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**Judgments of Supreme Court, South Indian
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NOTABLE POINTS

- * A balance sheet is to be prepared in considering the imposition of death penalty of the aggravating and mitigating circumstances, and a just balance is to be struck. (SC) 38
- * Appellate Court is not entitled to dismiss the criminal appeal for default nor can it dispose of the appeal on merits without hearing the advocate of the accused or a legal aid counsel on behalf of the accused. (A.P.H.C.) 32
- * The right under Section 162 (2) Cr.P.C., to be released on bail on default if charge-sheet is not filed within 90 days from the date of first remand is not an absolute or indefeasible right. The said right would be lost if charge-sheet is filed and would not survive after the filing of the charge-sheet. (SC) 84

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ANTICIPATORY BAIL – A CRITICAL STUDY IN THE LIGHT OF SUPREME COURT'S DECISION IN SIDDHARAM SATLINGAPPA MHETRE'S CASE*

By

Prof. (Dr.) Mukund Sarda**

In a Judgment¹ which can be considered as exhaustive and firm declaration of law in relation to anticipatory bail, the Apex Court has taken great pains to minutely discuss the law and laid down detailed guidelines.

2. Under the old Code,² there was no provision to grant anticipatory bail or bail in anticipation of arrest. There was difference of opinion amongst various High Courts, whether they could grant such bail under the inherent power of the Court³ and the preponderance of the view was that there was no such power.

3. The Law Commission of India pointed out the necessity of introducing a provision in the code of Criminal Procedure enabling the High Courts and Court of Sessions to grant anticipatory bail⁴. The reasons set out by the Law Commission favouring anticipatory bail can be stated as follows:-

- (i) 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 for some days;
- (ii) Accentuation of political rivalry, the tendency to implicate in false cases has been increasingly resorted to;

* *Siddharam Satlingappa Mhetre v. State of Maharashtra and others*: AIR 2011 SC P.312

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1. Supra Pages 312 to 340.

2. The Code of Criminal Procedure, 1898.

3. See Sec. 562 of the Code of Criminal Procedure, 1898.

4. 41st Report dated 29/9/1969, Para 39.9 (Vol I)

(iii) Where there are reasonable grounds for holding that a person accused of an offence is not likely to abscond or otherwise misuse his liberty, while on bail; and

(iv) There seems no justification to require him to submit to custody, remain in prison for some days and then apply for bail.

4. Provision for anticipatory bail was made for the first time in the Code of Criminal Procedure, 1973⁵. This provision contained the following reasons⁶ for the introduction of anticipatory bail:-

- (1) To recognize the importance of liberty and freedom in a free and democratic Country; and
- (2) To give recognition to the age-old principle which carried an initial presumption of innocence in favour of an accused person, until the guilt is established beyond all reasons of doubt in the criminal trial

5. The concept of anticipatory bail is that a person, who apprehends his arrest in a non-bailable offence, police custody is the inevitable consequence of such arrest and he can apply for grant of bail to the Court of sessions or High Courts. Power of the Police to arrest is subject to justification for the exercise of power. When an arrest is made, it totally deprives a person of his 'personal liberty' and the freedom of movement and locomotion are confined within the four walls of Police cell or prison walls. In A.K. Gopalan's case,⁷ the Supreme Court observed, 'personal liberty' includes not only immunity from arrest and detention but also other freedom of speech association etc: ... "it consists of freedom of movement and locomotion". In *Kharak Singh's case*,⁸ the Supreme Court ruled

5. See for details Sec. 438 Cr PC 1973

6. Statement of objects and reasons as stated in the Bill

7. AIR 1950 SC P.27

8. *Kharak Singh v. State of UP*: AIR 1963 SC 1295.

that 'personal liberty' under Article 21 includes all varieties of freedom except those included in Art 19. A contrary view was taken in *Menaka Gandhi's* case⁹ wherein it was held that 'personal liberty' includes all possible rights which go to constitute personal liberty including Article 19. In the *State of Andhra Pradesh* case,¹⁰ the Supreme Court held, 'Right to life' is one of the basic human rights and not even the State has the authority to violate the right and as elucidated in *Khadat Mazdoor Chetana sangath's*¹¹ case, 'if dignity or honour vanishes' nothing remains in life. In *Joginder Kumar's* case,¹² the Supreme Court had the occasion to point out the irrational and indiscriminate arrests resulting in violation of human rights, stressed the imperative need on the part of the arresting officer to clearly record the reasons for the arrest before arrest of the accused, in the case diary and in exceptional cases to record the same immediately after the arrest is made without any loss of time so that the Court gets the opportunity to properly consider the case of grant or refusal of bail in the light of the reasons so recorded in the case diary.

6. Dealing with the scope and ambit of anticipatory bail, the Supreme Court in *Sibbia's* case,¹³ laid down the following principles:-

- (i) Sec. 438 (1) of Cr. P.C. should be interpreted in the light of Art. 21 of the Constitution of India;
- (ii) Filing of FIR is not a condition precedent to exercise of power under Sec. 438 Cr. P.C;

9. *Menaka Gandhi v. Union of India and another*: (1978) 1 SCC P.248; AIR 1978 SC P.597

10. *State of Andhra Pradesh v. Challa Ramakrishna Reddy and others*: AIR 2000 SC P.2083

11. *Khadat Mazdoor Chetana Sangath v. State of M.P.*: AIR 1995 SC P.31

12. *Joginder Kumar v. State of UP*: AIR 1994 SC P.1349

13. *Gurbaksh Singh Sibbia and others v. State of Punjab*: AIR 1980 SC P.1632

- (iii) Order under Sec. 438 Cr. P.C. would not affect the right of Police to conduct the investigation;
- (iv) Conditions mentioned in Sec. 437 cannot be read into Sec. 438 Cr. P.C.
- (v) Although the power to release on anticipatory bail can be described as of an 'extra-ordinary' character this would not justify the conclusion that the power must be exercised in exceptional cases only. Powers are discretionary to be exercised in the light of circumstances of each case.
- (vi) Initial order can be passed without notice to the public prosecutor. Thereafter, notice must be issued forthwith and the case ought to be re-examined after hearing. Such interim order must conform to requirements of the section and suitable conditions should be imposed on the applicant.

7. The discretionary power vested in the Court to grant or refuse anticipatory bail has to be exercised by a careful and wise use and the Courts manned by Judges, who by virtue of their long experience, they are ideally suited to do. The Supreme Court has laid down the factors and parameters in *Sibbia's* case¹⁴ as follows:-

- (i) The nature and gravity of the accusation and the exact role of the accused must be properly comprehended before the arrest is made;
- (ii) The antecedents of the applicant including the fact as to whether the accused has previously undergone imprisonment on conviction by a Court in respect of any cognizable offence;
- (iii) The possibility of the accused to flee from justice;

14. *Supra*

(iv) The possibility of the accused's likelihood to repeat similar or other offences;

(v) Where the accusations have been made only with the object of injuring or humiliating the applicant by arresting him/her;

(vi) Impact of granting anticipatory bail particularly in cases of large magnitude affecting a very large number of people;

(vii) The Court's must evaluate the entire available material against the accused very carefully. The Court must also clearly comprehend the exact role of the accused in the case. The cases in which accused is implicated with the help of Sec. 34 and 149 of the Indian Penal Code, the Court should consider with even greater care and caution because over-implication in the cases is a matter of common knowledge and concern;

(viii) While considering the grant of anticipatory bail, a balance has to be struck between two factors namely, no prejudice should be caused to the free, fair and full investigation and there should be prevention of harassment, humiliation and unjustified detention of the accused;

(ix) The Court should consider reasonable apprehension of tampering of the witness or apprehension of threat to the complainant;

(x) Frivolity in prosecution should always be considered and it is only the element of genuineness that shall have to be considered in the matter of grant of bail and in the event of there being some doubt as to the

genuineness of the prosecution, in the normal course of events, the accused is entitled to an order of bail;

(xi) The arrest should be the last option and it should be restricted to those exceptional cases where arresting the accused is imperative in the facts and circumstances of that case; and

(xii) The Court must carefully examine the entire available record and particularly the allegations which have been directly attributed to the accused and these allegations are corroborated by other material and circumstances on record.

8. The Supreme Court¹⁵ gave the following suggestions, which might help not in the curtailment of personal liberty of the accused in a routine manner:-

(i) Direct the accused to join investigation and only when the accused does not cooperate with the investigating agency then only the accused must be arrested;

(ii) Seize either the passport or such other related documents, such as, title deeds of properties or fixed deposit receipts / share certificates of the accused;

(iii) Direct the accused to execute bonds;

(iv) The accused may be directed to furnish securities of number of persons which according to the prosecution are necessary in view of the facts of the particular case;

(v) The accused should be directed to furnish undertaking that he would not visit the place where the witnesses reside so that the possibility of tampering the evidence or otherwise influencing the course of justice can be avoided; and

15. Supra Siddharam Satlingappa Mahate Para 128

- (vi) Bank accounts be frozen for small duration during investigation.

9. The ratio in *Siddharam Satlingappa Mhetre's case*¹⁶ clearly lays down the following principles of law:-

- (1) Once the anticipatory bail is granted then the protection should ordinarily be available till the end of trial, unless the interim protection by way of anticipatory bail is curtailed, such as
 - (i) When the anticipatory bail granted is cancelled by the Court on finding fresh material or circumstances; and
 - (ii) On the ground of abuse of the indulgence by the accused
- (2) Limiting the duration of anticipatory bail for a particular period is not valid, as there is no such statutory restriction exists¹⁷

10. The Supreme Court's decision in *Siddharam Satlingappa Mhetre's case*¹⁸ lays down sufficient guidelines to exercise the power of grant or refusal of anticipatory bail. Some of these guidelines be given statutory recognition by suitable amendment to Sec. 438 Cr. P.C. The following suggestions are made:-

- (i) Periodic seminars and lectures must provide interaction between judiciary and executive for the proper balance between personal liberty and the social interests;
- (ii) Some of the important principles of vital interest to the subject of anticipatory bail may be given statutory recognition. Sec. 438 Cr.P.C. may be suitably amended for this purpose;
- (iii) Cases decided under anticipatory bail may be consolidated for the

purposes of evaluation by the higher judiciary and based on their experience;

- (iv) While dealing with anticipatory bail cases, if it is found that case against the accused is foisted with ultimate motives, the Court may eventually exercise the power to quash the proceedings;
- (v) Right to anticipatory bail must be made a specific fundamental right by adding to a provision to Art. 21 through a constitutional amendment consistent with the fundamental principles of criminal jurisprudence that every accused person is presumed to be innocent, until the guilt is established;
- (vi) The duration of anticipatory bail should be covered upto the point of final termination of criminal proceedings (including the appeal, revisional proceedings etc);
- (vii) While the cancellation of bail is pending, the accused must be given fair opportunity to contest that the grounds on which the cancellation is sought do not exist;
- (viii) Anticipatory bail may be granted to poor and economically backward classes of citizens on the basis of personal security instead of monetary consideration;
- (ix) It shall be the duty of the State to safeguard the liberty of the individual by not opposing such petitions unless there are genuine grounds; and
- (x) The Supreme Court must lay down norms for making the remedy of anticipatory bail more effective and take steps to balance with the interests of society.

16. Supra Para 117

17. Supra Para 134

18. Supra