

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

ANTICIPATORY BAIL APPLICATION NO.32 OF 2022

Md. Kalim S/o Mohd. Yusuf

...APPLICANT

VERSUS

The State of Maharashtra

...RESPONDENT

...
Mr.Nitin S. Kadam Advocate for Applicant.
Mr.V.M. Kagne, A.P.P. for Respondent-State.
...

CORAM: SMT. VIBHA KANKANWADI, J.

DATE : 8th FEBRUARY, 2022

ORDER :

1. The applicant is apprehending his arrest in connection with Crime No.357 of 2021 registered with Kotwali Police Station, Parbhani, Taluka and District-Parbhani for the offence punishable under Sections 328, 188, 269, 272 of the Indian Penal Code.
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 would show that it was registered against the persons namely, Sayyed Gous Sayyed Ali, Shaikh Jahir, Rizwan and one unknown person. It is submitted that First Information Report would show that accused – Sayyed Gous Sayyed Ali was caught raid handed by the raiding team, who was found to be transporting banned Gutka / Tobacco packets in the vehicle bearing No.MH-38-3202. It is the further prosecution story that on interrogation, said accused Sayyed Gous Sayyed Ali disclosed the name of the present applicant as the person to whom he was to deliver the Gutka. That means on the basis of statement of the accused, the Police want to arrest the present applicant. Learned counsel submits that in the First Information Report, name of the present applicant is not mentioned. There was no connecting material with the Police to connect the present applicant with the crime. His custodial interrogation is not necessary.

4. Per contra, the learned APP strongly opposed the Application and submitted that as per the police report the co-accused Sayyed Gous Sayyed Ali was found to be transporting the banned Gutka / Tobacco. The purpose for which the Gutka is

banned in the State of Maharashtra is well known and it is in the interest of public health. However, the information has been given by the co-accused that he was transporting the said Gutka for delivering the same to the present applicant and therefore his custody is required to reveal as to how he deals in such hazardous goods which are causing health problems to the generations.

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. Again it can be observed that in ***Anticipatory Bail Application No.1405 of 2021*** with companion matters, this Court had come to the conclusion that the applicants therein were found possessing the banned articles and therefore it will not be a good case to release them. However, in the present case the applicant is not the person in whose custody the banned articles were found. The name of the present applicant is not appearing in the First Information Report, however, in the remand report it is stated that on the statement made by the accused who was apprehended, the name of the present applicant was revealed as the person to

whom he was to deliver the Gutka. At this stage, what is appearing that actual delivery of the Gutka was not made to the applicant at any point of time. Under such circumstance, whether offence under Section 328 of the Indian Penal Code gets attracted or not as against the present applicant is a question. On the basis of statement of co-accused, Police want to arrest present applicant. The evidentiary value to the statement of the co-accused is nil. That means, it cannot be considered at all. Therefore, custodial interrogation of the applicant is not required for the purpose of investigation. The investigation can still go on if the attendance is directed to be given and therefore, the interim protection granted earlier deserves to be confirmed. Hence the following order:-

ORDER

- i) Application stands allowed.
- ii) The interim protection granted to the applicant by this Court vide order dated 18th January 2022 stands confirmed. It is clarified that in the event of arrest of applicant - Md. Kalim S/o Mohd. Yusuf in connection with Crime No.357 of 2021 registered with Kotwali Police Station, Parbhani, Taluka and District-

Parbhani for the offence punishable under Sections 328, 188, 269, 272 of the Indian Penal Code, 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 Kotwali Police Station, Parbhani on every Monday between 10.00 a.m. to 12.00 noon 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.]