

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

ANTICIPATORY BAIL APPLICATION NO.112 OF 2022

Bashid @ Basu Kachhi

...APPLICANT

VERSUS

The State of Maharashtra

...RESPONDENT

...
Mr.Avinash R. Borulkar Advocate for Applicant.
Mrs.Vaishali Patil-Jadhav, A.P.P. for Respondent-State.
...

CORAM: SMT. VIBHA KANKANWADI, J.

DATE : 31st JANUARY, 2022

ORDER :

1. Present applicant is apprehending his arrest in connection with Crime No.1 of 2022 registered with Selu Police Station, District-Parbhani for the offence punishable under Sections 328, 272, 273 read with Section 34 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 Police Naik Vilas Narayan Satpute attached to Local Crime Branch, Parbhani would show that on receiving secret information they have intercepted one red coloured Auto. They had apprehended one Shaikh Abdul Shaikh Gafur. It is stated that they had seized 104 packets of Premium Raj Niwas Scented Pan Masala, 104 packets of Goa Gutka, 72 big packets of Premium XL 01 Jafrani Jarda, 72 small packets of Premium XL 01 Jafrani Jarda, 48 packets of Premium Raj Niwas Scented Pan Masala. The total worth of the muddemal seized was Rs.92,776/. It is the further prosecution story that during investigation, accused Shaikh Abdul Shaikh Gafar disclosed that those articles were given to him by one unknown person on the say of the present applicant. 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. Learned Advocate for the applicant further submitted that the applicant was not manufacturing or adulterating the articles

seized by the police and therefore, ingredients of Section 272 of the Indian Penal Code are not attracted. So also the applicant was not found selling those articles which can be said to be noxious food or drink and therefore, the provisions of Section 273 of the Indian Penal Code are also not attracted. There was no connecting material with the police to connect the present applicant with the crime and therefore his custodial interrogation is not necessary.

5. Per contra, learned APP strongly opposed the application and stated that in view of the First Information Report, the custodial interrogation of the applicant is necessary in view of the fact that co-accused Shaikh Abdul Shaikh Gafar, who was arrested at the spot, has disclosed the name of the present applicant at whose instance the banned articles were being transported. The custodial interrogation of the applicant is necessary to reveal as to from where the hazardous goods, which are causing health problems to the generations, were purchased.

6. 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.

7. 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.

8. 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.

9. It is to be noted that in the First Information Report itself it is stated that after inquiry was made with the accused Shaikh

Abdul Shaikh Gafur who was arrested on the spot, as to from where he had brought the contraband articles, it was told that at the instance of present applicant those articles were brought by one unknown person. The intention with which the articles like Gutka were banned was for social purposes, as these articles would affect the health of public and therefore under this circumstance investigation definitely needs to be made as to why the applicant had ordered those contraband articles. The applicant, in his application, has given his occupation as labour, then the question arises as to why labour requires so much quantity of contraband Gutka.

10. Though learned counsel for the applicant has submitted that ingredients of Sections 272 and 273 of the Indian Penal Code are not attracted in the facts of the present case, we may not go to much details to which Section is applicable and which is not applicable. But, still if we want to go into that aspect, two things will have to be considered separately and then its collective impression. First is regarding whether the food that was seized or food article that was seized, was adulterated or not or whether it was a noxious food or not and second is whether the applicant was found possessing, manufacturing,

adulterating etc. When such banned articles in large quantity were found, its connection with the applicant is required to be established and for that purpose investigation is necessary. Therefore, custodial interrogation of the present applicant is definitely necessary to reveal the connection between the present applicant and the banned articles and therefore, the application deserves to be rejected. Accordingly, the Application is rejected.

[SMT. VIBHA KANKANWADI , J.]