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Crl.O.P.No.14100 of 2021

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 06.10.2023

CORAM:

THE HONOURABLE MR.JUSTICE **G.K.ILANTHIRAIYAN**

CRL.O.P.No.14100 of 2021 and
Crl.MP.No.7731 of 2021

1.Selvaraj
2.Arunachalam

... Petitioners

Vs.

The State through the Inspector of Police,
Thellar East Police Station,
Thiruvannamalai District
under Crime No.334 of 2021

... Respondent

PRAYER: Criminal Original petition is filed under Section 482 of Criminal Procedure Code, to call for the records of the first information report under crime No.334 of 2021 on the file of the respondent dated 25.07.2021 and to quash the same as illegal as far as the petitioners are concerned.

For Petitioners : Mr.R.Thirumoorthy

For Respondent : Mr.A.Gopinath,
Government Advocate(crl.side)

ORDER

This criminal original petition has been filed to quash the proceedings in crime No.334 of 2021 pending investigation on the file of the respondent / police, registered for the offence under Section 328 of IPC and



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Sections 7(5) and 20(2) of Cigarette and other Tobacco Products Act, 2003

insofar as the petitioners.

2. The case of the prosecution is that when the respondent police was in Patrol, they found the shop of the 2nd accused. At that time, the 2nd accused attempted to close his shop on seeing the respondent police. On check, he had a stock of 3 ½ sack of Pasumark Tobacco worth Rs. 28,000/- and 925 pockets of Kamatchi Tobacco worth Rs. 2,000/-, totally amounting to a sum of Rs.30,000/-, wherein the 2nd accused voluntarily confessed that those Tobacco were stocked in his shop for the purpose of retail sale and the said product will endanger the life of the persons who consume it and also confessed that he can identify the 1st accused who actually supplied the said tobacco to the 2nd accused and as such, based on confession, the present petitioners have been implicated as accused.

3. Though the learned counsel for the petitioner submitted that the offence under Section 328 of IPC is not at all attracted even as per the averments in the FIR, on perusal of FIR revealed that there are specific allegations in order to attract the offence under Section 328 of IPC. In this



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regard, this Court already dealt with Section 328 of IPC and passed detailed

order in Crl.OP.No.17533 of 2019 dated 07.08.2019, wherein it is held as follows:

17.The judgment of the Bombay High Court (Aurangabad Branch) throws a lot of light in this regard. In Vasim and Others .Vs. The State of Maharashtra and Others reported in MANU/MH/3205/2018, the Bombay High Court has dealt with the very same issue, and the relevant portions are extracted hereunder:

?5. It is not disputed that in Maharashtra, there is prohibition to manufacture, possess and on sale of aforesaid food articles and the possession or sale or manufacture is made punishable under the Act. The relevant provisions of this Enactment 26 (2) (1), 3 (1) (ZZ), 27 (3) (E) r/w. 59 and 27 (3) (d) are also mentioned by the Food Safety Officer. There was no question of licence of any kind with the applicants and from the huge quantity which is recovered, it can be said that they had the intention to sell these articles as food articles.

6.In support of aforesaid submissions made by the learned counsel for applicants, he placed reliance on some observations made by the Division Bench of this Court at this seat in Criminal Writ Petition No. 1027/2015 (Ganesh Pandurang Jadhao and Anr. Vs. The State of Maharashtra and Ors.) decided with other matters on 4.3.2016. In these matters, Gutkha which is also called as Pan Masala was seized and it was seized for violation of



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provisions of Government notification dated 15.5.2014. The crime was registered for aforesaid offences of IPC and also for offences punishable under sections 26 and 30 of the Act. In that case, the said Court observed that it cannot be said that Gutkha, Pan Masala were stupefying, intoxicating, unwholesome drug. It was also observed by that Court that intention mentioned in the aforesaid provisions of IPC to cause hurt cannot be inferred only due to possession of such articles and so the provisions of IPC are not applicable in such case. With due respect, this Court holds that those observations cannot be used in the present matters as there were some already decided cases on this point and they were not considered by the said Court and contrary observations were already made.

7.The learned APP placed reliance on the decision given in Writ Petition No. 1631/2012 (M/s. Dhariwal Industries Limited and Anr. Vs. The State of Maharashtra and Ors.) decided with other matters at Principal Seat of this Bench on 15.9.2012. This decision is not referred in the case of Ganesh cited supra. At Principal Seat, in this case not only the provisions of the Act are considered, but the research made on the components of these articles which have harmful effect is also discussed. Notification of the year 2014 was also considered. It is specifically observed that Pan Masala, Gutkha contain harmful component like magnesium carbonate and admittedly, tobacco contains nicotine. These harmful substances can even take life and they cause disease like cancer.



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8. *Prior to giving of the decision at Principal Seat, at this Court in Writ Petition No3398/2011 (Sanket Foods Products Pvt. Ltd. Vs. Union of India and Ors.) which was decided with connected matters on 23.11.2011 had considered the bad effects of the components of Gutkha, Pan Masala on health. In that matter, the manufacturers had challenged the action taken against them. This case is also not considered in the case of Ganesh cited supra. This Court had considered relevant rules under the Act in the case of Sanket Foods Products Limited cited supra which show that magnesium carbonate is injurious to health. This Court had also considered the applicability of the provisions of IPC like section 272 of IPC in such a case and it was laid down that these provisions of IPC can be used as there is no specific bar in Special Enactment to file prosecution under the provisions of IPC also. In the case of Ganesh cited supra, the relevant provisions of the Act (section 25) which show that the Act does not prohibit the prosecution for offences committed under other Acts are not referred.*

9. *In Writ Petition No. 830/2016 (Umraosing Julalsingh Patil Vs. The State of Maharashtra and Ors.) decided on 10.1.2017 at this seat though by Single Judge, the possibility of use of provision of section 328 of IPC was considered by this Court in relation to the similar substance. This Court had considered the notification of the State Government dated 15.7.2014 and the provisions of the Act. In that case, the Single Judge had held that these substances contain nicotine and*



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magnesium carbonate and they can take life. This Court had considered the ingredients of provision of section 328 of IPC like

- (i) causes to be taken by any person unwholesome drug and*
- (ii) knowing it to be likely that he will thereby cause hurt.*

Thus, if these two ingredients are made out, then the prosecution for offences punishable under section 328 of IPC is also possible. In present two matters, huge quantity of tobacco and Pan Masala is recovered and only inference from the circumstance like the food article was in huge quantity is that the applicants wanted to make money by selling it in this State as there was ban for manufacture, possession and sale of these articles. When there is such ban, the persons like applicants are making more money as the persons who are addicted to these substances are ready to pay any price. In recently decided case Criminal Application No. 4968/2016 (Zahir Ibrahim Panja and Ors. Vs. The State of Maharashtra and Anr.) decided with other case on 16.10.2018, this Court has again considered the applicability of provisions of sections 273 and 328 of IPC and also the provisions of the Act when such articles are found in possession in Maharashtra. The relevant portion of the observations are at paragraph Nos. 3, 4 and 5 and they are as under :-

“3. The learned counsel for applicants in both the proceedings made following submissions :-

- (i) When there are the provisions to cover such offences in Food Safety and Standards Act 2006 and Rules framed thereunder, police ought not to have register the crime.*



(ii) *The offences punishable under sections 328, 272, 273 of IPC are not made out due to allegations and so, police ought not to have taken cognizance. However, it is admitted that there was the order issued by the Government and the provision of section 188 of IPC could have been used.*

(iii) *The provisions of aforesaid Special Enactment with regard to sending copy of report to Commissioner etc. were not strictly followed, so J.M.F.C. ought not to have entertained the complaint.*

4. *Recently in Criminal Application No. 1195/2018 [The State of Maharashtra and others Vs. Sayyed Hasan and others] decided on 20.09.2018, the Apex Court has considered the various provisions of Special Enactment, the provisions of Indian Penal Code and also the provision of section 26 of General Clauses Act and the Apex Court has laid down that in aforesaid Special Enactment, there is no specific bar to register the crime under the provisions of IPC even if the provisions of Special Enactment are attracted due to the offences committed. In view of these circumstances, this Court holds that there is no force in the contention that the crime ought not to have been registered. Second contention made against use of provisions of sections 272 and 273 of IPC is also not having any force. The provision of section 272 covers the persons who are responsible for adulteration of any food article, to make such article noxious as found and which is intended for sale. The provision of section 273 of IPC covers the seller and also the person who is exposing the*



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articles for sale and those articles are noxious or in the state unfit for consumption as food. Both provisions can be used against the present applicants as huge quantity of prohibited food articles was found in their possession. There is copy of order issued by the Government in that regard dated 15.7.2016.

5. The contention that the provision of section 328 of IPC cannot be used in the present case also is not acceptable. This provision shows that whoever administers to or causes to be taken by any person anything which is likely to cause hurt then he can be punished under provision of section 328 of IPC. Specific person to whom the thing is administered or the specific incident in which it was caused to be taken need not be mentioned in the case like present one. The persons who are indulging in to illegal activity like possessing and selling the substances which are likely to cause hurt are covered by the provision of section 328 of IPC. This point was dealt with by this Court in Criminal Application No. 560/2013 [Manik More Vs. State and others). How these substances are injuries to health is considered by this Court while deciding in Writ Petition No. 3398 of 2011 [Sanket Food Products Private Limited Vs. Union of Indian and others] decided in the year 2011 itself. Further, the aforesaid order dated 15.7.2016 of the State Government shows that for issuing that order of prohibition, the State Government considered the research material of Tata Memorial Hospital, Tata Institute of Fundamental Research, research work done by James E. Harner and many other institutes from India and abroad. Scientifically, it is



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established that areca nut chewing has been classified as carcinogenic to humans. Tobacco and such food, substance like Pan Masala and Gutkha which contain the substances cause cardiac arrest, oral cancer, esophageal cancer, stomach cancer and other diseases. They cause diseases of various internal organs and glands also. The study revealed that in India in the year 2011, the amount has been spent on treatment in respect of such diseases for persons of age group 35 to 69 was Rs.1,04,500/- Crore. The States like Maharashtra, West Bengal, Utter Pradesh and Andhra Pradesh together contributed 60% of the diseases born from tobacco attributable C.V.D. as the study strongly recommends prohibition of manufacture, sell of tobacco products and in view of the aforesaid substances the order was issued by the State Government. These circumstances need to be kept in mind while considering the grounds raised by the persons like present applicants.”

18.The Bombay High Court has held that both the offences under Section 273 and 328 of IPC are attracted in cases of this nature. This Court is in complete agreement with the judgment of the Bombay High Court in the decision referred supra.

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29. In order to bring home the commission of an offence under Section 328 of the Indian Penal Code, the prosecution must show



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a. that the substance in question was a poison, or any stupefying, intoxicating or unwholesome drug or other thing

b. that the accused administered the substance to the complainant or caused the complainant to take such substance,

c. that he did so with intent to cause hurt or knowing it to be likely that he would thereby cause hurt, or with the intention to commit or facilitate the commission of an offence.

It is, therefore, essential for the prosecution to prove that the accused was directly responsible for administering poison etc. or causing it to be taken by any person, through another. In other words, the accused may accomplish the act by himself or by means of another. In either situation direct, reliable and cogent evidence is necessary. (vide Joseph Kurian .Vs. State of Kerala reported in (1994) 6 SCC 535). The import of the words 'other thing' occurring in Section 328 IPC was considered by a Division Bench of the Calcutta High Court way back in 1864 in the case of R v Jotee Ghorae [1 Sutherland Cr, 7], wherein it was observed as under:

“The words 'or other thing' must, in my opinion, be referred to the preceding words, and be taken to mean 'unwholesome or other thing,' and not other thing simply, as the Sessions Judge would construe it, for otherwise we should be involved in endless inconsistencies, and the offering of a loaf of



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wholesome bread might become the foundation of a criminal prosecution.”?

Tobacco and Tobacco related products have already been shown to be ?unsafe food? under Section 2(zz) of the FSSAI Act as it falls within the net of the expression ?deleterious substance? the ordinary, plain meaning of which was noticed as ?unwholesome or physically harmful?. The Division Bench in J. Anbazhagan?s case, has taken judicial notice of the harmful and irreversible effects of tobacco products on the human body. Therefore, there is no difficulty in concluding that that tobacco will fall within the net of the expression unwholesome??other thing? as construed by the Division bench in the Calcutta case.

That takes us to the next requirement ie., the causing of hurt (as defined in Section 319 IPC) or intention to commit or facilitate the commission of an offence. It is important to note that the word ?offence? as defined in Section 328 must take its meaning from its definition in Section 40 of the IPC. Section 40 of the IPC specifically provides that for the purposes of Section 328 IPC the word ?offence?

denotes a thing punishable under this Code, or under any special or local law ad hereinafter defined. In other words, the word ? offence? occurring in Section 328 IPC is not confined to offences under the Code and may extend to offences under a special law as well. As already noticed, Section 59 of the FSSAI Act penalizes the



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manufacture, sale, storage, distribution and import of unsafe food.

Thus an intention to commit or facilitate the commission of an offence under Section 59 of the FSSAI Act will be covered by Section 328 of the IPC if the other requirements are satisfied ie., that the accused had caused the complainant or any other person to take the unwholesome/deleterious substance.

4. Therefore, offence under Section 328 of IPC is attracted. Insofar as the other offences are concerned, there are specific averments in order to constitute them. In this regard, it is relevant to rely upon the judgment of the Hon'ble Supreme Court of India passed in ***Crl.A.No.255 of 2019*** dated ***12.02.2019*** in the case of ***Sau. Kamal Shivaji Pokarnekar vs. the State of Maharashtra & ors.***, wherein it is held as follows:-

"4. The only point that arises for our consideration in this case is whether the High Court was right in setting aside the order by which process was issued. It is settled law that the Magistrate, at the stage of taking cognizance and summoning, is required to apply his judicial mind only with a view to taking cognizance of the offence, or in other words, to find out whether a prima facie case has been made out for summoning the accused persons. The learned Magistrate is not required to evaluate the merits of the material or evidence in support of the complaint, because the Magistrate must not undertake the exercise to find out whether the materials would lead to a conviction or not.



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5. *Quashing the criminal proceedings is called for only in a case where the complaint does not disclose any offence, or is frivolous, vexatious, or oppressive. If the allegations set out in the complaint do not constitute the offence of which cognizance has been taken by the Magistrate, it is open to the High Court to quash the same. It is not necessary that a meticulous analysis of the case should be done before the Trial to find out whether the case would end in conviction or acquittal. If it appears on a reading of the complaint and consideration of the allegations therein, in the light of the statement made on oath that the ingredients of the offence are disclosed, there would be no justification for the High Court to interfere.*

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9. *Having heard the learned Senior Counsel and examined the material on record, we are of the considered view that the High Court ought not to have set aside the order passed by the Trial Court issuing summons to the Respondents. A perusal of the complaint discloses that prima facie, offences that are alleged against the Respondents. The correctness or otherwise of the said allegations has to be decided only in the Trial. At the initial stage of issuance of process it is not open to the Courts to stifle the proceedings by entering into the merits of the contentions made on behalf of the accused. Criminal complaints cannot be quashed only on the ground that the*



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allegations made therein appear to be of a civil nature. If the ingredients of the offence alleged against the accused are prima facie made out in the complaint, the criminal proceeding shall not be interdicted."

5. The above judgment is squarely applicable to the case on hand.

Therefore, this Court cannot conduct a mini trial to go into all the charges levelled against the petitioners. At the stage of FIR, while exercising the powers under Section 482 Cr.P.C., this Court is not required to conduct investigation or trial. This is not the stage where the prosecution / investigation agency is/are required to prove the charges. The allegations are required to be investigated during the investigation and on the basis of the evidence, the investigation agency could file charge sheet. Therefore, this Court has got very limited jurisdiction and is required to consider whether any sufficient material is available to proceed further against the accused for which the accused is required to be tried or not. Further, whether FIR is malicious or not is not required to be considered at this stage.

6. In view of the above discussion, this Court is not inclined to quash the First Information Report. Accordingly, this Criminal Original Petition stands dismissed. However, considering the crime is of the year 2021,



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the respondent / police is directed to complete the investigation in Crime No.334 of 2021 and file final report within a period of twelve weeks from the date of receipt of copy of this Order, before the jurisdiction Magistrate, if not already filed. Consequently, connected miscellaneous petition is closed.

06.10.2023

Index :Yes/No
Internet : Yes/No
Speaking order/non-speaking order
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G.K.ILANTHIRAIYAN, J.



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To

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1. Inspector of Police,
Thellar East Police Station,
Thiruvannamalai District
2. The Public Prosecutor,
High Court of Madras

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