takes the discretion to arrest away from the police and places the onus on the concerned magistrate. Thus, if this suggestion is taken up, it will mark a significant departure in the trend of leaving the arrest powers of the police largely intact. However, in the context of the abuse of 41A by the police as discussed above, it is advisable to take the discretion away from the police in case of issuance of 41AA notice. This will also strengthen the assurance that a person shall not be arrested as long as he continues to comply with the conditions in 41AA notice except under a warrant from a magistrate. Sub-section 4 of section 41AA is intended to introduce the practice of levying fines instead of arrest in case of non-compliance of conditions of 41AA notice in the absence of genuine causes. This section will be helpful to persons located outside jurisdictions who have been summoned by a distant police station.

Thus, to conclude, the two amendments suggested above shall have the effect of curing the tendency of the police to abuse their power under section 41A to compel attendance to harass and also at times to extort money especially persons residing outside the jurisdictions of the police station. Taking the discretion to arrest away from the police and introducing the practice of levying fines instead of arrests shall go a long way in reducing the apprehension of arrest experienced by recipients of 41A notices. Thus,

the process of compelling attendance of persons located outside the jurisdictional limits shall become efficient and seamless.

If you find yourself on the receiving end of a questionable Section 41A notice, and believe an arrest might be imminent, then anticipatory bail under Section 438 of the CrPC might be a possible recourse.

Evolution of Anticipatory Bail

Prior to the Code of Criminal Procedure of 1973,⁹ the prior Code of Criminal Procedure of 1898 had no provision for anticipatory bail. Erstwhile 1973, it was widely assumed that courts could not award anticipatory bail.¹⁰ The 41st Law Commission of India, in its report from 1969, emphasised the necessity for a new provision in the CrPC allowing the High Court and Court of Session to give "anticipatory bail." It was noticed that Several cases have been filed against someone solely for political or personal purposes (?). They are baseless and are intended to harass/torment litigants by imprisoning them. Citizens should be protected since arbitrary arrests which are still common in the country. Section 438 of the Criminal Procedure Code was created to address this issue. As a result, anticipatory bail was developed to safeguard persons from arbitrary breaches of their liberty. The Central Government concurred with the Law Commission's suggestions and included clause 447 in the Code of Criminal Procedure 1970 Draft Bill, allowing the High Court and Court of Session to issue anticipatory bail.¹¹ Confusion emerged when different courts voiced differing and inconsistent views on the scope of anticipatory bail, particularly whether it should be time-limited or not. Initially, the scope of Anticipatory Bail and particularly the duration for which Anticipatory Bail could be granted was unclear. Initially, the Apex Court was of the opinion that there could be no time limit for which Anticipatory Bail could be granted. The duration for which Anticipatory Bail could be granted depended solely on the discretion of the Court. The duration or the time limit was not important according to the Supreme Court. According to the Apex Court, importance should be given to the competing interests of protecting the rights of the accused and the power of the police to conduct a fair and thorough enquiry. This view was upheld in the early case of **Gurbaksh Singh Sibbia [1980]**¹².

This view taken by the Apex Court that Anticipatory Bail could not be limited in time and that it solely depended on the discretion of the Court was upheld in several subsequent cases. The notion that Anticipatory Bail must be valid for only a certain period of time after which the accused must surrender and apply for regular bail was rejected by the Supreme Court. One of the significant cases in which this view was adapted was the case of **Siddharam Satlingappa Mhetre vs State of Maharashtra & Ors. [2010]**¹³

Reversal

However, a discordant note was struck by the Hon'ble Supreme Court itself when they adapted the view

⁹ *The code of criminal Procedure 1973*

¹⁰ *Gurbaksh Singh Sibbia v State of Punjab (1980) 2 SCC 565 [4].*

¹¹ *Shah, Malika; Chadha, Vaibhav (2021). Evolution of Law on Anticipatory Bail in India. Janus.net, e-journal of international relations. Vol12, N^o. 1, May-October 2021. Consulted [online] at date of last visit, <https://doi.org/10.26619/1647-7251.12.1.14>*

¹² *Gurbaksh Singh Sibbia v State of Punjab (1980) 2 SCC 565 [4].*

¹³ *Siddharam Satlingappa Mhetre v. the State Of Maharashtra And Ors (2011) 1 SCC 694.*

that the order providing for anticipatory bail must be of limited duration. Bail lasting for unlimited duration could only be considered after the enquiry was completed (charge-sheet was filed). The court conducting the trial must thereafter consider granting regular bail based on relevant criteria. This reversal of opinion occurred in the case of **Salauddin Abdulsamad Shaikh vs St of Maharashtra [1996]**¹⁴.

Finally, there was another discordant note when the Supreme Court held that bail under section 438 was limited to the period of time it took for completion of the investigation and filing of charge sheet. Once the name of an accused appears on a charge sheet, the accused must thereafter apply for the regular bail because at that point of time, the discretion of the Court to grant anticipatory bail comes to an end. It was held that

"The accused has recourse to section 438 protection until the court summons him on the basis of the charge sheet," in the case of **HDFC Bank vs JJ Mannan [2009]**¹⁵

Thus, it is extremely clear that the Supreme Court tends to change its interpretation of section 438 wherein it was initially held that bail under s. 438 could not be limited in time and subsequently this view was reversed and in the at least twice between 1980 and 2010. One side claim that anticipatory bail cannot be time-limited, while the other says that it can.

Transit Anticipatory bail

According to a judge-made statute known as "transit anticipatory bail" or "transit bail," a person in India may request anticipatory bail from a court outside the jurisdiction where the lawsuit is lodged provided they have a good faith fear of being arrested in the other jurisdiction.¹⁶ Cases like as:

B.R. Sinha v. State (Calcutta HC)¹⁷

State of West Bengal v. Sailesh Jaiswal (Calcutta HC)¹⁸

State of Maharashtra v. N.K. Nayar (Bombay HC)¹⁹

Shantanu Muluk (Bombay High Court, Rangabad Bench)²⁰

The broader overview of section 438

There is a substantial worry about the possible conflict between the application of anticipatory bail authority and the legislative powers assigned to authorities by the Code. The Code authorises the police to undertake inquiries into cognizable offences without court authorisation or penalty. In this regard, Chapter X.I.T. of the Code may be of assistance. Section 151 authorises a police officer to detain an individual in order to prevent the commission of a recognisable offence. In cases when persons awaiting bail have committed a cognizable offence or made serious threats, one may argue that there is a sufficient rationale for allowing police authorities to take appropriate action. Section 154 outlines the process for reporting a cognizable crime and includes measures that limit the level of clarity required in the report. In the absence of a magistrate's order, a police officer may investigate a matter that is clearly recognisable under Section 156.

¹⁴ *Salauddin Abdulsamad Shaikh vs the State of Maharashtra* (1996) 1 SCC 667.

¹⁵ *HDFC Bank Limited v. J.J. Mannan* (2010) 1 SCC 679.

¹⁶ *Dr. Farrukh, Decoding the concept of Transit Bail, Legal Service India, 2021,*

¹⁷ *Cases like as B.R. Sinha v. State (Calcutta HC) led to this.*

¹⁸ *State of West Bengal v. Sailesh Jaiswal (Calcutta HC)*

¹⁹ *State of Maharashtra v. N.K. Nayar (Bombay HC)*

²⁰ *Shantanu Muluk v. State of Maharashtra, 965 of Anticipatory Bail Application No. 154 of 2021.*

In addition, an investigation process is developed, giving the police the authority to identify and capture the aforementioned individual. Section 57 allows a police officer to hold an individual for up to twenty-four hours after their arrest, without the necessity for court or magistrate permission. The only exception is the time required to convey the person from the place of arrest to the magistrate's court. It is worth noting that Article 22(2) of the Indian Constitution, which is couched in similar terms, shows that the police's authority is limited by the constitution. When a law enforcement officer is unable to complete an investigation within twenty-four hours, the Code establishes specific measures for dealing with the situation. Section 167(2)41 of the Code elaborates on this matter.

The court is responsible for determining the legitimacy and duration of Anticipatory Bail. In general, a previously issued Anticipatory Bail is effective until the procedures are completed, unless cancelled by the court. The court retains the ability to prolong Anticipatory Bail beyond the conclusion of the original period. Anticipatory bail petitions may be subject to a time constraint under certain circumstances. The court reserves the right to revoke Anticipatory Bail after the prescribed time limit or any extensions have expired. After the term or extended period of Anticipatory Bail expires, the trial court is compelled to take the necessary procedures. The High Court and Court of Sessions may allow anticipatory bail petitions in certain circumstances. However, unless the matter is swiftly referred to the High Court, it is usual to submit the application with the court first. However, litigants prefer to directly approach the High Court instead of the Sessions Court.

Obtaining an anticipatory bail is possible after filing a complaint and before any detention. The period of anticipatory bail is established at the court's discretion. In most cases, unless a judge orders otherwise, the order remains in effect until your case is finally resolved. Ideally, courts give 30-day anticipatory bail, requiring convicts to reapply for normal bail within that time frame. On the contrary, a person facing accusations must apply for Anticipatory (?) and follow the terms of the period. Once the stipulated term has elapsed, the person must either file for regular bail or resubmit the Anticipatory Bail Extension Form. Temporary bail is given awaiting the official filing of charges; nevertheless, once charges are filed, it is required to seek regular bail.

stronger arguments for cancelling bail must exist, such as a bail order based on erroneous information, the defendant's obstruction of an investigation or court processes, or the appointment of an incompetent judge. Raising the bond is feasible for the following reasons:

1. At what stage of the prosecution or is it possible to change a defendant's bail in light of the evidence presented?
2. If the individual who posted bond engages in criminal activities or commits other serious offences while out on bail.
3. The defendant who was given release and is now acquitted pending trial.
4. In cases when an individual claims to be in a condition of extreme fear after being assaulted and subsequently commits acts of hostility against law enforcement officers.
5. Instances in which a bailraider engages in significant societal problems related to law and order, endangering the community's security and welfare.
6. In cases where it is determined that the circumstances in issue constitute a non-leasing or serious offence. In awarding parole to the condemned defendant,
7. The court must determine whether the relevant judicial authority was followed.
8. To justify the revocation of parole, it is sufficient to demonstrate that the limitations imposed have violated the individual's autonomy.

9. In cases in which the accused's life is in risk while on parole.

The anticipatory bail will be cancelled whenever a normal bond is issued.

Ordinary Bail and Anticipatory Bail

The ordinary bail and the anticipatory bail differ in their material usage and significance. While the anticipatory bail is granted to a person when that person apprehends an arrest and before it actually becomes the reality. Whereas the ordinary bail is granted after the arrest has occurred.

The anticipatory bail under section 438 of the CrPC provides some protections to the person applying for it however it does not happen in the case of ordinary bail because it comes into effect only after the person has been arrested therefore, the person might have to face some period of incarceration as mentioned under the section of 439 CrPC. The court in the case of *Sushila Aggarwal v. State (NCT of Delhi)*²¹ highlighted that the concept of ordinary bail and anticipatory bail are not completely different from each other. The statutory language of the section 438 emphasises that the lawmakers had the intentions of drawing both the concepts on the same or similar lines.

Judicial discretion Vis a Vis Anticipatory Bail

A pivotal case from 1980 involved the Supreme Court's decision that anticipatory should be granted in an impartial manner, with the understanding that intervening upper courts retain the authority to do so. A dual protection mechanism has been implemented on this system in order to thwart any potential misuse of discretion and the process as a whole.²² The Supreme Court emphasised in *Directorate of Enforcement v. P.V. Prabhakar Rao*²³ that anticipatory should be granted with the uttermost caution and judicial discretion. It was specified that, following careful deliberation, this authority may be exercised exclusively by the High Court or the Sessions Court.²⁴

Whether granting Ordinary bail pursuant to Sections 437 and 439 of the Code or Anticipatory bail pursuant to Section 438, the court must exercise its discretionary authority prudently and refrain from arbitrary rulings. Determining whether to grant parole must be based on rational and justifiable considerations. The Code fails to stipulate any particular procedures or guidelines that the Court must adhere to when carrying out its discretionary authority. However, it is crucial to emphasise that in determining bail, the courts lack the authority to exercise arbitrary discretion.²⁵

Section 438 of the Code provides the Courts with unrestricted authority to exercise their jurisdiction. When an individual who is at risk of being arrested for a non-bailable offence requests anticipatory bail, the court retains the power and discretion to determine whether or not to grant the requested bail. The court is required to exercise its authority judiciously, while simultaneously contemplating the deficiencies of the system and the intent of the section.²⁶ It is imperative that courts exercise utmost prudence and diligence when granting anticipatory parole on account of its porous nature.²⁷

²¹ *Sushila Aggarwal v. State (NCT of Delhi)* 2020 5 SCC 1

²² *Gurbaksh Singh Sibbia v State of Punjab* (1980) 2 SCC 565 [4].

²³ *Directorate of Enforcement v. P.V. Prabhakar Rao*, AIR 1997 SC 3868

²⁴ *Afsar Khan v State*, 1992 Cr.L.J. 1676)

²⁵ *Natturasu v State*, 1998 Cr.L.J. 1762 (Mad.)

²⁶ *Natturasu v State*, 1998 Cr.L.J. 1762 (Mad.)

²⁷ *Km Hema Mishra v State of UP and ors*, (1976) 4 SCC 572

There are specific circumstances in which neither the High Court nor the Sessions Court may possess the jurisdiction to issue anticipatory. This is especially true when the investigation requires the accused to be acquitted and questioned by the police in order to obtain crucial information about the case. It is essential to observe, nevertheless, that the granting of anticipatory is subject to judicial discretion. Bail can be granted by the court solely on the condition that the defendant substantiates the request with adequate evidence that justifies the exercise of this discretion. It is the responsibility of the Court to maintain an equitable balance and ensure that the applicant's freedom and the police investigation process do not come into conflict. The automatic invocation of this section pertaining to anticipatory is not advised. There is a line in the section indicating that anticipatory may be granted if deemed appropriate. Upon careful examination of this line in conjunction with Subsection (2) of the Section, it becomes evident that the granting of such a bond is contingent upon discernible and rational grounds.

BNSS on Anticipatory Bail

The BNSS Act marks a significant reform in India's criminal law framework, notably in terms of anticipatory parole, which provides legal protection prior to arrest. The proposed legislative change seeks to improve the efficiency and clarity of the process of granting anticipatory bail, a component of the criminal justice system that has traditionally been both necessary and, on occasion, onerous under the Code of Criminal Procedure.

The BNSS has changed the limits within which anticipatory parole may be granted. Certain restrictions that were deemed barriers to the equitable administration of anticipatory have been deleted. The temporary provision for CrPC Sections 438(1), 438(1A), and 438(1B) has been deleted from the modified Section 484 of the BNSS.²⁸ The requirements included onerous conditions, such as requiring the actual attendance of an accused individual requesting anticipatory release or ensuring a fair chance for the Public Prosecutor to present their case during the application hearing. While revealing this information to the prosecutor or assuring their physical presence may be necessary in some cases, it should not have been established as a necessity, as was done in CrPC.

A possible option would have been to replace the phrase "shall" with "may" in both of the repealed sections. Adjustments have been made to put Section 481 of the BNSS in line with Section 436A of CrPC. A first-time offender awaiting trial is now eligible for obligatory parole after spending one-third of their sentence, as opposed to the former requirement of serving half. To improve the effectiveness of this measure, a supplemental provision has been inserted to Section 481. This clause states that the jail superintendent is responsible for submitting applications for the release of qualified detainees.

Other Countries

Nation criminal justice systems around the world have a range of distinct tactics when it comes to the granting of bail. In common law nations like the US, UK, and India, the adversarial system places the plaintiff against the responder with little to no judge involvement.²⁹ The US system is seen as wealthy-friendly³⁰ since it requires cash bonds, which may limit the rights of the poor. The accused's rights are

²⁸ *Bharatiya Nagarik Suraksha Sanhita 2023, s 484.*

²⁹ *Module 9: Prosecution strategies, Adversarial versus Inquisitorial legal systems, UNODC*

³⁰ *Shima Baugham, The Bail Book: A Comprehensive Look at Bail in America's Criminal Justice System-Introduction, Utah Law Scholarship, 2017*

restricted while those of the wealthy are given more leeway if they plead guilty or provide a specific sum of money as surety in order to be granted bail.³¹ The Bail Act of 1976 in the United Kingdom assigns the burden of proof on the prosecutor in cases when bail is granted with ease. If the prosecution objects, bail is nearly impossible in Scotland.³²

Criticism:

The Predictive bail detractors contend that it taints the investigating process. They argue that if bail is granted prior to an arrest, people are given the chance to tamper with the evidence or escape before the police have a chance to collect the relevant data. They contend that this undermines the prosecution's case and obstructs the quest for justice. Critics also draw attention to the possibility of abuse by influential people or those with substantial financial means. They contend that these people have the ability to use anticipatory bail to postpone inquiries and trials, impeding the legal system and undermining public trust. The argument goes that by granting bail, the court, even before guilt is proven, tacitly signals that the person may pose a threat. They assert that the accused may suffer from this change in public opinion. Lastly, detractors express worry about the burden that an overwhelming number of anticipatory bail applications may put on the legal system. An increase in these applications may cause backlogs in the docket and cause delays in the resolution of other significant legal cases. This has been backed by Supreme Court where a bench of Justices C.T. Ravikumar and Sanjay Kumar³³ stated that pre-arrest or anticipatory bail is an unusual court power that should not be granted simply because someone requests it and ruled that anticipatory bail is most definitely not the usual, even though bail may be the norm in numerous circumstances.

Judge Ravikumar made it clear that the intention of this ruling was not to rule out the granting of anticipatory bail in worthy instances. In fact, anticipatory bail served as a stopgap measure to preserve individual freedom against arbitrary detention or overreach by the state.

Nonetheless, the court ruled that only "extremely fit cases" or "extreme, exceptional cases in the interest of justice" should courts grant the relief of temporary protection.

In spite of these objections, proponents of anticipatory bail have strong arguments in opposition. They stress how it protects people from being harassed by unfounded allegations and arbitrary detentions. In an environment where nefarious accusations are frequent, anticipatory bail offers an essential protection for personal freedom. It also enables people to actively prepare for their defense and take part in the judicial process without restriction. Without the fear of being arrested right away, people are able to gather the evidence they need, speak with legal counsel, and possibly even.

In order to **increase the accessibility and reasonableness of bail for citizens** and prevent the bail amount from being misused as a means of imposing severe penalties or treating people unfairly, the **Eighth Amendment to the US Constitution** was created to. It states, "Excessive bail shall not be required," emphasizing the need for bail to be reasonable and proportionate to the alleged offense. This constitutional safeguard aims to prevent the imposing of disproportionate bail amounts that could effectively deprive individuals of their freedom based only on their financial capacity. By prohibiting excessive bail, the Eighth Amendment protects the presumption of innocence and attempts to strike a compromise between

³¹ K.T. May, *How the Bail System in the US became such a mess and- how it can be fixed*, Ideas.Ted, 31 Aug 2018.

³² *Bail, Being charged with a crime*, GOV.UK, <https://www.gov.uk/charged-crime/bail>.

³³ <https://www.thehindu.com/news/national/bail-may-be-a-rule-in-many-cases-but-anticipatory-bail-is-not-says-sc-judgment/article68009427.ece>

ensuring the accused's attendance at trial and upholding their fundamental right to freedom before conviction.

My recommendations would be that anticipatory bail should be accessible as it protects people from being harassed by unfounded allegations and arbitrary detentions, but it shouldn't get misused by following few guidelines:

1. More stringent criteria for granting bail: Courts should carefully assess the likelihood of absconding, tampering with the evidence, or influencing witnesses before giving anticipatory relief.
2. Stricter bond requirements: In order to reduce the likelihood of abuse, bail conditions may involve surrendering passports, appearing in court frequently, and setting up electronic monitoring.
3. Removing bail for misuse: If someone tries to flee or tamper with the evidence, the court should quickly cancel their anticipatory bail and order their arrest.
4. Improved application record-keeping: By centrally recording anticipatory bail applications and their results, biases can be detected and transparency can be boosted.
5. Time constraints for applications and outcomes: Setting up deadlines for anticipatory bail petition submissions and court rulings on them might help prevent abuse and ensure timely decisions.

Conclusion

An analysis of the utilisation of anticipatory bail by the Indian court system demonstrates its transformation from a makeshift idea in the 1898 Code of Criminal Procedure to a crucial protection against arbitrary detentions, as acknowledged in the 1973 Code. Section 438 of the Criminal Procedure Code (CrPC), which was recommended by the 41st Law Commission and subsequently enacted, marked a significant turning point in safeguarding the rights of individuals while also upholding the integrity of investigations. The existing law on anticipatory bail demonstrates the need to carefully balance the objectives of law enforcement with the rights of individuals. The Supreme Court of India has issued significant rulings that have clarified the complexity of the bail process, defining the scope, duration, and circumstances in which anticipatory bail can be granted or cancelled.

These instances highlight the courts' power to make decisions based on their own judgement, highlighting the need for a careful approach that considers both the potential harm to the accused and the requirement for a thorough inquiry without limitations. The necessity for more precise standards and revisions arises directly from the fact that this exercise of judgement has resulted in perplexity and unequal results.

The Bharatiya Nagarik Suraksha Sanhita (BNSS), 2023, has made a significant move to strengthen the legal basis for anticipatory bail. The primary objective of the BNSS is to streamline and enhance the accessibility of the anticipatory bail procedure, ensuring equal and equitable utilisation of the judicial system for all individuals. In order to achieve this objective, the system is being optimised and unnecessary requirements are being deleted. The historical evolution of anticipatory bail, from its origin to its present state, exemplifies the continuous endeavours to achieve equality in India's judicial system. The judges and politicians strive to safeguard individual rights and enhance the efficiency of the judicial system by continuously enhancing the use of anticipatory bail. The development of anticipatory bail, as demonstrated by modifications in laws and judicial discretion, signifies a wider dedication to preserving freedom, justice, and the supremacy of law in response to evolving social and legal conditions.

There you have it, folks! But let's not get carried away; after all, we're talking about a legal concept that is more elusive than the lead character's long-lost twin brother in a Bollywood movie! From its mysterious



beginnings in the 1969 Law Commission report to its most recent revision in the Bharatiya Nagarik Suraksha Sanhita of 2023, anticipatory bail has kept us guessing like a suspense novel.