IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH AT NAGPUR

CRIMINAL REVISION APPLICATION NO.22/2026

APPLICANTS :

1. Raju @ Rajesh S/o Narayan Yemulwar, aged about 40 years, occ- business, R/o Tatra Road, Near Netaji Subhash Chandra Boss Chowk, Ward No.14, Wani, Distt. Yavatmal.

2. Kushal @ Sunny S/o Girdharbahi Patel, aged about 40 years, occ - business, R/o house no.44, Wamnghat road, Ward No.20, Anne Chowk, Wani, Distt. Yavatmal.

...VERSUS...

RESPONDENTS :

1. State of Maharashtra, Through Police Station Officer/API, Wani Police Station, Distt. Yavatmal.

2. Food Safety Commissioner, Food & Drug Department, Maharashtra (M.S.)

(Amendment is carried out as per Hon'ble Court's order dt. 24/7/26)

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Mr. S.A. Mohta, Advocate for applicants
Mr. A.M. Ghogre, App for respondents

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CORAM : MEHROZ K. PATHAN, J.

Date of reserving the judgment : 25/08/2026
Date of pronouncing the judgment : 08/09/2026

J U D G M E N T :

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1. Heard. Admit. Taken up for final disposal with the consent of the learned Counsel for the rival parties.

2. The applicant has approached this Court challenging the order dated 28/01/2026, passed by the learned Additional Sessions Judge, Kelapur below Exh.16 in Sessions Case No.29/2021, thereby rejecting application for discharge filed by the applicants in Crime No.907/2020 registered with Police Station Wani for the offence punishable under Sections 188, 269, 270, 271, 272, 273 and 328 of Indian Penal Code (IPC) along with Section 130 and 177 of the Motor Vehicles Act, 1988.

3. The case of the prosecution is that the complainant received information and when he was on patrolling duty. He searched auto bearing No.MH-29-6843 and found contraband articles i.e. tobacco in the possession of applicant No.1. At that time, the applicant No.1 disclosed that the contraband articles belong to the applicant No.2 and therefore, against both the applicants, present offence was registered.

4. Mr. Mohta, learned Counsel for the applicants submits that what was seized during the raid conducted by the Authority was not a substance, which was prohibited vide notification issued by the Commissioner of Food Safety under Section 30 of the Food Safety and Standards Act, 2006 (for the sake of brevity “FSS Act, 2006”) and therefore, the offences as alleged are not made out against the present

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applicants. It is the submission of the learned Counsel for the applicants that the contraband, which was seized, has turned out to be a smoking tobacco. Notification issued by the Commissioner of Food Safety dated 15/07/2020 under Section 30 of the FSS Act, 2006 prohibits the manufacture, storage, distribution, transport and sale of tobacco and areca nut (beetelnut) which is either flavoured, scented or mixed with any of the said additives and whether going by the name or form of gutka, pan masala, flavoured/scented tobacco flavoured/scented supari, manufactured chewing tobacco with additives, kharra, or otherwise by whatsoever name called, whether packaged or unpackaged and/or sold as one product, or though packaged as separate products, sold distributed in such a manner so as to easily facilitate mixing by the consumer for its consumption.

5. Learned Counsel for the applicants further submits that '**smoking tobacco'** does not fall within the prohibited substance as mentioned hereinabove under the notification under Section 30 of the FSS Act, 2006 and as such offences invoked against the applicants cannot be said to be made out. During hearing of the said application for discharge, the Food and Drugs Inspector had produced on record communication dated 03/05/2021, informing the Police Station Authority that the smoking tobacco does not fall within the prohibited substances under the notification and as such, it is not possible to take

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action for violation of the notification under the FSS Act, 2006. Despite of such communication record pointed out to the learned Trial Court, the Trial Court, without considering the said communication dated 03/05/2021, has passed the impugned order, rejecting the discharge application even though the smoking tobacco does not fall within the definition of food, as defined under the FSS Act, 2006. He further relies upon the order of the Division Bench of this Court dated 06/04/2026, wherein an affidavit was filed on behalf of the Joint Secretary, Medical Education and Drugs Department, Mantralaya Mumbai, thereby informing that the Food Safety and Standards Authority of India vide communication dated 23/03/2026 informed that the flavoured Hukkah tobacco does not fall within the purview of food under the FSS Act, 2006, hence, coercive action under the said Act in respect of the petitioners therein, would not be warranted.

6. Learned Counsel for the applicants further relies upon the judgment of the Division Bench of this Court in the case of ***HLA Shwe and others Vs. State of Maharashtra through Police Station, Tahsil Nagpur***, reported in ***2020 DGLS (Bom.) 316*** to submit that the provisions of Section 188 of IPC are also not made out against the present applicants. Learned Counsel submits that the applicants were not only charge-sheeted for violation of order passed by the Competent Authority under Section 188 of IPC but were also charge-sheeted for violating the

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notification issued by the Commissioner for Food and Safety under Section 30 of the FSS Act, 2006. The applicants were also charge-sheeted for violation of the Covid lock-down orders issued by the Collector, Nagpur during the lock-down period, which covers the period of the date of incident i.e. 27/10/2020. The learned Counsel, therefore, relies upon the aforesaid judgment in the case of ***HLA Shwe*** (supra) to submit that no prosecution could have been allowed against the applicants under Section 188 of IPC by lodging an FIR, as Section 188 of IPC requires that a public servant before whom such offence is committed should file a complaint before the jurisdictional Magistrate either orally or in writing and registration of an FIR for offence under Section 188 of IPC is not permitted in law at the instance of police.

7. The learned Counsel for the applicants further submits that the learned Trial Court has failed to take into consideration the aforesaid aspects, which goes to the root of the matter and decided the application of discharge mechanically without any reasoning and application of mind to the points raised therein. The application filed by the applicants has also raised a ground that the Chemical Analyzer's report itself shows that the alleged contraband seized from the possession of the co-accused is a smoking tobacco, for which no offence can be made out. The applicants, thus, pray for discharge of the applicants from the aforesaid crime as no offences can be said to have been made out. The impugned

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order may be quashed and set aside, thereby discharging the applicants from the aforesaid offences.

8. As against this, Mr. Ghogre the learned Additional Public Prosecutor for the respondents/State strongly opposes the application on the ground that the applicants are not only prosecuted for violation of the order passed by the Competent Authority under Section 30 of the FSS Act, 2006, the applicants are also prosecuted for violation of the Covid lock-down orders, issued by the Collector, Nagpur under the National Disaster Management Act, 2005 and the Epidemic Diseases Act, 1897. The learned Additional Public Prosecutor further submits that the said fact was taken into consideration by the learned Trial Court while deciding the discharge application. The learned Trial Court has also taken note of the Chemical Analyzer's report dated 03/11/2020, issued by the District Public Health Services, Amravati and after consideration of the same, it was found by the learned Trial Court that there is sufficient evidence to proceed against the accused. The impugned order passed by the learned Trial Court clearly reflects the application of mind to the issues raised therein and the consideration of the documents submitted along with the charge-sheet. The impugned order is just and proper and is thus liable to be maintained. The Criminal Revision Application is devoid of substance and merit and is liable to be rejected.

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9. I have gone through the charge-sheet filed by the prosecution in the present crime. Perusal of the charge-sheet shows that the applicants are being prosecuted for the offences punishable under Sections 188, 269, 270, 271, 272, 273, 328 of Indian Penal Code along with Section 130 and 177 of the Motor Vehicles Act, 1988. Perusal of the offences under Section 269 to 271 of IPC would show that the same are the offences affecting the public health, safety, convenience, decency and morals. Section 269 of IPC prohibits negligent act likely to spread infection of disease dangerous to life, Section 270 pertains to malignant act likely to spread infection of disease dangerous to life and Section 271 pertains to disobedience to quarantine rule. All offences are non-cognizable offences. Offence under Section 272 of IPC pertains to adulteration of food or drink intended for sale. Section 273 refers to sale of noxious food or drink.

10. The aforesaid offences would necessarily require to first establish that the contraband seized from the possession of the accused persons falls under the category of food, as defined under the FSS Act, 2006. The Chemical Analyzer's report dated 03/11/2020 issued by the District Public Health Laboratory, Amravati shows that the sample seized from the possession i.e. Mazza 108, Hukkah Shisha tobacco is a '**smoking tobacco'** and not a food for edible purpose. The communication dated 03/05/2021 brought on record by the Food and Drugs Commissioner,,

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Yavatmal, upon a notice issued by the District and Sessions Court, Kelapur dated 20/07/2024, also shows that the sample seized from the possession of accused persons is a smoking tobacco and not food for edible purpose and as such, action and prosecution under the FSS Act, 2006 cannot be initiated against the accused persons. The judgment relied upon by the learned Counsel for the applicant in the case of ***SOEX India Pvt. Ltd Vs. State of Maharashtra and another***, dated 06/04/2026, passed in ***Writ Petition No.1204/2026*** by the Principal Seat of the Bombay High Court also shows that the Food Safety and Standards Authority of India had submitted a communication dated 23/03/2026 indicating that the flavoured Hukkah tobacco does not fall within the purview of food under the Food Safety and Standards Act, 2006.

The affidavit filed by the Joint Secretary, Medical Education and Drugs Department, Mantralaya, Mumbai dated 02/04/2026 reads as under :-

> "*5. I say and submit that, in light of the clarification issued by the Food Safety and Standards Authority of India (FSSAI) vide communication dated 23.03.2026, indicating that flavoured hookah tobacco does not fall within the purview of "food" under the Food Safety and Standards Act, 2006, it is submitted that continuation of coercive action under the said Act in respect of the Petitioners' products or similarly situated manufacturers/exporters would not be warranted. Accordingly, no such actions are required to be pursued under the Food Safety*

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*and Standards Act, 2006, in respect of such products as per the specific clarification received from FSSAI dated 23.03.2026."*

The notification dated 15/07/2020, relied upon by the prosecution for violation of order passed by the Competent Authority to prosecute the applicants under Section 188 of IPC, also does not show that the '**smoking tobacco'** falls within the prohibited items, as mentioned in the notification, issued by the State of Maharashtra under Section 30 of the FSS Act, 2006. The communication shows that the smoking tobacco falls under the Cigarettes and Other Tobacco Products Act (COPTA), 2003. However, no offence under the said Act has been proposed in the present charge-sheet, neither any prosecution appears to have been launched by the Food Safety Officer under the COPTA, 2003 against the applicants. The impugned order nowhere takes into consideration the aforesaid aspects, which goes to the root of the matter.

11. The Hon'ble Supreme Court in the case of ***Devendra Kumar Vs. State (NCT of Delhi) and another***, reported in ***2025 DGLS (SC) 1096*** was pleased to observe that the procedure contemplated under Section 195 of the Code of Criminal Procedure has to be followed for an offence to be made out for prosecuting a person under Section 188 of IPC. Section 195 (1) (a) (i) of the Code of Criminal Procedure bars the Court from taking cognizance of any offence punishable under Sections 172 to

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188 respectively of the I.P.C., unless there is a written complaint by the public servant concerned or his administrative superior for voluntarily obstructing the public servant from discharge of his public function. Without a complaint from the aforesaid persons, the Court would lack competence to take cognizance in certain types of offences enumerated therein.

12. Thus, the aforesaid observations of the Hon'ble Supreme Court would thus make it clear that for taking cognizance of an offence under Section 188 of IPC, the written complaint on the part of the public servant concerned or his administrative superior for voluntarily obstructing the public servant from discharge of his public function would be necessary. Without written complaint of the public servant, the cognizance of offence under Section 188 of IPC cannot be taken by the concerned Court.

13. Insofar as the offence under Section 328 of IPC is concerned, a perusal of the aforesaid section would itself suggest that 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 is necessary to be established. In the present case, offence under Section 328 of IPC cannot be said to be established

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as the substance which is found in the possession of accused persons does not fall under the category of food and also does not find place in the prohibited substances in the notification issued under Section 30 of the FSS Act, 2006 by the Commissioner of Food Safety dated 15/07/2020. Affidavit filed by the Food Safety and Standards of India before the Division Bench at the Principal Seat at Bombay High Court also clarifies that the flavoured Hukkah tobacco does not fall within the definition of food as defined under the FSS Act, 2006 and as such continuation of coercive action under the said Act would not be warranted, would itself suggests that the flavoured Hukkah tobacco like smoking tobacco in the present case would not satisfy the definition of the stupefying substance or other thing as defined under Section 328 of IPC. The **'smoking tobacco'** is not prohibited by the notification issued under the FSS Act, 2006 and as such offence under Section 328 of IPC cannot be said to be made out against the applicants.

14. Since the aforesaid cognizable offences are not made out against the applicants, other offences under the Motor Vehicles Act as well as offences under Section 269 to 271 of IPC mentioned earlier are all non-cognizable offences and cannot be prosecuted without permission of the Magistrate. Since the other offences are held to be not *prima facie* made out against the applicants, non-cognizable offences would not be permissible, except without obtaining permission of the

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learned Magistrate, as provided under Section 155 of the Code of Criminal Procedure. In my opinion, therefore, the impugned order, ignoring these aspects of the matter has mechanically decided the discharge application only on the ground that the applicants were directly named in the First Information Report. The impugned order though takes into consideration the Chemical Analyzer's report as well as the letter issued by the Food Safety Officer that the **'smoking tobacco'** does not fall within the definition of edible food, however, fails to deliberate upon the submissions made by the applicants and hence there is patent error committed by the learned Trial Court in rejecting the application for discharge filed by the applicants, which needs to be corrected by this Court under its revisional jurisdiction. A case is made out for interference of this Court under the revisional jurisdiction. Hence, I am inclined to pass the following order : -

**O R D E R**

(i) Criminal Revision Application is allowed.

(ii) The impugned order dated 28/01/2026 passed by the Additional Sessions Judge, Kelapur below Exh. 16 in Sessions Case No.29/2021 is hereby quashed and set aside.

(iii) The applicants are discharged from the offences punishable under Sections 188, 269, 270, 271, 272, 273, 328 of Indian Penal Code (IPC) along with Section 130 and 177 of the Motor

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Vehicles Act, 1988 in Crime No.907/2020 registered with Police Station Officer, Police Station, Wani.

(iv) Criminal Revision Application stands disposed off.

(MEHROZ K. PATHAN, J.)

Wadkar

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