

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

ANTICIPATORY BAIL APPLICATION NO.138 OF 2022

Wazir S/o Abdul Gani Mulla

...APPLICANT

VERSUS

The State of Maharashtra

...RESPONDENT

...
Mr.Amey Sabnis Advocate h/f. Mr. V.D. Gunale
Advocate for Applicant.
Mr.N.T. Bhagat, A.P.P. for Respondent-State.
...

CORAM: SMT. VIBHA KANKANWADI, J.

DATE : 10th FEBRUARY, 2022

ORDER :

1. Applicant is apprehending his arrest in connection with Crime No.258 of 2021 registered with Police Station Shirur Anantpal, Taluka-Shirur Anantpal, District-Latur for the offence punishable under Sections 328, 188, 372, 273 of the Indian Penal Code and Section 59 of the Food Safety and Standards Act, 2006.

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 Food Safety Officer, Latur would show that on receiving information, the Police Inspector, Shirur Anantpal Police Station, visited the shop of the present applicant and they had seized 60 packets of Vimal Pan Masala and 120 packets of Scented Tobacco etc. The total worth of the muddemal seized was Rs.7850/-. It is submitted that provisions of Section 328 of the Indian Penal Code are not attracted in the present case. The Police already conducted the Panchnama and seized the articles and therefore custodial interrogation of the applicant is not necessary.

4. Per contra, the learned APP strongly opposed the application and submitted that applicant was found possessing banned Gutka / Tobacco. He was very well having knowledge that Gutka is banned in the State of Maharashtra and that decision has been taken in the interest of public health. From the shop of the applicant the articles have been seized which are banned. 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.

5. Learned Advocate for the applicant relies on the interim order passed by this Court in Anticipatory Bail Application No.1183 of 2020 (Parvej Rashid Pathan vs. The State of Maharashtra) dated 18th December 2020, wherein this Court has observed that:

“Perusal of the FIR shows that allegations are made that the accused persons were found possessing the contraband articles. Therefore, Section 328 of the Indian Penal Code is not prima facie made out.”

6. It is to be noted, in this regard, that it was the only interim order which cannot be relied upon. In the said matter, final order appears to have been passed on 30th September 2021, along with companion matters, however, the Coram was different at that time.

7. Before proceeding further, it will not be out of place to mention that learned Advocate for the applicant tried to submit that offence under Section 328 of the Indian Penal Code will not be attracted in this case as the person was not present before

any accused person who could be administered poisonous substance. He relied on the decision in ***Anand Ramdhani Chaurasia and another vs. State of Maharashtra, 2019 SCC OnLine Bom. 1857***. Learned Advocate for the applicant also relied on the decision by this Court 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.

8. 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.

9. 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.

10. The banned articles i.e. Gutka / Pan Masala were found in the Kirana Store by name "Aman Kirana Stores" owned by the present applicant. Though the applicant was present at that time, the informant could not have arrested him as the informant is the Food Safety Officer. Further, it appears that he

was accompanied by Police. Whether that Police had authority to arrest the applicant as per the provisions of Code of Criminal Procedure, would be a question. If the informant would have had authority to arrest, he would have arrested the applicant at that moment itself. But since the applicant was not arrested, that does not give advantage to the applicant, in a sense that for that purpose discretionary relief cannot be granted in his favour.

11. It is to be noted that the shop is owned by the present applicant from where the contraband articles were seized. Prima facie, it appears that the applicant was carrying out the business of selling those banned articles. When such banned articles were found in the shop of the applicant, then exactly who had brought those banned articles and from where the same were purchased, is required to be revealed and for that purpose custodial interrogation of the applicant is definitely necessary and therefore at the threshold the application deserves to be rejected.

12. Accordingly, the Application is rejected.

[SMT. VIBHA KANKANWADI , J.]