

MANU/GJ/0504/2011

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

Special Criminal Application Nos. 1635, 1636, 1670, 2600, 2601 and 2602 of 2010

Decided On: 12.05.2011

Appellants: **Abdulkadar Mohamad Azam Sheikh**

Vs.

Respondent: **State of Gujarat and 2 Ors.**

Hon'ble Judges/Coram:

M.R. Shah, J.

Counsels:

For Appellant/Petitioner/Plaintiff: N.A. Shaikh, Adv.

For Respondents/Defendant: K.P. Raval, Addl. Public Prosecutor for Respondent 1, M.R. Kaushal D. Pandya, Adv. for Respondent 2 and R.J. Goswami, Adv. for Respondent 3

Case Note:

Constitution - Custody of Birds - Ligality of - Whether birds had a right to live freely, be kept in illegal custody - Held, wild life in country had already been considerably destroyed - However it established that illegal trade and commerce in skins and other body parts of tigers had done even much greater decimation - It was fundamental right of bird to live freely in open sky - It was duty of every citizen to see that there was no unnecessary pain to any animal or bird - Manner in which birds kept in small cages, their wings were cut - Considering facts and conduct of claimants and keeping birds in cages after cutting their wings, cutting their tails, prima facie offence of atrocity on animal has been made out - Most of birds were scheduled birds and admittedly respective claimants who were claiming custody of birds, had no license - Therefore custody cannot be handed over to them - Application of claimants dismissed and directed claimants to deposit amount towards cost of maintenance of birds

JUDGMENT

M.R. Shah, J.

1. As common question of facts and law arise in this group of petitions, and as such they can be said to be cross petitions, they are heard, decided and disposed of by this common judgment and order.

2. With the consent of the learned advocates appearing on behalf of the respective parties, all these petitions are heard finally.

3. Short question which is posed for consideration of this Court is, Whether do the birds have a right to live freely and/or Whether can birds be kept in illegal custody/cages and/or whether by keeping the birds in cages do their right to live freely is violated?

4. Facts leading to the present Special Criminal Applications, in nutshell, are as

under:

That a criminal complaint has been lodged against the respective Petitioner of Special Criminal Application Nos. 1635, 1635 and 1670 of 2010 with Athwa Police Station, Surat being CR No. II-131 of 2010 for the offences punishable under Sections 11(1)(a)(e)(m)(k) of Prevention of Cruelty to Animals Act, 1960 as well as under Section 12 of the Wildlife Protection Act, 1972 alleging inter-alia that 494 birds/animals have been found from the custody of the respective accused which were kept in different small cages and that their wings were cut, their tails were cut and cello-tape was put on their wings, there were rings on their legs. Therefore, it is alleged that there was atrocity on the said birds. It is alleged that the respective accused are not having any licence or permit to keep the birds/animals and/or to sell them. That all 494 birds/animals were taken in the custody by the police and the same were sent to one Non-Governmental Organization ("NGO" for short) namely "Live and Let Live", Surat for their treatment. That from the different cages, number of parrots, pigeons, love birds, sparrows, rabbit, mouse, dog etc. were found and the Petitioners - accused were selling the said birds in the open market. That the respective Petitioners - accused from whose custody birds/animals were seized, submitted applications under Section 451 of the Code of Criminal Procedure for interim custody of the said birds/animals and the learned trial Court i.e. Third Additional Senior Civil Judge and Additional Chief Judicial Magistrate, Surat dismissed the said applications, after hearing the parties and considering the report of the Wildlife Protection Officer, and directed that the muddamal birds/animals be enlarged free in the air/sky. Being aggrieved by and dissatisfied with the orders passed by the learned trial Court in application under Section 451 of the Code of Criminal Procedure the respective Petitioner - original accused from whom muddamal birds/animals were seized preferred Revision Application Nos. 230, 231 and 233 of 2010 before the learned Sessions Court under Section 397 of the Code of Criminal Procedure and the learned 4th Additional Sessions Judge, Surat by the impugned orders dtd.10/8/2010 has partly allowed the said Revision Applications quashing and setting aside the order passed by the learned trial Court by which the learned trial Court directed that the birds be enlarged free in the air/sky, however, rejected the applications of the aforesaid revisionist - original accused of handing over the custody of the birds/animals to them and observed that it will be open for the learned trial Court to pass appropriate order to give custody of the birds to the voluntary organizations and pass appropriate order with respect to expenditure for maintaining them. Being aggrieved by and dissatisfied with the orders passed by the learned Additional Sessions Judge in Revision Application Nos. 230, 231 and 233 of 2010 dtd.10/8/2010, the Petitioners - original accused/applicants have preferred Special Criminal Application Nos. 1635, 1636 and 1670 of 2010. It appears that thereafter pursuant to the order passed by the Sessions Court in the aforesaid Revision Applications, the learned trial Court has passed further order dtd.17/9/2010 directing the respective applicants - accused to deposit cost of Rs. 1,05,290 in the Court of for payment to Beauty without Brutality Organization, Surat, with whom custody of the birds is". By way of amendment, the aforesaid order is also challenged in the aforesaid Special Criminal Application Nos. 1635, 1636 and 1670 of 2010.

5 . Being aggrieved by and dissatisfied with the impugned order passed by the

Sessions Court dtd.16/8/2010 in Revision Application Nos. 230, 231 and 233 of 2010. in so far as quashing and setting aside the order passed by the learned trial Court by which the learned Additional Chief Judicial Magistrate directed to enlarge the birds free in the sky/air, the activist - original complainant has preferred the aforesaid Special Criminal Application Nos. 2600, 2601, 2602 of 2010, for appropriate order enlarging the birds free in the open sky and to restore the order passed by the learned trial Court.

6. Mr. N.A. Shaikh, learned advocate appearing on behalf of the original applicants - accused from whom birds/animals have been seized, has vehemently submitted that both the Courts below have materially erred in rejecting the applications of the respective applicants - original revisionists for handing over the muddamal birds/animals to them.

6.1. Mr. N.A. Shaikh, learned advocate appearing on behalf of the original applicants - accused has vehemently submitted that as such the respective Petitioners - original applicants/accused are dealing in the birds and other pet animals like parrots, pigeon, love birds, sparrows, rabbit, mouse, dog etc. in the city of Surat since long and they are never restrained from doing their business.

6.2. Mr. N.A. Shaikh, learned advocate appearing on behalf of the original applicants - accused has submitted that as such no license is required under the provisions of the Wildlife Protection Act for dealing in the birds/animals in question. It is further submitted that in fact, the original applicants are owners of birds/animals and if the custody of the same are kept with the police station, they will die.

6.3. Mr. N.A. Shaikh, learned advocate appearing on behalf of the original applicants - accused has further submitted that in fact, it is not mandatory to give interim custody of the birds/animals either to the Panjarapole or to the NGO.

6.4. Mr. N.A. Shaikh, learned advocate appearing on behalf of the original applicants - accused has relied upon the following decisions in support of his prayer to hand over the custody of beards to them:

2005 (3) GLH 216 Mukeshbhai N. Kamdar v. State of Gujarat and Ors.;

1998 (2) GLH 619 Daulatsinh Ramsinh Gohel v. GSRTC and Anr. and

MANU/GJ/0212/1997 : 1997 (2) GLR 1321 Manager, Panjarapole, Deodar v. C.M. Nat.

6.5. Mr. N.A. Shaikh, learned advocate appearing on behalf of the original applicants - accused has further submitted that as such the original applicants/accused have not committed any offence either under the Prevention of Cruelty to Animals Act, 1960 or under the Wildlife Protection Act, 1972, as birds are not the restricted birds under the Schedule of the Wildlife Protection Act, 1972 and no license to sell those birds is required to be obtained from the competent authority under the Wildlife Protection Act, 1972.

6.6. Mr. N.A. Shaikh, learned advocate appearing on behalf of the original applicants - accused has further submitted that even subsequent order passed by the Additional Chief Judicial Magistrate determining the amount of cost for keeping the birds is very high and excessive and the same is against the provisions of Sub-section (4) of Section 35 of the Prevention of Cruelty to Animals Act, 1960. It is submitted that the

owner of the muddamal birds cannot be deprived of custody of his Muddamal unless he is facing trial of the same offence for the second time and therefore, the accused cannot be fasten the liability to pay the cost of maintaining the muddamal in public or social organizational. It is submitted that even the original applicants are very poor and they cannot bear the cost of maintenance of the birds/animals.

Therefore, it is requested to allow the Special Criminal Applications filed by the original claimants - accused by quashing and setting aside the judgment and orders passed by the revisional Court and to hand over the custody of the muddamal to them on any condition that may deem fit to this Court.

All these petitions are opposed by Mr. N.M. Kapadia, learned advocate appearing on behalf of the original complainant as well as Mr. R.J. Goswami as well as Mr. Kaushal Pandya, learned advocates appearing on behalf of the NG Os and Mr. K.P. Raval, learned Additional Public Prosecutor for the State. It is submitted by the learned advocate appearing on behalf of the Respondents that the manner in which the birds were kept in small cages and considering the fact that in all 494 different birds were kept in cages and that too their wings were cut, their tails were cut and cello-tape was put on their wings, there were rings on their legs so that they cannot fly, custody of the muddamal birds cannot be given to the original claimants. It is submitted that the manner in which the birds are kept, it is absolutely inhuman and atrocious, which cannot be continued for a day. It is submitted that most of the birds are Scheduled birds under the provisions of the Wildlife Protection Act, 1972 and therefore, considering the provisions of the Wildlife Protection Act even for keeping them and/or selling them, they are required to have license which admittedly the Petitioners - original accused do not have.

7.1. The learned advocate appearing on behalf of the Respondents have submitted that even otherwise nobody can have license to deal with the birds in such an inhuman manner and commit atrocity on the birds. It is submitted that the manner in which the birds are kept in cages, the same is in violation of the right of the birds to live freely in the open sky/air and the same would be against the law of nature. Therefore, it is submitted that as such the learned Additional Chief Judicial Magistrate had rightly passed an order to enlarge the birds free in the open sky/air and the revisional authority has materially erred in interfering with such an order and to keep the birds with the institutions. It is submitted that as such, it will be practically impossible for any institution to keep and maintain 494 the birds, more particularly when the trial is likely to take a reasonably long time and in the meantime the birds can neither be kept in cages nor be kept even with NG Os. It is further submitted that even considering the provisions of Section 451 of the Code of Criminal Procedure, an order to enlarge the birds in the air/sky can be passed.

7.2. Mr. Kapadia, learned advocate appearing on behalf of the original complainant has relied upon the decision of the Hon'ble Supreme Court in the case of Chief Forest Conservator (Wildlife) and Anr. v. Nisar Khan reported in MANU/SC/0159/2003 : (2003) 4 S.C.C. 595 as well as recent decision of the Hon'ble Supreme Court in the case of Sansar Chand v. State of Rajasthan, reported in MANU/SC/0869/2010 : (2010) 10 S.C.C. 604.

7.3. Mr. Kapadia, learned advocate appearing on behalf of the original complainant has further submitted that in any case and even considering the manner in which the birds were kept in the cages and looking to the brutality and atrocity on them, custody of the muddamal birds cannot be given to the original claimants - accused.

Heard the learned advocates appearing on behalf of the respective parties.

8.1. At the outset, it is required to be noted that admittedly the original claimants are claiming that they are dealing in the trade and business of selling birds. It is an admitted position that the respective claimants, from whom 494 different birds have been seized, do not possess any license as required under the provisions of Wildlife Protection Act. It is to be noted that most of the birds are Scheduled birds as per the provisions of Wildlife Protection Act, therefore, even dealing with the same they are required to have license. It is to be required to be noted that though the original claimants from whom the custody of the birds is taken are claiming ownership, have failed to even prima facie prove their ownership.

8.2. It is to be noted that even for the purpose of license under the Wildlife Protection Act, 1972 and Wildlife (Protection) Licensing (Additional Matters for Consideration) Rules, 1983, if the licensing authority arrives at a finding of fact that applicant would not be able to carry on business of breeding of captive birds without hunting which includes trapping of birds, then the authority would be justified in refusing to grant license.

8.3. As observed by the Hon'ble Supreme Court in the case of Nasir Khan (supra), hunting includes trapping as per Section 2(16) of the Wildlife Protection Act, 1972. The Hon'ble Supreme Court has also observed in the said judgment that even business of breeding of birds in captivity by procuring them by trapping.

8.4. As stated hereinabove, most of the birds are Scheduled birds, such as, Popat (Parakeet), Kabutar (dove), pigeon, Sasla, Ounder (Mice), Chakli (Munias), Chakli (Finch).

8.5. It is to be noted that in all 494 different birds/animals like parrots, pigeon, love birds, sparrows, etc. came to be seized which were kept in small cages. From the Panchnama it has been found and it cannot be disputed that wings/tails of the aforesaid birds were cut, there were cello-tap affixed on the wings and there were rings found on the feet of the birds so that they cannot fly. Therefore, the manner in which the birds are treated, it is absolutely inhuman, atrocious and against the rule of nature and in violation of the right of the birds to move freely in the sky/air, and in breach of provisions of Prevention of Atrocities on Animal Act.

8.6. Assuming that for some of the birds license may not be required under the provisions of the Wildlife Protection Act, but still it does not mean that the original claimants - accused can commit atrocity on the birds; cut their wings and put rings on their legs. Birds cannot be kept in small cages. The aforesaid act is prima facie against the provision of Prevention of Atrocities on Animal Act.

8.7. In the recent decision the Hon'ble Supreme Court in the case of Sansar Chand (supra) had shown concern about the preservation of wildlife and to maintain ecological balance in the environment. In para 8 to 11, the Hon'ble Supreme Court has observed as under:

8 . Before dealing with the facts of this case, we may consider why preservation of wild life is important for human society.

9 . Preservation of wild life is important for maintaining the ecological balance in the environment and sustaining the ecological chain. It must be understood that there is inter-linking in nature. To give an example, snakes

eat frogs, frogs eat insects and insects eat other insects and vegetation. If we kill all the snakes, the result will be that number of frogs will increase and this will result in the frogs eating more of the insects and when more insects are eaten, then the insects which are the prey of other insects will increase in number to a disproportionate extent, or the vegetation will increase to a disproportionate extent. This will upset the delicate ecological balance in nature. If we kill the frogs the insects will increase and this will require more insecticides. Use of much insecticide may create health problems. To give another example, destruction of dholes (wild dogs) in Bhutan was intended to protect livestock, but this led to greater number of wild boar and to resultant crop devastation causing several cases of abandonment by humans of agricultural fields. Destruction of carnivorous animals will result in increase of herbivorous animals, and this can result in serious loss of agricultural crops and other vegetation.

10. It must be realized that our scientific understanding of nature, and in particular of the ecological chain and the linkages therein is still very primitive, incomplete and fragmentary. Hence, it is all the more important today that we preserve the ecological balance because disturbing it may cause serious repercussions of which we may have no idea today.

11. As already stated above, the wild life in India has already been considerably destroyed. At one time there were hundreds of thousands of tigers, leopards and other wild animals, but today there are only about 1400 tigers left, according to the Wildlife Institute. Until recently habitat loss was thought to be the largest threat to the future of tigers, leopards etc. However, it has now been established that illegal trade and commerce in skins and other body parts of tigers, leopards etc. has done even much greater decimation. Poaching of tigers for traditional Chinese medicine industry has been going on in India for several decades. Tigers and leopards are poached for their skins, bones and other constituent parts as these fetch high prices in countries such as China, where they are valued as symbols of power (aphrodisiacs) and ingredients of dubious traditional medicines.

8.8. From the Counter-Affidavit filed on behalf of the Animal Welfare Board of India before the Hon'ble Supreme Court in Writ Petition (Civil) No. 440 of 2000, it appears that Prevention of Cruelty to Animal, 1960 is enacted with a view to prevent unnecessary pain or suffering to animals generally. Article 51A(g) of the Constitution of India, casts a fundamental duty on every citizen to have compassion for living creature. Article 51A(g) not only imposes a duty on every citizen to protect all animals on which unnecessary pain is being inflicted. Infliction of unnecessary pain, or suffering on animals is anti-thesis to compassion, the duty as imposed by Article 51A(g) of the Constitution of India. Nobody has a right to inflict pain or suffering to others inclusive of the animals and birds. Even birds can not be kept in cages by which they suffer a pain. To keep birds in cages would tantamount to illegal confinement of the birds which is in violation of right of the birds to live in free air/sky. For the aforesaid a specific law might not be required. It is the fundamental right of the bird to live freely in the open sky. As stated above, it is the duty of every citizen to see that there is no unnecessary pain or suffering to any animal or bird.

8.9. In the present case, the manner in which the birds are kept in the small cages, that too, when their wings are cut; their tails are cut; on their wings cello-tape is put and there are rings on their feet, nothing can be more heinous than such acts and

there cannot be more glaring example of atrocity and inhumanity. Such an act cannot be tolerated and continued for a day. When everybody is talking about fundamental rights of the citizen, such as, right to live freely, right to food, right to move freely etc. a day has come to think about the rights of the birds and animals, because of such act even the birds have vanished and their numbers are in decrease.

8.10. Considering the facts and circumstances of the case and conduct/act of the original claimants and keeping the birds in the cages after cutting their wings, cutting their tails, this Court is of the opinion that prima facie offence of atrocity on animal has been made out. Most of the birds are scheduled birds and admittedly the respective claimants who are claiming custody of the birds, have no license and hence also the custody cannot be handed over to them.

8.11. Once it is held that the possession of the muddamal birds cannot be given to the original claimants, the next question which is posed for consideration of this Court is what should be done with the muddamal birds? Whether the birds are to be kept with some institution/NG Os and for how much time and if yes, who will bear the expenditure of maintenance of such birds? As stated above, every bird/animal has a right to move freely and it cannot be disputed that so far as the birds are concerned, they have right to move freely in the open sky/air and they cannot be kept in cages at all and that too with such a brutality. To keep the birds in the cages would be illegal confinement of such birds against their wish which would be against the fundamental right of the birds to move freely. Even practically and physically it is not possible to keep the custody of the birds even to the institutions/NO Gs for long time, as it will be too expensive as well as nobody knows when the trial will take place. Even environmentally also it is not safe and/or in the interest of birds. Under the circumstances the only order which can be passed in such circumstances would be to enlarge the birds free in the sky/air and if such an order is passed it would be respecting the rights of the birds.

8.12. This Court is conscious of the fact that this Court is dealing with the interim custody of the muddamal birds/animals but in the peculiar facts and circumstances of the case and the manner in which the birds/animals are kept in the cages and looking to the pain suffered to the birds/animals, this Court is of the opinion that the only order which can be passed in the interest of justice would be to enlarge the birds/animals free in the open sky/air. As such the learned Additional Chief Judicial Magistrate had rightly passed an order directing to enlarge the birds free in the open sky, however, the revisional Court, without assigning any reasons, has set aside such a direction. Even otherwise, Section 451 of the Code of Criminal Procedure confers powers upon the Court for custody and disposal of the property pending trial and the Court may make such order as it think fit for the proper custody of such property, pending conclusion of the inquiry or trial and if such property is subject to speedy and natural decay, or if it otherwise expedient to do so, Court may, after recording such evidence as it thinks necessary order it to be sold or otherwise dispose of. Considering the aforesaid provision and considering the fact that if birds in question are not ordered to be disposed of by way of enlarging them free in the air/sky, in that case looking to the hot weather, there are all chances that the birds may die. Under the circumstances also, it will be expedient and in their interest to enlarge the birds free. Under the circumstances the order passed by the revisional Court to that extent deserves to be quashed and set aside and the order passed by the learned Additional Chief Judicial Magistrate directing to enlarge the birds/animals in the open sky deserves to be restored.

8.13. In view of the above and for the reasons stated above, Special Criminal Application Nos. 1635, 1636 and 1670 of 2010 preferred by the original claimants - accused are hereby dismissed. Rule is discharged in Special Criminal Application Nos. 1635, 1636 and 1670 of 2010.

So far as the order passed by the learned Magistrate, directing the original claimants - accused to deposit a sum of Rs. 1,05,290 towards the cost of maintenance of the birds is concerned, the learned advocate appearing on behalf of the respective institutions have stated at the bar that looking to the pious duty which they are performing, they do not press for and/or claim the amount of costs towards maintenance of birds. In view of the above statement, order passed by the learned 3rd Additional Senior Civil Judge and Judicial Magistrate (First Class) dtd.17/9/2010 is not to be given effect to and therefore, no order is required to be passed to that effect.

Special Criminal Application Nos. 2600, 2601 and 2602 of 2010 are hereby allowed and the impugned judgment and order passed by the learned the learned 4th Additional Sessions Judge, Surat in Revision Application Nos. 230, 231 and 233 of 2010 dtd.10/8/2010 are hereby quashed and set aside so far as the orders passed by the learned Third Additional Senior Civil Judge and Additional Chief Judicial Magistrate, Surat in the respective Muddamal Applications filed by the original applicant - accused, by which it was directed to enlarge the birds in the open sky and consequently order passed by the learned Additional Chief Judicial Magistrate, Surat in Muddamal Application Nos. 69/2010, 70/2010 and 48/2010 are hereby restored and it is ordered to release and enlarge the muddamal birds/animal in the open sky/air forthwith, after making panchnama, as per the order passed by the learned Additional Chief Judicial Magistrate, Surat. Rule is made absolute accordingly in each of the Special Criminal Application Nos. 2600, 2601 and 2602 of 2010. D.S. Permitted.

After pronouncement of the Judgment, learned advocate appearing on behalf of the Petitioners has requested to stay the execution of the present judgment and order. However, considering the observations made hereinabove, the request is rejected.

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