

(2002) 04 GUJ CK 0067
In the Gujarat High Court

Case No : Misc. Criminal Application No's. 1873 and 2048 of 2002

K. Chandrasheekhar

APPELLANT

Vs

State of Gujarat and Another

RESPONDENT

Date of Decision : 10-04-2002

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 439, 482

Citation : (2003) 1 DMC 406 : (2002) 2 GLR 1783

Hon'ble Judges : B.J. Shethna, J

Bench : Single Bench

Advocate : Saurin A. Shah, for the Appellant; K.C. Shah, Assistant Public Prosecutor for Respondent No. 1, N.D. Nanavati, for Nirav C. Thakkar, for the Respondent

Final Decision : Allowed

Judgement

B.J. Shethna, J.—Misc. Criminal Application No. 1873 of 2002 is filed by petitioner-accused Sushilaben Prabhudas Tanna, aged 57 years, who is accused for the serious offences under Sections 304B, 498A and 306 read with Section 34 of I.P.C. and Section 4 of Prevention of Dowry Act registered as CR No. 1430 of 2001 with Jamnagar City, B-Division Police Station. Her son Kamlesh, who is husband of deceased-Sandhya, mother of two minor children Yash and Riddhi, aged 1 and 3 respectively, for the aforesaid offences.

2. In the instant case, accused Sushilaben filed anticipatory bail application being Misc. Criminal Application No. 468 of 2001, which was rejected on 19-9-2001 by the learned Additional Sessions Judge, Shri V. B. Mayani, by a reasoned order running into 9 typed pages by holding that there is a strong prima facie case against the accused-Sushilaben and though she is a lady she cannot be released on bail and even though she had two grandchildren aged 1 and 3 respectively and there was no one to look after them, if she is denied bail.

3. Thereafter, accused-Sushilaben, surrendered before the police and submitted

Misc. Criminal Application No. 478 of 2001 for releasing her on bail for the aforesaid offences. Surprisingly, within 9 days thereof i.e. on 28-9-2001, the same learned Judge Shri V. B. Mayani, giving totally different reasons released the accused on bail by observing that when her earlier bail application was rejected she was in jail, but now her minor children were with her in jail, therefore, though there is a strong prima facie case against her she has to be released on bail. That order of releasing the accused-Sushilaben was challenged by the State of Gujarat in Misc. Criminal Application No. 9023 of 2001, which has been allowed by this Court on 11-3-2002 and the impugned judgment and order passed by the learned Additional Sessions Judge releasing the accused-Sushilaben was set aside and she was ordered to be taken into custody forthwith. Accordingly, she was re-arrested by the police, and thereafter, she is in jail.

4. Misc. Criminal Application No. 1873 of 2002 is filed by accused-Sushilaben before this Court for releasing her on temporary bail for a period of two weeks on the ground that minor children has to be vaccinated. It may be stated that against the order dated 11-3-2002 passed by this Court in Misc. Criminal Application No. 9023 of 2001 cancelling her bail the accused-Sushilaben has approached the Hon'ble Supreme Court by way of S.L.P., wherein notice was issued to the State and it was kept on 8-4-2002. Today, it is stated at the Bar by Senior Advocate Mr. Nanavati that it is adjourned for 3 weeks on 8-4-2002. Misc. Criminal Application No. 1873 of 2002 was first time placed before this Court on 5-4-2002 and at the request of learned Counsel Shri Nirav Thakkar for accused-Sushilaben it was kept on 6-4-2002. On 6-4-2002 learned Counsel Shri Nirav Thakkar addressed the Court and as order earlier Shri K. Chandrasheekhar (father of deceased-Sandhya and grandfather of minor children Yash and Riddhi) remained personally present in the Court and insisted for custody of his grandchildren, who are taken in jail by accused-Sushilaben along with her. It may be stated that learned Senior Advocate, Shri Nanavati on 6-4-2002 wanted to withdraw the bail application but at the request made by Shri K. Chandrasheekhar this matter was kept today i.e. on 10-4-2002 as he wanted to make appropriate application seeking custody of his grandchildren, who are in jail. Accordingly, the matter is kept today and in the meanwhile, applicant-Chandrasheekhar, grandfather of minor children has filed Misc. Criminal Application No. 2048 of 2002 in above Misc. Criminal Application No. 1873 of 2002 through his Counsel Shri Saurin Shah, who is asked to assist the Court as *amicus curiae*.

5. At the outset, it may be stated that senior Advocate Shri Nanavati has not pressed Misc. Criminal Application No. 1873 of 2002 for temporary bail, therefore, there is no question of deciding that application on merits as Mr. K. C. Shah, learned A.P.P., appearing in this matter for respondent-State of Gujarat has no objection. Hence, without going into merits of the case and expressing any opinion on it, Misc. Criminal Application No. 1873 of 2002 is permitted to be withdrawn and accordingly it is dismissed as not pressed.

6. This brings me to Misc. Criminal Application No. 2048 of 2002 filed by Shri K. Chandrasheekhar, grandfather of minor children Yash and Riddhi, aged 1 and 3 respectively, who are at present in Jamnagar Jail along with accused-Sushilaben.

7. Learned Counsel Shri Saurin Shah appearing for the applicant-K. Chandrasheekhar, father of deceased-Sandhya and grandfather of minor children Yash and Riddhi submitted that even at the time of bail application being Misc. Criminal Application No. 478 of 2001 filed by accused-Sushilaben before the Court of Additional Sessions Judge, Jamnagar for releasing her on bail, he had not only opposed the bail but also prayed for custody of minor children. But, no such order was passed on such application by the learned Judge and accused-Sushilaben was enlarged on bail. It may be stated that in application for cancellation of bail filed by the State of Gujarat being Misc. Criminal Application No. 9023 of 2001, learned A.P.P. Mr. Shah had produced that application, which was filed by Shri K.C. Shah before the trial Court seeking custody of the children. But, at that time no such order was passed because accused-Sushilaben enlarged on bail. This Court is called upon to pass order regarding the custody of children in view of the fact that once again while going in jail, the accused-Sushilaben took the minor children Yash and Riddhi with her. Therefore, this Court is called upon to pass order regarding the custody of the minor children.

8. It is true that there is a special act enacted by the Legislature for the custody of the children including interim custody i.e. Guardians and Wards Act, 1890. In this case, learned Counsel Mr. Saurin Shah appearing for applicant-K. Chandrasheekhar, grandfather of minor children Yash and Riddhi relying upon two judgments of Hon"ble Supreme Court : (1) in the case of Gohar Begam Vs. Suggi alias Nazma Begam and Others, and (2) in the case of Sheela Barse (II) and Others Vs. Union of India (UOI) and Others, , submitted that the custody of minor children Yash and Riddhi, who are at present in Jamnagar Jail along with accused-Sushilaben be handed over to the applicant. This was vehemently objected to by learned Senior Advocate, Shri Nanavati appearing for accused-Sushilaben, grandmother i.e. mother-in-law of deceased-Sandhya on several grounds. His main objection was that this Court, in criminal proceedings, cannot entertain such request and pass the order regarding custody of minor children. Mr. Nanavati has taken me through all relevant provisions of Criminal Procedure Code, in support of his submissions. However, I have refrained myself from expressing any opinion on it because any opinion expressed by this Court is likely to come in the way of parties when parties approached the proper forum for the custody of minor children.

9. In the instant case, when the bail of the accused-Sushilaben has been cancelled by this Court on 11-3-2002, and that her temporary bail application is dismissed as withdrawn today, then same order is required to be passed regarding custody of minor children Yash and Riddhi because they cannot be allowed to be kept in jail for no fault of them along with accused-Sushilaben. In the instant case, the applicant-K. Chandrasheekhar is none else but real father of

deceased-Sandhya, mother of minor children Yash and Riddhi. He has come all the way from Goa and right from beginning during the pendency of bail application before Sessions Court at Jamnagar, he was claiming custody of his minor grandchildren, Yash and Riddhi. It is true that this Court is not assigned matters u/s 482 of Criminal Procedure Code but when this application is filed in an application for bail, then certainly this Court keeping in mind the paramount interest of the minor children, exercise the jurisdiction. Section 482 of Criminal Procedure Code gives inherent powers to the High Court. It says nothing in this Code shall be deemed to limit or affect the inherent powers of the High Court to make such orders as may be necessary to give effect to any order of this Code. Such powers can always exercise to secure the ends of justice. On peculiar facts and circumstances of the case, I am of the considered opinion that interim custody of the minor children Yash and Riddhi must be handed over to applicant-K. Chandrasheekhar, who is real grandfather (Nanaji) because to keep minor children even for a day further in the jail may be against their interest.

10. Under the circumstances, Misc. Criminal Application No. 2048 of 2002 filed by the applicant-K. Chandrasheekhar regarding custody of minor children Yash and Riddhi is allowed and the jail authority of Jamnagar Jail is directed to hand over the custody of minor children Yash and Riddhi to applicant-K. Chandrasheekhar forthwith.

11. It is made clear that the concerned parties are at liberty to approach competent Court for the permanent custody of the children. As and when such application is made before the competent Court, it shall pass appropriate orders in accordance with law.

12. With these observations rule issued in Misc. Criminal Application No. 2048 of 2002 is made absolute. Direct service permitted.

13. At this stage, it is made clear that if there is a change in circumstance, then parties may be at liberty to apply. At this stage, a request is made by Mr. Nanavati, Senior Advocate that Sunita Mandavia, who is real sister of accused-Kamlesh staying at Goa be permitted to meet the grandchildren, to which learned Counsel Shri Saurin Shah on instruction from applicant-K. Chandrasheekhar, who is present before the Court, stated that she is always welcome at his residence to meet the minor children Yash and Riddhi.

14. Before parting, I must state that in this case when Shri K. Chandrasheekhar came from Goa and remained present before this Court without assistance of a lawyer, then learned Counsel Shri Saurin Shah was requested to appear for him and assist this Court in the matter and accordingly, by filing Vakalatnama, he appeared for Shri K. Chandrasheekhar and ably assisted this Court. The valuable services and assistance rendered by Mr. Saurin Shah are highly appreciable.