

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

ANTICIPATORY BAIL APPLICATION NO.1405 OF 2021

PATHAN SHAFI KHAN RAHEMAT KHAN
VERSUS
THE STATE OF MAHARASHTRA

...
Advocate for Applicant : Mr. Anil Pawar And Mr. A. R. Syed

...

AND

ANTICIPATORY BAIL APPLICATION NO.1118 OF 2021

SATISH BHAGWANSINGH RAJPUT
VERSUS
THE STATE OF MAHARASHTRA

...
Advocate for Applicant : Mr. R.P. Mote

...

AND

ANTICIPATORY BAIL APPLICATION NO.1122 OF 2021

HEMANT OMPRAKASH SEWANI
VERSUS
THE STATE OF MAHARASHTRA AND ANOTHER

...
Advocate for Applicant : Mr. Chaitanya C. Deshpande

...

AND

ANTICIPATORY BAIL APPLICATION NO.1155 OF 2021

GURUNATH MALLIKARJUN
VERSUS
THE STATE OF MAHARASHTRA

...
Advocate for Applicant : Mr.C.V. Bodkhe, Advocate holding for
Mr. Siddharth V. Gawande

...

AND

ANTICIPATORY BAIL APPLICATION NO.1156 OF 2021

FARUK ALLAUDDIN CHAUDHARI
VERSUS
THE STATE OF MAHARASHTRA

...

Advocate for Applicant : Mr. P.P. More

...

AND

ANTICIPATORY BAIL APPLICATION NO.1160 OF 2021

VISHNU DNYANDEVRAO PAWAR
VERSUS
THE STATE OF MAHARASHTRA

...

Advocate for Applicants : Mr. B.N. Gadegaonkar.

...

AND

ANTICIPATORY BAIL APPLICATION NO.1165 OF 2021

SHIVAJI BALASAHEB PAUL
VERSUS
THE STATE OF MAHARASHTRA

...

Advocate for Applicant : Mrs. Ashwini Lomte, Advocate holding for

Mr. S.J. Salunke

...

AND

ANTICIPATORY BAIL APPLICATION NO.1169 OF 2021

MOHAMAD JAVEED ABDUL SATTAR PIRANI
VERSUS
THE STATE OF MAHARASHTRA

...

Advocate for Applicant : Mr. R.R. Karpe.

...

AND

ANTICIPATORY BAIL APPLICATION NO.1170 OF 2021

MOHAMAD JAVEED ABDUL SATTAR PIRANI
VERSUS
THE STATE OF MAHARASHTRA

...
Advocate for Applicant : Mr. R.R. Karpe.

...

AND

ANTICIPATORY BAIL APPLICATION NO.1221 OF 2021

ASHOK KASHINATH RAUT
VERSUS
THE STATE OF MAHARASHTRA

...
Advocate for Applicant : Mr. Manish Tripathi.

...

AND

ANTICIPATORY BAIL APPLICATION NO.1222 OF 2021

SUKHDEV KHANDU RATHOD
VERSUS
THE STATE OF MAHARASHTRA

...
Advocate for Applicants : Mr. S.S.Panale.

...

AND

ANTICIPATORY BAIL APPLICATION NO.1233 OF 2021

VIJAYKUMAR DHONDIRAM TAPDIYA
VERSUS
THE STATE OF MAHARASHTRA

...
Advocate for Applicant : Mr. B.N. Gadegaonkar.

...

AND

ANTICIPATORY BAIL APPLICATION NO.1235 OF 2021

MUKHTAR IBRAHIM PANJA
VERSUS
THE STATE OF MAHARASHTRA

...
Advocate for Applicant : Mr. N.L. Choudhari.

...

AND
ANTICIPATORY BAIL APPLICATION NO.1241 OF 2021

SANJIV VISHWANATH YEWATE
VERSUS
THE STATE OF MAHARASHTRA

...

Advocate for Applicant : Mr. T.M. Venjane.

...

AND
ANTICIPATORY BAIL APPLICATION NO.1267 OF 2021

YADAV SURYAKANT CHAVAN
VERSUS
THE STATE OF MAHARASHTRA

...

Advocate for Applicant : Mr. Mahesh Bhosale

...

AND
ANTICIPATORY BAIL APPLICATION NO.1317 OF 2021

DILIP VITTHAL GHODKE
VERSUS
THE STATE OF MAHARASHTRA

...

Advocate for Applicant : Mrs. Ashwinin Lomte, Advocate holding for
Mr. S.J. Salunke

...

AND
ANTICIPATORY BAIL APPLICATION NO.1330 OF 2021

SAHIL RAFIQ HASMANI (MEMON) AND ANOTHER
VERSUS
THE STATE OF MAHARASHTRA

...

Advocate for Applicants : Mr. Sagar S. Chitre & Mr. V.B. Patil.

...

AND

ANTICIPATORY BAIL APPLICATION NO.1345 OF 2021

WASIM RAHIMODDIN SIDDIQUI
VERSUS
THE STATE OF MAHARASHTRA

...
Advocate for Applicant : Mr. A.M. Inamdar

AND

ANTICIPATORY BAIL APPLICATION NO.1346 OF 2021

SHAIKH MAHAMMAD MEHMOOD
VERSUS
THE STATE OF MAHARASHTRA

...
Advocate for Applicant : Mr. R.G. Hange and Mr. A.R. Hange

AND

ANTICIPATORY BAIL APPLICATION NO.1363 OF 2021

SHABANA BEE SHAIKH MOHAMMAD
VERSUS
THE STATE OF MAHARASHTRA AND ANOTHER

...
Advocate for Applicant : Mr. A.R. Syed.

AND

ANTICIPATORY BAIL APPLICATION NO.1365 OF 2021

SHAIKH ALIM SHAIKH SALIM
VERSUS
THE STATE OF MAHARASHTRA

...
Advocate for Applicant : Mr. G.R. Syed

AND

ANTICIPATORY BAIL APPLICATION NO.1375 OF 2021

SHAIKH SADDAM HUSSAIN S/O. ISMAIL
VERSUS
THE STATE OF MAHARASHTRA

...
Advocate for Applicant : Mr. B.N. Gadegaonkar.

...

AND**ANTICIPATORY BAIL APPLICATION NO.1464 OF 2021**

JINDER GOBIND SINGH

VERSUS

THE STATE OF MAHARASHTRA

...

Advocate for applicant : Mr. S.G. Chapalgaonkar

...

AND**ANTICIPATORY BAIL APPLICATION NO.1487 OF 2021**

SHAIKH ALTAMASH SHAIKH ALEEM @ TABBU

VERSUS

THE STATE OF MAHARASHTRA

...

Advocate for the applicant : Mr. G.R. Syed

...

...

Mr. A.V. Deshmukh, APP in ABA Nos.

Mr. S.B. Narwade, APP in ABA Nos.

Mr. A.S. Shinde, APP in ABA Nos.

Mr. V.S. Badakh, APP in ABA Nos.

...

CORAM : PRAKASH D. NAIK, J.

Reserved on : 04-12-2021
Pronounced on : 23-12-2021

COMMON ORDER :

1. These applications are preferred under Section 438 of the Code of Criminal Procedure (for short "Cr.P.C.") seeking anticipatory bail in connection with the First Information Reports (for short "F.I.R.") against them. In all these applications, the offences were registered under Sections 26 (2) (iv), 27 (3) (d), 27 (3) c), 30 (2) (a), Sections 3, 59 of the Food Safety and Standards Act, 2006

and under Sections 188, 272, 273, 328 of the Indian Penal Code (for short "I.P.C.").

2. Since common question is involved in all these applications, they were heard together and disposed of by common order.

3. The common grounds urged in these applications seeking anticipatory bail are as follows :

(i) The police officer could not have registered offences punishable under Sections 188, 272, 273, 328 of the I.P.C. since the Food Safety Standards Act makes the provision for initiating action for such acts and recourse could have been taken under the said provisions only.

(ii) Except Section 328 of I.P.C. all the other offences are bailable in nature.

(iii) The offence under Section 328 of I.P.C. is not attracted applicable in the facts of these cases.

4. Learned Advocate for the applicant in ABA No. 1405/2021 submitted that mens rea is necessary to constitute offence under Section 328 of I.P.C. There is no consumption of prohibited substance. Basic ingredients of Section 328 of I.P.C. are absent. He relied on decision of Apex Court in the case of **Joseph Kurion Philip Jose vs State of Kerala, AIR 1995 (SC) 4**. Learned Advocate for applicant in ABA No. 1122/2021 submitted that the applicant is owner of vehicle. Other accused were arrested and

released on bail. He was granted interim relief and he has co-operated with investigation. Learned Advocate for applicant in ABA No. 1156/2021 submitted that section 328 of I.P.C. is non-bailable. Other offences are bailable. Incident is of 17.08.2021. F.I.R. is lodged on 20.08.2021. Sale of Gutka is banned. Other substances are not prohibited. Section 328 of I.P.C. is not attracted. Except stating that he is owner of shop, there is no role attributed to him. Learned APP Submitted that Pan Masala is banned / prohibited substance. Learned Advocate for applicant in ABA No. 1160/2021 submitted that applicant has co-operated with investigation. Learned A.P.P. submitted that, applicant ran away from the spot. Statement of independent witness shop owner is recorded. Custody of accused is required. Learned Advocate for applicant in ABA No.1165/2021 submitted that, applicant is sought to be arrested on suspicion. Transportation does not amount to commission of offence. Custody not necessary. He relied on decision of this Court in ABA No. 944/2020 and group matters dated 30.09.2021 (Coram : V.G. Bisht, J.). Advocate for applicant in ABA No. 1169/2021 submitted that Gutka was found away from shop of accused, Section 328 of I.P.C. is not applicable. It requires administration / intoxication on somebody. The police have no authority to register F.I.R. Driver was granted bail. Learned A.P.P. submitted that applicant is the owner. Custody is necessary. Advocate for applicant in ABA No. 1170/2021 submitted that Gutka is not found in his shop. Section 328 of I.P.C. is not attracted. Learned A.P.P.

submitted that applicant is named in F.I.R. He was involved in similar crime. Learned Advocate in ABA No. 1221/2021 submitted that there is no evidence against applicant. His name is allegedly disclosed by co-accused. There is delay in F.I.R. He is ailing. He has undergone kidney transplant. Section 328 of I.P.C. is not applicable. Intention and knowledge is required to constitute said offence. Learned A.P.P. submitted that applicant is named in F.I.R. He has similar antecedents. Offence under Section 328 of I.P.C. is made out. Learned Advocate for the applicant in ABA No. 1222/2021 submitted that the case relates to preparation of illicit liquor. This case can be distinguished from other cases. Section 328 of I.P.C. is not applicable. He relied on the decision of Supreme Court in the case of Joseph Kurion (supra). Learned A.P.P. submitted that three similar cases are registered against the applicant. The contention of the applicant in ABA No. 1233/2021 is that, the case relates to Pan Masala / Gutka. Applicant was not present at spot. He was admitted in hospital. Learned A.P.P. submitted that co-accused disclosed involvement of applicant. Custodial interrogation is necessary. Applicant in ABA No.1235/2021 submitted that applicant is at the most transporter. Truck was not in applicant's custody. Learned A.P.P. submitted that applicant is transporter. Owner is also accused. Gutka was found. Value of Gutka was Rs. 18,00,000/-. Learned Advocate for applicant in ABA No. 1241/2021 has submitted that the procedure adopted by police is illegal. No panchanama was drawn while taking goods from the

shop. He was not arrested when he was present at the police station. There are no antecedents against him. Learned A.P.P. submitted that spot panchanama was prepared. Applicant is involved in offence. Applicant in ABA No. 1267/2021 has submitted that, custody is not required. He was merely supplier. Learned A.P.P. submitted that applicant is involved being supplier. Applicant in ABA No. 1317/2021 submitted that he is not concerned with business of Pan Masala. Transportation does not amount to offence under Section 328 of I.P.C. Investigation is complete. Learned A.P.P. submitted that Gutka worth Rs. 40,00,000/- was recovered. Applicant is owner of the vehicle. He is involved in crime. He has criminal antecedents. Learned Advocate appearing for the applicant in ABA No. 1330/2021 submitted that co-accused were arrested and granted bail. Custody is not required. Prosecution is relying on statement of co-accused. He was not present. He relied on order dated 30.09.2021 (Coram : V.G. Bisht, J.). Learned Advocate also relied on order dated 25.06.2020 passed in ABA No. 461/2020 and order dated 26.02.2020 passed in ABA No. 57/2020 by this Court (Corum : Mangesh.S. Patil, J.). Learned A.P.P. submitted that applicant is the main accused. His custody is required. Applicant in ABA No. 1346/2021 submitted that, complete name of applicant is not mentioned in F.I.R. Contraband is seized. Names of panchas are not mentioned in F.I.R. Custody is not required. Statement of co-accused is not admissible in evidence. Learned A.P.P. submitted that applicant is named in F.I.R. He is supplier. Grounds urged by

applicant can be considered in trial. Applicant in ABA No. 1363/2021 has contended that offence under Section 328 of I.P.C. is not attracted. Investigation is over. Learned A.P.P. submitted that articles were found in house. Applicant ran away from the spot. Applicant in ABA No. 1305/2021 submitted that he is involved by co-accused. He is allegedly supplier. Custody is not required. Learned A.P.P. submitted that co-accused is owner of shop. He disclosed involvement of the applicant. Learned Advocate for the applicant in ABA No. 1375/2021 submitted that applicant is not named in F.I.R. He is named by co-accused. Section 328 of I.P.C. is not attracted. Custody of the applicant is not required. Learned A.P.P. submitted that Gutka was purchased from the applicant. He is involved in similar offence. ABA No. 1464/2021 was heard separately on 06.12.2021. It is submitted that applicant is implicated on the basis of statement of co-accused. Learned A.P.P. submitted that applicant is involved in this case.

5. Thus, the learned Advocates representing the applicants relied on decision of the Apex Court in the case of Joseph Kurian Philip Jose (supra), the decision of learned Single Judge of this Court in ABA No. 944/2020 and other companion matters (Coram : V.G. Bisht, J.) dated 30.09.2021. Relying upon the said decisions, it has been urged that the ingredients to constitute the offence under Section 328 of I.P.C. are lacking in these cases. To constitute the offence under Section 328 of I.P.C. It is submitted that it is necessary to establish that the accused has administered poison or

any stupefying, intoxicating or unwholesome drug, or other thing with intent to cause hurt to such person, or with intent to commit or to facilitate the commission of an offence or knowing it to be likely that he will thereby cause hurt.

6. The prosecution has strongly countered the submissions of the learned Advocates representing the applicants. Contention of the learned prosecutors is that Section 328 of I.P.C. is squarely applicable in all these cases. The facts relating to all the first information reports show involvement of the applicants. On facts of individual cases, it is submitted that complicity of all the applicants is disclosed in F.I.R. and during investigation.

7. Mr. A.V. Deshmukh, the learned A.P.P. who led the arguments from the prosecution side, urged as follows :

(i) Commissioner of Food Safety, Food and Drugs Administration had issued prohibitory order on 15th July 2020 prohibiting the manufacture, storage, distribution, transport and sale of tobacco, areca nut which is either flavoured, scented or mixed with any of the said additives and whether going by the name of form of gutka, pan masala, flavoured/scented tobacco, flavoured/scented supari, manufactured chewing tobacco with additives, kharra, or otherwise by whatsoever name called, whether packaged or unpacked and/or sold as one product, or through packaged as separate products, sold, distributed in such a manner so as to easily facilitate mixing by the consumer for its consumption.

The prohibitory order was issued taking into consideration the directive principles of Article 47 of the Constitution of India and various reports of agencies. He referred to clause 10 of the Notification wherein it is stated that by Notification dated 19th July 2019 issued under Section 30 (2)(a) of Food Safety Standards Act, 2006, the Commissioner of Food Safety in Maharashtra had prohibited for one year the manufacture, storage, distribution, transport and sale of tobacco which is either flavoured, scented or mixed with any of the said additives, and whether going by the name of form of gutkha, pan masala, flavoured/scented tobacco, flavoured/scented supari kharra, or otherwise by whatsoever name called, whether packaged or unpacked and / or sold as one product or through packaged as separate products, sold or distributed in such a manner so as to easily facilitate mixing by the consumer. Reference is also made to Clause 12 of the Notification which mentions that harmful effects of tobacco, areca nut (betelnut) and several of the said additives, often found in the form of gutka and pan masala, include Acute Hyper magnesias, cardiac arrest, oral sub mucous fibrosis, oral cancer, Leukoplakia, Esophageal cancer, Stomach cancer, Metabolic abnormalities, reproductive health, Gastro intestinal and respiratory diseases. Reference is made to scientific reports, articles, opinions which demonstrate the extremely harmful effects of such foods. It is submitted that admittedly the prohibitory order is issued in State of Maharashtra. The orders are renewed every year. The public are made aware with regard to prohibitory

order by publishing in official gazette of State of Maharashtra.

(ii) The order of Commissioner issued in 2012 was challenged before Division Bench of this Court (Coram : Mohit S. Shah, CJ and N.M. Jamdar, J.). Vide order dated 15th September 2012, interim relief was refused in Writ Petition 1631 of 2012 and other companion matters. Although it was interim order, the Court has dealt with all the issues in detail and referred to the harmful effects of the contraband. Notification was under challenge. The Court referred to the reports of National Institute of Health and Family Welfare and provisions of Food Safety and Standards Act, Prevention of Food Adulteration Act, Cigarettes Act and held that the regulations have to be treated not merely as having force of law, but also as part of the Food Safety Standards Act, 2006. It was also observed that even if gutka or pan masala were not to be ingested inside the digestive system, any substance which goes into the mouth for human consumption is sufficient to be covered by definition of food just as chewing gum may be kept in the mouth for some time and thereafter thrown out. Similarly gutka containing tobacco may be chewed for some time and then thrown out. Even if it does not enter into the digestive system, it would be covered by the definition of "food" which is in the widest possible terms.

(iii) The issue regarding applicability of Section 272, 273, 328, 511 of I.P.C. alongwith the provisions of Food Safety Standards Act, 2006 was raised before this Court in **Writ Petition No. 830 of 2016** in the case of **Umraosing Julalsingh Patil vs State of**

Maharashtra and others. This Court, after going through the provisions, has observed that wide scope is given to Section 328 of I.P.C. When the Legislature feels that these substances are harmful to life, they can take away the life and they can cause serious harm to the life, it is not open to the Court to presume that such substances may not cause such harm. The Legislation is made in public interest and Court needs to keep in mind that it is scientifically proved that these substances can take away the life by causing disease like cancer. It was also observed that the contention of the petitioner therein that the prosecution needs to make allegation with regard to any specific person for use of Section 328 of I.P.C. and actually administering of such substance needs to be alleged, cannot be accepted.

(iv) The issue relating to applicability of Section 328 of I.P.C. is considered by Division Bench of this Court in ***Criminal Application No. 4968 of 2016 with Criminal Application No. 4214/2016 (Zahir Ibrahim Panja and others vs. State of Maharashtra and another)***. Similar issue was also dealt by this Court in ***Criminal Application No. 4353 of 2016 (Vasim Shaikh vs State of Maharashtra and others)***. The Division Bench of this Court at Nagpur had also dealt with similar issue in Criminal Application No. 800 of 2020 (Ankush Vs. State), wherein the F.I.R. was sought to be quashed on the ground that Section 328 of I.P.C. is not applicable. In the said order it was observed that the case of the petitioner therein is covered by later part of language of Section 328

of I.P.C. and impediment cannot be created for the Investigating Officer to investigate into the crime.

(v) The applicants in the applications before this Court are the persons dealing with contraband articles either as manufactures, distributors, sellers, transporters, etc. Huge quantity of contraband was seized from them. Section 328 of I.P.C. is attracted in these cases. He relied on the orders passed by this Court in ABA No. 991 of 2019 dated 16.08.2019, Criminal Application No. 3194 of 2019 with Criminal Application No.3423 of 2019 with Criminal Application No. 3195 of 2019 with Criminal Application No.3422 of 2019 dated 09.10.2019 passed by Division Bench of this Court, the order dated 06.09.2020 passed in ABA No. 2451 of 2020, order dated 25.01.2021 in ABA No. 119 of 2021, order dated 09.03.2021 in ABA No. 587 of 2021 and the order dated 24.03.2021 passed in ABA No. 483 of 2021.

(vi). In the order dated 30.09.2021 relied upon by the learned Advocates for the applicants, this Court has relied upon the decision by the Apex Court in the case of Joseph Kurian (supra). The said decision was delivered in the facts of that case. While dealing with the question of applicability of Section 328 of I.P.C., the Apex Court had observed that it cannot be said that the accused or any of them knew that arrack mixed with small quantity of methyl alcohol (2.64 % as found by the chemical analyst) was likely to cause death or serious bodily injury that is likely to cause death. On this finding applicability of Section 302 or even that of Section 304 of

I.P.C. is ruled out. The finding of the High Court on the facts situation is open to doubt. If the finding be correct that the accused did not have guilty knowledge of causing death or of likelihood of causing death or of serious bodily injury likely to cause death, how could the guilty knowledge stop in that slide or grading not coming down to take within its arms hurt. He submitted that in the present cases accused were well aware and knowing that the contraband products are injurious to health, their harmful effect and that there is prohibitory order issued against sale, storage, transport and manufacture of the contraband products. Thus, the facts in the present cases and in the case of Joseph Kurian (supra) are altogether different. Apart from that, later part of Section 328 of I.P.C. was not considered by the Apex Court. In the order dated 30th September 2021, passed by this Court in ABA No.944 of 2020 and other companion matters, this Court had not considered various orders passed by this Court, more particularly the order passed in ABA No.2451 of 2020 in the case of Vinod Gupta and another. The investigation is at primary stage. Custody of the applicants is necessary. The orders passed by this Court in the cases of Anand Chaurasiya and Ganesh Jadhao are stayed by the Supreme Court and the ratio laid down in the case of Vasim Shaikh stands reviewed. This Court, in the order dated 30th September 2021 (supra) has observed that the order passed by Division Bench of this Court at Nagpur in the case of Nilesh Narayan Sanghvi vs State of Maharashtra (Coram : V.M. Deshpande and Anil S. Kilar, JJ.) was

not considered by this Court in various orders. It is submitted that the same Division Bench at Nagpur at latter point of time in the case of Ankush vs State of Maharashtra, has observed that Section 328 of I.P.C. is applicable in such cases.

(vii) The Apex Court, in the case of ***State of Maharashtra vs Sayyed Hasan Sayyed*** delivered in ***Criminal Appeal No.1195/2018***, has considered various provisions of special enactment, the provisions of I.P.C. and Section 26 of General Clauses Act and held that in the special enactment there is no specific bar to register the crime under I.P.C. even if the provisions of special enactment are attracted.

8. In the case of ***Dhariwal Industries Ltd. Vs State of Maharashtra (Writ Petition No. 3398 of 2011)*** and other companion matters, the Division Bench of this Court was dealing with validity of different regulations under Food Safety and Standards Act, 2006 and statutory order dated 19th July 2012 issued by Commissioner of Food and Safety, State of Maharashtra under Section 30 (2) (a) of Food Safety and Standards Act, 2006. Although the order dated 15th September 2012 was relating to refusal of interim relief, the Court has dealt with in detail the provisions of various Acts, various reports and harmful effects of tobacco and other articles. It was observed that the report of National Institute of Health and Family Welfare reveals that more than one-third of adults in India use tobacco in some or other form, more than 16 crore people are users of only smokeless tobacco and

4 crore people are users of both smoking and smokeless tobacco. Several studies in India have reported a strong association between smokeless tobacco use and oral pre-malignant / pre-cancerous lesions. The risk increases with the duration and frequency of smokeless tobacco use. There are consistent results of an increased risk of oral cancer with the use of different forms of smokeless tobacco used in the country. There is also strong association between smokeless tobacco and pancreatic cancer, throat cancer, oesophageal cancer, renal cancer and higher mortality rate. The use of smokeless tobacco also causes non-cancerous diseases/conditions including nervous system diseases, metabolic abnormalities, reproductive complications and other diseases like gastrointestinal and respiratory diseases. The study further reveals that areca nut or supari causes harmful effects like oral pre-malignant lesions, oral cancer, throat cancer, oesophageal cancer, liver cancer and non-cancerous diseases/conditions like hypertension and cardiovascular diseases, nervous system disease, metabolic abnormalities, reproductive abnormalities, liver and kidney diseases.

9. Criminal Writ Petition No.1027 of 2015 preferred by Ganesh Pandurang Jadhao (supra) and other Writ Petitions and Criminal Applications were disposed of by Division Bench of this Court, (Aurangabad Bench) vide Judgment and order dated 4th March 2016 (Coram:- A.V. Nirgude and I.K. Jain, JJ.). The petitions/applications were allowed. The action initiated against

petitioners/applicants was declared illegal and complaints/reports were quashed. The said Judgment and order was challenged by State of Maharashtra before Apex Court. By order dated 20.09.2018, Apex Court set aside the finding of High Court and matters were remitted back to High Court for considering contentions afresh which were not argued before High Court.

10. The Division Bench of this Court (Aurangabad Bench) in the case of Vasim Jamil Shaikh Vs. State of Maharashtra (Coram:- T. V. Nalawade and Smt. Vibha Kankanwadi, JJ.) (Criminal Application No.4353 of 2016 with Criminal Application No.4354 of 2016) held that the contention that the provision of Section 328 of IPC cannot be used in that case is not acceptable. This provision shows that, whoever administers to or causes to be taken by any person which is likely to cause hurt then he can be punished under provision of Section 328 of IPC. Specific person to whom the thing is administered or the specific incident in which it was caused to be taken need not be mentioned in the case like present one. The persons who are indulging into illegal activity like possessing and selling the substances which are likely to cause hurt are covered by the provisions of Section 328 of IPC. The contention of applicants in the said proceedings was that, even if it is presumed that the applicants were found in possession of prohibited articles and they were in huge quantity, the provisions of Section 272, 273 and 328 of IPC cannot be used. It cannot be inferred on the basis of prohibition for manufacture, possession and sale of articles, they are injurious

to health as mentioned in the above provisions of IPC. Reliance was placed on observations made in Judgment dated 04.03.2016 delivered in Criminal Writ Petition No.1027 of 2015 (Ganesh Pandurang Jadhao and Anr. Vs. State of Maharashtra and Ors.) which was set aside subsequently by Apex Court. The prosecution relied upon order dated 15.09.2012 passed by this Court in Writ Petition No.1631 of 2012 (M/s. Dhariwal Industries Ltd. Vs. State of Maharashtra. The said decision was not referred in the case of Ganesh Pandurang Jadhao (supra). The Court referred to decision of this Court in the case of Sanket Foods Products Pvt.Ltd. Vs. Union of India dated 23.11.2011 (Writ Petition No.3398 of 2011). The Court had considered bad effects of the components of Gutkha, Pan Masala on health. Reference is made to decision of this Court in Writ Petition No.830 of 2016 (Umrao Singh Vs. State of Maharashtra and Ors.) decided on 10.01.2017. Applicability of Section 328 of IPC was considered. It was held that, these substances contain nicotine and magnesium carbonate and they can take life. The Court considered ingredients of provisions of Section 328 of IPC i.e. (i) causes to be taken by any person unwholesome drug (ii) knowing it to be likely that, he will thereby cause hurt. Court also referred to decision in the case of Zahir Ibrahim Panja and Ors. Vs. State of Maharashtra (Criminal Application No.4968 of 2016), decided on 16.10.2018, wherein applicability of Sections 273 and 328 of IPC and also provisions of the Act when such articles were found in possession in Maharashtra. The Court also referred to decision in the case of State

of Maharashtra and Ors. Vs. Sayyed Hasan and Ors. (Criminal Application No.1195 of 2018) decided on 20.09.2018. In that decision Court had considered provisions of Special Enactment, IPC and Section 26 of General Clauses Act and observed that there is no Specific bar to register crime under IPC even if provisions of Special Enactment are attracted. The Court held that ratio in the case of Ganesh Jadhao (supra) cannot be used in favour of applicants therein and no relief can be granted to them.

11. This Court in the case of Anand Ramdhani Chaurasia, (supra) has dealt with the similar issue. The Division Bench of this Court relied upon the decision of the Apex Court in the case of Joseph Kurian (supra), it was held that Section 328 of IPC is not attracted. It was also observed that the Division Bench of this Court in the case of Vasim Shaikh (supra) has not considered the judgment of the Apex Court in the case of Joseph Kurian (supra) and it is per incuriam. The decision of this Court in the case of Anand Chaurasia was challenged before the Apex Court vide Special Leave Petition (Criminal) No.8224 of 2020. On 31.08.2020, the Apex Court passed the following order:-

“Delay condoned. Issued notice. Until further orders, there shall be a stay of operation of the impugned judgment and order passed by the High Court of Judicature at Bombay.”

12. Criminal Writ Petition No.1027 of 2015 preferred by Ganesh Pandurang Jadhao and other connected matters. Which

were remitted for fresh hearing was heard by the Division Bench (Aurangabad Bench). The said petition was decided vide order dated 15.10.2020. Court referred to decision of this Court in the case of Anand Ramdhani Chaurasia and concurred with the view expressed in the said Judgment and order dated 13.09.2019, on the issue of applicability of Section 328 of IPC. After pronouncement of judgment, it was pointed out to the Court that the decision in the case of Anand Chaurasia (supra) has been challenged before the Apex Court and interim order has been passed by the Apex Court. Hence, the Division Bench stayed the said order for a period of six weeks. The said decision dated 15.10.2020 in the case of Ganesh Jadhao & Ors. (supra) was challenged before the Apex Court by the State of Maharashtra. The Apex Court passed the following order on 07.01.2021: -

“Issue Notice. Until further orders, there shall be a stay of operation of the impugned judgment(s) and order(s) passed by the High Court. Tag with SLP (Cri.) Diary No. 8224/2020”

13. Learned Single Judge of this Court dealt with the issue about the applicability of Section 328 of IPC in the case of Vinod Ramnath Gupta (supra). The contention of the applicants in the said application was that offences punishable under Sections 188, 272 and 273 of IPC are bailable and so far as offence under Section 328 of the IPC is concerned, the Division Bench of this Court in the case of Anand Chaurasia (supra) has held that mere storage of prohibited food articles without any further action and on contemplation that it

would be sold in the market, brought by a person from the market and consumed by him is too far fetch consequence of an act of administering or causing to be taken. This Court in the case of Vinod Gupta vide order dated 06.11.2020 had taken into consideration the decisions delivered in the case of Anand Chaurasia (supra) and Ganesh Jadhao (supra). It was observed that in the case of Anand Chaurasia, FIR was registered on the basis of complaint received from Food Safety Officer recording that search of residence and warehouse of the petitioner resulted in recovery of Gutkha and Pan Masala and the storage contravened the notification dated 28.07.2020 issued by the Food Safety Commissioner. Accused were arrested and released on bail. Petitioners therein had challenged the action initiated against them by registering the FIR. The judgment in the case of Anand Chaurasia (supra) has been stayed by the Apex Court. The judgment in the case of Ganesh Jadhao (supra) was stayed by same bench for a period of six weeks. Considerations for quashing FIR/complaint under Article 226 of the Constitution of India and under Section 482 of Cr.P.C., being different, cannot be applied in pre-arrest bail proceeding. Section 328 of IPC is attracted where the substance in question is poison or any stupefying, intoxicating or unwholesome drug or other thing is administered or caused to be taken by any person with an intent to cause hurt or with an intent to commit or to facilitate the commission of an offence or intent it to be likely that he will thereby cause hurt, becomes punishable under the provision.

The first part of Section 328 contemplates a direct involvement of person and second part suggest any indirect method for causing one of the substances to be taken by any person. Expression “causing” involves some action. “Causation” means the action of causing something. “Intervening causation” means an event that comes between the initial event in sequence and the end result. Manufacturing “unsafe food” is initial event. Causing its movement by transporting or storing it with an intent to reach to end user are the events in sequence caused by active participation of intermediate agencies or persons. Thus, all such events involving active participation of persons at each stage, is relevant. A person at end is a ‘consumer’ to whom “unsafe food” is sold, knowing well that its consummation would cause hurt to him. Persons involved in manufacturing “unsafe food”, causing its movement to market or storing it with intent to sell it, either himself or through other persons, while prohibitory ‘order’ promulgated under Section 30 of the Food and Safety Act is in force and such all persons, under express or implied authority either individually or otherwise, “causes person to take” unsafe food with intent to cause hurt. It is indirect causation. It was further observed that the manufacturing unsafe food articles, moving these goods from manufacturing unit to market for its sale is an event and that any action in chain of circumstances which foreseeably leads to and facilitates the sale of food articles is further event may be said to be a cause of that event to bring the action within the expression’ “causes to be taken by a person”, any poison

with intent to cause hurt to such person, in Section 328 of the IPC. The offence under Section 328 of IPC, essentially is not causing someone else to do prohibited act but 'causing' a person to consume food articles knowing well that its consumption would hurt such person. Even otherwise, where the investigation is at initial stage, and the relevant material is yet to be collected; it may not be appropriate to hold that FIR does not make out an offence under Section 328 of IPC. The said application was rejected.

14. In the case of Sagar Sadashiv Kore (supra) decided on 08.02.2021 the same ground was urged again with additional contention that stay of operation of the judgments in the case of Anand Chaurasia (supra) and Ganesh Jadhao (supra) does not mean that those judgments do not exist and therefore the ratio is not applicable. The applicant was seeking anticipatory bail on the ground that except offence under Section 328 of IPC, all other offences are bailable. Section 328 of IPC is not attracted. The advocate for applicant had also relied upon the decision of the Supreme Court in the case of Shree Chamundi Mopeds Ltd. (supra). The application was rejected by order dated 08.02.2021. It was observed that the judgment in the case of Anand Chaurasia (supra) as well as Ganesh Jadhao (supra) were stayed by Supreme Court. The Court relied on the decision of this Court in the case of Vinod Ramnath Gupta (supra). Since the Judgment in the case of Anand Chaurasia is stayed the ratio laid down in Vasim Shaikh's case stands revived. In the case of Vasim J. Shaikh (supra), the Court had

relied upon the order passed in Zahir Ibrahim Panja & Ors. Vs. State of Maharashtra & Anr. (Criminal Application No.4986 of 2016). It is observed that reference was made in that judgment to the purpose of issuing orders of prohibition. State Government had considered research material of Tata Memorial, Tata Institute of Fundamental Research and other institutes. It was observed that it was scientifically established that areca nut chewing has been classified as carcinogenic to humans. Tobacco and such food, substance cause cardiac arrest, oral cancer, esophageal cancer, stomach cancer and other diseases. They cause diseases of various internal organs and glands. The Division Bench in Vasim's case had observed that Section 328 of IPC is applicable in such cases. Court also noted the fact that Vasim's case (supra) was cited before the Division Bench in Anand Chaurasia's (supra) case and it was held that the decision in Vasim's case (supra) was per incuriam. Now the Supreme Court has stayed the operation of the judgment and order in Anand Chaurasia's (supra) case and thus, the ratio laid down in Vasim Shaikh's (supra) case stands revived. Learned advocate appearing for the applicant therein had submitted that stay of operation of judgment passed in Anand Chaurasia's case (supra) and Ganesh Jadhao's case (supra) does not mean that those judgments do not exist. The Court considered the said submissions and the ratio laid down in Shree Chamundi Mopes Ltd. (supra). This Court rejected the contention of the counsel for the applicant and observed that the judgment in Shree Chamundi Mopes Ltd. (supra),

itself clarifies that stay of operation of order means that the order which has been stayed would not be operative from the date of passing of the stay order. This sufficiently clarifies the position. The Apex Court stayed operation of judgment and order in Anand Chaurasia's case. The operation of Anand Chaurasia's judgment was stayed on 31.08.2020. The incident in question in that case is dated 07.01.2021 thus, operation of Anand Chaurasia Judgment was stayed on that particular date. Hence, Anand Chaurasia's case does not operate. It was specifically observed that there shall be a stay of operation of the impugned judgment and order passed in Anand Chaurasia's case (supra).

15. It is pertinent to note that the judgment of the Apex Court in the Case of Joseph Kurian (supra) was referred to by Division Bench of this Court in Anand Chaurasia's case (supra). The judgment in the case of Anand Chaurasia (supra) has been stayed by the Apex Court. The case of Ganesh Jadhao was initially heard by Division Bench of this Court at Aurangabad Bench and the said petition was allowed. The decision was challenged before the Apex Court. The order is set aside and the matter was remanded back to the High Court by the Apex Court. Thereafter, it was again heard by Division Bench of this Court at Aurangabad Bench and the petition was allowed. However, since it was pointed out that on the date of pronouncement of judgment, the judgment in the case of Anand Chaurasia (supra) has been stayed by the Apex Court. The decision in the case of Ganesh Jadhao (supra) was stayed by the Division

Bench for a period of six weeks and subsequently which has been stayed by the Apex Court.

16. The decision in the case of Joseph Kurian (supra) was delivered in the facts of the said case. It is apparent that the Court primarily proceeded on the basis that the accused had no knowledge that the liquor was adulterated. There was no reason to believe that arrack was mixed with small quantity of methyl alcohol. It is also apparent that the Apex Court has not dealt with later part of Section 328 of I.P.C. since there was no occasion to do so. The applicants, who are involved in possessing, transporting, selling the contraband, are aware that the products are injurious to health and also about their harmful effects. They are also aware about prohibitory order issued to sell, storage, transport, manufacture of such contraband products. No one can show ignorance about such prohibitory order. Thus, the observations in the case of Joseph Kurian (supra) are not applicable in the facts of the present cases.

17. While deciding ABA No. 944 of 2020 and other connected matters, vide order dated 30th September 2021, this Court had observed that there is no dispute that judgment in the cases of Anand Chaurasiya and Ganesh Jadhao are stayed by the Apex Court. However, the judgment delivered by Division Bench of this Court in the case of Nilesh Sanghvi (supra) was not referred by the learned Single Judge of this Court. The Court has also relied upon the decision of the Apex Court in the case of Joseph Kurian

(supra) and decision in the case of Nilesh Sanghvi (supra) delivered by Division Bench of this Court at Nagpur vide order dated 9th September 2020 is referred to the decision in the case of Anand Chaurasiya and another vs State of Maharashtra. The said decision has been stayed by the Apex Court. The Division Bench has also made reference to the decision of ***Malkiat Singh vs. State of Punjab, AIR 1970 (SC) 713***. The said decision is not applicable in the present cases. It was delivered in different context and facts. Thus, the Court had relied upon the decision of Anand Chaurasiya (supra). The same Division Bench had occasion to deal with similar issue at later point of time in the case of Ankush Vs. State of Maharashtra. Although the matter was at interim stage, the reasons assigned by the Court are vital and important. The Court has analyzed Section 328 of I.P.C. The facts of the said case indicate that on search 1970.80 kg of scented tobacco, pan masala was seized. Crime was registered under Sections 26, 27 and 59 of the Food Safety and Standards Act, 2006 and under Sections 188, 272, 273 and 328 of the I.P.C. The petitioner therein had challenged the F.I.R. relating to the aforesaid offences. It was observed that if section 328 of I.P.C. is properly analyzed, then prima facie, the Court is of the view that Section 328 of I.P.C. can be made applicable in view of the language used in the later part of the Section. The accused is running a business establishment and at the time of search of his business, huge quantity of the contraband was seized. Therefore, prima facie case of the accused is covered by later part of

Section 328 of I.P.C. In para 29 of the said decision, it was observed that, since the case of the petitioner is covered by the later part of the language of Section 328 of I.P.C., at least prima facie, an impediment cannot be created for the Investigating Officer to investigate into the crime. If the prayer made by the applicant is granted, it would amount to stalling the investigation which is right of the Investigating Officer to investigate into the matter, especially when prima facie material is available on record that the accused has committed offence for which the crime is registered against him. The prayer for stay for investigation was rejected. Prayers for no coercive steps or arrest of the accused in the said crime were also rejected. Paragraph 30 of the said order also refers the fact that the decision in the case of Nilesh Narayan Sanghavi vs. State of Maharashtra in Criminal Application No. 442 of 2020 was brought to the notice of the Court which was decided by the same Court. The Court has observed that the Court is not making any comment in respect of the applicability of the said decision.

18. In the case of ***Umraosing Julalsingh Patil*** (supra), the learned Single Judge of this Court, vide order dated 10th January 2017, had considered the applicability of Section 328 of I.P.C. wherein the accused had approached this Court for quashing the proceedings. The applicant therein had relied upon the decision of this Court in the case of **Ganesh Jadhao and another vs State of Maharashtra**. After quoting Section 328 of I.P.C. it was observed that the said provision contains three aspects ; (i) causes to be taken

by any person, (ii) other thing and (iii) knowing it to be likely that he will thereby cause hurt. The court observed that Legislature feels that these substances are harmful to the life, they can take away the life and they can cause serious harm to the life and it is not open to the Court to presume that such substances may not cause such harm. The Legislation is made in public interest and the Court needs to keep in mind that it is scientifically proved that these substances can take away the life by causing disease like cancer. The decisions in the case of Zahir Ibrahim Panja and others dated 16.10.2018, Vasim Jalil Shaikh and others dated 29.11.2018 and several other orders took similar view.

19. While deciding ABA No. 483 of 2021, the applicant therein had urged that Section 328 of I.P.C. is not applicable and the decision in the case of Joseph Kurian (supra) holds the field. The decisions in the cases of Anand Chaurasiya and Ganesh Jadhao (supra) also support the contention of the applicant. Several decisions were cited on law of precedents and it was also contended that merely because the Apex Court had stayed the decisions of this Court, effect of such decision does not get stayed. In paragraph 14 of the said decision dated 24.03.2021, this Court has referred the decision in the case of Joseph Kurian (supra) and has observed as to why it is not applicable in the present cases. It was observed that the decision of the Apex Court in the case of Joseph Kurian (supra) was referred to by Division Bench of this Court in the case of Anand Chaurasiya and the decision delivered in the case of Anand

Chaurasiya has been stayed by the Apex Court. The decision delivered in the case of Ganesh Jadhao wherein reference was made to the decision of Anand Chaurasiya's case is also stayed by the Apex Court. It was also observed that the Apex Court in the case of Joseph Kurion (supra) was adjudicating criminal appeals arising out of judgment of the High Court. Accused were convicted. Trial Court had appreciated the evidence. The conviction was confirmed by the High Court. The facts of the said case indicate that it was relating to consumption of poison arrack adulterated with methyl alcohol and it is in the context of the facts of the said case. It was observed that to constitute the offence under Section 328 of I.P.C. the prosecution was required to prove that substance in question was poison or any stupefying, intoxicating or unwholesome drug, etc., that the accused administered the same to the victim with intent to cause hurt or knowing it to be likely that he would thereby cause hurt. It is also apparent that the decision proceeded on the basis of the fact that the accused therein had no knowledge about the presence of adulterated substance in the liquor. While deciding ABA No.483 of 2021, it was observed that the Court is relying upon the view expressed by Division Bench of this Court in the case of Vasim Shaikh vs State of Maharashtra and the decisions of single Judge of this Court in the case of Vinod Gupta and Sagar Kore. Investigation is in progress. Decision in the case of Joseph Kurian (supra) was delivered after the trial was over. After the evidence was recorded, the accused was convicted and the appeals challenging the

conviction were before the Court.

20. ABA No. 483/2021 was decided by me vide order dated 24th March 2021. I am reiterating and in agreement with all the decisions wherein it is held that Section 328 of I.P.C. is applicable in such cases. There is no bar for invoking provisions of I.P.C. In all the applications before me, involvement of applicants is disclosed. They are not entitled for anticipatory bail. Section 328 of I.P.C. is applicable in all these cases. The Apex Court had no occasion to deal with latter part of Section 328 of I.P.C. in the case of Joseph Kurian (supra).

21. Since the Court was not inclined to grant relief, learned Advocates, on instructions, seek permission to withdraw ABA No.1365/2021, ABA No. 1487/2021, ABA No. 1160/2021, ABA No.1233/2021, ABA No. 1375/2021 and ABA No. 1363/2021. In view of submissions, they are allowed to withdraw the applications.

22. In view of the above, no case is made out for granting relief in these applications. Hence, I pass the following order.

ORDER

Anticipatory Bail Applications except those applications which were allowed to be withdrawn, stand rejected and disposed of.

(PRAKASH D. NAIK, J.)

23. At this stage, learned Advocates appearing in ABA No.1156/2021, ABA No. 112/2021, ABA No.1118/2021 submit that the applicants propose to move Apex Court, hence interim protection may be continued for four weeks. Learned A.P.P. opposed the prayer.

24. Considering the submissions of learned Advocates for the applicants, interim relief is continued for four weeks.

(PRAKASH D. NAIK, J.)

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