

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

ANTICIPATORY BAIL APPLICATION NO.1630 OF 2021

Israr Mansoori Mustaq Mansoori

...APPLICANT

VERSUS

The State of Maharashtra

...RESPONDENT

...
Mr.Avinash R. Borulkar Advocate for Applicant.
Mr.A.M. Phule, A.P.P. for Respondent-State.
...

CORAM: SMT. VIBHA KANKANWADI, J.

DATE OF RESERVING ORDER : 7th JANUARY 2022

DATE OF PRONOUNCING ORDER : 10th FEBRUARY 2022

ORDER :

1. The applicant is apprehending his arrest in connection with Crime No.106 of 2021 registered with Shirpur Taluka Police Station, District-Dhule for the offence punishable under Sections 188, 272, 273, 328 of the Indian Penal Code read with Sections 26(2), 26(2)(iv), 27(3)(d), 27(3)(e), 30(2)(a), 3 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 would show that it was registered against two persons, namely, Ajim Wahid Shaikh and Akram Shabbir Ali who found to be transporting banned Gutka / tobacco packets in the vehicle bearing No. CG-04-MG-1807. It is the further prosecution story that on interrogation, said two persons disclosed the name of the applicant by stating that the said Gutka packet were being transported from Indore to Bhiwandi at the instance of the applicant. That means, on the basis of the statement of the accused the police want to arrest the applicant. Learned counsel submits that the copy of the RC Book placed on record clearly shows that the said vehicle is not owned by the applicant. Thus, there was no connecting material with the police to connect the present applicant with the crime. His custodial interrogation is not necessary.

4. Per contra, the learned APP strongly opposed the Application and submitted that as per the police report the co-

accused Ajim Wahid Shaikh and Akram Shabbir Ali 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 they were transporting the said Gutka at the instance of the present applicant and therefore his custody is required to reveal as to how he deals in such hazardous goods. Though copy of the RC Book placed on record reveals that the said vehicle is not owned by the applicant but in the investigation it is revealed that said vehicle is owned by brother of the applicant and it was used for transporting banned articles at the instance of the applicant and therefore 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. So far as present case is concerned, the First Information would show that Gutka packets were being transported from Indore, Madhya Pradesh and selling of Gutka in Madhya Pradesh is not banned, therefore, offence under Section 328 of the Indian Penal Code has not been made out. Now it is required to be seen, whether there was 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 banned articles were being transported in the said vehicle at the instance of present applicant. The copy of RC Book placed on record clearly discloses that the said vehicle is not owned by the present applicant. The police papers do not contain any such material to show that said vehicle 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 – Israr Mansoori Mustaq Mansoori in connection with Crime No.106 of 2021 registered with Shirpur Taluka Police Station, District-Dhule for the offence punishable under Sections 188, 272, 273, 328 of the Indian Penal Code read with Sections 26(2), 26(2)(iv), 27(3)(d),

27(3)(e), 30(2)(a), 3 of the Food Safety and Standards Act, 2006, 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 Shirpur Taluka Police Station on every Monday between 11.00 a.m. to 2.00 p.m. till filing of the charge-sheet and co-operate with the investigation.

iv) Applicant shall not tamper with the evidence of the prosecution in any manner.

[SMT. VIBHA KANKANWADI , J.]

asb/FEB22