

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

ANTICIPATORY BAIL APPLICATION NO.74 OF 2022

Gajanan @ Nagorao Laxman Gadade

...APPLICANT

VERSUS

The State of Maharashtra

...RESPONDENT

...
Mr.Mahesh K. Bhosale Advocate for Applicant.
Mr.V.M. Kagne, A.P.P. for Respondent-State.
...

CORAM: SMT. VIBHA KANKANWADI, J.

DATE : 18th JANUARY, 2022

ORDER :

1. The applicant is apprehending his arrest in connection with Crime No.374 of 2021 registered with Selu Police Station, District-Parbhani for the offence punishable under Sections 328, 272, 273 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 that has been lodged by PSI – Ashok Balaji Jatal attached to Selu Police Station that the raid was conducted at a place which was under new construction which was at a distance of about ½ km. From Walur bus stand at about 3.00 p.m. on 15th December 2021 and they had apprehended one Kanhoba Laxman Gadade. It is stated that they had seized 10 packets of Goa Gutka, 6 packets of Premium Raj Niwas scented Pan Masala, 7 packets of Premium Jafrani Jarda and 2 packets of Chewing Tobacco. The total worth of the muddemal seized was Rs.3670/-. On the inquiry, it was revealed that those articles were kept by Kanhoba Gadade with an intention to sale. It is the further prosecution story that during investigation the arrested accused disclosed the name of the present applicant as the person conducting the business along with him. 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. It is then stated that Kanhoba is the brother of the applicant and there is only one shop. The applicant is the only earning member of the family and he is ready to abide by the

terms of the bail. There was no connecting material with the police to connect the present applicant with the crime and therefore his custodial interrogation is not necessary.

4. Per contra, learned APP strongly opposed the application even for grant of interim relief 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 applicant. The custodial interrogation of the applicant is not necessary in view of the fact that Kanhoba is the brother of the applicant and they could be found possessing only one shop. He has disclosed the name of the present applicant also as the person who is running the business. The custodial interrogation of the applicant is necessary to reveal as to from where the hazardous goods, which is causing health problems to the generations, were purchased. Taking into consideration the social view, those articles are banned in Maharashtra.

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 the applicant is not denying a fact that there is only one shop between the two brothers. That means it is the family shop and therefore, exactly who had brought those banned articles, is required to be revealed.

Kanhoba - the brother of the applicant has been released on regular bail and not anticipatory bail. Therefore, custodial interrogation of the applicant is definitely necessary to reveal the connection between the present applicant and the banned articles and therefore at the threshold the Application deserves to be rejected. Accordingly, the Application is rejected.

[SMT. VIBHA KANKANWADI , J.]

asb/JAN22