
(2018) 11 BOM CK 0101

In the Bombay High Court

Case No : Criminal Application No. 4353, 4354 Of 2016

Vasim S/O Jamil Shaikh

APPELLANT

Vs

State Of Maharashtra And Anr

RESPONDENT

Date of Decision : 29-11-2018

Acts Referred:

Code of Criminal Procedure, 1973 — Section 482
Indian Penal Code, 1860 — Section 188, 272, 273, 328
General Clauses Act, 1897 — Section 26, 30

Citation : (2018) 11 BOM CK 0101

Hon'ble Judges : T.V. Nalawade, J;Vibha Kankanwadi, J

Bench : Division Bench

Advocate : Chaitanya C. Deshpande, M.M. Nerlikar

Final Decision : Dismissed

Judgement

1. Both the applications are filed under section 482 of Criminal Procedure Code for relief of quashing and setting aside the proceedings. The first

proceeding is filed for quashing of Sessions Case No. 13/2015, which is pending before the learned Additional Sessions Judge, Nandurbar and the said

case is filed for offences punishable under sections 272, 273 and 328 of Indian Penal Code against the applicant. The second proceeding is filed for

quashing of Sessions Case No. 15/2015, which is pending in the same Court and which is filed for similar offences. Both the sides are heard. The

papers of investigation were made available.

2. The facts of the first case show that the F.I.R. was given by Food Safety Officer, Dhule that on 9.4.2014. On the basis of secret information

received by his office when action was taken and search of house of one Khurshida Hamid Shaikh was taken, present applicant Shri. Wasim Shaikh

was present in that house and in the house huge quantity of Pan Masala (Vimal Premium), scented tobacco (V-1), scented tobacco Bagwan 480, scented tobacco Bagwan 69 was found and the value of these articles was more than Rs. 46,500/-. The present applicant admitted that he was the owner and he had kept the articles there. He did not produce the bills of purchase and he did not supply information as to from where he has brought these goods. His place of residence was situated opposite to this place. As in Maharashtra, there is ban to manufacture, possess and sell of these goods, the food articles, these pouches were seized under panchanama by Food Safety Officer and the report was given. The report was given for aforesaid offences punishable under IPC and also for the offences punishable under the Food Safety and Standards Act, 2006 (hereinafter referred to as 'the Act' for short) and they are mentioned in the F.I.R.

3. The F.I.R. from the second proceeding was also filed by the Food Safety Officer of Dhule and he had taken action on 9. 4.2014 on the basis of secret information and he had searched the place of Daulatram Agrawal, applicant of the second proceeding. During search, many pouches, bags containing pouches of articles scented tobacco (V-1), Pan Masala (Vimal containing saffron), Pan Masala (Vimal Premium), paper box of scented tobacco (V-1) were found. The value of these pouches was more than Rs.16,600/-. On inquiry, the applicant did not produce any record in respect of the purchase of these articles. As in Maharashtra the manufacture of these articles, storage and sell, all are prohibited, report was given by Food Safety Officer under aforesaid provisions of IPC and also under the Act.

4. It was argued for the applicants that even if it is presumed that the applicants were found in possession of aforesaid articles and they were in huge quantity, the provisions of sections 272, 273 and 328 of IPC cannot be used. He submitted that it cannot be inferred only because there was prohibition for manufacture, possession and sale of these articles, these articles are injurious to health as mentioned in the aforesaid provisions of IPC.

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

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.

8. Prior to giving of the decision at Principal Seat, at this Bench, 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 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 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

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.â??

10. In view of the facts and circumstances of the present matter and the observations made by this Court in the cases cited supra, this Court holds

that the ratio of the case of Ganesh cited supra cannot be used in favour of the applicants and no relief can be granted to the applicants. In the result,

both the applications stand dismissed. Interim relief is vacated.