

# Krishnakumar Thupay vs The Inspector Of Police on 21 June, 2022

**Author: G.Ilangovan**

**Bench: G.Ilangovan**

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 21/06/2022

CORAM:

THE HON'BLE MR JUSTICE G.ILANGOVAN

Crl.O.P.(MD)No.12686 of 2018  
and  
Crl.MP(MD)No.5764 of 2018

Krishnakumar Thupay

: Petitioner/Accused/

Vs.

The Inspector of Police,  
Thilagar Thidal Police Station,  
Madurai City,  
(Crime No.751 of 2017)

: Respondent/Complainant/  
De-facto Complainant

Prayer: Criminal Original Petition  
Section 482 Cr.P.C., to call for the records in PRC No.16  
of 2018 on the file of the Judicial Ma  
Madurai, in Crime No.751 of 2017 on the  
Inspector of Police, Thilagar Thidal  
Madurai and quash the same as illegal.

For Petitioner

: Mr.K.R.Laxman

For Respondent

: Mr.R.Meenakshi Sunda  
Additional Public Pr

O R D E R

This criminal original petition is filed seeking quashment of the case in PRC No.16 of 2018 on the file of the Judicial Magistrate No.2, Madurai. <https://www.mhc.tn.gov.in/judis>

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2.The case of the prosecution in brief:-

On 29/07/2017 at about 11.00 am, when the police party made a search in the shop located within the jurisdiction of the Thilagar Thidal police limit, they found the accused in possession of 16 tins of BABA 120 Power Tobacco, 12 tins of BABA 54 Power tobacco, BABA 160 power tobacco 4 tins, and 2 tins and tobacco pocket ½ kgs were seized and sent to the forensic science laboratory for examination and it was found that it contains nicotine and arecoline. Tobacco substances are dangerous to the human life and consumption.

Based upon which, a case was suo motu registered in Crime No.751 of 2017. After completing the formalities of the investigation, final report has been filed stating that the accused has committed the offences under section 328 IPC and section 24(1) of Cigarette and other Tobacco Products Act, 2003, in PRC No.16 of 2018 and it was taken on file by the Judicial Magistrate No.2, Madurai.

3.Seeking quashment of the same, this petition has been filed mainly on the ground that the allegations mentioned in the final report does not attract the penal provision under section 328 IPC and section 24(1) of the Cigarette and Other Tobacco Products Act, 2003.  
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4.Heard both sides.

5.Even though, an elaborate argument has been advanced by the learned counsel appearing for the petitioner on the basis of several judgments rendered by the various High Courts as well as the Hon'ble Supreme Court, I am of the considered view that after going through the records, hearing the arguments and the latest position of the issue, the matter can be disposed of, on a short premise.

6.For the purpose of better understanding the issue, let us start the discussion on the basis of the judgment rendered by the High Court of Telangana in the case of Kamadhenu Traders Vs. State of Telangana and others [2022(1)ALT 112]. The ill effects of tobacco and tobacco products were felt from time immemorial and various legislations were enacted to control the manufacturing, storing of the tobacco and tobacco products. Originally, during the era of Godawat Pan Masala Products I.P Vs. Union of India and others (Appeal civil) 4674 of 2004, regarding the definition of food under the provisions of Prevention of Food Adulteration Act, 1954 was under consideration.  
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7.The Hon'ble Supreme Court, on the basis of the definition under the provision of the Prohibition of Food Adulteration Act, found that the tobacco and tobacco products did not fit into the definition. But later, new Act has been brought in 2006 namely the Food Safety and Standard Act, 2006, wherein entirely new dimensions have been given to the definition of food and now, whether the tobacco and tobacco products will fit into the definition is under consideration by the Hon'ble

Supreme Court, which is admitted by both sides during the course of arguments.

8.The learned counsel appearing for the petitioner would submit if the court directs, he can wait till the disposal of the matter by the Hon'ble Supreme Court. A similar contention has been raised before the Telungana High Court over the issue. But however, the matter is of the year 2018 and the offence is of the year 2017. Five years lapsed and there is no point in keeping the matter pending, when the process of committal is underway. This court directed the parties to get along with hearing. On that ground, it was heard.

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9.Now the position as to whether the tobacco and the tobacco products will fit under the definition of food, even though under consideration of the Hon'ble Supreme Court, it has been held that more than one occasions, it is fit into the definition as defined under the above said Act. Moreover, the contention on the side of the petitioner that when a specific special Act has been enacted to deal with the tobacco and tobacco products namely the Cigarette and other tobacco products, prohibition of advertisement regarding trade and commerce, the Cigarettes and Other Tobacco Products Act 2003 has been brought into inexistence, then the provisions of Food Safety and Standard Act, 2006 does not apply and has also been negated by various courts, including by a Division Bench of this court, which was subsequently referred by a single Judge of this court in the case of Jeetmal Ramesh Kumar Vs. The Commissioner, Food Safety and Drug Administration Department, Chennai in WP(MD)No.778 of 2019, dated 14/02/2019.

10.So we need not go into the controversy now, since the matter has been seized by the Hon'ble Supreme Court. As on date, the judgment rendered by this court and several <https://www.mhc.tn.gov.in/judis> CrI.O.P.(MD)No.12686 of 2018 other courts stands. So, we can proceed on that basis. Even though the issue, that has been raised by the petitioner is not directly connected with the crime, now alleged against the petitioner, the learned counsel appearing for the petitioner wanted to stress upon the fact to the effect that since Act has been brought into force, the Food Safety and Standard Act, 2006, as mentioned earlier, will not apply, but we need not go to the controversy now, especially in this matter.

11.Before we go into the main issue, the back ground must also be taken into account again. The reason being that the Hon'ble Supreme Court in the case of Ankur Gutka Vs. Indian Asthma Care Society (SLP No.16308 of 2007, dated 07/12/2010) has directed the Government of India to make a study with regard to the harmful effect or human life by the use of the Gutka, tobacco, panmasala and similar articles. In pursuance of the above said direction, a detailed study was undertaken and a report was also filed before the Hon'ble Supreme Court.

12.On going through the report, the Hon'ble Supreme Court, by order, dated 03/04/2013 in the above said recommendation, directed the Health Department of the <https://www.mhc.tn.gov.in/judis> CrI.O.P.(MD)No.12686 of 2018 States and Union Territories, to file affidavits with regard to the compliance of the ban imposed on manufacturing and sale of gutka and panmasala with tobacco and/or nicotine. In pursuance of the above said direction, several State

Governments issued notifications, orders under the provisions of the Food Safety and Standard Act, 2006. The notification, that was issued by the Government of Telungana in compliance of the above said order was under challenge in Kamathenu Traders case. Here, in Tamil Nadu, in No.VI(1)155(a)/2017, a similar notification was issued on 23/05/2017, banning and prohibiting the manufacture, storage, transport, distribution or sale of Gutkha, Panmasala, Chewing Tobacco, containing tobacco or nicotine as ingredients for a period of one year with effect from 23rd May 2017. This is the continuation of the ban order. It is seen that on the date of the inspection and seizure and registration of the case, the ban was in force.

13.The learned counsel appearing for the petitioner would submit that he was issued with the licence by the competent authority under the provisions of Food Safety and Standard Act, 2006 to run a pan centre namely Banarasi Pan Centre originally. It started in 2012 and periodically <https://www.mhc.tn.gov.in/judis> CrI.O.P.(MD)No.12686 of 2018 licence has been renewed. But on the date of the inspection and seizure, the licence was not in force, because it ended in March 2017 and in May 2017, the ban order came into force and technically, the storage of tobacco become illegal. So the offence under the provisions of the COTPA, 2003, will be attracted and there can be no second opinion on that. What provision attracts to the facts and circumstances is for the committal court or for the trial court to frame proper charge, even though the charge mentioned in the final report, is supported by documentary evidence or statement of witnesses. So, on that ground, the proceedings cannot be quashed.

14.Now the only point that got to be decided is whether section 328 IPC can be made applicable.

15.Section 328 IPC is extracted hereunder:-

“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 <https://www.mhc.tn.gov.in/judis> CrI.O.P.(MD)No.12686 of 2018 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.”

16.The learned counsel appearing for the petitioner would submit that at no stretch of imagination, storage of the tobacco product will attract the ingredients of the offence under section 328 IPC. For that purpose, he would rely upon several judgments.

17.In Criminal Writ Petition No.1027 of 2015, dated 04/03/2016 in the High Court of Judicature at Bombay Bench at Aurangabad in the case of Ganesh Pandurang Jadhao and another vs. The State of Maharashtra, through the Principal Secretary, Food & Drugs Department, Mantalaya, Mumbai-323 and others, wherein a similar question arose. The subject matter was Gutka and panmasala. The court held that cutka and panmasala are not intoxicating drugs. So, section 328 IPC cannot be made applicable.

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18.The next judgment, which has been cited in the order in Criminal Writ Petition No.3607 of 2019, dated 13.09.2019 on the file of the High Court at Bombay (Anand Ramdhani Chaurasi and two another Vs. The State of Maharashtra and three others, wherein, it has been held on a similar line that storage will not attract the ingredients of section 328 IPC. It has been held that mere storage without any further action will not fit into the definition of the administering or causing to be taken. It was on the line that it was only an attempt to sell, which is not punishable under the provisions of the Act. There is no sale also.

19.On a similar line, the Bombay High Court has also held in Nilesh Vs. State of Maharashtra in Criminal Application (APL) No.442 of 2020 is also on the very same line.

20.Similarly, the High Court of Telangana, in Criminal Petition No.152 of 2020, dated 15th July 2021 in the case of Mr.Mohd. Jameel Ahamed Vs. The State of Telangana, represented by Public Prosecutor, High Court of Telangana, Hyderabad and another, was also dealing with the similar issue.

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21.On the basis of the allegations mentioned in the complaint, it was held that it does not attract the ingredients of section 328 IPC.

22.On the basis of these judgments, the learned counsel appearing for the petitioner wants this court also adopt the very same approach for quashing the proceedings. So the question, which arises for consideration is whether the ingredients of section 328 IPC are attracted now.

23.As mentioned above, the petitioner was found in possession of banned products, which was intended for sale, because he obtained licence for running a panmalasa centre. So the argument that it was only stored and no other attempt was made cannot be accepted.

24.In this context, the observation of the Hon'ble Supreme Court in Ankur Gutka Vs. Indian Asthma Care Society (SLP No.16308 of 2007), was brought to the notice for the purpose of cumulative regulations, the vendors started selling the panmasala products separately and tobacco products were started selling separately. So that both can be mixed before use. On finding that this short cut method to overcome the ban products, the above said circular was issued.

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25.In obedience of the order passed by the Hon'ble Supreme Court, it was also taken into account at this stage.

26.I am unable to agree with the definition to the effect that the word 'cause to be taken' must be given a narrow interpretation. I am of the considered view that the phrase 'cause to be taken' must

be taken a proper meaning keeping in mind the offence, which is sought to be punished.

27. It is the another contention on the part of the petitioner that absolutely, there is no intention on the part of the petitioner to cause hurt to the purchaser. But here, it may not be the proper approach to the issue. Here absolutely, there is no intention on the part of the petitioner to harm the purchaser. But in view of the ban order imposed by the Government, he knew that because of the harmful effect, it has been banned. So, if it is sold in the open market, technically it will cause hurt. Such sort of narrow interpretation should not be given in such offences and matters. In short, exhibiting the ban products in the panmasala shop is sufficient enough to attract the definition of phrase 'cause to be taken'. <https://www.mhc.tn.gov.in/judis> CrI.O.P.(MD)No.12686 of 2018

28. A single judge of this court had an occasion to consider a similar issue, in that case, a lorry was intercepted, which was found in possession of banded articles like tobacco and panmasala and cases were registered for the offences under sections 273 and 328 of IPC r/w 7 and 20(1) of COTPA Act, 2003. The petitioner challenged the registration of the case on very many grounds and sought quashment of the investigation. That was negatived by this court, after elaborate discussion, wherein the harmful effect of tobacco was also considered, in the light of several judgments. It arrived at the conclusion that the tobacco products are harmful, which fit into the definition of unsafe foods.

29. With regard to section 328 IPC, para 29 is relevant:-

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

<https://www.mhc.tn.gov.in/judis> CrI.O.P.(MD)No.12686 of 2018 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 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 <https://www.mhc.tn.gov.in/judis> CrI.O.P.(MD)No.12686 of 2018 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 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.

30. So in the light of the above said, I am of the considered view that this is not a fittest case to quash the criminal proceedings.

31. In the result, this criminal original petition is dismissed. But however the petitioner is at liberty to make out the defences that are available factually before the trial court at the time of framing of charge or trial. The trial court may also frame proper charge on the basis of the materials that have been collected by the Investigating <https://www.mhc.tn.gov.in/judis> CrI.O.P.(MD)No.12686 of 2018 Agency. Consequently, connected Miscellaneous Petition is closed.

32. After passing this order, the learned counsel appearing for the petitioner would submit that he may be permitted to re-argue the case. For that, this court has expressed that such rehearing is not permissible. But he was directed to go through the order and inform the court about his choice or option.

33. After going through the orders, the learned counsel appearing for the petitioner would submit that the observation of this court may affect his defence during the trial process, so he may be permitted to withdraw this petition. Accordingly, permission is granted and this criminal petition is dismissed as withdrawn.

21.06.2022 Internet:Yes/No Index:Yes/No er <https://www.mhc.tn.gov.in/judis> Crl.O.P.(MD)No.12686 of 2018 Note: In view of the present lock down owing to COVID-19 pandemic, a web copy of the order may be utilized for official purposes, but, ensuring that the copy of the order that is presented is the correct copy, shall be the responsibility of the advocate/litigant concerned.

<https://www.mhc.tn.gov.in/judis> Crl.O.P.(MD)No.12686 of 2018 To,

- 1.The Judicial Magistrate No.2, Madurai.
- 2.The Inspector of Police, Thilagar Thidal Police Station, Madurai City,
- 3.The Additional Public Prosecutor, Madurai Bench of Madras High Court, Madurai.

<https://www.mhc.tn.gov.in/judis> Crl.O.P.(MD)No.12686 of 2018 G.ILANGO VAN,J., er Crl.O.P.(MD)No.12686 of 2018 21/06/2022 <https://www.mhc.tn.gov.in/judis>