

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**R/SPECIAL CIVIL APPLICATION NO. 20048 of 2021****FOR APPROVAL AND SIGNATURE:****HONOURABLE DR. JUSTICE ASHOKKUMAR C. JOSHI**

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?	NO
2	To be referred to the Reporter or not ?	YES
3	Whether their Lordships wish to see the fair copy of the judgment ?	NO
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	NO

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SHEHJADA HANIFBHAI PATEL

Versus

BILKIS W/O SHAHEJADA HANIFBHAI PATEL D/O SALIM HASAN
RANGUNI

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Appearance:

MR MTM HAKIM with MR VA MANSURI(2880) for the Petitioner(s)
No. 1

NOTICE SERVED BY DS for the Respondent(s) No. 1

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CORAM:HONOURABLE DR. JUSTICE ASHOKKUMAR C. JOSHI**Date : 24/03/2022****ORAL JUDGMENT**1. *Rule.*

2. This petition under Articles 226/227 of the Constitution of India is filed by the petitioner - original applicant against an order

dated 22.10.2021 passed below application Exh. 21 in Criminal Misc. Application No. 68 of 2019 by the learned Judge, Family Court No. 2, Surat. By the said application, the petitioner - applicant had prayed for to handover the interim custody of his children, which came to be rejected by the aforesaid order.

3. Heard, learned advocate Mr. MTM Hakim with learned advocate Mr. V. A. Mansuri for the applicant. The respondent is served and though sufficient opportunity was given, none has put in appearance for the respondent leaving no option but to proceed with the matter.

4. The learned advocate for the petitioner submitted that the impugned order passed by the learned Court below is illegal, unjust, perverse and against the facts and the evidence on record. He submitted that the learned Family Judge has failed to take into consideration the material aspect that the respondent herein has extra marital affair with other persons and the said fact was also established by cogent evidence, however, the learned Family Judge did not take the same into consideration. The learned advocate for the petitioner submitted that in the matter of a child's custody, the paramount consideration is the welfare of the child and from the facts and record, it emerges that the children of the petitioner are not safe with the respondent and their future may spoil, however, the learned Family Judge has also failed to take into consideration the said aspect in proper perspective.

4.1 The learned advocate for the petitioner submitted that earlier when the respondent had deserted the petitioner in 2015, the minor children were residing with the petitioner only, for

about two years. Thereafter, since compromise took place between them, the respondent against started residing with the petitioner. However, again in 2019, quarrel took place between them and the petitioners constrained to lodge FIR against the respondent for the offence punishable under Sections 323 and 294(B) of the Indian Penal Code, 1860 (the IPC). Thus, in view of the conduct of the respondent, it is not proper to have the custody of the children with her.

4.2 Thus, making such submissions, it is urged that this Court may kindly grant indulgence in this petition under Articles 226/227 of the Constitution of India.

5. Regard being had to the submissions made and considering the averments made in the petition so also perusing the material placed on record, it appears that petitioner's application (Exh. 22) for interim custody of his children (Sons), aged 17 years and 12 years respectively, came to be rejected by the impugned order.

5.1 At the outset, it would be worthwhile to refer to a decision of the Apex Court in ***Shalini Shyam Shetty and Another Vs. Rajendra Shankar Patil, (2010) 8 SCC 329***, wherein, the Court has considered in detail the scope of interference by this Court to hold and observe that Article 227 can be invoked by the High Court *Suo motu* as a custodian of justice. An improper and a frequent exercise of this power would be counterproductive and will divest this extraordinary power of its strength and vitality. The power is discretionary and has to be exercised very sparingly on equitable principle. The observations of the Hon'ble Supreme Court, read as under:

“57. Articles 226 and 227 stand on substantially different footing. As noted above, prior to the Constitution, the Chartered High Courts as also the Judicial Committee of the Privy Council could issue prerogative writs in exercise of their original jurisdiction. [See 1986 (suppl.) SCC 401 at page 469)].

58. However, after the Constitution every High Court has been conferred with the power to issue writs under Article 226 and these are original proceeding. [State of U.P . and others vs. Dr. Vijay Anand Mahara j - AIR 1963 SC 946, page 951].

59. The jurisdiction under Article 227 on the other hand is not original nor is it appellate. This jurisdiction of superintendence under Article 227 is for both administrative and judicial superintendence. Therefore, the powers conferred under Articles 226 and 227 are separate and distinct and operate in different fields.

60. Another distinction between these two jurisdictions is that under Article 226, High Court normally annuls or quashes an order or proceeding but in exercise of its jurisdiction under Article 227, the High Court, apart from annulling the proceeding, can also substitute the impugned order by the order which the inferior tribunal should have made. {See Surya Dev Rai (supra), para 25 page 690 and also the decision of the Constitution Bench of this Court in Hari Vishnu Kamath vs. Ahmad Ishaque and others - [AIR 1955 SC 233, para 20 page 243]}.

61. Jurisdiction under Article 226 normally is exercised where a party is affected but power under Article 227 can be exercised by the High Court suo motu as a custodian of justice. In fact, the power under Article 226 is exercised in favour of persons or citizens for vindication of their fundamental rights or other statutory rights. Jurisdiction under Article 227 is exercised by the High Court for vindication of its position as the highest judicial authority in the State. In certain cases where there is infringement of fundamental right, the relief under Article 226 of the Constitution can be claimed ex-debito justitia or as a matter of right. But in cases where the High Court exercises its jurisdiction under Article 227, such exercise is entirely discretionary and no person can claim it as a matter of right. From an order of a Single Judge passed under Article 226, a Letters Patent Appeal or an intra Court Appeal is

maintainable. But no such appeal is maintainable from an order passed by a Single Judge of a High Court in exercise of power under Article 227. In almost all High Courts, rules have been framed for regulating the exercise of jurisdiction under Article 226. No such rule appears to have been framed for exercise of High Court's power under Article 227 possibly to keep such exercise entirely in the domain of the discretion of High Court.

62. *On an analysis of the aforesaid decisions of this Court, the following principles on the exercise of High Court's jurisdiction under Article 227 of the Constitution may be formulated:*

(a) A petition under Article 226 of the Constitution is different from a petition under Article 227. The mode of exercise of power by High Court under these two Articles is also different.

(b) In any event, a petition under Article 227 cannot be called a writ petition. The history of the conferment of writ jurisdiction on High Courts is substantially different from the history of conferment of the power of Superintendence on the High Courts under Article 227 and have been discussed above.

(c) High Courts cannot, on the drop of a hat, in exercise of its power of superintendence under Article 227 of the Constitution, interfere with the orders of tribunals or Courts inferior to it. Nor can it, in exercise of this power, act as a Court of appeal over the orders of Court or tribunal subordinate to it. In cases where an alternative statutory mode of redressal has been provided, that would also operate as a restraint on the exercise of this power by the High Court.

(d) The parameters of interference by High Courts in exercise of its power of superintendence have been repeatedly laid down by this Court. In this regard the High Court must be guided by the principles laid down by the Constitution Bench of this Court in Waryam Singh (supra) and the principles in Waryam Singh (supra) have been repeatedly followed by subsequent Constitution Benches and various other decisions of this Court.

(e) According to the ratio in *Waryam Singh (supra)*, followed in subsequent cases, the High Court in exercise of its jurisdiction of superintendence can interfere in order only to keep the tribunals and Courts subordinate to it, 'within the bounds of their authority'.

(f) In order to ensure that law is followed by such tribunals and Courts by exercising jurisdiction which is vested in them and by not declining to exercise the jurisdiction which is vested in them.

(g) Apart from the situations pointed in (e) and (f), High Court can interfere in exercise of its power of superintendence when there has been a patent perversity in the orders of tribunals and Courts subordinate to it or where there has been a gross and manifest failure of justice or the basic principles of natural justice have been flouted.

(h) In exercise of its power of superintendence High Court cannot interfere to correct mere errors of law or fact or just because another view than the one taken by the tribunals or Courts subordinate to it, is a possible view. In other words the jurisdiction has to be very sparingly exercised.

(i) High Court's power of superintendence under Article 227 cannot be curtailed by any statute. It has been declared a part of the basic structure of the Constitution by the Constitution Bench of this Court in the case of *L.Chandra Kumar vs. Union of India & others*, reported in (1997) 3 SCC 261 and therefore abridgement by a Constitutional amendment is also very doubtful.

(j) It may be true that a statutory amendment of a rather cognate provision, like Section 115 of the Civil Procedure Code by the Civil Procedure Code (Amendment) Act, 1999 does not and cannot cut down the ambit of High Court's power under Article 227. At the same time, it must be remembered that such statutory amendment does not correspondingly expand the High Court's jurisdiction of superintendence under Article 227.

(k) The power is discretionary and has to be exercised on equitable principle. In an appropriate case, the power can be exercised suo motu.

(l) On a proper appreciation of the wide and unfettered power of the High Court under Article 227, it transpires that the main object of this Article is to keep strict administrative and judicial control by the High Court on the administration of justice within its territory.

(m) The object of superintendence, both administrative and judicial, is to maintain efficiency, smooth and orderly functioning of the entire machinery of justice in such a way as it does not bring it into any disrepute. The power of interference under this Article is to be kept to the minimum to ensure that the wheel of justice does not come to a halt and the fountain of justice remains pure and unpolluted in order to maintain public confidence in the functioning of the tribunals and Courts subordinate to High Court.

(n) This reserve and exceptional power of judicial intervention is not to be exercised just for grant of relief in individual cases but should be directed for promotion of public confidence in the administration of justice in the larger public interest whereas Article 226 is meant for protection of individual grievance. Therefore, the power under Article 227 may be unfettered but its exercise is subject to high degree of judicial discipline pointed out above.

(o) An improper and a frequent exercise of this power will be counter-productive and will divest this extraordinary power of its strength and vitality."

5.2 Thus, exercise of power under Article 227 of the Constitution of India should be with a view to keep the tribunals / Courts within the bounds of their authority, to ensure that law is followed by tribunals / Courts by exercising jurisdiction which is vested in them and/or when there has been a patent perversity in the orders of tribunals and Courts subordinate to it or where there has been a gross and manifest failure of justice or the basic

principles of natural justice have been flouted. In exercise of its power of superintendence, High Court cannot interfere to correct mere errors of law or fact or just because another view than the one taken by the tribunals or Courts subordinate to it, is a possible view. In other words the jurisdiction has to be very sparingly exercised.

5.3 The Apex Court in a recent decision in ***Puri Investments v. Young Friends and Co. and Others, MANU/SC/0290/2022*** has observed as under:

“13. There was no perversity in the order of the Appellate Tribunal on the basis of which the High Court could have interfered. In our view, the High Court tested the legality of the order of the Tribunal through the lens of an appellate body and not as a supervisory Court in adjudicating the application under Article 227 of the Considering. This is impermissible. The finding of the High Court that the appellate forum’s decision was perverse and the manner in which such finding was arrived at was itself perverse.”

5.4 Thus, a petition under Article 227 of the Constitution of India cannot be given a shape of appeal in disguise.

5.5 Adverting the case on hand, the petitioner has alleged that the respondent has extramarital affair with two persons. Further, the petitioner had also produced on record a copy of FIR filed by the brother of the respondent herein against one Shrirang Dharmendra Survey, with whom the respondent indulged in extramarital affair. The learned Family Judge has considered the said aspect and has opined that there is nothing on record to show as to how it is unsafe for his children and as to how the life of his children is at stake with the respondent herein. Further, so far as the allegations *qua* the character of the respondent is concerned, the learned Family Judge has opined that the same

could not be believed only on the basis of the FIR, Photographs and/or the chatting details. It is further observed by the learned Family Judge that by virtue of an order passed below Exh. 6, visitation right has been granted to the petitioner and the respondent herein has been complying the said order scrupulously and the present petitioner and the respondent go out together with their children also and to substantiate the said fact, photographs of 24.07.2021 were also produced on record of the case in the learned Court below. The learned Family Judge has further observed that since beginning, the children are residing with the respondent only, however, only on bare averments *qua* character of the respondent, *sans* any corroborative evidence, it is not proper to hand over the custody of the children to the petitioner. Thus, the learned Family Judge has considered all the aspects of the matter in the impugned order.

5.6 In the opinion of this Court, the learned Family Judge has committed no error, much less an error apparent on the face of it, which requires interference at the hands of this Court in a petition under Articles 226/227 of the Constitution of India.

6. In aforesaid view of the matter, this petition fails and is accordingly dismissed. Rule is discharged. However, in the facts and circumstances of the case, there shall be no order as to costs.

[A. C. Joshi, J.]

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