
CASE COMMENT: GURBAKSH SINGH SIBBIA V STATE OF PUNJAB

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Introduction and Background of the case

The case of Gurbaksh Singh Sibbia v State of Punjab¹, decided by the Hon'ble Supreme Court in the year 1980, analyses all the aspects of Section 438² of the Criminal Procedure Code, 1973 which provides for the grant of anticipatory bail in detail and is a landmark case. The said case had been decided on 9th April, 1980 by a 5- judge bench comprising Chief Justice of India Y.V. Chandrachud, Justice P.N. Bhagwati, Justice N.L. Untwalia, Justice R.S. Reddy and Justice O. Chinnappa.

The Supreme Court in this case was dealing with the slew of directions regarding Section 438 of Criminal Procedure Code, which were passed by the Punjab and Haryana High Court which had shortened the ambit and circumstances in which anticipatory bail could be granted by the court in its regular procedure.

The case was initially filed as an application under Section 438 of CrPC, 1973 to the Punjab and Haryana High Court, by Mr. Gurbaksh Singh Sibbia, who was the power and irrigation minister in the Congress Ministry of State of Punjab, as well as several other ministers, who were also the appellants in this case, after severe allegations of corruption were made against them, during their tenure in the Punjab Government. The application was filed as they were apprehending arrest on the charges levied against them and therefore were seeking bail, in the event of arrest. The application was mentioned before a Single Judge of the High Court, who then sent it for reference to the full bench of the Punjab and Haryana High Court, taking into consideration the graveness and importance of the matter. The Full bench of the court rejected the applications filed by the appellants in its judgement dated 13th September, 1977³.

¹ *Shri Gurbaksh Singh Sibbia and Ors. v State of Punjab*, 1980 SCC (Cri) 465

² S. 438, The Code of Criminal Procedure, 1973

³ *Gurbaksh Singh Sibbia v State of Punjab*, AIR 1978 P&H 1

Therefore, Mr. Gurbaksh Singh Sibbia as well as other appellants have approached the Hon'ble Supreme Court to appeal against the judgement by the High Court. Various Criminal Appeals and Special Leave Petitions by different ministers were merged by the Supreme Court before giving the Final Judgement.

Issue involved before the Court and the approach by SC

The main issue involved in this case is the interpretation of *Section 438 of the Criminal Procedure Code, 1973* and the circumstances and conditions for granting anticipatory bail in a case. It mainly deals and focuses on how the Punjab and Haryana High Court in its judgement to the application filed by the appellant, had given its own legal standing and interpretation to the application of Section 438. It had limited its application to exceptional cases only and mentioned that it is of an extraordinary character. It mentioned that the provision for anticipatory bail cannot be used as a cover for any kind of offence to be committed or for any kind of accusation to be levelled at a future date.

The High Court applied all the limitations of general bail for non-bailable offences as per Section 437 of the Criminal Procedure Code, 1973⁴ to section 438 of the code. It also added certain other limitations for the application of Section 438 which are as following:

- There must be some 'special circumstance,' which needs to be shown by the applicant for grant of anticipatory bail.
- When the investigating agency finds out a legitimate case for remand under Section 167(2)⁵ of the code or any incriminating material under Section 27⁶ of the Indian Evidence Act, the power of anticipatory bail will not be exercised in such cases.
- It cannot be applied for offences which prescribe life imprisonment or death sentence as a punishment.
- It cannot be applied in cases of serious offences like economic offences, where charges of corruption have been levied against higher officials.

⁴ S.437, Code of Criminal Procedure, 1973

⁵ S.167(2), Code of Criminal Procedure, 1973

⁶ S.27, The Indian Evidence Act, 1872

- The mere allegation of exercise of mala powers by the authorities is also not sufficient for the section to be applied in a case, unless the court is satisfied by the materials presented before it.

The Hon'ble Supreme Court in this judgement analyses in detail the legal standing given by the High Court and its own views to each and every point mentioned in it. While analysing it, it also gives its own interpretation to Section 438 and how it is to be applied in a certain case. While analysing it, it also uses certain basic principles or rules of interpretation and construction of statutes like beneficent construction, literal interpretation as well as internal and external aids to interpretation.

Purpose and overview of Section 438

Before going ahead with this case commentary, let me first give an overview of Section 438 Crpc provides for the grant of anticipatory bail, which is basically when a person or the applicant apprehends or has any reason to believe any kind of arrest by the authorities or law enforcement agencies, for any non-bailable offence. Such application can only be made to High Court or Sessions Court, and the court may, on its discretion, direct the release of the person, in any event of arrest on aforesaid charges in the application.

While granting bail under this section, the court may impose certain conditions like the person to make himself available for interrogation as per the requirement, the person should not induce, threat, or promise to any person associated with the case or a police officer, the person should not leave India without prior permission of court and any other condition as the court may deem fit.

The Hon'ble Supreme Court first, tries to highlight the purpose of anticipatory bail in the criminal provisions of our country. It was first mentioned and proposed in the *41st Law Commission Report*⁷, in the year 1969 that the necessity of giving anticipatory and introducing it in the criminal provisions of India was to prevent influential persons from to implicate their rivals in the clutches of law, by detaining or imprisoning them in any false case as a result of any political development which happens in any state on a regular basis. It also mentioned not to enumerate any exhaustive condition for grant of anticipatory bail in any case, and rather

⁷ Para 39.9, 41st Law Commission Report, 1969

leave it to the discretion of the court while granting bail under this section. The 48th Report of the Law Commission in the year 1978⁸ also mentioned the reasons for granting bail should be recorded and it should be done only for the 'interest of the justice'.

It is the routine duty of the police to investigate the crime and the charges brought before them and it is their duty to treat all the criminals in an equal manner, irrespective of the charges and the complainant who brought the case before them. But, sometimes there can be scenario where the provisions of the regular procedural law can be misused to such an extent by those in power to whom they favour, that the police or law enforcement agencies is hesitant to act freely, as they are expected to by the common public, and which may lead to great amount of inconvenience and harassment to a particular person in the society, which can be unjust and unfair to that person, which may lead to humiliation in front of the society and expose that person to social ridicule, and to prevent all this, the provision of 'anticipatory bail' or Section 438 was introduced in the country.

Arguments by the Appellant

The Counsel for the Appellants have argued that the power of the court in granting anticipatory bail should be left entirely on the discretion of the court concerned, as the situation may vary with facts and circumstances.

Secondly, they have related the provision of Article 438 with *Article 21 of the Indian Constitution*,⁹ since it involves the questions of right of personal liberty of a person, especially when that person has still not been convicted for that offence. Imposing restrictions on Section 438, amounts to deprivation of personal freedom of person, that too when he is still presumed to be innocent in the eyes of law, and therefore it should be struck down, since it violates Article 21 of the Indian Constitution. The counsel also argued that such restrictions imposed by High Court in this case should not be considered since it has been not been enacted by legislature and the order of High Court also violates the scheme of separation of powers, by overstepping its powers.

⁸ Para 31, 48th Law Commission Report, 1978

⁹ Art.21, The Constitution of India, 1949

Arguments by the Respondent

It was argued by the Additional Solicitor General on behalf of the state that the applicant in the case needs to show that he will be arrested by an ulterior motive by the state, by showing that the charges proposed or to be proposed on the person are baseless and mala fide, for the anticipatory bail to be granted.

Secondly, the counsel argued that since the provision of anticipatory bail is an extraordinary remedy, and so whenever it is quite probable or evident that the accusations proposed are indeed true, procedure mentioned in *Section 437 or 439 of the criminal procedure code, 1973* for grant of regular bail should be followed, after being arrested.

Interpretation of Section 438 by the Supreme Court

The Supreme Court firstly gave literal interpretation, i.e., the meaning of the words mentioned in the statute should be construed or meant as it is, for the purpose of interpreting the legislative intent in section 438 of the Crpc. It mentioned that the Section 438(1) is a very broad provision, and no restriction or limitation are to be incorporated in it, if the legislature has not done so purposefully. The court mentioned that if preceding section (Section 437 of Criminal Procedure Code), which is regarding the regular bail procedure of non-bailable offences and the succeeding section (Section 439), which is regarding the special powers of High Court and Sessions Court, has placed similar restrictions or limitations for the exercise of power in that section and has not included the limitations in Section 438, it has been done deliberately by the legislature. All three sections deal with the same kind of offences. The court mentioned the legislature could have easily adopted the conditions mentioned in Section 437 or Section 439 by bringing in certain modifications, but it did not purposefully do so. The court interpreted that legislature may also have taken into consideration the recommendation given by the Law commission of India, where it had left to the discretion to be exercised by the courts through their judicial discretion and legislature not to put much restrictions or conditions on the same. It also uses the word “may as it think fit”, which confers a wide discretionary power on the court to impose any condition which it may find suitable for the particular case in hand, which one cannot find in Section 437 or Section 439 of the code. The Supreme Court also cited the case of *Hyman v Rose*¹⁰, a foreign judgement, where it was held that the court should insist on

¹⁰ *Hyman v Rose*, 1912 AC 623

certain things to be considered, if the legislature does not desire to do so.

The Court also mentioned there should be no issues or risk regarding giving the powers to the High Court or Court of Sessions since they are the higher courts in the criminal justice system of our country and they are manned by the well-experienced and knowledgeable person in the field. Secondly, the orders are not final and can be appealable to the Hon'ble Supreme Court of India, as this case itself or revisional powers can be exercised on the orders passed by the court.

Secondly, the court also adopted the basic rule used in the interpretation of any penal statute, where the interpretation should be given in such a way that there is a presumption of innocence for any person accused of any offence. Here, the court mentioned that since the provision of Section 438 is regarding the personal liberty of the person, the High court should not have interpreted the statute in a way, which curtails or brings any kind of restriction to such personal liberty, especially when such legislature has not intended to bring any such kind of restriction to the statute.

Analysis in the Supreme Court Judgement

The Hon'ble Supreme Court of India, gave an analysis to all the 8 directions, given by the Punjab and Haryana High Court on the use and the grant of Section 438. It negated all the directions given by the High Court, except one.

In the point where the High Court mentions that Section 438 is of an extraordinary character and can be applied only on exceptional cases, the Supreme Court indeed agrees that it is of an 'extraordinary character', since it is different from the regular bail provisions. But when it comes to applying on exceptional cases, the Supreme Court mentions that it is not appropriate to make a self-imposed restriction on the power conferred by the legislature and it is the duty of the court, to deal with every case with care, depending on the circumstances which may arise in a particular case. In the point in which the High Court mentioned that Section 438 should be exercised in special cases only, the Supreme Court questioned whether the provision contains something volatile to the regular procedure, which needs to be handled with due care and caution and mentioned that there is a judicial discretion to be exercised by the Judges, which will take care of all the circumstances arising before them and take a decision based on it.

The Supreme Court mentioned that stage of forming belief of whether a person accused of offence which may lead to life imprisonment or death sentence is yet to be arrived at in Section 438 and therefore it cannot be a ground for not exercising Section 438 on the same. It also questioned the obviousness of the corruption to be analysed at the time of granting anticipatory bail. The Court also stated about the wide power of discretion to be exercised by the court for granting anticipatory bail, which can vary in circumstances and should not be limited only where there is exercise of mala fide power by the authority. The court also mentioned that instead of enacting *Section 27 of the Indian Evidence Act* as a limitation in the likelihood of production of incriminating material by the accused, it can be added as a condition under Clause 2 of the section on case-to-case basis. The court also added that anticipatory bail should not be denied if there is any legitimate case under *Section 167(2) of Criminal Procedure Code, 1973* since the order of anticipatory bail does not hamper the investigation of the police for the offence.

The Court somewhat agreed with the contention of Appellant of relating the provision of Section 438 with the *Article 21 of the Indian Constitution* by relying on the landmark judgement of *Maneka Gandhi v Union of India*¹¹, which held that the procedure established by the law should be fair and reasonable and by inclusion of any exception to this by the court, which was not intended by the legislature will be constitutionally unviable. The court herein mentions about the principle that bail is the rule and its denial is an exception, so that the accused person can look after the case to defend himself, since he has more liberty to do so, than when he is in custody and also has the right to do so.

The judgement, by relying on the case of *State v Captain Jagjit Singh*¹² mentions that the things which are to be considered for the grant of anticipatory bail are the seriousness of the charges, context of the event leading to charges, insecurity of applicant's presence at the trial, apprehension of tampering of witnesses as well as keeping in mind interest of the state.

Final Directions by the Supreme Court

Therefore, the Supreme Court gave final directions for the grant of anticipatory bail which includes that the court should have a "reason to believe" to do so. It needs to be examined objectively and not based on vague grounds asserted by the applicant. Secondly, it should only

¹¹ *Maneka Gandhi v Union of India*, 1978 1 (SCC) 248

¹² *State v Captain Jagjit Singh*, AIR 1962 SC 253

be granted by the High Court or Supreme Court, and not left to the magistrate to examine it under the provisions of Section 437 of Crpc. Thirdly, filing or not filing of FIR is irrelevant for grant of anticipatory bail. Fourthly, it should not be invoked for the offences in which the accused has already been arrested and for that general provisions of Section 437 or Section 439 of CrPC need to be invoked.

Therefore, the court agreed with one of the views of the High Court that no blanket orders of anticipatory bail should be passed, since it has a potential to cover any kind of unlawful activity done by the applicant, and so specific reasons need to be cited. The order of anticipatory bail should not in any way affect or interfere the investigation of the police from any angle.

The court also held that the order of anticipatory bail can be passed without notice to the public prosecutor, but notice should be sent to them after passing of the order and the public prosecutor file any objections if any. Additional conditions can be imposed on the applicant if the objections are approved by the court. In my opinion, such direction was not necessary since it will lead to the wastage of time of the court and the application of anticipatory bail cannot be considered without involving all the necessary parties and here, the stand of appropriate authority involved in the arrest needs to be considered, otherwise the point of including this provision in the CRPC will be proved pointless.

The court therefore dismissed the judgement by the Punjab and Haryana High Court.

Conclusion

This case was one of the landmark judgements in the area of anticipatory bail. It gives a detailed analysis of the provisions of Section 438 and the circumstances in which the anticipatory bail can be granted. It basically tries to lay down that the anticipatory bail should be within the discretion of the court concerned and it should not try to lay down any additional conditions or limitations to it, which the legislature never intended to do so.

The Supreme Court, in my view, has basically tried to balance the provisions of Section 438. In one side, it related it to the provisions of Article 21, recognizing the rights of personal liberty of a person under the constitution of India and invoking the well-known and widely used principle of “BAIL IS THE RULE, JAIL IS AN EXCEPTION” , by differentiating it from the general provisions of the regular bail in the CRPC and on the other hand, also has mentioned

that applicant should not invoke vague grounds for exercise of this section, and the court has a duty to examine every application objectively, in order to prevent hampering of general law provisions and affecting investigation of police.

This judgement will guide the courts in circumstances on where to use the provisions mentioned in Section 438. The court will be able to evaluate the circumstances in which the provisions can be used, and prevent any kind of blind orders on this provision. It will enable the court to look at every applicant through the lens of the basic constitutional rights of personal freedom and liberty, especially at the time when they have still not been declared guilty of any offence. This judgement also recognized the right of every applicant to defend themselves in the court of law, when accusations are being levelled against them. But, at the same time it should be ensured that it is not granted to every person and his chance of influencing or tampering the evidence should be taken into consideration.

In my opinion, the basic premise of courts using this provision is when they have trust on the applicant to follow all the conditions laid on them. The only drawback in this judgement was that it failed to lay down or give certain direction regarding this 'trust' on the applicant, which may vary with their background and their position in the society. The judgement should have mentioned something about the trust of the applicant in its directions, to submit himself whenever required by the law to do so.