

Anticipatory Bail

Dr Janardan Kumar Tiwari
Assistant Professor
Institute of Law
Jiwaji University, Gwalior

What is Bail

When you are arrested, you are taken into custody. This means that you are not free to leave the scene. Without being arrested, you can be detained, however, or held for questioning for a short time if a police officer or other person believes you may be involved in a crime.

What is Anticipatory Bail?

If a person believes that he may be arrested for a non-bailable offence, he may apply to the High Court or Court of session for anticipatory bail i.e, in the event of arrest, he shall be released on bail. While granting anticipatory bail, the court may impose certain conditions in the interest of justice and to ensure that no obstructions are created on the path to justice. The accused may have to take the permission of the court before leaving the country. The anticipatory bail is valid during the whole proceedings of the case unless cancelled earlier.

Which Section?

Section 438 of the Criminal Procedure Code empowers the High Court and the court of session to grant anticipatory bail i.e., a direction to release a person on bail issued even before the person is arrested.

What Consideration?

The nature and gravity of the accusation. The antecedents of the applicant including the facts as to whether he has previously undergone imprisonment on conviction by a court in respect of any cognizable offence.

The possibility of applicant's fleeing from justice.

Whether the accusations have been made within a view to injuring or humiliating the application.

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whether there is reason to believe that the petitioner may be arrested on an accusation of having committed to non-bailable offence; and

whether it thinks fit that in the event of such arrest, he could be released on bail and also it may impose such conditions on the order, as it may think fit, in the light of the particular case.

What Condition?

a condition that the person shall make himself available for interrogation by a police officer as and when required;

a condition that the person shall not, directly or indirectly, make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to any police officer;

a condition that the person shall not leave India without the previous permission of the Court. < such other condition as may be imposed.

Which is Competence Court?

Under Section 438, only the High Court and the Court of Session have been given the jurisdiction to entertain an application for Anticipatory Bail. The next issue for consideration regarding jurisdiction under s. 438 is as to whether accused is supposed to move the court of session before applying to high court. The words used in the provision are 'high court or the court of session'. Ordinarily a matter is brought before the lowest court competent to hear it and therefore an application of anticipatory bail may be made to the high court only after the court of session rejects it.

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Under the provision both courts are empowered to pass an order under s. 438. The petitioner may choose one of the two courts and apply to the court of his choice.

When ?

When any person apprehends that there is a move to get him arrested on false or trump up charges, or due to enmity with someone, or he fears that a false case is likely to be built up against him. He has the right to move the Court of Session or the High Court under section 438 of the code of Criminal Procedure for grant of bail in the event of his arrest, and the court may, if it thinks fit, direct that in the event of such arrest, he shall be released on bail.

What discretion?

The courts have been given a wide discretion while deciding on such applications because it is legislatively impossible to lay down all the possible cases where Anticipatory bail may be granted. Therefore, it is but natural that such competence be given only to the higher judiciary. As more experienced and more competent judges preside over such courts, it was intended this would act as a safeguard against any abuse of such powers in the favor of a 'connected' accused.

Muzafat Hossain Khan vs. State of Orissa,
1990 CrLJ 1024 (ori)

The applicant was a minister of the state and there was a prima facie case that he had fired a pistol inside a polling booth. He was refused an anticipatory bail on the grounds that there was a likelihood that the confidence of the public being shaken as the investigation may be interfered with if the application was allowed..

Salauddin Abdul Samad Shaikh vs. State of Maharashtra (1996) CrLJ 1368(SC)

held that the order under s. 438 must be of limited duration only and ordinarily on the expiry of that duration, the court granting anticipatory bail must leave it to the regular court to deal with the matter on appreciation of evidence placed before it after the investigation has made progress on the charge-sheet submitted. The essence of the judgment is that anticipatory bail must be granted only till the time challan is filed.

**Balchand Jain vs. State of Madhya
Pradesh 1977 CrLJ225**

‘The rule of prudence is that notice must be given to the other side before passing a final order under s. 438 so that wrong order of anticipatory bail is not obtained by a party by placing wrong incorrect or misleading facts or suppressing material fact.’

Conclusion

The Code of Criminal Procedure, 1973, s. 438, at the very outset is based on a clear nexus of personal liberty of the individual with the protection granted under the Constitution of India, Art. 21. The law presumes an accused to be innocent till the guilt is proved and this is important component of the right to fair trial that an essential ingredient of right to life and personal liberty enshrined in Art. 21. Keeping in mind all these factors, s. 438 seems to be in consonance with the principles enshrined in the Constitution.

Thanking You