

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

ANTICIPATORY BAIL APPLICATION NO.61 OF 2022

1) Shaikh Juber S/o Shaikh Habib Tamboli,

2) Shaikh Aslam S/o Shaikh Gaus

...APPLICANTS

VERSUS

The State of Maharashtra

...RESPONDENT

...
Mr.Sudarshan J. Salunke Advocate for Applicants.
Mr.N.T. Bhagat, A.P.P. for Respondent-State.
...

CORAM: SMT. VIBHA KANKANWADI, J.

DATE : 3rd FEBRUARY, 2022

ORDER :

1. The applicants are apprehending their arrest in connection with Crime No.410 of 2021 registered with Police Station, Purna, District-Parbhani for the offence punishable under Sections 328, 272, 273, 188, 34 of the Indian Penal Code.
2. Heard learned Advocate for the applicants and learned APP for the respondent – State.

3. It has been vehemently submitted on behalf of the applicants that perusal of the First Information Report that has been lodged by PSI – Mahendrakumar Shamrao Popalwar attached to Purna Police Station would show that on receipt of secret information, the raid was conducted at the house situated in front of Siddhi Vinayak Temple, Mastanpura, Purna. They had apprehended one Shaikh Asif Shaikh Habib Tamboli. It is stated that they had seized 26 packets of Goa Premium Gutka, 118 packets of Rajniwas Premium Gutka, 27 packets of Vajir Jarda, 19 packets of Baba Scented Tobacco, 50 packets of Ratna Scented Tobacco etc. The total worth of the muddemal seized was Rs.88,900/-. On the inquiry, it was revealed that those articles were kept there with an intention to sale. It is the further prosecution story that during investigation the arrested accused disclosed the names of the present applicants as the persons who were conducting business along with him. There is no evidentiary value to the said statement and therefore physical custody of the applicants 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 in view of the First Information Report and the order passed by the learned Additional Sessions Judge while rejecting the application filed by the present applicants, the custodial interrogation of the applicants is necessary. Applicant No.1 is the brother of the co-accused Shaikh Asif Shaikh Habib Tamboli and applicant No.2 is their friend. The co-accused has disclosed the names of the present applicants as the persons who were running the business with him. The custodial interrogation of the applicants is necessary to reveal as to from where the hazardous goods, which are causing health problems to the generations, were purchased.

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. It is to be noted that names of both the present applicants are mentioned in the First Information Report. The co-accused, who has been apprehended on the spot, has stated before the police that he was carrying out the business of selling those banned articles along with the present applicants. When such banned articles in large quantity were found, its connection with the applicants is required to be established and for that purpose investigation is necessary. Exactly who had brought those banned articles and from where the same were purchased, is

required to be revealed. When prima facie involvement of the present applicants is established, their custodial interrogation is definitely necessary to reveal the connection between the present applicants and the banned articles and therefore, the application deserves to be rejected.

9. Accordingly, the Application is rejected.

[SMT. VIBHA KANKANWADI , J.]