

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

ANTICIPATORY BAIL APPLICATION NO.19 OF 2022

Vijaykumar S/o Dhondiram Tapdiya

...APPLICANT

VERSUS

The State of Maharashtra

...RESPONDENT

...
Mr.Bharat N. Gadegaonkar Advocate for Applicant.
Mr.V.M. Kagne, A.P.P. for Respondent-State.
...

CORAM: SMT. VIBHA KANKANWADI, J.

DATE : 3rd MARCH, 2022

ORDER :

1. Present applicant is apprehending his arrest in connection with Crime No.375 of 2021 registered with Police Station, Jintur, Taluka-Jintur, District-Parbhani for the offence punishable under Sections 272, 273, 328 of the Indian Penal Code and Sections 26(2)(iv), 27(3)(d), 27(3)(e), 30(2)(a), 59 of Food Safety and Standards Act.

2. Heard learned Advocate for the applicant and learned APP for the respondent – State.

3. It has been vehemently submitted on behalf of the applicant that perusal of the First Information Report that has been lodged by PSI – Topaji Eknathrao Korke attached to Jintur Police Station would show that on receipt of secret information, the raid was conducted at the shop of one Navnath Dombe. They had apprehended Navnath Shahaji Dombe. It is stated that from the shop of Navnath Dombe, they had seized 20 packets of Vajir Gutka, 25 packets of Vimal Panmasala, 25 packets of V-1 Tobacco, 15 packets of Premium Rajniwas Scented Panmasala, 15 packets of XL-1 Tobacco. On further inquiry, said Navnath Dombe disclosed that he has also kept remaining Gutka / Tobacco packets in the field of his relative namely, Purbhaji Chavan. The raiding team visited the said spot from where more banned articles such as Vajir Gutka, Vimal Panmalsa, Premium Rajniwas Scented Panmasala etc. were seized. The total worth of the Muddemal seized was Rs.4,26,850/-. It is the further prosecution story that during investigation the arrested accused disclosed the name of present applicant from whom he has brought those articles. There is no evidentiary value to the said statement and therefore physical custody of the applicant is not required for the purpose of investigation. It is also submitted

that Section 328 of the Indian Penal Code is not attracted to the case as it is.

4. Per contra, the learned APP strongly opposed the application and it is stated that contents of the First Information Report accused Navnath Dombe, who was arrested on the spot, has disclosed the name of the present applicant from whom he has purchased those banned articles. When banned articles of such huge quantity were seized at the instance of co-accused who has stated that said banned articles were purchased from present applicant, custodial interrogation of the applicant is necessary to reveal the connection of the applicant with said banned articles.

5. Before proceeding further, it will not be out of place to mention that there are two sets of decisions which say that offence under Section 328 of the Indian Penal Code cannot be said to have been made out and another set of decisions say that under these circumstances as regards Gutka or scented betel-nut Section 328 of the Indian Penal Code would be attracted. In ***Anand Ramdhani Chaurasia and another vs. State of Maharashtra, 2019 SCC OnLine Bom. 1857,*** and in ***Anticipatory Bail Application No. 944 of 2020*** with

companion matters, decided on 30th September, 2021 **(Coram:V.G. BISHT, J.)**, whereby in similar situations the applicants therein who have been arrested holding or possessing Gutka, have been released on anticipatory bail, holding that offence under Section 328 of the Indian Penal Code has not been made out. Ratio laid down in ***Joseph Kuruian Philip Jose vs. State of Kerala, (1994) 6 SCC 535*** was relied.

6. At the outset, it is to be noted that though this Court **(Coram:V.G. BISHT, J.)** in the aforesaid Judgment and order in ***Anticipatory Bail Application No.944 of 2020*** with companion matters, had come to the conclusion that in such facts of the cases offence under Section 328 of the Indian Penal Code cannot be said to have been made out, there is another set of decision in ***Anticipatory Bail Application No.1405 of 2021*** with companion matters, decided by this Court **(Coram: PRAKASH D. NAIK, J.)** on 23rd December 2021, wherein it has been held that in such cases offence under Section 328 of the Indian Penal Code can be said to have been made out and hence certain applications were rejected and certain applications came to be withdrawn when disinclination was shown by the Court. In both the matters, mainly decisions of this Court in ***Anand Ramdhari Chaurasia and another vs. State of Maharashtra***

(supra) and in ***Ganesh Pandurang Jadhav vs. State of Maharashtra (Criminal Writ Petition No.1027 of 2015 with companion matters)*** were referred and note was taken that Hon'ble Apex Court has stayed the decisions of this Court. Those were the cases in which the First Information Reports were sought to be quashed under Section 482 of the Code of Criminal Procedure Code on the ground that offence under Section 328 of the Indian Penal Code has not been made out. However, note of other two decisions by the Division Bench of this Court were also taken. One is in the case of ***Vasim S/o Jamil Shaikh vs. State of Maharashtra and another in Criminal Application No. 4353 of 2016*** decided on 29th November 2018, wherein this Court was also one of the party, **(CORAM: T.V. NALAWADE AND SMT. VIBHA KANKANWADI, JJ.)**, and in that decision view was taken that the contention of the applicant that in such cases provisions of Section 328 of the Indian Penal Code cannot be used, is unacceptable. Thereafter, there is also case of ***Zahir Ibrahim Panja and others vs. State of Maharashtra and others (Criminal Application No.4968 of 2016)*** decided on 16th October 2018, wherein it was held that Section 328 of the Indian Penal Code can be invoked in such cases.

7. As regards the decision in **Joseph Kurian Philip Jose** is concerned, it was referred in **Anand Ramdhari Chaurasia** (supra), wherein **Vasim Shaikh's case** (supra) was held to be *per incuriam* in view of **Joseph Kuruian Philip Jose**. However, the position stands and it has been so considered in **Anticipatory Bail Application No.1405 of 2021** (supra) that the said decision has been stayed by the Apex Court and therefore, this Court would agree with the reasons given by this Court **(CORAM: PRAKASH D. NAIK, J.)** in **Anticipatory Bail Application No.1405 of 2021** with companion matters, decided on 23rd December 2021.

8. In spite of the fact that in such cases offence under Section 328 of the Indian Penal Code can be invoked, now it is required to be seen, whether there is any material to connect present applicant with the crime. Allegations against the present applicant are that accused Navnath Dombe, who was caught hold of with the banned articles, has taken the name of the present applicant as a person from whom he had purchased those articles. It is to be noted that the raid alleged to have been conducted on 13th October 2021 and the said statement is also made by that accused to the Police on that day ireself, yet that statement has not been considered further by the Investigating

Officer in order to reveal the connection between the said articles and the present applicant. The Investigating Officer could have conducted raid on the business place of the applicant and could have seen as to whether applicant is possessing more banned articles. What remains is that there is only statement of co-accused, which is inadmissible in evidence. Therefore, custodial interrogation of the applicant is not necessary for the purpose of investigation. If attendance is directed to be given, the investigation can still go on and therefore the Application deserves to be granted. Hence the following order is passed:-

ORDER

- i) Application stands allowed.
- ii) In the event of arrest of the applicant – Vijaykumar S/o Dhondiram Tapdiya in connection with Crime No.375 of 2021 registered with Police Station, Jintur, Taluka-Jintur, District-Parbhani for the offence punishable under Sections 272, 273, 328 of the Indian Penal Code and Sections 26(2)(iv), 27(3)(d), 27(3)(e), 30(2)(a), 59 of Food Safety and Standards Act, he be released on bail on PR Bond of Rs.30,000/- (Rupees Thirty

Thousand) with two solvent sureties of Rs.15,000/- (Rupees Fifteen Thousand) each.

iii) Applicant shall attend Police Station, Jintur on every Monday between 10.00 a.m. to 2.00 p.m. till filing of the charge-sheet and co-operate with the investigation.

iv) Applicant shall not tamper with the evidence of the prosecution in any manner.

[SMT. VIBHA KANKANWADI , J.]

asb/MAR22