

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

ANTICIPATORY BAIL APPLICATION NO.1530 OF 2021

Govind S/o Namdev Bhakare

...APPLICANT

VERSUS

The State of Maharashtra

...RESPONDENT

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

CORAM: SMT. VIBHA KANKANWADI, J.

DATE OF RESERVING ORDER : 6th JANUARY 2022

DATE OF PRONOUNCING ORDER : 12th JANUARY 2022

ORDER :

1. The applicant is apprehending his arrest in connection with Crime No.364 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 applicant and learned APP for the respondent – State.

3. It has been vehemently submitted on behalf of the applicant that the perusal of the First Information Report would show that it was registered against two persons, namely, Manik Bapurao Kadam and Aananda Uddhavrao Dhone, who found to be possessing banned Gutka packets of various descriptions. It is the further prosecution story that as the investigation progressed, in the remand report dated 16th October 2021 it was informed to the Magistrate that while interrogating those two accused persons who have been caught red handed, information has been given that said Gutka was stored in a tin shed owned by the present applicant. That means, on the basis of the statement of the accused the police want to arrest the applicant. There was no connecting material with the police to connect the present applicant with the crime. His custodial interrogating is not necessary.

4. Per contra, the learned APP strongly opposed the Application and submitted that as per the police report the co-accused Manik Kadam and Aananda Dhone were found to be transporting the banned tobacco / Gutka. The purpose for which

the tobacco is banned in the State of Maharashtra is well known and it is in the interest of public health. However, the information has been given by the co-accused that the said Gutka was stored in the tin shed of the present applicant and therefore his custody is required to reveal as to how he deals in such hazardous goods. Though it has further revealed by the police that the seized contraband in fact purchased from one person named Khayyum, resident of Nanded, yet the custodial interrogation of this applicant is necessary.

5. 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.

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. In spite the fact that in such cases offence under Section 328 of the Indian Penal Code can be invoked, now it is required to be seen, whether there is any material to connect present applicant with the crime. Again it can be observed that in ***Anticipatory Bail Application No.1405 of 2021*** with companion matters, this Court had come to the conclusion that the applicants therein were found possessing the banned articles and therefore it will not be a good case to release them. However, in the present case the applicant is not the person in whose custody the banned articles were found. On the basis of statement made by co-accused it is the prosecution story that the tin shed allegedly belonging to the applicant was used for storing those articles. The police papers do not contain any such material to show that such tin shed belongs to the present applicant. The evidentiary value to the statement of the co-

accused is nil. That means, it cannot be considered at all. Therefore, the custodial interrogation of the applicant is not required for the purpose of investigation. If attendance is granted to him, the investigation can still go on. With these observations, following order is passed:-

ORDER

- i) Application stands allowed.
- ii) In the event of arrest of the applicant – Govind S/o Namdev Bhakare in connection with Crime No.364 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, he be released on bail on PR Bond of Rs.30,000/- (Rupees Thirty Thousand) with two solvent sureties of Rs.15,000/- (Rupees Fifteen Thousand) each.
- iii) Applicant shall attend Purna Police Station on every Monday between 11.00 a.m. to 2.00 p.m. till further orders and co-operate with the investigation.
- iv) Applicant shall not tamper with the evidence of the prosecution.

[SMT. VIBHA KANKANWADI , J.]