

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

Criminal Writ Petition No.416 of 2015

Jagdishprasad M. Joshi.

.. Petitioner.

Versus

The State of Maharashtra
And Another.

.. Respondents.

Shri. S.B. Talekar, Advocate, instructed by Shri. Pavan P .
Uttarwar, Advocate, for petitioner.

Smt. R.K. Ladda, Additional Public Prosecutor, for
respondent Nos.1 and 2.

With

Criminal Writ Petition No.380 of 2015

Jagdishprasad M. Joshi.

.. Petitioner.

Versus

The State of Maharashtra
And Another.

.. Respondents.

Shri. Pavan P. Uttarwar, Advocate, for petitioner.

Smt. R.K. Ladda, Additional Public Prosecutor, for
respondent Nos.1 and 2.

With

Criminal Writ Petition No.381 of 2015

Jagdishprasad M. Joshi.

.. Petitioner.

Versus

The State of Maharashtra
And Another.

.. Respondents.

Shri. Pavan P. Uttarwar, Advocate, for petitioner.

Smt. R.K. Ladda, Additional Public Prosecutor, for
respondent Nos.1 and 2.

**CORAM: T.V. NALAWADE &
Smt. I.K. JAIN, JJ.**

DATE : 31st MARCH 2015

ORDER:

1) All the three proceedings are filed to challenge the notice given under section 41A (1) of the Code of Criminal Procedure.

2) Criminal Writ Petition No.416 of 2015 is filed to challenge the notice issued in respect of CR No.24/2014 registered in Ardhapur Police Station Nanded for offences punishable under sections 179, 272, 273 etc. of the Indian

Penal Code and sections 26(2)(i), 26(2), 27(3)(d), (e), 59 etc. of the Food Safety and Standard Act, 2006 and it is mainly in respect of Goa Gutkha and other similar food articles. In this crime Goa Gutkha worth Rs. 8.81 lakh was seized. Charge sheet is already filed but the police wants to make further investigation under section 178(3) of the Code of Criminal Procedure. The present petitioner is not shown as accused in the charge sheet but the material seized and information collected shows connection of the petitioner with Goa Gutkha manufacture.

3) Criminal Writ Petition No.380 of 2015 is filed in respect of CR No.5/2015 registered with Hadgaon Police Station Nanded for offences punishable under sections 188, 273 of the Indian Penal Code and sections 26(2)(i), 26(2), 27(3)(d),(e), 59 etc. of the Food Safety and Standard Act, 2006.

4) Criminal Writ Petition No.381 of 2015 is filed in respect of Crime No.52/2014 registered at Kandhar Police Station Nanded for offences punishable under sections 181, 272, 273 of the Indian Penal Code and sections 26(2)

(i), 26(2), 27(3)(d), (e), 59 etc. of the Food Safety and Standard Act, 2006.

5) Both the sides are heard.

6) The learned counsel for the petitioner mainly submitted that some false record is created in respect of Crime No.5/2015 registered in Hadgaon Police Station. He also submitted that the notice was replied by the petitioner and he had informed to police about the circumstances that he had no concern with Goa Gutkha at present and he wanted more information from police like copies of FIR etc. Copy of the said notice cum reply dated 4-2-2015 is produced. The present proceeding came to be filed on 18-3-2015. It can be said that in response to the notice the petitioner did not appear before police when he was expected to appear on 10-2-2015 in all the matters. Here itself it needs to be observed that there is either some mistake or there is possibility of having similar registration number in respect of two FIRs. However, these two crimes were registered on different dates in the same police station. In the present matter, in view of other

material this circumstance need not be dealt with in detail.

7) The learned counsel for the petitioner argued much on the provisions of Section 41-A of the Code of Criminal Procedure and he submitted that this power is not arbitrary and unless there is some material or accusation against the petitioner, notice under section 41A (1) cannot be issued against the person like the petitioner. Provision of Section 41A of the Code reads as under :-

"41A - Notice of appearance before police officer. (1) The police officer shall, in all cases where the arrest of a person is not required under the provisions of sub-section (1) of section 41, issue a notice directing the person against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists that he has committed a cognizable offence, to appear before him or at such other place as may be specified in the notice.

(2) Where such a notice is issued to any person, it shall be the duty of that person to comply with the terms of the notice.

(3) Where such person complies and continues to comply with the notice, he shall not be arrested in respect of the offence referred to in the notice unless, for reasons to be recorded, the police officer is of the opinion that he ought to be arrested.

(4) Where such person, at any time, fails to comply with the terms of the notice or is unwilling to identify himself, the police officer may, subject to such orders as may have been passed by a competent Court in this behalf, arrest him for the offence mentioned in the notice."

8) This provision needs to be read with the provision of Section 41 of the Code. If the provision of the old Code is compared with the amended provision it can be said that some restrictions are put on the powers of the police to arrest. They are expected to give now reasons when the offence is punishable with imprisonment upto 7 years. The Apex Court had an opportunity to discuss this provision in the case reported as **(2014) 4 SCC 453 (Hema Mishra v. State of U.P.)**.

9) The discussion about the object behind Section 41A can be found in paragraph 20 of the case of Hema

Mishra (cited supra) which reads as under :-.

"**20.** Reference in this connection may also be made to Section 41-A CrPC inserted vide Act 5 of 2009 w.e.f. 1-11-2010, which reads as follows:

"41A - Notice of appearance before police officer. (1) The police officer shall, in all cases where the arrest of a person is not required under the provisions of sub-section (1) of section 41, issue a notice directing the person against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists that he has committed a cognizable offence, to appear before him or at such other place as may be specified in the notice.

(2) Where such a notice is issued to any person, it shall be the duty of that person to comply with the terms of the notice.

(3) Where such person complies and continues to comply with the notice, he shall not be arrested in respect of the offence referred to in the notice unless, for reasons to be recorded, the police officer is of the opinion that he ought to be arrested.

(4) Where such person, at any time, fails to comply with the terms of the notice or is unwilling to identify himself, the police officer may, subject to such orders as may have been passed by a competent Court in this behalf, arrest him for the offence mentioned in the notice."

The abovementioned provisions make it compulsory for the police to issue a notice in all such cases where arrest is not required to be made under clause (b) of sub-section (1) of the amended Section 41. But, all the same, unwillingness of a person who has not been arrested to identify himself and to whom a notice has been issued under Section 41-A, could be a ground for

his arrest. The legislation has laid down various parameters, warranting arrest of a person, which itself is a check on arbitrary or unwarranted arrest and the right to personal liberty guaranteed under Article 21 of the Constitution of India."

The interpretation done by the Apex Court and the provision itself show that whenever notice is issued to any person by the investigating officer, such person is bound to comply with the terms of the notice considering the wording of section and considering provision of Section 41-A(1) which provides that satisfaction of the investigating officer is sufficient for issuing such notice and that can be done even on reasonable suspicion. It can be said that Courts are not expected to lightly interfere in this power of the police. It always needs to be kept in mind by the Courts that it is the statutory power given to the police to make investigation and the persons interested are always trying to use some provisions to protract the things. Present case can be said to be one of such category. In the present case the investigating officer remained present before this Court. He also made some submissions and the report prepared by him is also seen by the Court.

10) In the present proceedings contentions are made by the petitioner that in the past the petitioner was engaged in Goa Gutkha. He also admits that even at present on the pouch of the Goa Gutkha there is his photograph. In all the cases, Goa Gutkha pouches are seized and Gutkha is banned in the State. The petitioner wants to show that he was dealing in the Gutkha business in the past but after the ban imposed he has given up the business. This contention of the petitioner cannot be considered by this Court in the present proceeding. The power is with the police to ascertain such thing. He can appear before police and he can explain the things to the investigating officer. Such submission cannot be heard in the proceedings like present one and this Court is not expected to deal with factual aspects. It is a part of investigation process and questioning the notice will amount to curtailing the power and preventing investigation by way permitted by the Code.

11) Learned counsel for the petitioner has placed reliance on the following reported cases :-

- (1) **(2012) 5 SCC 1 (Ramlila Maidan Incident, In Re.);**
- (2) **(2014) 8 SCC 273 (Arnesh Kumar v. State of Bihar);**
- (3) **(2014) 4 SCC 453 (Hema Mishra v. State of U.P.);**
- (4) **(2000) 10 SCC 651 (State of Bihar v Shiv Shankar Singh).**

12) Facts of the reported cases are altogether different. It needs to be kept in mind that some restrictions are put on the powers given to police in section 41 of the Code but the powers of arrest are still kept there. The wording used, the circumstances mentioned for using the provision of section 41-A are similar to the provisions of section 41 of the Code. In view of the wording, it needs to be presumed that it depends on the subjective satisfaction of the police officer issuing such notice whether to use this procedure or not. The power under section 41-A is a part of the power given under section 41 of the Code. It can be said that by following procedure given in section 41-A of the Code, the investigating officer gives opportunity to the accused or suspect to explain the things and that way the provision is for the benefit of the accused or the suspect. A suspect or accused can avoid unnecessary arrest by taking this

opportunity. The provision of section 41-A (3) of the Code shows that after the appearance of the accused/suspect and the compliance of the conditions of the notice by the accused the investigating officer needs to give reasons if he forms opinion that such person needs to be arrested. Thus the provision enables the police officer to collect information from the accused/suspect without effecting arrest and so the provision is not that way against persons like petitioner if the power given under section 41(1) of the Code is kept in mind. The provision of section 41 of Code is never declared ultra vires and section 41-A is introduced in the Code to see that the power of arrest given under section 41 is not used unnecessarily. It is a safeguard on casual exercise of the power given under section 41 of the Code. In view of these circumstances, the argument advanced on the basis of Articles 20 and 21 of the Constitution cannot help the person like present petitioner. This Court hopes that provision of section 41-A of the Code will be used by concerned also when poor or persons not having any kind of influence are found in similar situation.

13) In the present case reports are given, crimes are registered and articles like Gutkha in huge quantity are recovered and seized. When there is ban on manufacture, sale, possession of the Gutkha in this State, Gutkha of petitioner's brand is found in this State. This Court has no hesitation to hold that challenge against propriety of the notice issued under section 41A of the Code has no force. In view of these circumstances, this Court holds that it is not a fit case to set aside the notice under challenge.

14) All the petitions are dismissed.

15) Learned counsel for the petitioner requests for grant of time of four weeks as he wants to challenge the order. No such time can be given in view of the mandatoryness of the provision. The request is rejected.

Sd/-
(Smt. I.K. JAIN, J.)

Sd/-
(T.V. NALAWADE, J.)