Subject Name: Code of Criminal Procedure
Topic Name: Anticipatory Bail

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Introduction

Section 438 of the law provides a mechanism allowing superior courts to grant anticipatory bail, which essentially means releasing an individual on bail even before their arrest.

The rationale behind this provision stems from the unfortunate reality wherein influential figures endeavour to embroil their adversaries in fabricated accusations, either to tarnish their reputation or for ulterior motives, by orchestrating their incarceration for a few days.

Particularly with the escalation of political rivalries, this trend has seen a gradual uptick. Beyond false allegations, if there are substantial grounds to believe that an accused individual is unlikely to flee or misuse their freedom while on bail, compelling them to undergo custody initially, spending days in confinement before seeking bail, appears unjustifiable.

The Law Commission, recognizing the necessity for such provision, emphasised its use should be reserved for exceptional circumstances. It underscored the importance of safeguarding against misuse, proposing that the decision for anticipatory bail should only be finalised after notifying the Public Prosecutor, with the initial order being interim.

Moreover, it recommended that the court should issue such a direction only when convinced of its necessity in upholding justice, with reasons for the decision duly recorded.

Section 438 of CrPC

Section 438 stipulates that an individual who apprehends arrest for a non-bailable offence may petition the High Court or the Court of Session for anticipatory bail. The court, considering various factors, including the gravity of the accusation, may grant such relief, ensuring that the Public Prosecutor and the Police Superintendent are duly informed for a fair hearing. The presence of the

petitioner during the final hearing is deemed obligatory, with the court empowered to mandate it if deemed essential for justice.

When granting anticipatory bail, the court may impose conditions tailored to the specifics of the case, such as making oneself available for police interrogation, refraining from influencing witnesses, obtaining court permission before leaving the country, among others, as permitted under relevant sections. If the individual is subsequently arrested without a warrant, they may be released on bail if willing to furnish it, and if a Magistrate decides to issue a warrant, it must align with the court's direction under subsection (1).

Meaning of Anticipatory Bail

The term "anticipatory bail" does not appear verbatim in Section 438 or its heading. In essence, "anticipatory bail" is a misnomer as it does not entail bail being granted in anticipation of an arrest. Rather, when the court grants "anticipatory bail," it issues an order stipulating that upon arrest, the individual shall be released on bail. Clearly, bail cannot be granted until after an individual is arrested, thus the order for "anticipatory bail" only takes effect upon arrest.

Notably, the section does not differentiate whether the arrest is expected at the hands of the police or upon the Magistrate's directive. The issuance of a warrant by the Magistrate against an individual understandably instigates such anticipation, justifying the petition for "anticipatory bail." Likewise, the issuance of a summons for appearance also warrants an application for "anticipatory bail."

It has been established that "anticipatory bail" cannot be granted to permit actions likely to be construed as criminal, even if the individual intended them as exercises of their rights. The phrase "anticipatory bail" serves as a convenient means of indicating the possibility of applying for bail in anticipation of arrest.

The fundamental distinction between a regular bail order and an order for "anticipatory bail" lies in the timing: the former is granted post-arrest, signifying release from police custody, whereas the latter is granted in anticipation of arrest, thus becoming effective at the moment of arrest itself.

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Concurrent Jurisdiction of High Court and Sessions Court

As per Section 438(1), an application for "anticipatory bail" can be lodged with either the High Court or the Court of Session. Nevertheless, it is generally presumed that the Court of Session should be the initial recourse for seeking "anticipatory bail," unless a compelling case is presented to directly approach the High Court without prior engagement with the Court of Session.

However, the Full Bench of the Allahabad High Court has taken a divergent stance, allowing bail applications under Section 438 to be filed directly in the High Court without mandating recourse to the Court of Session. If an application for "anticipatory bail" is dismissed by the Court of Session, the applicant retains the option to approach the High Court afresh under Section 438(1), as there exists no prohibition against such action.

Given that bail pertains to prevention of arrest and detention, the competent court within whose jurisdiction the arrest is either impending or envisioned holds authority to grant bail to the individual concerned. Consequently, the High Court or the Court of Session possessing jurisdiction over the area where the applicant anticipates arrest maintains the authority to entertain applications for "anticipatory bail," even if the first information report (FIR) has been filed within the jurisdiction of another High Court or Court of Session.

The prevailing opinions articulated by the Supreme Court in certain instances appear to lean toward the notion that deliberations concerning the grant of "anticipatory bail" to individuals allegedly involved in an offence ought to be primarily undertaken by courts within whose territorial jurisdiction such offences could potentially occur.



Reasonable Apprehension of Arrest for a Non-bailable Offence

Section 438(1) confers upon the High Court and the Court of Session the authority to grant "anticipatory bail" if the applicant possesses a reasonable belief that they may face arrest on the allegation of committing a "non-bailable offence."

In matters concerning non-bailable offences, the classification of the offence as cognizable or non-cognizable, or whether it falls under the ambit of the Indian Penal Code or any other legislation such as the Customs Act, 1962, holds no relevance under Section 438. Notably, "anticipatory bail" has been granted by the Karnataka High Court to an individual fearing arrest by forest officials. The severity of the punishment, be it death penalty or life imprisonment, does not restrict the granting of "anticipatory bail."

Section 438 does not mandate that the offence in question must be officially registered with the police via a First Information Report (FIR) for the exercise of the power under Section 438. The anticipation of impending arrest based on reasonable grounds can exist even in the absence of an FIR.

The utilisation of the term "reason to believe" underscores the requirement for the applicant's belief in potential arrest to be grounded in rational justification. Mere "fear" does not equate to "belief"; thus, vague apprehensions about potential accusations are insufficient. The grounds forming the basis of the applicant's belief in potential arrest for a "non-bailable offence" must be subject to objective scrutiny by the court to assess the legitimacy of the apprehension.

In this determination, the complainant does not possess the right to contest against the granting of "anticipatory bail" as emotional biases could likely influence their stance, potentially driven by a desire for retribution. However, the court's decision must strike a balance between all pertinent factors.

Should the apprehension persist even during committal court proceedings, nothing in Section 438 prohibits the individual from seeking "anticipatory bail" in anticipation of commitment to custody. Upon such application, the High Court or the Court of Session may issue an order under Section 438 directing the committing Magistrate to refrain from committing the individual in custody to the Court of Session.

Landmark Cases on Anticipatory Bail

In the case of **Union of India v. Padam Narain, (2008) 13 SCC 305**, the term 'anticipatory bail' remains undefined within the Code. Anticipatory bail, in essence, is granted in anticipation of arrest. When such bail is granted, it ensures that in the event of arrest, the individual is released on bail. However, it's important to note that the order for anticipatory bail only becomes effective post-arrest.

In the case of **Gurbaksh Singh Sibba v. State of Punjab, (1980) 2 SCC 565**, the Supreme Court delineated several principles pertaining to anticipatory bail:

1. The registration of an FIR is not a prerequisite for exercising the power under Section 438.
2. An interim order can be issued without prior notice to the Public Prosecutor, but before the final order is passed, notice must be given.
3. The grant of anticipatory bail does not impede the police's right to conduct an investigation.
4. When there's a need for remand under Section 167(2) or a reasonable claim to secure incriminating evidence under Section 27 of the Evidence Act, the power under Section 438 should not be exercised.
5. Blanket orders for anticipatory bail should be avoided.

Moreover, in **Prithvi Raj Chauhan v. Union of India, (2020) 5 SCC 421**, the Supreme Court elucidated that Section 438 of the CrPC cannot be construed as an integral component of Article 21. Anticipatory bail is not granted as an absolute entitlement; it cannot be deemed an essential facet of Article 21. Furthermore, the non-application of anticipatory bail to certain specified categories of offences does not contravene Article 21.

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