

Ganesh Pandurang Jadhao And Anr vs The State Of Maharashtra & Ors on 15 October, 2020

Author: Prasanna B. Varale

Bench: Prasanna B. Varale, R.G. Avachat

Cr.WP.1027.2015+.doc

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL WRIT PETITION NO. 1027 OF 2015

1. Ganesh Pandurang Jadhao,
Aged 27 years, Occupation Driver,
Resident of Gursale, Taluka Khatav,
District Satara
 2. Chand Sahbha Patel,
Aged 43 years, Occupation Driver,
Resident of Sahapur, Taluka Tuljapur,
District Osmanabad
- ...Petitioners

VERSUS

1. The State of Maharashtra,
Through the Principal Secretary,
Food and Drugs Department,
Mantralaya, Mumbai - 32.
 2. The State of Maharashtra,
Through, it's Chief Secretary
 3. The State of Maharashtra,
Through the Principal Secretary,
Home Department, Mantralaya,
Mumbai - 32
 4. Food Safety Officer,
Food and Drugs Administration,
Government of Maharashtra,
Osmanabad, District Osmanabad.
 5. Commissioner of Food Safety,
Food and Drug Administration,
Maharashtra, Mumbai.
- ...Respondents

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ALONG WITH
CRIMINAL WRIT PETITION NO. 1186 OF 2014

Shankar Kanhaiyalal Lalwani,
Aged 28 years, Occupation Business,
Resident of Bungalow No. 10,
Manohar Virar, Shri Sadguru Nagar,
Govind Nagar, Nashik CIDCO Colony,
Nashik, Taluka and District Nashik

...Petitioner

VERSUS

1. The State of Maharashtra,
Through the Police Inspector,
Police Station Dhule, Taluka
and District Dhule.
2. Kishor Atmaram Salunke,
Aged 32 years, Occupation Food
Security Officer, Food and Drug
Administration, Near Water Tank,
Ashok Nagar, Dhule, Taluka
and District Dhule

...Respondents

ALONG WITH
CRIMINAL WRIT PETITION NO. 856 OF 2015

Sk. Sujauddin Sk. Khaliluddin,
Aged 45 years, Occupation Auto Driver,
Resident of SRT 211, Sanathnagar,
P. Hyderabad - 500 018

...Petitioner

VERSUS

1. The State of Maharashtra,
Through the Principal Secretary,
Food and Drugs Department,
Mantralaya, Mumbai - 32.

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2. The State of Maharashtra,
Through, it's Chief Secretary
3. The State of Maharashtra,
Through the Principal Secretary,
Home Department, Mantralaya,
Mumbai - 32
4. Food Safety Officer,
Food and Drugs Administration,
Government of Maharashtra,
Osmanabad, District Osmanabad.
5. Commissioner of Food Safety,
Food and Drug Administration,
Maharashtra, Mumbai.

...Respondents

ALONG WITH
CRIMINAL WRIT PETITION NO. 1183 OF 2015

1. Vijay Shantilal Chopada,
Aged 42 years, Occupation Business,
Resident of Nimgaon - Korhale,
Taluka Rahata, District Ahmednagar
2. Pravin Rameshchandra Ajmera,
Aged 40 years, Occupation Business,
Resident of New Hudco, Savedi,
Taluka and District Ahmednagar
3. Anwar Yusufe Syed,
Aged 38 years, Occupation Business,
Resident of H.No. 4/6/147, Near
Ganesh Mandir, Dalalwadi, Taluka
and District Aurangabad.

...Petitioners

VERSUS

Umesh Malani

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1. The State of Maharashtra,
Through The Home Department,
Mantralaya, Mumbai - 32.
2. The Director General of Police,
Maharashtra State, Mumbai.
3. The Commissioner of Food and Safety,
Maharashtra State, Mumbai. ...Respondents

ALONG WITH
CRIMINAL WRIT PETITION NO. 1368 OF 2015

Sk. Harun Sk. Sagir Ahmad,
Aged 29 years, Occupation Education,
Resident of Pangan Road, Southern
Ambikanagar, Beed, District Beed. ...Petitioner

VERSUS

1. The State of Maharashtra,
Through the Principal Secretary,
Food and Drugs Department,
Mantralaya, Mumbai - 32.
 2. The State of Maharashtra,
Through, it's Chief Secretary.
 3. The State of Maharashtra,
Through the Principal Secretary,
Home Department,
Mantralaya, Mumbai - 32.
- And
- Police Station Officer, Shivajinagar
Police Station, Beed, District Beed
4. Food Safety Officer,
Umesh Malani

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Food and Drugs Administration,
Government of Maharashtra,

Osmanabad, District Osmanabad.

5. Commissioner of Food Safety,
Food and Drug Administration,
Government of Maharashtra,
Mumbai. ...Respondents

ALONG WITH
CRIMINAL APPLICATION NO. 615 OF 2014

Rameshkumar S/o Narendar Tiwari,
Aged 39 years, Occupation Service (Manager),
Resident of, C/o. Onkar Transport
Corporation Maharashtra Vibhag, Office 25,
Motiya Khan, 2nd Floor, Rani Jhasi Road,
New Delhi - 110055. ...Applicant

VERSUS

1. The State of Maharashtra
2. Food Safety Inspector, Dhule,
Resident of Indumati Heights, Near
Datta Mandir, Dhule, District Dhule ...Respondents

ALONG WITH
CRIMINAL APPLICATION NO. 1992 OF 2014

Sayyed Ali Sayyed Hasan,
Aged 42 years, Occupation Business,
Resident of Ekbal Nagar, Purna,
District Parbhani. ...Applicant

VERSUS

1. The State of Maharashtra,
Umesh Malani

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Through the Police Inspector,
Police Station, Purna,
District Parbhani.

2. The Assistant Commissioner,
Food and Drugs Administration,

Parbhani.

...Respondents

ALONG WITH
CRIMINAL APPLICATION NO. 1993 OF 2014

1. Sayyed Hassan Sayyed Subhan,
Aged 85 years, Occupation Nil,
2. Sayyed Ali Sayyed Hasan,
Aged 42 years, Occupation Business,
3. Sayyed Habib Sayyed Hassan,
Aged 30 years, Occupation Business

All Resident of Ekbal Nagar, Purna,
District Parbhani

...Applicants

VERSUS

1. The State of Maharashtra,
Through Police Inspector,
Purna Police Station, Purna,
District Parbhani
2. The Assistant Commissioner,
Food and Drugs Administration,
Parbhani.

...Respondents

ALONG WITH
CRIMINAL APPLICATION NO. 2271 OF 2014

1. Arun S/o. Hanumant Pannde,
Umesh Malani

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Aged 34 years, Occupation Business,
Resident of Chikalthana, Taluka Kannad,
District Aurangabad.

2. Shaikh Bilal Gulam Ghous,
Aged 33 years, Occupation Business,
Resident of Karimnagar, Kannad,
Taluka Kannad, District Aurangabad.

VERSUS

1. The State of Maharashtra,
Through Police Station Kannad,
Taluka Kannad, District Aurangabad.
2. The Food Inspector, Food and Drugs
Administration, Aurangabad. ...Respondents

ALONG WITH
CRIMINAL APPLICATION NO. 6982 OF 2014

Sachin S/o. Jawaharlal Jain,
Aged 30 years, Occupation Business,
Resident of Plot No. 1, Gut No. 77,
Holkar Chowk, Satara Parisar,
Aurangabad, Taluka and District Aurangabad. ...Applicant

VERSUS

The State of Maharashtra ...Respondent

ALONG WITH
CRIMINAL APPLICATION NO. 4395 OF 2015

1. Mehbood Amirsab Tamboli,
Aged 36 years, Occupation Labour,
Resident of Bisti Galli,
Ahmedpur, District Latur.

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2. Nisar Hussain altafhussain Shaikh,
Aged 40 years, Occupation Labour,
Resident of Gadi Galli, Ahmedpur,
District Latur. ...Applicants

VERSUS

1. The State of Maharashtra
2. Nitin Govindra Kenekar,
Aged 33 yrs, Occupation Service,
Resident of Police Station Ahmedpur,
Taluka Ahmedpur, District Latur.

3. V.W. Hadke, Aged 52 years, Occupation Service, Resident of Police Station, Ahmedpur, Taluka Ahmedpur, District Latur. ...Respondents

ALONG WITH
CRIMINAL APPLICATION NO. 4517 OF 2015

1. Johel Ahemad S/o. Jamil Ahemad, Aged 25 years, Occupation Education / Labour, Resident of Mohd. Ali Road, Behind YS Garage, Akola, Taluka and District Akola
2. Mohd. Khalil S/o. Mohd. Salim, Aged 26 years, Occupation Labour, Resident of Old Jaim Mandir, Matka Bazar, Akola. ...Applicants

VERSUS

1. The State of Maharashtra, Through Police Station, Railway Nanded, District Nanded.

Umesh Malani

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2. Pravin S/o. Manoharrao Kale, Aged 45 years, Occupation Service, Resident of C/o. Food Safety Officer, Food and Drugs Administration, Maharashtra State, Shri Nagar, Nanded, District, Nanded. ...Respondents

Mr. R. R. Mantri, Mr N. L. Choudhari, Mr. D.B. Thoke, Mr. R.F. Totla, Mr. P.F. Patni, Mr. C.R. Deshpande, Mr. Z.M. Pathan, Mr. R.P. Adgaonkar, and Mr. R.O. Awasarmal for the Petitioners / Applicants.

Mr. S.B. Yawalkar, APP for the Respondent - State.

CORAM : PRASANNA B. VARALE &
R.G. AVACHAT, JJ.

RESERVED ON : FEBRUARY 20, 2020

PRONOUNCED ON : OCTOBER 15, 2020

ORDER (PER : PRASANNA B. VARALE, J)

1. Heard learned Counsels appearing for the respective parties.
2. It would not be out of place to state here that in all these petitions and applications an identical/common issue is involved, as such, the petitions and applications are tagged together and accordingly are taken up for hearing and disposal. By consent of the parties Criminal Writ Petition No. 1027 of 2015 is taken up as lead petition.
3. Brief facts giving rise to the petitions and applications and Cr.WP.1027.2015+.doc the sequence of facts are briefly stated as below:-
 - a. The police authorities have lodged first information reports against the Petitioners/applicants at respective police stations for commission of offences under the provisions of Food Safety and Standards Act, 2006 (for short "Act of 2006") as well as under the provisions of Sections 272, 273, 188 and 328 of Indian Penal Code, 1860 (for short "IP Code"). It would not be out of place to state here that first information reports are sought to be quashed initially, but subsequently as the charge-sheet was filed in the Competent Court, the proceedings arising out of the charge-sheet are also sought to be quashed by seeking leave and by amending the petitions and applications.
 - b. The sum and substance of the first information report is an information received by the officers of Respondent No. 5 herein about apprehend of certain vehicles, namely, Tempo/Trucks. The driver of the vehicles fled away from the spot and it revealed that those vehicles were carrying large quantity of gunny bags containing the packets of Gutka and Pan masala and the packets of tobacco. The bags were unloaded in the office of Joint Commissioner of Food and Safety Department, Osmanabad. One Mr. S K Shaikh approached the Respondent authorities Cr.WP.1027.2015+.doc disclosing that he is resident of Hyderabad and is possessing State permit for transport. On finding that Mr Shaikh escaped, who was possessing the State permit having the registration number of vehicles apprehended was carrying the articles which were prohibited under the notification issued by the State of Maharashtra. Offences, namely, Sections, 26(2)(4) and 30(2)(a) of the Food Safety and Standards Act, 2006 and under Section 272, 273, 188 and 328 of Indian Penal Code were registered against Mr S K Shaikh.
 - c. Various grounds were raised in the petitions and applications challenging the action of registration of offences. It is submitted that in view of the provisions of Act of 2006 the police authorities could not have registered the offences attracting the provisions of Indian Penal Code. It is also submitted that the action of respondent authorities is arbitrary, without authority of law and untenable.

d. The petitions and applications were extensively heard and by judgment and order dated 04th March, 2016, the Division Bench of this Court (Coram : A V Nirgude and Indira K Jain, JJ) was pleased to allow the writ petitions and applications. The action initiated against the petitioner by the police authorities in the nature of complaints/reports Cr.WP.1027.2015+.doc was declared to be illegal and resultantly, the complaints/reports were quashed.

e. Being aggrieved by the judgment and order in Writ Petition No. 1027 of 2015 (hereinafter referred to as in the matter of Ganesh Pandurang Jadhao and Others Versus The State of Maharashtra and others for the sake of ready reference) and other connected petitions and applications, the State of Maharashtra preferred special leave petition before the Hon'ble the Apex Court.

f. The Apex Court in order dated September 20, 2018 was pleased to observe that :

6. There is no dispute that Section 55 of the FSS Act provides for penalty to be imposed for non compliance of the requirements of the Act, Rules or Regulations or orders issued thereunder by the Food Safety Officer. But, we are afraid that we cannot agree with the conclusion of the High Court that non compliance of the provisions of the Act, Rules or Regulations or orders cannot be subject matter of a prosecution under IPC unless expressly or implidely barred. The High Court is clearly wrong in holding that action can be initiated against defaulters only under Section 55 of FSS Act or proceedings under Cr.WP.1027.2015+.doc Section 68 for adjudication have to be taken. A further error was committed by the High Court in interpreting the scope of Section 188 of the IPC. Section 188 of the IPC does not only cover breach of law and order, the disobedience of which is punishable. Section 188 is attracted even in cases where the act complained of causes or tends to cause danger to human life, healthy or safety as well. We do not agree with the High Court that the prohibitory order of the Commissioner, Food and Safety is not an order contemplated under Chapter X of the IPC. We are also not in a position to accept the findings of the High Court that Section 55 of he FSS Act is the only provision which can be resorted to for non compliance of orders passed under the Act as it is a special enactment.

7. There is no bar to a trial conviction of an offender under two different enactments, but the bar is only to the punishment of the offender twice for the offence. Where an act or an omission constitutes an offence under two enactments, the offender may be prosecuted and punished under either or both enactments but shall not be liable to be punished twice for the same offence. The same set of facts, in conceivable cases, can constitute offences under two different laws. An act or an omission can amount to and constitute an offence under the IPC Cr.WP.1027.2015+.doc and at the same time, an offence under any other law.

The Hon'ble the Apex Court further observed that:

A perusal of the provisions of the FSS Act would make it clear that there is no bar for prosecution under the IPC merely because the provisions in the FSS Act prescribe penalties. We, therefore, set aside the finding of the High Court on the first point.

g. The Hon'ble the Apex Court by order dated September 20, 2018 was pleased to grant leave and the parties were permitted to approach before this Court for considering the contentions afresh which were not argued before this Court. Resultantly, the matters were remitted back to this Court. It was further directed by the Hon'ble the Apex Court that no coercive action was taken against the respondents till the disposal of the petitions and applications.

4. Learned Counsel Mr. Mantri appearing for the petitioners in his detailed submission vehemently submitted that the action initiated against those petitioners/applicants is untenable and only shows the arbitrariness of the authorities. Mr. Mantri invited our attention to the provisions of Act of 2006, notification issued by the competent authority Cr.WP.1027.2015+.doc on 18th July, 2013, the prohibitory order issued by the authority, judgment and order passed by the Division bench of this Court in the matter of Ganesh Pandurang Jadhao and Others Vs. The State of Maharashtra and Ors and also invited our attention to the judgment dated 13th September, 2019 passed by the Division bench (Coram : Shri Ranjit More and Smt. Bharati Dangre, JJ) delivered at principal seat in Criminal Writ Petition No. 3607 of 2019.

5. Learned Counsel Mr Mantri vehemently submitted that the judgment of the Division bench at principal seat in Criminal Writ Petition No. 3607 of 2019 in clear and unambiguous words hold that Section 328 of the IP Code is not at all attracted and lodgment of FIR for the offences under Section 328 and 188 of IP Code against the petitioners is an abuse of process of law. It is then submitted by the learned Counsel Mr Mantri that the Division bench of this Court (Coram : T.V. Nalawade and Smt. Vibha Kankanwadi, JJ.) in Criminal Applications No. 4353 of 2016 and 4354 of 2016 while delivering the order dated 29th November, 2018 though referred earlier judgment and order of this Court dated 04th March, 2018 observed that, observations made cannot be used in the present matter. The Division bench in order Cr.WP.1027.2015+.doc dated 29th November, 2018 also referred to the order of the Apex Court in the matter of State of Maharashtra and Ors V/s. Syed Hassan and Others and ultimately Criminal Applications were dismissed.

6. Mr Mantri vehemently submitted that vide Section 89 of the Act, an overriding effect is given to new Act i.e. Act of 2006 over the general law. It is also submitted by the learned Counsel Mr Mantri that the statement of object and reasons for repealing the old Act by the new Act is mainly the achieve an objective of controlling the trade and introducing / fixing civil or penal liability. Mr Mantri invited our attention to section 30 to submit that as per the provision under Section 30, Commissioner of Food Safety is a competent authority to perform various functions and is the competent authority to issue necessary orders or notifications. The orders issued by the competent authority dated 18th July, 2013 and notification dated 15th July, 2014 are placed on record at annexures C and D respectively.

7. Learned Counsel Mr Mantri then submitted that Act of 2006 provides various compliance, such as, food articles be tested from laboratory so as to arrive at a conclusion as to whether the food article is harmful or substandard or adulterated. It is the submission of learned Cr.WP.1027.2015+.doc Counsel Mr Mantri that the Respondent authorities have not forwarded these food articles for any laboratory test and only on assumptions and presumptions the offences are registered against the petitioners. By inviting our attention to various judgments Mr Mantri submitted that on the backdrop of the judgment delivered at the Principal seat in Writ Petition No. 3607 of 2019, the Division bench of this Court ought not to have dismissed Criminal Applications No. 4353 of 2016 and 4354 of 2016 by order dated 29th November, 2018.

8. It was an attempt of the learned Counsel Mr Mantri to submit before this Court that order dated 29th November, 2018 is per incuriam. In support of his submissions, learned Counsel Mr Mantri placed reliance on the following reported judgments: AIR 1990 SC 261, AIR 2004 SC 754, AIR 2004 SC 2317, AIR 1995 SC 4, AIR 1986 Bombay 308, AIR 2012 SC 1485, 2009 All MR (Cri.) 699, 2018 All MR (Cri.)3014 and 1968 CRI.L.J 281.

Mr Totla, learned Counsel appearing for the Applicants adopted submissions of learned Counsel Mr Mantri.

9. Per contra, learned APP vehemently opposed petitions and applications. It is submitted by learned APP Mr Yawalkar appearing for Cr.WP.1027.2015+.doc the Respondents that there was a need of new law in the changed scenario, as the provisions of old law i.e. The Prevention of Food Adulteration Act, 1954, were not sufficient enough to curb the menace of tobacco products. Learned APP further submitted that the statement of object and reasons would show objective of introducing the new act i.e. to bring out a single statute relating to safety and to provide a systematic and scientific development of food processing industries. Learned APP further submitted that by taking recourse to the provisions of Act of 2006 the competent authority i.e. the Food Safety Commissioner issued order and notification. By inviting our attention to the relevant clauses i.e. D and E of the order dated 18 th July, 2013 also clauses of notification, learned APP vehemently submitted that food articles which were found in the vehicle apprehended were banned articles and there was a prohibitory order for storage, distribution or sale of these banned articles i.e. Gutka or Pan Masala. Learned APP by inviting our attention to the notification dated 15 th July, 2014 submitted that under the scientific research and study it clearly revealed that the tobacco and other products like Gutka or Pan Masala consumption of such articles is seriously harmful and leads to serious ailment like cancer.

Cr.WP.1027.2015+.doc Learned APP then submitted that a scientific studies further revealed that consumption of the banned articles i.e. Gutka or Pan Masala lead to oral sub-mucous fibrosis and there is constant increase in numbers of such patients. Learned APP then submitted that large quantity of prohibited articles was being transported for the purpose of sale. It was further submission of learned APP that as the prohibited articles were to be sold in open market for the consumers and as such the activity of sale and transport was done by the petitioners/applicants within the stipulated period of the order issued by the respondent authority and the notification issued by the State of Maharashtra, as such the petitioners / applicants have committed offence

under Section 188, 328, 272 and 273 of the IP Code.

10. We find considerable merit in the submission of learned APP that competent Authority had issued the order dated 18 th July, 2013 and as per clause G of the order the activities, such as manufacture, storage, distribution or sale of Gutka or Pan Masala, containing either tobacco and/or nicotine or Magnesium Carbonate as ingredients, by whatsoever name these are available in the market and any other products marketed separately to constitute as Gutka or Pan Masala etc. as final products.

Cr.WP.1027.2015+.doc

11. Learned APP further submitted that petitioners / applicants who are drivers were acting under the directions of their master, as such, they were acting as the facilitators and the act committed by the petitioners/applicants was within specified period of 1 year of the prohibitory order. As such, the petitioners have committed an offence under Section 188 of IP Code.

12. As the facts are stated in detailed, it would not be necessary for us to repeat facts. As stated above, in first round of proceedings the Division bench of this Court by order dated 04 th March, 2016 allowed the petitions / applications. The Division bench of this Court in order dated 04th March, 2016 was of the opinion that non compliance of provisions of the act, rules or regulations or orders (Act of 2006) cannot be subject matter of prosecution under IP Code unless expressly or impliedly barred.

13. We find considerable merit in the submissions of Mr Mantri that even by taking the facts on fact on it as referred to in the first information report no offence under Section 328 is made out against the Petitioners. Mr Mantri was also justified on placing heavy reliance on the Cr.WP.1027.2015+.doc judgment of the principal seat. The Division bench at principal seat dealt with all the relevant factors coming in play for attracting Sections 188 and 328 of IP Code. We may refer to these relevant observations of the Division bench at principal seat as under:

16.....

Before we go to the said judgment, it would be apposite for us to reproduce Section 328 of the IPC which reads thus:

"328. Causing hurt by means of poison, etc., with intent to commit an offence.--Whoever administers to or causes to be taken by any person any poison or any stupefying, intoxicating or unwholesome drug, or other thing with intent to cause hurt to such person, or with intent to commit or to facilitate the commission of an offence or knowing it to be likely that he will thereby cause hurt, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine."

17. The Apex Court had an occasion to deal with Section 328 of the IPC in case of Joseph Kurian Philip Jose (supra). The criminal appeals placed before Cr.WP.1027.2015+.doc the Apex Court arose out of a phase of sporadic incidents referred to as "Punalur Liquor Tragedy" where certain persons died and others received injuries due to consumption of poisonous adulterated arrack, ethyl alcohol adulterated with methyl alcohol. Cases under Sections 272 and 328 of the IPC and Section 57(a) of the Kerala Abkari Act were registered. On recording a finding of guilt against A-1 and A-4, the Sessions Court imposed sentence. The remaining accused were found guilty of offences punishable under the Abkari Act and were imposed nominal sentences of fine only. The High Court confirmed the conviction and sentence of A-1 and conviction of A-4 came to be set aside and he was convicted under Section 109 for abetting the offences punishable under Sections 272 and 328 of the IPC. In the backdrop of these facts, the Apex Court was called upon to decide the applicability of Sections 272 and 328 of the IPC against the said Accused. Adulteration of liquor is prohibited under Section 57 of the Abkari Act to a licensed vendor or manufacturer. After making a reference to the provisions of Section 328 of the IPC, the Apex Court observed thus:

"In order to prove offence under Section 328 the prosecution is required to prove that the substance in question was a poison, or any stupefying, intoxicating or unwholesome drug Cr.WP.1027.2015+.doc etc, that the accused administered the substance to the complainant or caused the complainant to take such substance, 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. Now on that basis it has to be seen whether A-1 had any role to play in directly administering to or causing to be taken the poisonous liquor by Sreedharan Pillai deceased, who had purchased and consumed liquor from a retail shop, with intent to cause hurt to him or knowing it to be likely that it would cause hurt to him. This has to be solved remaining cognizant that Sections 272 and 328 are separate offences described in the Indian Penal Code."

11. As it appears both the findings of the Trial Judge as also by the High Court are somewhat vague and confusing. The Trial Court observed, as is evident from the emphasised portion, that it cannot be said that the accused or any of them knew that arrack mixed with small quantity of methyl alcohol (2.64% as found by the chemical analyst) was likely to cause death or serious bodily injury that is likely to cause death. On this finding Cr.WP.1027.2015+.doc applicability of Section 302 or even that of Section 304 I.P.C. has been ruled out. This finding on the fact situation is open to doubt. If the finding be correct that the accused did not have guilty knowledge of causing death or of likelihood of causing death or of serious bodily injury likely to cause death, how could the guilty knowledge stop in that slide or grading not coming down to take within its arms hurt also.

The act of the accused in adulterating liquor per se, as the law then stood sans amendments, would not attract the provision of Section 328 of I.P.C. unless there is positive evidence that A-1

administered the poisoned liquor directly or by Sreedharan, deceased indirectly caused it to be taken by Sreedharan indirectly with the necessary intent and mens rea. This view of the learned Trial Judge as confirmed by the High Court does not appear to us to be sound in the back drop of the death actually occurring. But since it has taken that view it cannot stop short of hurt and so must slip down to a fall downright. Important links in the prosecution case on this particular remain otherwise missing. A-1 would thus have to be acquitted of the charge under Section 328 IPC in carrying out the findings of the High Court to their logical end."

18. The said observations are accordant in the backdrop of the facts of the case which we are dealing. It is held that in order to prove an offence under Section 328 of the IPC, it is essential for the prosecution to prove that Cr.WP.1027.2015+.doc the accused was directly responsible for administering poison etc. or causing it to be taken by any person, through another and it is further clarified that the accused may accomplish the act by himself or by means of another and in either of these situations direct, reliable and cogent evidence is necessary and in the backdrop of this proposition the Apex Court examined whether A-1 had any role to play in directly administering to or causing to be taken the poisonous liquor by the deceased, who had purchased and consumed liquor from a retail shop.

The conviction of A-1 under Section 328 of the IPC was set aside since the prosecution was not been able to prove that it was he who administered the said liquor to the deceased or he caused it to be consumed by the deceased though the case of the prosecution was that the liquor was sold out from the Punalur Depot where from the adulterated sample was taken. The adulterated liquor was sold out at the said Depot by A-1 and, therefore, his conviction under the Abkari Act came to be maintained.

19. This binding precedent has clearly missed the attention by the Division Bench of this High Court while deciding the case on remand from the Apex Court. In case of Vasim Shaikh in dealing with an application under Section 482 of Cr.P.C. for quashing of FIR which Cr.WP.1027.2015+.doc came to be registered when huge quantity of Pan Masala and scented tobacco were seized on search of the house of one Khurshida Hamid Shaikh, the Division Bench while taking note of the case of prosecution that the accused did not produce bills of purchase nor supply any information as to from where he has brought these goods and after noting that the Pan Masala and Gutka contained harmful contents which are possible for causing of disease like cancer, recorded a finding to the following effect.

"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."

The subsequent judgments follow the same path and are relied upon by the learned Public Prosecutor to submit that the issue as to the applicability of Section 328 of the IPC in case of the Petitioners is already put to rest by the aforesaid judgments.

Cr.WP.1027.2015+.doc

20. We must candidly express that the Division Bench has not taken into consideration the judgment of the Apex Court in the case of Joseph Kurian Philip Jose (supra) and, therefore, we do not feel bound by the same as it is per incuriam. Apart from this, it did not go to the root of the issue as to whether offence under Section 328 of the IPC is made out.

21. Section 328 of the IPC finds place in Chapter XVI under caption "Causing hurt by means of poison, etc". The offence under Section 328 IPC is cognizable, non-bailable and non-compoundable. We can analyse the said section by dissecting it into two parts, first part viz.

"whoever administers to" and second part "or causes to be taken by any person". The first part uses the terminology 'Administers to'. The Cambridge Dictionary defines the term 'Administer' to mean to control the operation or arrangement of something and its colloquial meaning is to cause someone to receive something. The Collins Dictionary defines it to mean 'to direct or control or to put into execution; dispense'. The first part of Section 328 of IPC therefore contemplates a direct involvement of a person to be brought within the purview of Section 328 of the IPC and it covers a situation of administration of one of the substance mentioned, to another. The second part of the section Cr.WP.1027.2015+.doc which uses the phraseology 'cause to be taken' employs an indirect method where a person causes one of the substance to be taken by another person. This 'causing' is suggestive of involvement of a third person and, therefore, employs an indirect method. The word 'causes' involves some degree of dominance or, control or some express or positive mandate and necessarily induces an element of some active operation aimed at a result. The word 'cause' which denotes to make something happen is a verb whereas the word 'causing' is present participle of the word 'cause'.

The judgment of the Queens Bench in the case of Shave (supra) relied upon by Mr. Ponda aptly depicts an illustration of 'causing' in the backdrop of the provisions contained in the Motor Vehicles (Construction and Use) Regulations, 1951. The pronouncement came in the backdrop when an owner of a motor vehicle left it at the respondent's garage to have the brakes re-shoed and after the work was completed, the vehicle was delivered to the owner, who drove the respondent back to garage so as to test the brakes himself. Later on, the same day, while the owner was driving the vehicle, one of the front wheels came off and injured a passer-by and the accident occurred since the nuts were not properly fastened by the respondent's Cr.WP.1027.2015+.doc workmen while carrying out the works of the brakes. The respondent was charged with 'unlawfully causing' a vehicle to be used on a road in such condition that danger was caused to a person on the road contrary to the Motor

Vehicles (Construction and Use) Regulations, 1951. The Queens Bench in these facts held that the word 'causes' in the Regulations of 1951 involved some degree of dominance or control over the person who used the vehicle, or some express or positive mandate to him, by or from the person alleged to have caused the user after the respondent had delivered the vehicle back to the owner he ceased to have any control over it; and, therefore, he had not caused it to be used on a road within the meaning of Regulation 101. Lord Goddard, C.J., by referring to the Regulation penned his verdict in the following manner 'if any person uses or causes or permits to be used on any road a motor vehicle or trailer in contravention of or fails to comply with any of the preceding regulations contained in Part III of these regulations, he shall for each offence will be liable to a fine' held that the expressions 'causes or permits' in contrast or juxtaposition 'permit' means giving leave and licence to somebody to use the vehicle, and 'causes' involves a person, who has authority to do so, ordering or directing another person to use it". The distinction is succinctly brought out in the following word of Lord Cr.WP.1027.2015+.doc Goddard, C.J. - "If I allow a friend of mine to use my motor car, I am permitting him to use it. If I tell my chauffeur to bring my car round and drive me to the courts, I am causing the car to be used. There may be a civil liability to indemnify the owner if he is made liable, but if the owner is sued, the garage proprietor would have an action brought against him and part of the damage for not doing the work properly would be the damages the owner is caused to pay to the person injured. But, from the point of view of the criminal law, I do not think the regulation is wide enough to catch this case." The word 'causes' was therefore interpreted to be something involving control or dominance or compulsion.

14. Then the Division Bench at principal seat also considered the applicability and attraction of Section 188 of IP Code and observed that:

23. The argument as regards Section 188 of the IPC advanced by Mr. Ponda is also required to be considered with reference to the use of the phraseology employed in the said section. Section 188 of the IPC reads thus:

188. Disobedience to order duly promulgated by public servant.--Whoever, knowing that, by an order promulgated by a public servant lawfully empowered to Cr.WP.1027.2015+.doc promulgate such order, he is directed to abstain from a certain act, or to take certain order with certain property in his possession or under his management, disobeys such direction, shall, if such disobedience causes or tends to cause obstruction, annoyance or injury, or risk of obstruction, annoyance or injury, to any person lawfully employed, be punished with simple imprisonment for a term which may extend to one month or with fine which may extend to two hundred rupees, or with both; and if such disobedience causes or trends to cause danger to human life, health or safety, or causes or tends to cause a riot or affray, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

Explanation.--It is not necessary that the offender should intend to produce harm, or contemplate his disobedience as likely to produce harm.

It is sufficient that he knows of the order which he disobeys, and that his disobedience produces, or is likely to produce, harm. Illustration An order is promulgated by a public servant lawfully empowered to promulgate such order, directing that a religious procession shall not pass down a certain street. A knowingly disobeys the order, and thereby causes danger of riot. A has committed the offence defined in this section.

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15. In Writ Petition No. 3607 of 2019, the Division bench at Principal seat was pleased to observed that the first information report lodged against the petitioners leads only storage and there is nothing in the first information report attributes any other act to the petitioners i.e. of manufacture, distribution or sale. The Division bench at Principal seat then further observed that disobedience of the promulgated order under Section 188 of the IP Code if it causes or tends to cause danger to human life. The section do not use the term 'likely to cause', conveying that there has to be a positive evidence of causing or tends to cause danger to human life and in absence, Section 188 is not attracted. The Division Bench further observed that it is not in doubt that the tobacco and its products are dangerous to human life and safety. However, mere possession or storage cannot fall within the purview of 'Danger' contemplated under the said section. It is further observed that the good, as long as they remain stored, do not pose any danger. The good will have to be moved beyond the store to be sold.

16. We may state here that, we are in respectful agreement with the view expressed by the Division Bench at principal seat in so far as the applicability of Section 328 of IP Code against the petitioners in the Cr.WP.1027.2015+.doc present matter. We further state that in so far as Section 188 of IP Code is concerned, the facts in the present matter are distinguishable from the facts of the Writ Petition No. 3607/2019. As stated above, in Writ Petition No. 3607/2019 the Division bench at principal seat was pleased to observed that the Writ Petition only refers to the storage of food article Gutka or Pan Masala but in the present matters the first information reports specifically refers to transportation of large quantity of the prohibited articles i.e. Gutka or Pan Masala.

17. It would not stand for either reason or logic that such a large quantity referred to in the first information report i.e. nearly 200 gunny bags of the Gutka or Pan Masala was for the personal consumption of the petitioners. The report further refers to approach of Mr S K Shaikh to the respondent authorities disclosing that he is possessing transport permit and is the claimant of the articles, meaning thereby large quantity of articles loaded in the vehicles was for the sale purposes.

18. At the cost of repetition, we may state that in the present matters period specified in the order dated 18th July, 2013 is of one year from 20th July, 2013 and under notification dated 15th July, 2014 also the period is specified is of one year from 20th July, 2014.

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19. Considering these facts, we are unable to give any benefit to the petitioners/applicants in so far as the protection of Section 188 of the IP Code against them. In so far as the other offences, namely, Sections 272 and 273 of the IP Code is concerned, Sections 272 and 273 both the provisions referred to sale of prohibited articles. As stated above, there is positive material against the petitioners/applicants to show that the large quantity of prohibited articles were being transported from one place to another and statement in first information report on face of it constitutes offences under Sections 188, 272 and 273 of IP Code.

20. In so far as Writ Petition No. 1183 of 2015 is concerned, it is filed under Article 226 of the Constitution of India and general directions have been sought for in prayer clauses B and C. The prayer clauses B and C reads thus:

B) By issuing of appropriate writ, order or direction in the like nature that, it be declared that, the police authorities do not have any power to raid, seized and lodge the any prosecution against the producer/manufacturer, distributor or seller, stockiest, without being a companied by the officer authorized under the Food Safety standards act 2006.

Cr.WP.1027.2015+.doc C) By issuing of appropriate writ, order or direction in the like nature that, authorized officer under the Food Safety standards act 2006 be directed to Act strictly according to the provisions of the Act and not to filed any prosecution, unless confirmed by the appropriate lab that, the sample seized by the authority is ban in Maharashtra under this act.

Though the petitioners have placed on record copy of the first information report dated 05th February, 2013 lodged at Rahuri Police Station and copy of charge-sheet, there are no specific prayers seeking quashment of the same. In other companion petitions wherein quashment is sought for and separate order has been passed.

In the backdrop of above facts, there is no need to pass any order in this Petition. Hence, Writ Petition is disposed of accordingly.

21. On hearing of the learned Counsel appearing for the respective parties and on going through the judgment delivered at the principal seat in Writ Petition No. 3607/2019, we are of the opinion that learned Counsel for the petitioners and applicants made out case for allowing the Writ Petitions and Criminal Applications partly. Hence, we pass the following order:

Cr.WP.1027.2015+.doc :ORDER:

A. Criminal Writ Petitions and Criminal Applications are partly allowed.

B. FIR No. 70/2015 dated 15/5/2015, registered at Osmanabad Rural police station, Osmanabad and subsequent charge-sheet bearing RCC No. 286/2015 pending in the Court of JMFC, Osmanabad is hereby quashed only in respect of offence under Section 328 of Indian Penal Code, 1860 qua the petitioners in Writ Petition No. 1027

of 2015.

C. FIR No. 70/2015 dated 15/5/2015, registered at Osmanabad Rural police station, Osmanabad and subsequent charge-sheet bearing RCC No. 286/2015 pending in the Court of JMFC, Osmanabad is hereby quashed only in respect of offence under Section 328 of Indian Penal Code, 1860 qua the petitioner in Writ Petition No. 856 of 2015.

D. FIR No. 222/2015 dated 26/7/2015, registered at Shivajinagar police station, Beed is hereby quashed only in respect of offence under Section 328 of Indian Penal Code, 1860 qua the petitioner in Writ Petition No. 1368 of 2015.

E. FIR No. 162/2014 dated 19/05/2014, registered at Cr.WP.1027.2015+.doc Taluka Police Station Dhule is hereby quashed only in respect of offence under Section 328 of Indian Penal Code, 1860 qua the petitioner in Writ Petition No. 1186 of 2014.

F. FIR No. 234/2013 dated 03/11/2013, registered at Dhule City Police Station, and subsequent charge-sheet No. 71/2014 (RCC No. 228/2014) pending in the Court of CJM, Dhule is hereby quashed only in respect of offence under Section 328 of Indian Penal Code, 1860 qua the applicant in Criminal Application No. 615 of 2014.

G. FIR No. 65/2014 dated 03/04/2014, registered at Purna Police Station, Purna, Dist. Parbhani, is hereby quashed only in respect of offence under Section 328 of Indian Penal Code, 1860 qua the applicant in Criminal Application No. 1992 of 2014.

H. FIR No. 64/2014 dated 03/04/2014, registered at Purna Police Station, Purna, Dist. Parbhani, is hereby quashed only in respect of offence under Section 328 of Indian Penal Code, 1860 qua the applicant in Criminal Application No. 1993 of 2014.

I. FIR of Crime No. I-267/2014 dated 21/10/2014, registered at M-Waluj Police Station, Aurangabad, is Cr.WP.1027.2015+.doc hereby quashed only in respect of offence under Section 328 of Indian Penal Code, 1860 qua the applicant in Criminal Application No. 6982 of 2014.

J. FIR No. 193/2013 dated 03/04/2014, registered at Police Station Kannad, is hereby quashed only in respect of offence under Section 328 of Indian Penal Code, 1860 qua the applicant in Criminal Application No. 2271 of 2014.

K. Proceedings of Sessions Case No. 14 of 2015 pending before the Ld. Additional Sessions Judge, Ahmedpur is hereby quashed only in respect of offence under Section 328 of Indian Penal Code, 1860 qua the applicant in Criminal Application No. 4395 of 2015.

L. Charge-sheet bearing No. 06 of 2014 arising out of the FIR vide Cr. No. B-1/14 dated 09.01.2014 registered with Police Station Railway, Nanded (Dist. Railway Nagpur) is hereby quashed only in

respect of offence under Section 328 of Indian Penal Code, 1860 qua the applicant in Criminal Application No. 4517 of 2015. M. Respondent authorities are at liberty to proceed against the Petitioners/Applicants for the offences punishable under Sections 188, 272 and 273 of Indian Penal Code and Sections 26 and 30 of the Food Safety and Standards Cr.WP.1027.2015+.doc Act, 2006.

(R. G. AVACHAT, J.) (PRASANNA B. VARALE, J.) At this stage after pronouncement of order, Mr. Yawalkar the learned APP submitted before this Court that as per the information received by him recently the Division Bench order delivered at principal seat in the matter of Anand Ramdhani Chaurasia and Anr Vs. The State of Maharashtra and Ors. (Criminal Writ Petition No. 3607/2019) was the subject matter in a Special Leave Petition (Criminal) Diary No. 8224/2020 preferred before the Hon'ble the Apex Court and an interim order is passed in the said special leave petition. In view of this fact, Mr Yawalkar learned APP prayed for sometime to take appropriate steps and also prayed for an interim order in the nature of stay to this order for a period of 8 weeks.

Considering the oral submission made by the learned APP that above mentioned special leave petition is pending before the Hon'ble the Apex Court and stay has been granted therein, we, therefore, grant stay to this order for a period of 6 weeks only. (R. G. AVACHAT, J.) (PRASANNA B. VARALE, J.)