

(2005) 07 GUJ CK 0045

In the Gujarat High Court

Case No : Criminal Revision Application No. 864 of 2004

Mukeshbhai N. Kamdar

APPELLANT

Vs

State of Gujarat and Others

RESPONDENT

Date of Decision : 26-07-2005

Acts Referred:

Bombay Essential Commodities and Cattle (Control) Act, 1958 — Section 42, 57
Constitution of India, 1950 — Article 226, 227
Criminal Procedure Code, 1973 (CrPC) — Section 397, 451, 457
Prevention of Cruelty to Animals Act, 1960 — Section 11, 11(1), 12, 29, 29(2)

Citation : (2005) 07 GUJ CK 0045

Hon'ble Judges : C.K. Buch, J

Bench : Single Bench

Advocate : S.K. Jhaveri and Jirga D. Jhaveri, for the Appellant; N.C. Sood, Assistant Public Prosecutor for Respondent No. 1, L.R. Pathan and Mohd. Hanif Shaikh for Respondent Nos. 2 and 3, for the Respondent

Final Decision : Dismissed

Judgement

C.K. Buch, J.—The present Cri. Rev. Application is preferred by the petitioner Gadhada Mahajan Panjarapole & Gaushala, through Mr. Keshabhai N.Kamdar for quashing and setting aside the order dated 14.09.2004 passed by Id. IInd Jt. Addl. Sessions Judge, Bhavnagar in Revision Application Nos. 65 & 66 of 2004.

2. Initially, the petitioner had moved Special Criminal application No. 998/2004 challenging the very order and this Court issued notice for final disposal vide order dated 24.09.2004 and granted interim relief in favour of the petitioner. Thereafter, vide order dated 16.12.2004, this Court permitted the petitioner to convert Spl. Criminal Application into a Cri. Rev. Application which has been now duly registered as Cri. Rev. Application No. 864/2004. When the matter came up for hearing, the parties have jointly submitted that as the parties are very well served with the notice for final disposal when these proceedings were pending before this Court, the present Cri. Rev. Application may be heard finally at admission stage and, therefore, the same is heard finally.

3. That a complaint came to be registered with Gadhada Police Station being CR No. 41/2004 for the offences punishable u/s 11(1)(a)(b)(c)(d)(e) of the Prevention of Cruelty to Animals Act, 1960 (hereinafter referred to as the Act) and also under sections 42 & 57 of the Bombay Animals & Cattle Control Act. On registration of the complaint, certain numbers of animals (sheeps & goats) were detained and taken into custody by the police and they were handed over to the Panjarapole of Gadhada. The petitioner is the Farm Manager of Panjarapole which is a registered institute under the Bombay Public Trusts Act, as well as recognised institution by Animal Welfare Board of India. The petitioner, at present is having custody of the animals. Respondent No. 2 is the alleged owner of the animals and in the capacity of the owner of the animals, he had filed an application for custody thereof pending trial before the Id. JMFC, Gadhada at Botad u/s 457 of CrPC jointly with respondent No. 3 who is the transporter. Id. JMFC, Botad, after hearing the parties, decided to hand over interim custody of the animals to the petitioner panjarapole vide order dated 24.05.2004. As per the allegations, animals were being carried in truck No. GJ-1-U-5672 wherein 83 sheeps and 90 goats were loaded and in truck No. GJ-14-T-3747 wherein 160 sheeps and goats were carried and the allegation is that they were kept inside the vehicle and were taken to a destination without following the norms prescribed under the law and number of animal kept itself is sufficient to infer that they were carried in inhuman conditions under constant cruelty. However, after hearing the parties, vide order dated 07.06.2004, the Id. JMFC rejected the request of the applicants of that application i.e. Respondent Nos. 2 & 3 herein for interim custody. The said order of the Id. JMFC was assailed by way of filing Cri. Rev. application Nos. 65 & 66 of 2004 separately by both the respondents u/s 397 of CrPC in the Court of Sessions, Bhavnagar. The Id. Addl. Sessions Judge, Bhavnagar, after verifying various details and hearing the parties, allowed the Revision Applications vide judgment and order dated 14.09.2004 granting interim custody of the animals to respondent nos. 2 & 3. It is this order which is assailed by the petitioner by filing present Cri. Rev. application.

4. It is submitted by Id. Sr. Counsel Mr. S.K. Jhaveri appearing with Id. Counsel Ms. Jigna Jhaveri for the petitioner that the decision of the Id. Addl. Sessions Judge granting interim custody to respondent nos. 2 & 3 is against the decision of the Apex Court. The Id. Addl. Sessions Judge has failed in verifying the details and scrutinising the fact of alleged ownership of respondent No. 2. Though there was no material and legal error, no element of perversity, Id. Addl. Sessions Judge has reversed the finding of the Id. JMFC and, thereby exceeded the jurisdiction. The order of Id. JMFC, according to the petitioner, is absolutely legal and valid and there was no need to interfere with the findings recorded as to the disposal of muddamal animal pending trial. It is alleged by the petitioner that these animals were being taken to a slaughter house or at least the intention of the carrier and/or the owner was to take them to a slaughter house and there was no other purpose and hence the observations made by the Apex Court would squarely help the petitioner and, therefore, the present Rev. Application should

be allowed. This is a question of life and death of 333 animals. It is further submitted that the offence in question is a serious offence because the accused persons have committed second offence as one prosecution of similar nature is pending in the criminal court.

5. Ld. Sr. Counsel Mr. Jhaveri for the petitioner has taken me through relevant decisions and has argued that the impugned order passed by the Id. Addl. Sessions Judge should be quashed and the petitioner should be permitted to retain the custody of all the animals that have survived till the disposal of the criminal case filed against the accused persons. Mr. Jhaveri has pointed out following aspects:-

1. There was no permit to carry the animals and the respondents were under obligation to obtain permit for transporting the animals, even if they are dealing in the business of livestock;

2. Veterinary Doctor's opinion clearly reveals that the offence of cruelty to animals is committed and no contrary view could have been taken by the Addl. Sessions Judge in the background of the opinion of the Veterinary Doctor and in absence of permit to carry/transport animals.

3. In view of the scheme of sections 11 & 29 of the Act, respondent nos. 2 & 3 can be said to be a person/persons treating the animals with cruelty and the Courts have power to deprive such persons, even from the ownership of animals and such animals can be even confiscated and Id. Addl. Sessions Judge has failed in appreciating this aspect emerging from section 29 of the Act.

6. The Id. Sr. Counsel Mr. Jhaveri has taken this court through sub-section (2) of section 29 of the Act and has hammered a point that in the present case, there is ample scope of confiscation of all the livestock in view of second prosecution. He has further submitted that Id. Addl. Sessions Judge was under obligation to appreciate the findings recorded by the Id. JMFC and he has taken this court through the observations made by the Id. JMFC in paras-5, 6 & 7 of his decision. Id. JMFC has discussed all relevant cited decisions and the conduct of the applicants. When it is found that seizure of these animals is legal, then the livestock can not be handed over to a person accused when investigating agency has found prima facie case. He has further argued that the Id. JMFC has positively observed that there is no strength in the say of respondent nos. 2 & 3 that there is no scope of confiscation of the livestock. Ld. Addl. Sessions Judge has recorded contrary finding after referring the decision in the case of Panjrapole, Deodar and etc. Vs. Chakaram Moraj Nat and Another, The allegations, according to Id. Addl. Sessions Judge are not of serious nature, quantum of punishment is limited and there is no allegation in the complaint that animals were carried to a slaughter house. Ld. Addl. Sessions Judge has observed that because surname of one of the respondents-applicants is Skhatki? (Skhatki? means Butcher), it can not be inferred that animals were taken to a slaughter house.

7. In support of the contentions raised in the memo of the Cri. Rev. Application, the petitioner has submitted two additional affidavits on behalf of the petitioner and it is argued that FIR does not disclose correct offence and it is alleged that the accused persons must have managed with police in getting the complaint registered and, therefore only, it is not clear in the complaint that animals were carried to a slaughter house. According to the petitioner, the police officer did not record the complaint of the fact that the animals were carried out to a slaughter house and the accused persons are habitual offenders and one another offence is also pending against them. Mr. Jhaveri has placed reliance on the observations made by this Court in the decision in the case of *State of U.P. v. Mustakeem and Ors.* 2002(3) GLH (U.J.) P.8 and the decision of the Apex Court in the case of *Manager, Panjarapole, Deodar and Anr. v. Chakaram Moraji Nat and Ors.* 1999(1) GLR 587. It would be relevant to quote paras 6 & 10 of the decision of the Apex Court in the case of *Manager, Panjarapole Deodar (supra)*, wherein the Apex Court has observed thus:

6. For judging the merits of these contentions, it will be apt to notice the scheme of the Act in the light of the relevant provisions thereof. Section 4 of the Act postulates establishment of Animal Welfare Board by the Central Government for the promotion of animal welfare generally and for the purpose of protecting animals from being subjected to unnecessary pain or suffering, in particular. The Board is a body corporate having perpetual succession and a common seal with power to acquire and dispose of property, subject to the provisions of the Act. Section 9 of the Act enumerates functions of the Board; clause (g) thereof contains the objective which reads : to encourage, by the grant of financial assistance or otherwise, the formation of establishment of Panjarapoles, rescue homes, animal shelters, sanctuaries and the like where animals and birds may find a shelter when they have become old and useless or when they need protection. Section 11 enlists offences against the animals and prescribes penalty therefor; Section 12 prescribes penalty for specific offence of practising Sphooka and doom dew?. u/s 29 the Magistrate has powers to deprive a person of the ownership or custody of an animal on his conviction of offences under the act subject to certain conditions. Sections 32 to 34 deal with the power of search and seizure, issuing of search warrant and general power of seizure for examination. The owner is required to accompany the seized animals to the place of inspection.

10 Now, advertent to the contention that u/s 35(2), in the event of the animal not being sent to infirmary, the Magistrate is bound to give the interim custody to Pinjrapole, we find it difficult to accede to it. We have noted above the options available to the Magistrate u/s 35(2). That sub-section vests in the Magistrate the discretion to give interim custody of the animals to Pinjrapole. The material part of sub-section (shorn of other details) will read, the Magistrate may direct that the animal concerned shall be sent to a Pinjrapole. It is thus evident that the expression Sshall be sent? is part of the direction to be given by the Magistrate if in his discretion he decides to give interim custody to Pinjrapole. It follows that u/

s 35(2) of the Act, the Magistrate has direction to hand over interim custody of the animals to Pinjrapole, but he is not bound to hand over custody of the animal to Pinjrapole in the event of not sending it to an infirmary. In a case where the owner is claiming the custody of the animal, Pinjrapole has no preferential right. In deciding whether the interim custody of the animal be given to the owner who is facing prosecution or to the Pinjrapole, the following factors will be relevant:

- (1) the nature and gravity of the offence alleged against the owner,
- (2) whether it is the first offence alleged or he has been found guilty of offences under the Act earlier;
- (3) if the owner is facing the first prosecution under the Act the animal is not liable to be seized, so the owner will have a better claim for the custody of the animal during the prosecution;
- (4) the condition in which the animal was found at the time of inspection and seizure;
- (5) the possibility of the animal being again subjected to cruelty.

There can not be any doubt that establishment of Pinjrapole is with laudable object of preventing unnecessary pain or suffering to animals and providing protection to them and birds. But it should also be seen, (a) whether the Pinjrapole is functioning as an independent organisation or under the scheme of the Board and is answerable to the Board, and (b) whether the Pinjrapole has good record of taking care of the animals given under its custody. A perusal of the order of the High Court shows that the High court has taken relevant factors into consideration in coming to the conclusion that it is not a fit case to interfere in the order of the learned Additional Sessions Judge directing the State to hand over the custody of animals to the owner.

8. Section 35 of the Act deals with the treatment and care of animals and on plain reading of section 35 of the Act, it is evidently clear that sub-section (1) of Section 35 of the Act enables the State Government to appoint infirmaries for the treatment and care of the animals. Of course, the panjarapole managed by the Trust and looked after by the petitioner is not an infirmary in stricto-senso, but undisputedly, panjarapole is able to take care of ailing animals. On close scrutiny of the facts placed before the court, it emerges that in a short span of some months, comparatively good number of animals have succumbed to death from the livestock that was recovered and seized by the police in the crime in question. No specific figure has been given to the Court by the petitioner that how many new births have taken place during the interregnum period.

9. Having considered the totality emerging from the record, this court can not ignore one aspect that case of the prosecution emerging from the complaint does not reveal that stock was carried to a slaughter house. It is also not a matter of dispute that the respondents have claimed ownership and none-else except the petitioner panjarapole has assailed the ownership of respondent no. 2.

Respondent No. 3 who was carrying the animals was a joint applicant before the Id. JMFC for getting the interim custody and respondent No. 3 does not dispute the ownership of respondent No. 2 qua the animals seized. It would be difficult for a owner who is dealing in the business of such animals like sheeps and goats to have any documents showing ownership. Responent No. 3 from whose possession the livestock was recovered/ seized confirms the ownership of respondent No. 2. In absence of any rival claim, the say of respondent No. 2 should not be viewed with doubt. It is specifically alleged and it emerges from record that these animals were carried out to Fare Spot (Mela) where such animals are being taken in large number. It was possible for the investigating agency or even for the applicant panjarapole to show that during relevant period, there was no animal fare organised in the area where these animals were being taken. So, the case of the petitioner is contrary to the oral version brought before the Court by way of an additional affidavit. In other words, the petitioner panjarapole is saying something inconsistent with the case placed by the police against the accused persons. Ratio of the decision in the case of Gitaben Shah (supra) would not help the petitioner panjarapole. On the contrary, the observations made by the Apex Court in the case of Manager, Panjarapole, Deodar (supra), would help the respondent No. 2. Provisions of section 451 of CrPC empowers the Court to handover muddamal property by way of an interim arrangement pending trial and it appears that the owner of the livestock has a better claim. Merely because one prosecution of similar nature is pending against respondent Nos. 2 & 3 or any of them, can not be equated with previous conviction. The present prosecution, therefore, can not be said to be a second offence within the meaning of section 29 of the Act. So, it is rightly argued by Id. Counsel Mr. Pathan for the respondent Nos. 2 & 3 that even if offence alleged is ultimately held to be proved, even then, there is no scope of confiscation of animals. The maximum punishment prescribed under the law is not grave in nature and, therefore, the alleged offence should not be equated with any grave offence committed qua the animals. The animals, according to Id. Counsel Mr. Pathan, were comparatively more in number vehicle wise, but geographical distance between two places is relevant aspect and the carrier can manage to provide for food and other relaxations to the animals being carried by him. The place where the vehicles were intercepted is an important state Highway and animals were carried smoothly. Mr. Pathan has drawn attention of this Court to one decision in the case of Botad Mahajan Panjarapole v. State of Gujarat in Special Criminal Application No. 91/2005 (Coram: D.H. Waghela, J) decided on 16.04.2003, wherein this Court has directed the trial Court to conduct the trial with due priority against respondent No. 2 of that petition and conclude the proceedings, but the fact remains that finding recorded in favour of respondent No. 2 was not turned down by the Court. In the case of Bhavnagar Panjarapole (Samdhiyala Branch) v. State of Gujarat, in Cri. Rev. Application No. 209/2003 (Coram: Sharad D. Dave, J) decided on 07.05.2003, this Court in reference to the prosecution instituted against the carrier and owner of the animals u/s 11(1) (d),(e) & (f) of the Act, has observed thus:-

14. I am of the opinion that the order passed by the learned Additional Sessions Judge, Bhavnagar on 20.07.2003 in Criminal Revision Application No. 38 of 2003 is based on sound principle and, that is, what is observed in the case of Vadhwan Mahajan Panjarapole (supra). In the aforesaid case also, this Court has relied upon the case of the Hon''ble Apex Court in Manager, Panjarapole, Deodar and Anr. v. Chakaram Moraji Nat and Ors., reported in 1999(1) GLR 587 : (S.C., reported in 1999(1) SCC 587. In the said case also the Hon''ble Apex Court has also laid down certain guidelines. It is not the case of the petitioner or respondent No. 1-State that the respondent No. 2 is in habit of doing offence again and again. It is the first offence committed by the respondent No. 2. It is the duty of the prosecution to bring on record that the respondent No. 2 is in habit of doing the offence off and on. How the trial court has come to the conclusion that the owner of the truck is involved in such type of cases, without any material on record?

10. In above decision also, the allegation against the owner of the livestock was that the animals were being transported only for the purpose of slaughtering and were tied very tightly with each other. Therefore, the decision in the case of State of U.P. v. Mustkeem and Ors. 2002(3) GLH (UJ) 8, would not come in the way respondent Nos. 2 & 3. Where there is no question of taking animals for slaughtering even as per the complainant, respondent Nos. 2 & 3 can be said to be a person dealing in business of transportation of such animals. In absence of of contrary evidence, there was no reason to disbelieve one fact emerging from the case of prosecution that they were taken to animal fare. Ultimately, respondent Nos. 2 & 3 are given custody of the animals by way of interim arrangement and that too on stringent conditions and when it appears that panjarapole was not able to save and preserve all animals that were handed over to panjarapole. It would not be proper for this Court to observe that finding of the Id. Addl. Sessions Judge is either bad, illegal or perverse.

11. Because of interim order passed by this court on 10.01.2005, it appears that animals are with panjarapole. So, in the event of rejection of the present Cri. Rev. Application, the petitioner shall have to handover interim custody in compliance with the order passed by Id. Addl. Sessions Judge, Bhavnagar dated 14.09.2004, with detailed accounts as to the death of any of the animals supported by the documentary evidence and newly born (animals subsequently born) to respondent No. 2.

12. It is true that two different Revision Applications were filed, first before the Court of Sessions and second in the Hon''ble High court, but the Court is not inclined to dismiss the present Cri. Rev. Application on such a technical ground. Initially the petitioner has challenged the order passed by Id. Addl. Sessions Judge by filing Spl. Cri. Application i.e. a substantive petition under Articles 226 & 227 of the Constitution of India and this Court has permitted the petitioner to convert the same into Cri. Rev. Application. The Court is not ready to accept that the respondents are habitual offenders and they were taking animals to a

slaughter house. On the contrary, the police should avoid such seizure. By a discreet inquiry in such a fact situation, it is possible to ascertain whether carrier or the owner are genuine traders or agriculturists or transporters. When a special plea of carrying animals to a Mela spot is emerging at initial stage, then such fact can be counter-checked by using special machinery like telephone or wireless and by taking help of counter-part i.e. police official stationed at such place alleged for verifying such fact. This was possible in the present case and protraction of litigation between the parties probably has created inconvenience to both i.e. panjarapole and respondent Nos. 2 & 3. The court can not ignore also the quantum of punishment prescribed for the offences registered against respondent Nos. 2 & 3.

13. For short, there is no merits in the Cri. Rev. Application and the same is hereby dismissed. Interim relief granted earlier stands vacated. The petitioner and in turn panjarapole shall hand over the custody of animals with detailed accounts as observed earlier in compliance with the order passed by the Id. Addl. Sessions Judge, Bhavnagar dated 10.01.2005 at the earliest.