

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

50 CRIMINAL APPLICATION NO.2340 OF 2021

- 1 Ganesh Ashruba Kurhade,
Age 32 yrs., Occ. Business,
R/o Rachna Colony, Manwat,
Tq. Manwat, Dist. Parbhani.
- 2 Yogesh @ Gotu Kishanrao Sorekar,
Age 30 yrs., Occ. Business,
R/o Ekta Nagar, Palodi Road,
Manwat, Tq. Manwat,
Dist. Parbhani.
- 3 Yogesh Devidas Fatale,
Age 25 yrs., Occ. Servant,
R/o Sambhaji Nagar, Manwat,
Tq. Manwat, Dist. Parbhani.

... **Applicants**

... **Versus** ...

- 1 The State of Maharashtra
Through Police Inspector,
Manwat Police Station,
Dist. Parbhani.
- 2 Sugriv Kishanrao Kendre,
Age 41 yrs., Occ. Service (PHC)
Local Crime Branch, Parbhani,
Tq. & Dist. Parbhani.

... **Respondents**

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Mr. S.V. Mundhe, Advocate for applicants

Mr. S.J. Salgare, APP for respondent Nos.1 and 2

...

**CORAM : SMT. VIBHA KANKANWADI AND
ABHAY S. WAGHWASE, JJ.**

DATE : 19th DECEMBER, 2022

ORDER : (SMT. VIBHA KANKANWADI, J.)

1 Present application has been filed invoking the inherent powers of this Court under Section 482 of the Code of Criminal Procedure, 1973 for quashing the First Information Report vide Crime No.165/2020 dated 28.08.2020 registered with Manwat Police Station, Dist. Parbhani, for the offence punishable under Section 328, 188, 272, 273 of the Indian Penal Code, 1860, so also charge sheet No.28/2020 i.e. proceedings bearing Sessions Trial No.96/2021 pending before Sessions Judge, Parbhani.

2 Heard learned Advocate Mr. S.V. Mundhe for applicants and learned APP Mr. S.J. Salgare for respondent Nos.1 and 2.

3 The present applicants are the original accused persons. It has been contended on behalf of them that perusal of the First Information Report as well as the statements of witnesses would show that when police received secret information they had conducted raid at a place which was under locked condition and when it was asked to the owner of the said room,

it was told that the said room has been taken on rent by the present applicants for storing toffees and biscuits. The police had then called all the three accused persons on phone, however, only accused Yogesh @ Gotu Kishanrao Sorekar answered on phone and he was asked to come to the house but he gave evasive answers and, therefore, the landlord opened the door from the back side of the said room, which was allegedly given on rent. The room was then unlocked and it was found that it was containing boxes of Gutkha which is banned article. These facts even repeated by the witnesses in their statements under Section 161 of the Code of Criminal Procedure and, therefore, this will not amount to an offence under Section 328 of the Indian Penal Code as neither the accused persons were present nor any person who was supposed to consume the article was present. Learned Advocate for the applicants relied on the decision in **Anand Ramdhani Chaurasia and another vs. State of Maharashtra, 2019 SCC OnLine Bom.1857** and **Ganesh Pandurang Jadhav vs. State of Maharashtra (Criminal Writ Petition No.1027 of 2015 with companion matters)**. He also relied on the decision in **Joseph Kuruian Philip Jose vs. State of Kerala, (1994) 6 SCC 535** and submitted that unless the person who was supposed to consume the food article is present it cannot attract ingredients of offence under Section 328 of the Indian Penal Code. Learned Advocate for the applicants therefore submitted that when ingredients of the offence are not attracted, it would be a futile exercise to

ask the applicants to face the trial. He prayed for setting aside the First Information Report as well as the entire criminal proceedings.

4 Per contra, the learned APP submitted that the decisions in **Anand Chaurasia** (supra) and **Ganesh Jadhav** (supra) have been stayed by Hon'ble Apex Court. Note of those cases were taken by this Court in **Vasim Jamil Shaikh vs. State of Maharashtra and another** in **Criminal Application No.4353 of 2016** decided on 29.11.2018, wherein one of us (SMT. VIBHA KANKANWADI, J.) was party. There is no stay to this case i.e. **Vasim Shaikh** (supra), therefore, it is to be noted that it holds the field. As regards the facts of the case are concerned, whether it was conscious possession or not would be decided on the evidence that would be led before the Trial Court. The evidence that is collected would show that the room was given on rent to the accused persons. It has a separate entrance, though from the back side the landlord could enter, however, it would be for the accused persons to prove that the landlord could have played this kind of mischief. Therefore, this cannot be taken as a fit case for exercising inherent powers of this Court.

5 As regards the legal position is concerned, it is to be noted that two Judgments on which the applicants are relying are stayed by Hon'ble Apex Court and the third is not stayed at all and, therefore, this position will have to be accepted. As on today the observations in that case that making

such food article, which would cause injury to the health to such an extent that even death can cause, would attract the ingredients of Section 328 of the Indian Penal Code.

6 As regards the conscious possession is concerned, the contents of the First Information Report would show that the landlord was present and in presence of panchas he had opened the room from the back side. It would be then the matter of evidence and appreciation by the concerned Trial Court to hold as to whether the accused persons had conscious possession or not. Here, we would also like to harp upon a fact that Gutkha was required to be banned because of its contain of tobacco and other such material which is hazardous to the life of human being. Taking into consideration the hazardous effects on the health of the mankind if steps are taken of banning the article itself, then such cases will have to be seen from social angle also. It would be otherwise easy for the accused persons to get scot-free by using those loopholes. Under such circumstance, we do not find this to be a fit case to exercise our inherent powers for quashing the First Information Report as well as the proceedings. Application stands rejected.

(Abhay S. Waghware, J.)

(Smt. Vibha Kankanwadi, J.)