

BNSS 2023 – LECTURE 19

Notes - Bail and Bond-III (Anticipatory bail, Power of HC and Sessions)

Anticipatory Bail

Introduction

Anticipatory bail to a layman sounds like bail which is given in anticipation of arrest, i.e. a bail given before arrest. But that is a misnomer as no bail can be granted before arrest. It is a direction which is given in case of an arrest the person can be released on bail right after his arrest similar to that of 'bail in bailable offence'.

In the landmark case of **Balchand Jain v State of M.P.** (1976), a three judge bench of the SC observed that the term anticipatory bail is a misnomer. It is not that the bail is granted by the court in anticipation of arrest. No bail can be granted unless the person is under detention or custody.

This order comes only into effect when the arrest happens. Whenever a person is arrested and is ready to furnish bail, anticipatory bail ensures that he will be released on arrest with bail.

This section was brought about by the 41st law commission's recommendation and an amendment to the Cr.P.C. in 1974. The need for this section arose due to a rise in false cases being filed due to political or other rivalry to put people in unnecessary custody before they could be released.

It was present in Section 438 of Cr.P.C. which was incorporated into the BNSS unchanged in Section 482.

Necessary requirements

According to Section 482(1), before applying for pre-arrest bail, one should -

- I. Have reason to believe that he may be arrested, and
- II. The arrest will be on the accusation of commission of a non-bailable offence.

Conditions to be imposed

Section 482(2) says that the Court receiving an application for the grant of anticipatory bail should look at the facts of the case and then apply the following conditions as it thinks fit –

- I. The person will make himself available for interrogation to a police officer whenever required, i.e. he will assist the investigation and cannot abscond after getting an order for pre-arrest bail.
- II. The person will not make any threat, inducement or promise to any person connected with the case who will appear before the court or a police officer.
- III. The person shall not leave India without the court's permission.
- IV. Conditions similar to the special conditions for certain offences under Section 480(3) can be imposed on that person too.

If he does violate any of the conditions, his bail can be cancelled by the Court under Section 492 due to breach of conditions.

Consequence of the grant of anticipatory bail

Section 482(3) says that when a person who has got an order of anticipatory bail for an offence is arrested for that offence without warrant by a police officer, he will be released when he is ready to pay bail. It is not required to pay bail at the time of arrest. He can pay the bail and get released at any time, either at the time of arrest or while he is in the custody of the police officer.

If he is brought before a magistrate after being arrested without a warrant, the magistrate shall issue a 'bailable warrant' against him with the conditions imposed by the court and release him on bail.

To whom can anticipatory bail not be granted

Section 480(4) talks about two offences in which anticipatory bail shall not be granted. They are:-

- I. Section 65 of BNS 2023 - Whoever commits the rape of a woman under sixteen years of age and whoever commits a rape of a woman under twelve years of age
- II. Section 70(2) of BNS 2023- When a person along with other persons commits the rape of a woman under eighteen years with common intention (Gang rape of a woman under eighteen years of age)

Which court has jurisdiction to give anticipatory bail?

Section 482(1) says that the application for anticipatory bail would be made to either a High Court or a Court of Session. But in a few cases the question arose in which High Court or Court of Session shall such appeal be filed which was made clear in the following cases :-

Syed Zafrul Hassan and Anr. v. State (1986)

In this case, the Patna High Court ruled that the section does not permit any court throughout the country where the applicant may be arrested to entertain the application. This power only vests in the Court of Session or High Court having jurisdiction over the locale of the commission of the offence of which the person is accused of.

Sushila Agarwal v. State of Delhi (2020)

This is a landmark case where conflicting views of various High Courts with respect to anticipatory bails were taken into consideration and detailed general guidelines while deciding the application for anticipatory bail were given by the Supreme Court. Important guidelines with respect to examinations are :-

1. The application for anticipatory bail should contain the bare essential but concrete facts relating to the non-bailable offence which has happened and why does the applicant apprehend arrest.
2. It is not necessary that an FIR should be filed before the application. Only the offence should have happened and the applicant apprehends arrest over the commission of this offence.
3. The Courts would be guided by the facts of the case, nature and gravity of the offence, the role of the applicant etc. It can impose restrictions apart from those in Section 480(3) depending upon case-to-case and the materials present before the court.
4. The court may issue notice to the public prosecutor to get a better picture of the facts if needed even in interim anticipatory bail.
5. Anticipatory bail can have a life from arrest to even beyond filing of chargesheet until the end of the trial.
6. This bail is not a blanket permission to commit any crime and be indefinite protection from arrest. It is limited only to certain accusations in a specific offence and the person can be arrested for commission of any other offence.
7. This order does not limit the investigating power of the police and it is open to the police to move for arrest if the bailed person violates the conditions or does not cooperate with the investigating agencies.
8. The order for anticipatory bail can be appealed against by the State in an appellate or superior court. This order can also be set aside on the ground that the court did not consider material facts or crucial circumstances.

Special Power of High Court and Court of Session (Section 483 BNSS)

Section 439 of the Cr.P.C, has been incorporated as Section 483 in BNSS without any change.

It talks about special powers of the High Court and Sessions courts with respect to the power to give bail. Section 483 talks about three powers. They are :-

- I. Grant bail - Section 483(1)(a) says that the HC and Court of Sessions have the powers to release any person accused of any offence. While releasing the person, the court can also impose whatever conditions it deems necessary.
- II. Modify conditions - Section 483(1)(b) gives the power to both the courts to set aside or modify any order given in a bail order by a Magistrate.
- III. Re-arrest - If the court feels necessary, section 483(3) gives it the power to arrest and commit to custody any person who has been released under this Section.

There are a couple of conditions imposed while exercising the power. They are -

- I. If the offence is triable either by Court of Session or punishable with imprisonment for life, the court shall give a notice of application of bail to the Public prosecutor. If the court does not send him any notice, it will record why it did not in writing.
- II. If a person is accused of either an offence under Section 65 (rape of a woman under 18 years of age) or an offence under Section 70(2) (gangrape of a woman) applies for bail under Section 483, the public prosecutor must be sent a notice about the bail within 15 days of receipt of the notice for bail.

Parity in bail

Parity in bail is the principle that co-accused in similar circumstances should be treated equally in terms of bail. The following case was with respect to this principle in application of Section 483, but the court's observations apply to all cases of bail.

In the case of **Neeru Yadav v. State of U.P. (2014)**, an accused approached the court on the ground that since the rest of the co-accused in the same case had been granted bail and so on the principle of parity, he should also be granted bail and got it from the High Court.

The SC on appeal cancelled that bail and observed that the principle of parity cannot be applied absolutely. It will only be applied when the co-accused stands on the same ground, and this will be looked at by looking at the facts of the case and the antecedents of the accused.

In this case, the co-accused was a history sheeter with a long list of crimes which was not similar to the other co-accused, and thus his bail was cancelled.

Cancellation of bond and bail bond (Section 492) (imp for prelims)

This says that when a person forfeits a bond or a personal bond due to breaching a condition in that bond, his bond and bonds by his sureties stand cancelled.

If the person in front of whom the bond maker is not satisfied that there was sufficient cause to breach the bond, he will not release that person only on his personal bond.

The person in front of whom the bond maker was to appear can still release the person on a fresh personal bond as well as a bond by one or more sureties at his discretion. After breach, a person can not be released on the basis of only personal bond.