

4. TRANSIT ANTICIPATORY BAIL: JUDICIAL INSIGHTS AGAINST LEGISLATIVE DEFICIENCIES

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Abstract

This paper examines about transit (anticipatory) bail as an important but neglected aspect of criminal jurisprudence, reflecting the shifting balance between personal rights and judicial discretion. The paper gives a comprehensive analysis of transit bail, contemplating its evolution and highlighting important judicial interpretations, including the most recent judgment by the Hon'ble Supreme Court. The paper, in the first part, elaborates upon the concept of bail, its significance in criminal jurisprudence, and its relation to the theory of legal paternalism. In the second part, the concept of transit bail is brought out in relation to anticipatory bail, explaining distinct characteristics and their respective legal implications. The third part discusses judicial developments in transit bail. It has considered the growth and development that have taken place through various pronouncements of the high courts. The considerations and salient factors relevant in granting transit bail are considered in the fourth section. It also throws light on the recent changes in the law concerning this issue and points out the lack of any specific provision of transit bail in the Bharatiya Nagarik Suraksha Sanhita (BNSS) 2023. The paper also contends that this may amount to a violation of the rights of individuals in cases where a person is accused of a crime committed outside his jurisdiction. This seems to be in contrast to the inclusion of the Zero FIR provision in BNSS which will be further dealt with in the paper. The existing gap in the statutory framework for transit bail may lead to arbitrary detention and inconsistent application across different jurisdictions. The paper advocates the need for explicit provision in BNSS to ensure clarity and consistency.

Keywords: Transit anticipatory bail, arrest, jurisdiction, extra-territorial, protection.

INTRODUCTION

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“Bail is the rule and jail is an exception” is a fundamental canon of criminal jurisprudence, established by the Hon’ble Supreme Court.¹ The primary objectives of an accused person’s arrest and incarceration are to guarantee his presence during the trial proceedings and to ensure that he is available to receive the punishment if found guilty. It would be unreasonable and unjust to deny the accused their freedom while the proceedings against him are pending if there was a reasonable way to secure his attendance at the trial other than by arrest and imprisonment.² The purpose of bail is to “procure the release of a person from legal detention by undertaking that he shall appear at the time and place indicated and subject himself to the authority and judgement of the court.”³ Section 438⁴ authorises the Session and High Courts to allow pre-arrest or anticipatory bail which is a directive allowing an individual to be released on bail prior to their arrest. The objective of anticipatory bail is to prevent harassment and ensure that personal liberty is not compromised. Additionally, the jurisprudence of transit bail has developed through judicial decisions to harmonise ‘the right to life and personal liberty’ under Article 21⁵ with ‘the right to freedom of movement’ under Article 19(1)(d),⁶ while also aligning with the criminal justice administration outlined in the Code of Criminal Procedure, 1973. However, it is crucial to differentiate between anticipatory bail and transit bail, as they serve different purposes.

The term ‘transit’ originates from the Latin word ‘transitus,’ which signifies the ‘passage from one place to another.’ The Code of Criminal Procedure, 1973, as well as the new criminal procedural law, The Bharatiya Nagarik Suraksha Sanhita (BNSS), 2023,⁷ have not incorporated the term ‘transit anticipatory bail’ or ‘extra-territorial bail’, though such bail was granted as early as 1980 by the Delhi High Court.⁸ Therefore, the dictionary definition of the term ‘transit’ can be discussed. According to The Concise Oxford English Dictionary, the act of moving goods or people from one place to another, conveying individuals via public transportation, or simply passing

¹ *State of Rajasthan v Balchand alias Baliay* [1977] 4 SCC 308

² K.N. Chandrasekharan Pillai, *RV Kelkar’s Criminal Procedure* (7th edn, Eastern Book Company 2023) 287

³ *Vaman Narain Ghiya v State of Rajasthan* [2009] 2 SCC 281

⁴ Code of Criminal Procedure 1973, s 438

⁵ Constitution of India 1950, art 21

⁶ *ibid* art 19(1)(d)

⁷ The Bharatiya Nagarik Suraksha Sanhita 2023

⁸ *Pritam Singh v State of Punjab* [1980] SCC OnLine Del 336

through or across a location are all considered forms of ‘transit.’ Likewise, the act of moving from one state or circumstance to another is referred to as a ‘transition.’

The Supreme Court’s first case concerning ‘transit anticipatory bail’ was *State of Assam v. Brojen Gogol (Dr)*,⁹ decided in the year 1998. The objective of such bail is to protect individuals from arrest while they are travelling to seek regular anticipatory bail in a jurisdiction that is different from their current location. The lack of any provision for transit anticipatory bail from the Bharatiya Nagarik Suraksha Sanhita¹⁰ can be viewed as a significant oversight in recognising the importance of pre-arrest legal safeguards. In such absence, the granting of transit bail is determined by the discretion of the courts.

The recent judgement in *Priya Indoria* case ¹¹ has served as a landmark case in the context of ‘transit anticipatory bail.’ The apex court has outlined the conditions that courts must consider before granting such bail, thereby ensuring robust and well-defined legal safeguards for individuals. The paper delineates the historical development, legal structure, and judicial interpretation of ‘transit anticipatory bail.’

THE RELEVANCE OF ANTICIPATORY BAIL IN SHAPING TRANSIT ANTICIPATORY BAIL

In order to comprehend the extent and application of ‘transit anticipatory bail,’ it is important that we first explore the development of ‘anticipatory bail.’ The Code of Criminal Procedure of 1898 did not have provision for pre-arrest or anticipatory bail. The provisions on bail were contained in Sections 497¹² and 498¹³. This omission had led to several debates among High Courts regarding their inherent authority to grant pre-arrest bail, with the prevailing view that such power did not exist under the 1898 Code.

It is essential to first understand the broader relevance of anticipatory bail, which serves as the foundational principle of transit anticipatory bail, in order to appreciate its significance. The necessity for having anticipatory bail as an integral legal

⁹ *State of Assam v. Brojen Gogol (Dr)* [1998] 1 SCC 397

¹⁰ (n 7)

¹¹ *Priya Indoria v State of Karnataka and Ors* [2024] 4 SCC 749

¹² The Code of Criminal Procedure 1898, s 497

¹³ *ibid* s 498

protection, advanced by the Law Commissions, which are discussed below, aids in understanding the role of transit anticipatory bail in maintaining justice across the jurisdictions. The 41st Commission Report¹⁴ explicitly discussed the concept of ‘anticipatory bail,’ stating:

“The necessity for granting anticipatory bail arises mainly because sometimes influential persons try to implicate their rivals in false causes for the purpose of disgracing them or for other purposes by getting them detained in jail for some days. In recent times, with the accentuation of political rivalry, this tendency is showing signs of steady increase. Apart from false cases, 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, there seems no justification to require him first to submit to custody, remain in prison for some days, and then apply for bail.”

The 48th Commission Report¹⁵ acknowledged anticipatory bail as a “useful addition” but emphasised that it should be allowed only in truly exceptional cases. It recommended that:

- The initial order for anticipatory bail should serve as a provisional measure.
- The reasons for granting bail must be documented.
- The Court must be satisfied that granting bail is necessary for justice.
- The conclusive decision on pre-arrest bail should be made only after informing the Public Prosecutor in order to avoid any misuse of the legal process by unscrupulous petitioners.

Despite the provision for anticipatory bail being included in Section 438,¹⁶ following the Law Commission’s recommendations, the term remains undefined in the Code itself. The Supreme Court explained that ‘anticipatory bail’ refers to “bail in anticipation of arrest.”¹⁷ The Court further noted that such bail can be sought either before an FIR is lodged or after its registration but before the charge sheet is submitted, as long as the case is still under investigation. It can also be submitted after the investigation has concluded. The conditions imposed when granting anticipatory

¹⁴ Law Commission of India, *Forty-First Report on the Code of Criminal Procedure* 1398 (September 1969)

¹⁵ Law Commission of India, *Forty-Eighth Report on Some Questions under the Code of Criminal Procedure Bill, 1970* (July 1972)

¹⁶ (n 4)

¹⁷ *Balchand Jain v State of Madhya Pradesh* [1976] 4 SCC 572

bail are influenced by the status of the investigation. The new procedural law, effective from July 1, 2024, explicitly addresses anticipatory bail in Section 482.¹⁸

The significance of transit anticipatory bail becomes evident when considered in the context of anticipatory bail as a whole. Whereas regular anticipatory bail protects arrest within one jurisdiction where the offence has been committed, transit anticipatory bail extends it across jurisdictions. The extension is quite relevant in the present context where many cases stretch over more than one state or region due to the mobility of the accused or the extensive nature of the offence.

THE CRUCIAL ROLE OF TERRITORIAL JURISDICTION

Territorial jurisdiction is essential for instituting a case before a court of law. It is held to be crucial for administering justice. The apex court determined that a ‘Magistrate takes cognisance of an offence and not the offender’.¹⁹ The Court also noted, that Section 177²⁰ states that, generally, every offence should be investigated and adjudicated by the court within whose territorial limits the offence was committed.²¹ Therefore, applying the principles held by the apex court, all orders, including those pertaining to bail and anticipatory bail, may be issued by the court within the jurisdiction where the offence occurred. Section 167(2)²² of the Code stipulates that a judicial order to detain an accused for more than 24 hours must be issued by the ‘nearest Magistrate’, and not necessarily the Magistrate having jurisdiction over the case. The Magistrate may prolong custody for up to 15 days but lacks the authority to approve bail. The bail can only be granted by the Magistrate who has jurisdiction over the case for trial.

The Court held that “the High Court” or “the Court of Session” in Section 438²³ refers specifically to the respective Court having jurisdiction over the area where the FIR is registered, rather than “any” High Court or Court of Session in general. The Court highlighted the practical difficulties that would arise if the jurisdiction of a criminal court were based on ‘the shady or evasive movements of the offender.’ It could lead to

¹⁸ (n 7) s 482

¹⁹ *Raghubans Dubey v State of Bihar* [1967] 2 SCR 423

²⁰ (n 4) s 177

²¹ *Dashrath Rupsingh Rathod v State of Maharashtra* [2014] 9 SCC 129

²² (n 4) s 167(2)

²³ (n 4)

judicial chaos and an inherent conflict between the comity of Courts. The Court raised concerns about the possibility of *a fugitive offender may well move from Court-to-Court ad infinitum and if he fails in one jurisdiction, then on to another until he secures relief in the last*, if anticipatory bail applications were permitted beyond the Court's territorial jurisdiction.²⁴ It could be contended that anticipatory bail cannot be granted by the court that lacks territorial jurisdiction. However, in today's world, where people move frequently and quickly, it is crucial to balance 'right to life and personal liberty' guaranteed by Article 21²⁵ with 'right to freedom of movement' under Article 19(1)(d)²⁶. This has led to the development of 'transit anticipatory bail' or 'extra-territorial anticipatory bail'

THE EVOLUTION OF TRANSIT ANTICIPATORY BAIL IN ENHANCING JUSTICE ACROSS JURISDICTIONS

It is reasonable to expect that, since the term 'anticipatory bail' is not expressly outlined, the broader concept of 'transit anticipatory bail' would similarly lack any explicit definition or exposition within the Code.²⁷ It may be argued that the necessity for 'transit anticipatory bail' has emerged since the police have been allowed the right under the Code to apprehend an accused across different jurisdictions. When a person is arrested beyond the jurisdiction where the offence took place, the police must obtain a 'transit remand.' The arrested individual must be produced before the nearest magistrate, and if such magistrate determines they lack the authority to try the case, he may direct the accused to be transferred to the magistrate having jurisdiction to try or commit the case for trial. Therefore, the police are required to obtain 'transit remand' to move the individual from the spot of arrest to the location where the crime was reported to ensure conformity with Article 22.²⁸

The objective of a 'transit remand' is to ease the transfer of the accused from the location of arrest to the jurisdiction where the investigation will be conducted. The requirement for a 'transit remand' appears to have given rise to the demand for 'transit anticipatory bail,' to ensure that the individuals who are affected by such a situation

²⁴ *Syed Zafrul Hassan and Anr v State* [1986] SCC OnLine Pat 3

²⁵ (n 5)

²⁶ (n 6)

²⁷ (n 4) 35

²⁸ (n 5) art 22

have access to remedy.²⁹ It ensures that individuals apprehending potential arrest in a different jurisdiction have a chance to seek protection and prevent unnecessary detention.

JUDICIAL EVOLUTION ON TRANSIT ANTICIPATORY BAIL

The jurisprudence and significance of ‘transit bail’ have evolved through a series of judicial decisions by various High Courts. The Delhi High Court first introduced ‘extra territorial anticipatory bail’ in the year 1980. The court allowed anticipatory bail to the accused under Section 438³⁰, though the FIR had been registered in Punjab. It was reasoned that jurisdiction for cognisance of an offence should not be intertwined with the jurisdiction for granting bail. Bail deals with issues of arrest and detention and not the jurisdiction where the offence was committed. Therefore, any court where the arrest occurs or is anticipated to occur will also have the authority to grant bail to the individual concerned. It was further determined that if the Court of Session or the High Court can allow interim bail, they also have the authority to issue full anticipatory bail under the same jurisdiction. The Code allows for concurrent jurisdiction of courts across different states. Although Section 438 does not provide for a clear division of jurisdiction into interim and final categories, any competent court may grant anticipatory bail for a specified period if deemed necessary.³¹ The Calcutta High Court granted anticipatory bail and reasoned that it could consider the bail application of an individual residing within its jurisdiction, even though the arrest was apprehended in relation to a case initiated outside that jurisdiction.³²

The Kerala High Court granted anticipatory bail, extending beyond its territorial jurisdiction, and observed that in case the offence requires the applicant to travel through different states, it would not be feasible for the applicant to seek anticipatory bail from each and every High Court of the state through which he may pass. Thus, a balance has to be struck between the constitutional guarantees under Articles 21³³ and Article 22³⁴, the procedural safeguards provided under the Code, and the powers vested in the High Courts. The court then held that pre-arrest or anticipatory bail can

²⁹ (n 28)

³⁰ (n 4)

³¹ (n 9)

³² *In Re: Benod Ranjan Sinha* [1981] SCC OnLine Cal 102

³³ (n 5)

³⁴ (n 29)

be granted for cases of arrest made within the state in which the High Court is located so that conflicting decisions of the various High Courts are avoided.³⁵ The expression ‘apprehension of arrest’ was emphasised, and the Bombay High Court ruled that if there is a likelihood of arrest occurring outside the jurisdiction of the court, the person can still apply to that court for anticipatory bail, regardless of whether the offence took place in another state.³⁶

The Calcutta High court explained that while the High court or Sessions court cannot issue pre-arrest bail outside their jurisdiction, they can consider granting ‘transit anticipatory bail’ for a temporary period during the transition. Therefore, the court denied anticipatory bail but provided ‘transit anticipatory bail’ instead.³⁷ The Calcutta High Court further noted that the jurisdiction of High Court is confined to its own state under Article 214³⁸ and therefore, pre-arrest bail can only be issued by the High Court or Sessions Court within their territorial limits under Section 438 of the Code.³⁹

The Karnataka High Court ruled that, despite the alleged offence occurring outside its jurisdiction, it still had the authority to grant bail. The Court reasoned that it could exercise this power based on established legal principles, allowing it to address matters even when the offence occurred beyond its jurisdiction. The Court directed the immediate release of the applicant if arrested, on the condition that they appear before the appropriate court within 15 days of their arrest or within 15 days from the date of the order, whichever is sooner.⁴⁰

The Bombay High Court reasoned that interim bail or ‘extra territorial anticipatory bail’ can be granted to protect personal liberty and prevent immediate arrest.⁴¹ The Allahabad High Court also recognised that ‘transit anticipatory bail’ provides preliminary protection from arrest for a defined duration.⁴² The Allahabad High Court explained that transit bail serves as a provisional safeguard for an accused to avoid arrest while they move to the court having appropriate jurisdiction.⁴³ In its recent

³⁵ *C.L. Mathew v Govt. of India* [1984] SCC OnLine Ker 207

³⁶ *N.K. Nayar v State of Maharashtra* [1985] SCC OnLine Bom 53

³⁷ *Sailesh Jaiswal v State of West Bengal* [1998] SCC OnLine Cal 215

³⁸ (n 5) Art 214

³⁹ *Sadhan Chandra Kolay v State of West Bengal* [1998] SCC OnLine Cal 382

⁴⁰ *Gameskraft Technologies (P) Ltd. v State of Maharashtra* [2019] SCC OnLine Kar 520

⁴¹ *Nikita Jacob v State of Maharashtra* [2021] SCC OnLine Bom 13919

⁴² *Ajay Agarwal v State of U.P* [2022] SCC OnLine All 689

⁴³ *Amita Garg v State of U.P* [2022] SCC OnLine All 463

2023 judgement, the Bombay High Court allowed a four-week period of transit anticipatory bail, giving the applicants time to seek appropriate relief from the relevant court.⁴⁴

The above judicial decisions discussed regarding transit bail demonstrate a nuanced approach to balancing jurisdictional constraints with the need to protect personal liberty in cases spanning multiple jurisdictions. The courts have generally upheld the principle that pre-arrest bail should be granted by a court within the jurisdiction where the alleged offence took place, in alignment with Article 214⁴⁵ and Section 438.⁴⁶ This principle ensures that a High Court or Sessions Court can only allow anticipatory bail for offences committed within its own territorial limits.

However, with the practical difficulties that these jurisdictional boundaries cause, the jurisprudence of ‘transit anticipatory bail’ has evolved. This type of bail provides preliminary protection to a person who apprehends that they might be arrested while they move from one jurisdiction to another. It serves as a fundamental protection since it allows the accused to avoid immediate detention and enables them to approach the appropriate court to seek relief. The above rulings reflect the judiciary’s commitment to upholding individual rights across jurisdictions.

THE SUPREME COURT’S VIEWPOINT ON TRANSIT ANTICIPATORY BAIL

The Supreme Court has reviewed whether the High Courts have the jurisdiction to allow ‘transit bail’ in instances like *State of Assam v. Brojen Gogol*⁴⁷ and *Teesta Atul Setalvad v. State of Maharashtra*.⁴⁸ However, it did not settle the legal issue regarding the scope of the High Court’s jurisdiction. This lack of clarity has led to substantial legal uncertainty, such as undefined jurisdiction and different judicial practices by the High Courts. The ambiguity affects access to justice because individuals may fail to identify the appropriate court to seek bail, leading to delays that might lead to unwarranted imprisonment. Furthermore, the absence of precise jurisdictional requirements poses a practical challenge for law enforcement agencies since it may

⁴⁴ *Manda Suresh Parulekar v State of Goa* [2023] SCC OnLine Bom1568

⁴⁵ (n 39)

⁴⁶ (n 4)

⁴⁷ (n 10)

⁴⁸ *Teesta Atul Setalvad v. State of Maharashtra* [2014] SCC OnLine Bom 5140

jeopardise the administration of bail decisions. In *Priya Indoria*,⁴⁹ the Court laid down clear procedure for granting transit bail, upholding principles of justice, and safeguarding individual rights. The need to define jurisdictional limits makes evident the need for legislative reform.

PRINCIPLES ESTABLISHED IN PRIYA INDORIA V. STATE OF KARNATAKA AND ORS FOR ‘LIMITED ANTICIPATORY BAIL’ OR ‘TRANSIT ANTICIPATORY BAIL’

Supreme Court’s Ruling on Limited Anticipatory Bail or Transit Anticipatory Bail

The apex court, after examining the ambiguity and lacunae in the legal framework and considering the decisions of the High Court with respect to ‘extra territorial anticipatory bail’ or interim bail, laid down the ratio decidendi that, in the interest of justice, the High Court or the Court of Session may allow ‘limited anticipatory bail’ in the form of preliminary safeguard under Section 438⁵⁰ with regard to the FIR that has been registered outside its territorial limits.⁵¹ The court observed that anticipatory bail serves as an important remedy for individuals who are experiencing difficult life situations and are likely to be further complicated as our societal and legal frameworks evolve. The distinction between the jurisdiction arising from concerns about potential arrest and the jurisdiction that emerges following the “commission and cognisance of an offence” was highlighted. The court, upon examining Section 438, observed that it is clear that the terms “the High Court” or “the Court of Session” are not confined by local or territorial boundaries. However, this does not imply that an accused can seek anticipatory bail in a court situated in a different state solely because an FIR was registered elsewhere. An accused can seek anticipatory bail in a different state only if they were residing or present there for a legitimate reason at the time the FIR was filed. Moreover, the definite article “the” implies that it does not restrict the jurisdiction to the court where the FIR was filed. The court further noted that if Parliament had intended for the term “the High Court or the Court of Session” to exclusively refer to the court that takes ‘cognisance of an offence,’ it would have explicitly mentioned. In the absence of any explicit restriction, it should be interpreted in a manner that upholds the constitutional principle of protecting individual liberty. It is aligned with

⁴⁹ (n 12)

⁵⁰ (n 4)

⁵¹ (n 12) 36

the spirit of Article 21⁵² to grant broader jurisdiction to the courts in matters of pre-arrest, rather than limiting this jurisdiction by imposing restrictive interpretations.

Conditions for Granting Limited Anticipatory Bail

In light of the constitutional mandate to protect a citizen's right to life, personal liberty, and dignity enshrined under Article 21, it was observed that the High Court or the Court of Session may allow 'limited anticipatory bail' or interim protection under Section 438⁵³ with regard to an FIR lodged outside their territorial limits. However, this power is subjected to the following conditions:⁵⁴

- The public prosecutor and investigating officer associated with the FIR should be informed on the initial hearing date, although the Court may grant interim bail or transit bail at its discretion in suitable cases.
- The order granting limited or interim bail must include reasons for the applicant's apprehension of arrest across states and the effect of such bail on the investigation's status.
- The jurisdiction where the offence is taken cognisance of does not exempt it from the applicability of anticipatory bail, even if there is any State amendment with respect to Section 438.

The individual seeking transit anticipatory bail must establish to the Court that they are unable to obtain such relief from the Court that has territorial jurisdiction over the offence. The grounds for this might include:

- There is a credible and imminent threat to life, personal freedom, or physical safety within the jurisdiction where the FIR has been filed.
- There is a reasonable fear of a breach of the right to liberty or possible impediment owing to arbitrary conduct.
- The medical condition or disability of the applicant seeking 'limited anticipatory bail' outside the territorial jurisdiction shall be considered.

The court acknowledged the issue that it is not feasible to predict every urgent situation where an order for 'extra-territorial anticipatory bail' might be crucial for

⁵² (n 6)

⁵³ (n 5)

⁵⁴ (n 52)

safeguarding an applicant's fundamental rights. The court reiterated that the authority to allow such bail should be exercised solely in 'exceptional and compelling situations.' Such bail should be granted only if denying interim protection or transit anticipatory bail, which would enable the applicant to seek anticipatory bail from a court with appropriate jurisdiction, would result in 'irremediable and irreversible prejudice' to the applicant.⁵⁵ The Court may, when considering an application for such bail, if deemed appropriate, allow temporary protection for a defined duration and instruct the applicant to seek relief from a court with competent jurisdiction. The Court also overturned the Patna High Court's decision in the case of *Syed Zafrul Hassan*⁵⁶ and the Calcutta High Court's decision in the case of *Sadhan Chandra Kolay*⁵⁷ insofar as these rulings concluded that the High Court does not have the authority to allow 'extra-territorial anticipatory bail,' including 'limited or transit anticipatory bail.' Therefore, even if the accused is not in the state where the FIR is registered, they may still seek 'limited transit anticipatory bail' by applying to the court in the state where they reside or are temporarily present.

Judicial Oversight to Prevent Forum Shopping

The court also acknowledged that allowing the accused to seek anticipatory bail from any court could lead to 'forum shopping,' where the accused may select the most convenient or favourable court, undermining the concept of territorial jurisdiction, which is a key principle in the Code. In order to avoid such misuse of the legal process and ensure the integrity of the law, it is crucial for the court to examine the territorial proximity between the accused and the court's jurisdiction when considering an anticipatory bail application. This connection could be based on the accused's residence, occupation, employment, or profession. It implies that the accused is not permitted to travel to any other state merely to obtain anticipatory bail. The court must be provided with a clear and explicit reason as to why the bail is being sought in a jurisdiction where the FIR has not been filed. The accused should establish that there is a reasonable belief or immediate fear of arrest for a non-bailable offence or explain his inability to promptly approach the court in whose jurisdiction the FIR has been

⁵⁵ (n 12) 37

⁵⁶ (n 25)

⁵⁷ (n 40)

lodged.⁵⁸ This ensures that the application for anticipatory bail is not merely an attempt to bypass the proper legal channels.

Measures to Prevent Forum Shopping

The Learned Senior Counsel appearing for the State of Rajasthan has proposed the following safeguards in order to prevent forum shopping when seeking interim protection:⁵⁹

- The applicant must provide proof of residence to show that they have been living in the area where temporary relief is sought.
- If the applicant is seeking interim relief outside their usual place of residence, they must explain why and detail their apprehension of arrest in the area where they do not reside.
- Interim protection should generally be granted for no more than fourteen days.
- The public prosecutor in the court where the provisional application is submitted should be notified beforehand. This allows the prosecutor to reach out to the relevant police station to obtain details about the status and nature of the investigation.
- The limited duration of interim protection helps guarantee that ‘regular anticipatory bail’ is issued exclusively by a court with the appropriate jurisdiction.
- Provisional protection should only be granted if the conditions outlined in Section 438⁶⁰ are met.

COMPARATIVE ANALYSIS OF ZERO FIR AND TRANSIT ANTICIPATORY BAIL PROVISION IN THE BHARATIYA NAGARIK SURAKSHA SANHITA (BNSS), 2023

⁵⁸ (n 12) 40

⁵⁹ *ibid* 7.3

⁶⁰ (n 4)

In the preceding discussion, the significance of transit anticipatory bail has been highlighted. Despite the recognition of this crucial aspect of criminal jurisprudence through various judicial decisions, The Bharatiya Nagarik Suraksha Sanhita, 2023⁶¹ does not explicitly provide for any provision of 'transit anticipatory bail.' On the other hand, the statute has embraced the concept of Zero FIR, a reform aimed at improving efficiency in crime reporting and addressing jurisdictional delays. Zero FIR is a First Information Report that can be lodged at any police station, irrespective of the location where the crime took place or the jurisdiction of the police station. While Zero FIR enables complaints to be registered immediately irrespective of territorial jurisdiction, transit anticipatory bail allows temporary protection from arrest in cases involving jurisdictional complications. Both the provisions, though different in their goals, relate to the same issue of jurisdictional hurdles.

Where Zero FIR ensures that a victim can file a complaint without delays caused by territorial limitations, transit anticipatory bail offers protection to an accused who may otherwise face arrest before having the opportunity to approach the appropriate court. Thus, the two mechanisms complement each other by seeking to mitigate jurisdictional delays from both the perspective of the complainant and the accused. However, the absence of a statutory provision for transit anticipatory bail leaves a gap in the legal framework, as it fails to offer protection to those accused in inter-state cases. This analysis consequently tries to examine how these provisions differ and supplement one another and identifies areas in which legal reform may be required to ensure a more comprehensive and efficient justice system.

Zero FIR and Efficiency in Crime Reporting

The informant's statement recorded under Section 154 of the Code⁶² is termed as the First Information Report (FIR). 'The principal object of the FIR from the point of view of the informant is to set the criminal law in motion.'⁶³ In *Lalita Kumari v. Govt. of U.P.*,⁶⁴ the apex court held that once a cognisable offence is reported to the police, an FIR must be registered without delay. Generally, the FIR must be registered at a police station having competent jurisdiction over the locality in which the offence is

⁶¹ (n 8)

⁶² (n 5) s 154

⁶³ *Sk. Hasib v State of Bihar* [1972] 4 SCC 773

⁶⁴ *Lalita Kumari v Government of Uttar Pradesh* [2013] 6 CTC 353

committed. However, before the introduction of Zero FIR, issues of jurisdiction often led to delays and confusion in the registration of FIR because some police stations, at times, refuse to register FIRs on grounds of dispute over jurisdictions, thus hindering the timely administration of justice. The introduction of Zero FIR, in the wake of the Justice Verma Committee Report⁶⁵ and subsequently the Criminal Law (Amendment) Act, 2013⁶⁶ represented one of the major progressive reforms in the Indian criminal justice system as well as a potent change in response to the Nirbhaya case⁶⁷. This allows a victim to lodge an FIR at “any” police station without any concern for where the offence occurred. The FIR is then forwarded to the relevant jurisdiction for further investigation.⁶⁸

The Bharatiya Nagarik Suraksha Sanhita, 2023⁶⁹ has acknowledged and embraced the reform in the statute. Section 173(1)⁷⁰ stipulates that “Every information relating to the commission of a cognisable offence, irrespective of the area where the offence is committed, may be given orally or by electronic communication to an officer in charge of a police station.” The inclusion of the phrase ‘irrespective of the area where the offence is committed’ indicates progressive mindset towards criminal justice aimed at improving policing effectiveness and efficiency.

Implications of the Absence of Transit Anticipatory Bail Provision

It can be considered a major oversight that The Bharatiya Nagarik Suraksha Sanhita, 2023 does not provide for any form of ‘transit anticipatory bail’. Transit bail has emerged as judicial balancing in order to equate the rights of the accused with the right of the state to enforce laws. It has a particular relevance in geographically diverse countries like India, where one may have valid reasons to be in some state other than that in which an FIR is lodged. The absence of such a provision sheds light on the failure of the legislature to adapt to the evolving demands of contemporary justice. It is important for preventing arbitrary and/or unreasonable actions of police detainment or arrest. It aids the courts in analysing how grave the fear of apprehension is from the bail applicant and in delivering a decision based on the same. In absence

⁶⁵ Justice Verma Committee, *Report of the Committee on Amendments to Criminal Law* (January 2013)

⁶⁶ The Criminal Law (Amendment) Act 2013

⁶⁷ *Mukesh & Anr. v State (NCT Of Delhi) & Ors.* [2017] 6 SCC 1

⁶⁸ Chahal Academy, ‘Zero FIR’ <<https://chahalacademy.com/zero-fir>>accessed 2 September 2024

⁶⁹ (n 8)

⁷⁰ *ibid* s 173(1)

of any express provision, there is a possibility of arbitrary and unreasonable detention. The concept of transit bail itself is deeply rooted in the principles of access to justice and equality envisioned under Article 14.⁷¹

The option for transit anticipatory bail serves as a balanced approach, even though it is well-established that an accused individual cannot acquire full anticipatory bail in their state of residence while the FIR is lodged elsewhere. It offers provisional safeguarding, allowing the individual to apply to the appropriate court for ‘regular anticipatory bail.’ The omission of BNSS to include this clause falls short of providing a sufficient counterbalance between the state’s interests in law enforcement and the rights of individuals and fair process.

Evaluating the Reforms and Addressing Shortcomings

The concept of Zero FIR and transit anticipatory bail are the intrinsic aspects of the criminal justice delivery system, each playing a different role. Zero FIR is a major breakthrough development to expedite the filing and investigation process without considering the bounds of jurisdiction. It is aimed at making the administration of justice more efficient and responsive by enabling the victims to report the commission of a crime the very moment it is committed, regardless of the location of such a crime. The absence of any express provision for ‘transit anticipatory bail’ presents a serious lacuna in the protection of the procedural rights of a person who is likely to be arrested outside the territorial jurisdiction where he is presently residing.

The Bharatiya Nagarik Suraksha Sanhita, 2023,⁷² articulates an optimistic vision for reforming India’s criminal justice system, including the implementation of Zero FIR. However, the absence of any provision for transit anticipatory bail is a significant omission and raises issues on access to justice, personal liberty and arbitrary detention. It underlines the need for a more nuanced and comprehensive approach to criminal procedural law. The statute must be reviewed and amended in accordance with the changing needs of the society while safeguarding the individuals’ rights. The suggestions and recommendations of the legal fraternity, law enforcement agencies can be considered for bringing out a better balancing system that would help in effective enforcement of laws without compromising civil liberties. Organising

⁷¹ (n 5) Art 14

⁷² (n 7)

training programs and seminars for law enforcement and judicial officers upon the significance and application of transit anticipatory bail would further ensure uniformity across different jurisdictions. These initiatives are essential for reducing the possibility of arbitrary detention. The principles of justice, freedom, and the protection of fundamental rights would be undermined in the absence of safeguards such as ‘extra-territorial anticipatory bail.’

CONCLUSION

To summarise, it should be noted that although the concept of transit anticipatory bail has not been explicitly provided for in the statute, it has been affirmed by the apex court in the *Priya Indoria* case.⁷³ The court ruled that ‘limited anticipatory bail’ can be granted by the High Court or Court of Session in the form of interim protection under Section 438⁷⁴ even when an FIR is registered outside their territorial jurisdiction, provided it is in the interests of justice. For instance, if an FIR is filed against a person in Kolkata, whereas the accused lives in Bangalore. In such cases, transit anticipatory bail would allow the person to approach a court in Bangalore seeking protection from arrest so that they get adequate time to appear before the court in Kolkata where the FIR has been registered. However, though this provision serves as an important function in the protection of an individual’s liberty, there are some inherent risks involved with it and hence it is necessary that it should be exercised judiciously. The main apprehension being that the accused might misuse his liberty and try to evade arrest once he receives the transit anticipatory bail. The accused may not only cause delay but also avoid presentation before the concerned court within whose jurisdiction the FIR is registered. This may subvert the judicial process and frustrate the course of justice. This could result in a situation where the accused continues to be beyond the reach of law enforcement and in the process may influence the witnesses or tamper the evidence before the trial.

The courts must, therefore, balance the rights of the accused with the requirement that justice is not compromised. To that end, the courts must ensure strict guidelines and conditions to be followed while granting transit anticipatory bail in order to guarantee that such a legal provision does not become subject to abuse but serves the purpose

⁷³ (n 12)

⁷⁴ (n 5)

for which it is intended, that is, the protection of the liberty of an individual while ensuring that he appears before the appropriate forum. The conditions for granting anticipatory bail are equally relevant while considering an application for granting transit anticipatory bail. Section 438⁷⁵ or Section 482⁷⁶ cannot be applied if the applicant has already been arrested. It would be paradoxical to provide anticipatory bail after an arrest as the purpose of such bail is to prevent arrest, and not to secure release once an arrest has occurred. ‘Anticipatory bail cannot be used as a blanket of protection against any potential arrest.’⁷⁷ Similarly, transit anticipatory bail does not provide a blanket safeguard against arrest.

Therefore, in addition to the conditions laid down in the *Priya Indoria* case⁷⁸ for granting transit anticipatory bail, the following measures could be taken into consideration to prevent any misuse of such provision.

- The applicant should be required to submit verified identification documents, including proof of residence and a verified and present mobile number. This ensures that the court has the accurate and updated contact information.
- The applicant should be mandated to provide both the present residential address as well as other addresses where he intends to stay during the period of bail. This information should be recorded in the court’s order for monitoring purposes and to prevent the accused from absconding.
- There has to be an undertaking by the applicant as a condition for granting transit anticipatory bail that they will appear before the competent court in the city in which the FIR is registered within a stipulated period for seeking regular anticipatory bail.
- The court can also consider the temporary surrender of the passport and other travel documents of the applicant to reduce the risk of absconding. This measure bears particular relevance in those cases where the probability of absconding is high.
- The court, while granting such bail, should impose certain conditions, like reporting to the local police station at regular intervals till they appear before

⁷⁵ *ibid*

⁷⁶ (n 19)

⁷⁷ *Gurbaksh Singh Sibbia v State of Punjab* [1980] 2 SCC 565

⁷⁸ (n 12)

the court in the city where the FIR is lodged. If the applicant fails to satisfy these conditions, it should entail the immediate cancellation of the bail.

The court can mitigate the risks associated with transit anticipatory bail and ensure that it is used appropriately and does not become a tool for evading justice by implementing the above measures. The Supreme Court's distinction between anticipatory bail and transit anticipatory bail serves to highlight their different purposes within the legal framework. While the former may be for an indefinite duration, the latter is available for a specific period so as to allow the applicant enough time to approach the appropriate court. It is significant that anticipatory bail granted for a transitory period allows individuals an attempt to overcome problems caused by jurisdictional and procedural obstacles, as well as reduce the burdens brought forth by such hurdles. It assures that people will have access to justice by giving them provisional relief in the place of residence before they approach for full anticipatory

