

## **2. Anticipatory Bail**

**Prelims Syllabus:** Judiciary

**Mains Syllabus:** GS-II Indian Constitution- historical underpinnings, evolution, features, amendments, significant provisions and basic structure.



### **Why in News?**

- Recently, an MLA has been granted pre-arrest bail or Anticipatory bail by the High Court; a decision challenged in Supreme Court by the state Lokayukta.

### **What did the apex court say earlier in this regard?**

- A Bench while considering an application for grant of anticipatory bail, had to consider the nature of the offence, the role of the person, the likelihood of his influencing the course of investigation, etc.
- The apex court judgment set aside an anticipatory bail granted by the Madhya Pradesh High Court in a murder case.
- The High Court had granted the bail, despite refusal by the trial court earlier. A man was shot dead by two men while a third held him down over a rivalry.
- Courts ought to be generally guided by considerations such as the nature and gravity of the offences, the role attributed to the applicant and the facts of the case, while considering whether to grant anticipatory bail.
- The court reiterated the settled law that an appellate or superior court could set aside anticipatory bail granted by a lower court on the ground that the latter “did not consider material facts or crucial circumstances”.

### What is Anticipatory Bail?

- Anticipatory bail is a direction to release a person on bail, issued even before the person is arrested.
- Under Indian criminal law, there is a provision for anticipatory bail under **Section 438 of the Criminal Procedure Code**.
- **Law Commission of India** in its 41st report recommended incorporating this provision in procedure code.
- This provision allows a person to seek bail in anticipation of an arrest on accusation of having committed a non-bailable offence.
- It is only issued by the Sessions court and High Court.

### Why such a law is needed?

- Anticipatory bail helps to prevent influential powers from implicating their rivals in false cases.
- **Section 438** (anticipatory bail) of the Code of Criminal Procedure protects people from the ignominy of detention in jail for days on end and **disgrace to their reputation**.
- Anticipatory bail is more needed now because there is rising trend of political rivalry and is showing signs of steady increase.

### SC previous Verdicts regarding Anticipatory Bail:

- The questions referred to the Constitution Bench was, whether the protection granted to a person under Section 438 should be limited to a fixed period till the accused surrenders in court.
- Whether the life of anticipatory bail should end when the accused is summoned by the court.
- SC said that the life or duration of an anticipatory bail order does not normally end at the time and stage when the accused is summoned by the court, or when charges are framed, but can continue till the end of the trial.

### What are the contradictions?

- Denial of bail amounts to deprivation of the Article 21 of the Indian Constitution (**fundamental right to personal liberty in a free and democratic country**).
- The specter of arbitrary and heavy-handed arrests: too often, to harass and humiliate citizens, and oftentimes, at the interest of powerful individuals (and not to further any meaningful investigation into offences) led to the enactment of Section 438.

- The protection against arrest should be in favour of the accused. Restricting the protection would prove unfavorable for the accused.

## The back story of **advance bail**

- The old Cr.PC of 1898 did not contain any specific provision corresponding to the present Section 438. There was a difference of opinion among various HCs whether court had an inherent power to grant pre-arrest bail

- The Law Commission of India on September 24, 1969, highlighted the need for introducing a provision in the Code enabling courts to grant "anticipatory bail" as an antidote to detention in false cases

- Clause 447 of the Draft Bill of 1970 was enacted with some modifications and became Section 438 of the Cr.PC, 1973

A five-judge Supreme Court Bench in the 1980 case of **Gurbaksh Singh Sibbia vs. State of Punjab** interpreted that the power to grant anticipatory bail is

"cast in wide terms and should not be hedged in through narrow judicial interpretation". It held that courts could impose conditions which were appropriate



### Is there any a restriction or condition for granting bail?

- It is open for a court to impose appropriate conditions for grant of anticipatory bail if the specific facts or the feature of the offence involved demands it.
- Courts have to consider the nature of the offence, the role of the person, the likelihood of his influencing the course of investigation or tampering of evidence, including intimidating witnesses and fleeing justice.
- But restrictions/conditions can be imposed only on a case-to-case basis.

### What is the concern?

- The court held that a plea for anticipatory bail can be filed even before the registration of FIR as long as there is reasonable basis for apprehension of arrest and clarity of facts.
- However, the grant of protection should not be "blanket" but confined to specific offence or incident for which relief from arrest is sought.