

CHILD AND LAW: CONCEPT OF ANTICIPATORY BAIL IN CONTEXT OF CHILDREN

Prakhar Dubey*

Amisha Chauhan**

ABSTRACT

The guidelines with respect to anticipatory bail is given under Section 438, which states this bail is used at the time of anticipation of arrest. However, there is always a state of uncertainty surrounding when it comes to Juveniles. The chapter briefly explains the concept of bail on context of juvenile in crimes. Bail is a right but when juvenile's turn comes, it seems to be difficult to seek it. In this chapter authors have analyzed various High Court judgement with respect to maintainability of Anticipatory bail and the conflict with Juvenile Justice (Care and Protection of Children) Act 2015.

The researchers have worked upon the literal interpretation to study the various existing statute to suggest some recommendation, which might be helpful in protecting the rights of juvenile. The chapter discusses in detail Purposive Approach propounded by High Court keeping in mind the various provision related to Juvenile. The research chapter also highlight the role of Judiciary in promoting and protecting the right of Juvenile for the purpose of Justice.

Keywords: Arrest; Courts; Juvenile; Justice; Purposive Approach.

*Student, School of Law, University of Petroleum and Energy Studies, Dehradun, Email: dubeyprakhar93@gmail.com.

** Student, School of Law, University of Petroleum and Energy Studies, Dehradun, Email: ameira1100@gmail.com.

CHILD AND LAW: CONCEPT OF ANTICIPATORY BAIL IN CONTEXT OF CHILDREN

Introduction

In Indian criminal justice system, the position of law about anticipatory bail is clear but the question to its applicability arises, when talked about in context of the juveniles. This issue remains in a state of flux until today.¹

One must know that bail, as a concept is a very useful tool that aims to prevent the innocent person from getting punishment for the crime that he/she was not involved in. Anticipatory bail have been included in the Code with the motive to prevent the violation of the right to personal liberty and freedom as none can be detained under custody unnecessarily. The granting power should be exercised cautiously by the Court so as not to provide chance for the abuse of the special privilege given to the accused.

Juvenile Justice Law in India works on the principles of restorative justice and interpret laws in the interest of the children.²The authors through this paper have tried to approach the question dealt by various courts whether to provide anticipatory bail to children or not especially involved in conflict with law.

Do Children Have the Right to Bail in India?

It is a known fact that bail is a norm and judicial detention is an observatory home that is an exception for juvenile in conflict with law whenever they are produced by police or they appear before Juvenile Justice Board (JJB). Justice S. Vimala stated that juveniles have been approaching to High Court where they have expressed their willingness to surrender before the JJBs if appropriate direction was issued to consider their bail application on the day when they are asked to surrender.³

¹ Criminal law studies nluj, <https://criminallawstudiesnluj.wordpress.com/2020/06/07/anticipatory-bail-and-children-in-conflict-with-law/> (last visited on 20 March, 2022).

² The Hindu, <https://www.thehindu.com/news/cities/Madurai/juveniles-have-statutory-right-to-bail-says-hc/article7794003.ece>, (last visited on 22March, 2021).

³ The Hindu, <https://www.thehindu.com/news/cities/Madurai/juveniles-have-statutory-right-to-bail-says-hc/article7794003.ece> (last visited on 20March, 2022).

Even the *Section 12*⁴ talks about the bail of juveniles and mentions that when any person is accused of committing bailable or non-bailable offence, and if a juvenile is arrested, he must be released on bail with or without surety. However, if there are enough strong reasons, to deprive the accused juvenile of the bail, JJB can issue orders for the detention of the juvenile in an observation home or any other safe place.⁵

The Mischief to Grant Anticipatory Bail to Children

The judiciary has given its own reasoning for not granting anticipatory bail to a juvenile in conflict with law, firstly that Juvenile Justice Act is itself self-contained code which means that the provisions of the Criminal Code cannot be implemented in JJ Act. The Juvenile Justice Act does not aim at arresting the young criminals but apprehend them. Hence, it has been concluded by the court that there arises no need for granting a bail in anticipation of any arrest.⁶

Bail means release of an accused person awaiting trial or appeal by deposition of security, which acts as assurance of submission made, by person who is detained whenever it is demanded by legal authority. The granting of bail is dependent upon the nature of offence and is generally granted in bailable offence under Code of Criminal Procedure, 1973. It becomes a subject of discretion whenever there is a non-bailable offence on the other hand Anticipatory Bail can be seen under section 438 of the Code of Criminal Procedure, 1973 which was instituted on the recommendation of the 41st Law Commission Report. The mechanism was developed to grant pre-arrest bail under CrPC to avoid any kind of harassment with the innocent.⁷

Now as we have good idea about the concept of bail. We will further talk about anticipatory bail, we will analyze how different courts have taken stand on granting children with anticipatory bail starting with *Gurbaksh Singh Sibbia v. State of Punjab*⁸ here in this case Supreme Court have tried to differentiate the concept of normal bail with that of anticipatory bail. In this case, it was held that

⁴ The Juvenile Justice (Care and Protection of Children) Act, 2015, section 12.

⁵ Juveniles have statutory right to bail, says HC <https://www.thehindu.com/news/cities/Madurai/juveniles-have-statutory-right-to-bail-says-hc/article7794003.ece>.

⁶ Anticipatory bail petition not maintainable under Section 438 CrPC in case of a juvenile <https://indianexpress.com/article/cities/chandigarh/anticipatory-bail-petition-not-maintainable-under-section-438-crpc-in-case-of-a-juvenile-hc-7394295/>.

⁷ Dubey, J. P. (2011). [Review of BAIL: LAW AND PROCEDURE WITH TIPS TO AVOID POLICE HARASSMENT, by J. R. Jai]. Journal of the Indian Law Institute, 53(3), 523–525. <http://www.jstor.org/stable/45148571>.

⁸ *Gurbaksh Singh Sibbia v. State of Punjab* ((1980) 2 SCC 565).

after a person who is arrested, he can be released from the custody of the police by normal bail however the anticipatory bail is granted where there is anticipation of arrest. This was reason why court came up with certain guidelines under Section 438⁹ of Code.

We can very well say that law with regards to anticipatory bail is clear but the issue regarding the anticipatory bail in matters related to children is still not clear. This is because there is no clarity given by the Hon'ble Supreme Court and this is why there is inconsistency in various decision given by High Courts and that is why the High Court have come up their own reasoning which presented in the form of Juvenile Justice [Care and Protection of Children] Act 2015¹⁰ vis-à-vis Section 438¹¹. Even we have seen that various Law Commission Report which are silent to grant anticipatory bail to children.¹²

In this chapter, the authors have attempted at working towards examining the various judgement given by the respective High Courts where the question regarding the maintainability of anticipatory bail and child in conflict with law has been talked about. The chapter ends with suggestion that could solve this mischief.

Interpretation of the Statute in the Strict Manner

Section 12¹³ discusses the maintainability of anticipatory bail in that the former statue it provides for non-obstante clause thus it can be seen that there is no applicability of anticipatory bail given under section 438 when we talk about juveniles. The same logic was accepted by the 2-judge bench of Calcutta High Court in the case of *In Re: Krishna Garai* ¹⁴here in this case court rejected the application applied for anticipatory bail and finally it was held that JJ Act 2000 has an overriding effect over Cr. P.C 1973.

⁹ The Code of Criminal Procedure 1973, Section 438.

¹⁰ Prs india, <https://www.prindia.org/theprsblog/juvenile-justice-bill-2015-all-you-need-know> (last visited on 29th June, 2021)

¹¹ The Code of Criminal Procedure, 1973, Section 438.

¹²Law Commission of India, SECTION 438 OF THE CODE OF CRIMINAL PROCEDURE, 1973 AS AMENDED BY THE CODE OF CRIMINAL PROCEDURE (AMENDMENT) ACT, 2005 (ANTICIPATORY BAIL) DECEMBER 2007, Report No.203,

¹³ Juvenile Justice Act, 2015

¹⁴ In Re: Krishna Garai MANU/WB/1374/2016

Now regarding the jurisdiction of Juvenile Board, so this matter was taken up by the single bench of Madhya Pradesh High Court in case of *Kapil Durgawani v. State of Madhya Pradesh*¹⁵ the judge in this case held that on reading Section 12 of the JJ Act 2000 it can be seen there no specific power which is provided to the JJ Board which is similar to that of given in Section 438 of Cr. P.C 1973. Thus, the JJ Board does not have any right over the jurisdiction where a juvenile file the application for anticipatory bail.

*Preetam Pathak V. State of Chhattisgarh*¹⁶ the court applied same reasoning as that of M.P High Court Judgement¹⁷ and even in this case it was argued that power is granted to neither High Court nor the Court of Session to have jurisdiction for the anticipatory bail application.

In another case of *Satendra Sharma v. State of Madhya Pradesh*¹⁸ the Madhya Pradesh High Court rejected the application of anticipatory bail and the power which is provided to JJ Board can be used by the High Court or the Court of Session whenever any proceeding is presented before them by appeal, revision or otherwise except under the Section 438¹⁹ and 439²⁰ of the Code.

In case of *Kamlesh Gurjar v. The State of Madhya Pradesh*²¹, it was held that there is no provision which is given either in JJ Act 2000 or in the Code of Criminal Procedure 1973 which can provide juvenile chance to bring forth his application for anticipatory bail. Whether the application is before any Hon'ble High Court or the Court of Session or even it has to present before the JJ Board. Thus, in the end it was held that in the absence of any specific provision in the JJ Act, a juvenile would not be allowed to move his application under Section 438 of Cr. P.C 1973.

*Preetam Pathak v. the State of Chhattisgarh*²² the High Court bench have rejected the concept of Anticipatory Bail under section 438 of Cr. P.C 1973 and decided that juvenile should move with his application under Section 12 of JJ Act 2000 instead of going up with application of bail.

Secondly, the other argument which goes against the application of anticipatory bail is that provision as mentioned under the JJ Act 2000 does not mention anything about arrest of children when they

¹⁵ Kapil Durgawani v. State of Madhya Pradesh MANU/MP/0287/2010.

¹⁶ Preetam Pathak V. State of Chhattisgarh M.Cr.C.[A] No. 1104 of 2014.

¹⁷ Kapil Durgawani v. State of Madhya Pradesh MANU/MP/0287/2010.

¹⁸ Satendra Sharma v. State of Madhya Pradesh M.Cr.C. No.4183 of 2014.

¹⁹ *Ibid.*

²⁰ The Code of Criminal Procedure 1973, Section 439.

²¹ Kamlesh Gurjar v. The State of Madhya Pradesh M.Cr.C. No 103045 of 2019.

²² *Supra.*

are involved in activity that are against law. We see the Parliament have purposely used the term apprehend rather than using word arrest. As a necessary requirement of apprehension of arrest as given under Section 438 of Cr. P. C 1973 is not present and thus power under this proviso can't be used to provide bail to juvenile whether it may be Hon'ble High Court or the Court of Session.

In the case of *K. Vignesh v. State*²³, the judgement given by the Madras High Court, where Justice Nagamuthu argued that the intention of the legislature i.e. Parliament was not that it may empower the police to arrest any child who is found in conflict with law rather the law was made so that the children can be apprehended under the JJ Act. Thus, the Court finally decided that a fear cannot be created by the way of arrest when children is involved in conflict with law and the current legal position given in the statue totally eliminate the need which can exist if the child want to seek anticipatory bail.

Landmark Judgements Dealing with the Anticipatory Bail in Context of Juveniles

There has always been chaos between the general legislation and special legislation whenever we interpret the provisions given under the JJ Act 2000 in general and Section 12 in particular; we have seen that that the provision provided under the special laws will always prevail. However, if the situation is such when there is no consistency and if there is situation when something is not present in special legislation but provided under the general legislation then the latter will prevail.

The same argument has been taken in the case of *Shahaab Ali [Miner] and Ors v. the State of U.P.*²⁴ Justice Yashwant Varma said that the provision provided under Cr. P.C 1973 may prevail and will operate in areas where the JJ Act provides no construction. It was decided that the non-obstante clause, which is present under Section 12, is only indicative of the fact that the JJ Board is being provided with the power to grant bail notwithstanding that any kind of disturbance, which may be found in, regards to provision of Code of Criminal Procedure 1973.

In the case of *Mohan [In Jail] v. the State of Chhattisgarh*²⁵ and in *Subhash Kumar @ Sonu v. State of Chhattisgarh*²⁶, the matter was present before the court to interpret Section 12 of the JJ Act so after looking into question the court held that despite of provision presented in Section 12 of JJ Act

²³ K. Vignesh v. State Cr. No. 22361 of 2015.

²⁴ Shahaab Ali [Miner] and Ors v. the State of U.P. M.Cr.C.[A] No.597 of 2020.

²⁵ Mohan [In Jail] v. the State of Chhattisgarh 2005 CriLJ 3271.

²⁶ Subhash Kumar @ Sonu v. State of Chhattisgarh M.Cr.C.No.5651/2014.

2000 the maintainability of bail under Section 439 of Code²⁷ is valid before any of the Hon'ble High Court or the Court of Session specified under the local jurisdiction.

On reading the Juvenile Justice Act, 2015 Section 12 it mentions about post arrest provision and non obstante clause the word written is "shall" not operate to exclude the pre-arrest bail provision for the juveniles. The court said while providing protection to child when he or she is brought before Juvenile Justice Board the granting of bail will be decided by reading Section 10 and 12 of JJ Act 2015.²⁸

In *Krishna Kumar through his Mother v. State of Haryana*²⁹ the Punjab and Haryana High Court allowed a pre-arrest bail to minor. The court went further to say just because the J.J. Act 2015 is silent on the aspect of anticipatory bail it cannot be assumed that juveniles can be denied for this right. In this provision regarding special legislation is silent on the aspect of granting bail thus there is presumption that general law is to be abided.

The JJ Act 2015 is a social welfare legislation it protects children from becoming criminals and sending these children to rehabilitation center is the best possible means. The legislature does not mean to exclude juveniles from justice delivery system

In the case of *Kureshi Irfan Hasambhai v. State of Gujarat*³⁰, the High court of Gujarat said that there is no express bar on the application of Section 438³¹ of Code to the child who are in conflict with law as per the provision of JJ Act 2015. A necessary procedure has to be followed as required under Section 12 of the JJ Act 2015 and based on which protection shall be given.

The court have observed that word apprehension used in Section 10 of the JJ Act 2015 is similar to arrest as used in Section 438 of Code. The court said it is important to focus on the liberty of the child and complete denial to anticipatory bail is curtailing the liberty embedded in Article 21 of the Constitution³². The court finds no explicit bar if we read language of the JJ Act 2015 as mentioned in Section 10 and 12.

²⁷ *Ibid.*

²⁸ *Supra.*

²⁹ *Krishna Kumar through his Mother v. State of Haryana CRM-M-19907-2020.*

³⁰ *Kureshi Irfan Hasambhai v. State of Gujarat R/Criminal Misc. Application No. 6978 of 2021.*

³¹ *Ibid.*

³² The Constitution of India, Article 21.

The court opined that there is no express bar on the application of Section 438³³ to children where there arises a conflict in law. We have JJ Act 2015 and if in case there is no bar on the application of Section 438³⁴ there cannot be any reason to imply such bar in the present case where the applicant who in this case is found juvenile.³⁵

*“The Court opined that personal liberty of an individual is of utmost importance and it cannot be ignored or considered lower. Right of an individual to get himself/herself a legal recourse is fundamental for an individual and has to be so if not with more vigor for juvenile”.*³⁶

In *Shahaab Ali [Miner] and Ors. V. The State of U.P*³⁷ which was discussed earlier the court gave clarity over the words “arrest” and “apprehend” was given it was stated that both these words can be used as substitute of each other and even they also convey the same meaning. However, it was finally held that application of Section 438 of Cr. P.C 1973 can be taken before the registration of FIR but it is up to the Hon’ble High Court or the Session Court that the weather Anticipatory Bail should be given to juveniles or not.

Now after getting a good idea about the mischief, it is high time that this need to be resolved and equality should not be divided by treating children in one category and other person in different category who can enjoy the privilege of anticipatory bail.

Conclusion

Allahabad High Court judgement of *ShahaAb Ali and Ors v. State of U.P*³⁸ where it was prescribed that application of Code of Criminal Procedure 1973 on the issues concerning the JJ Act are either completely silent or providing no special measures which are in consonance with the principles as mentioned in the statutory interpretation.

Talking about the second approach where the court has relied upon the purposive interpretation of the JJ Act 2000 and Section 438 of the Code. It was noticed that the original purpose of Section

³³ The Code of Criminal Procedure, 1973, Section 438.

³⁴ *Ibid.*

³⁵ <https://primelegal.in/2021/06/14/the-applicability-of-anticipatory-bail-under-section-438-cr-pc-to-minors-in-confrontation-with-the-law-under-the-jj-act-is-not-expressly-barred-gujarat-high-court/> Last Accessed on 21 March 2022.

³⁶ *Ibid.*

³⁷ *M.Cr.C.[A] No.597 of 2020.*

³⁸ *Ibid.*

438³⁹ was to provide personal liberty and freedom to person living in India even though the legislative intent was also to acknowledge that a person is considered innocent until proven guilty by the court but when we refer to provide relief to children for the anticipatory bail, the statute remains silent on this aspect. It shows how true spirit of liberty and freedom take a break in this manner.⁴⁰

The JJ Act 2015 acts as a means of providing beneficial and remedial legislation which are based on welfare of the children who are involved in conflict with law and it becomes duty of the court to see juvenile's rights are not violated, denying of anticipatory bail defeats the spirit of the law behind the JJ Act, 2000.

When we have an uncertain situation where some High Courts held that applicability of CrPC would not be applied for child in conflict with law even though we have special legislation in the form of JJ Act while on the contrary some High Courts believe that citizens cannot be deprived of their freedom which include child and Section 3(i) serves the purpose as it mentions regarding presumption of innocence of any criminal intent arising in favor of child. The goal should be always working towards welfare of the child.

Suggestions

The court while deciding the matter regarding granting of anticipatory bail to children should weigh on the personal freedom as it becomes duty of court to protect the child's right. Even after having JJ Act 2015 which clears the intention of legislature regarding protecting child's right, it becomes the role of judiciary to provide protection under Section 438⁴¹

The case in which a juvenile has committed a petty offence⁴² falling under JJ Act and the child is made to appear before the JJ Board and after listening the issue is released on bail it would not be justifying the purpose. It is not the case where the pre-arrest bail is granted but however where the nature of offence seems petty after seeing the situation and circumstances it becomes important that JJ Boards must be empowered with the power of granting anticipatory bail to child in conflict with law.

³⁹ The Code of Criminal Procedure, 1973, Section 438.

⁴⁰ Ved Kumari The Juvenile Justice (Care and Protection of Children) Act 2015, (Universal Publication, 2017)

⁴¹ The Code of Criminal Procedure, 1973, Section 438

⁴² The Juvenile Justice (Care and Protection of Children) Act, 2015, Section 2(45).

When an anomaly arises in some situations, then intention of legislature needs to be looked upon, we must remember that the reason behind enactment of Juvenile Justice (Care and Protection of Children) Act, 2015 was to extend restorative justice to juvenile in conflict with law where the aim was to give chance to such juveniles to under rehabilitation so that they can mix up with the society and not turn into hard core criminals. Hence, this can be proved the terms “accused” has been avoided and instead of that word child in conflict with law have been used. Thus, it becomes important that juvenile should be provided with option of availing protection under section 438⁴³, and additionally it becomes important that Supreme Court also give clarity over the position keeping in mind the interest of child.

⁴³ The Code of Criminal Procedure, 1973, Section 438.