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IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/CRIMINAL MISC.APPLICATION NO. 13761 of 2021
With
R/SPECIAL CRIMINAL APPLICATION NO. 7670 of 2021

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MEHER ISMAILBHAI MALEK
Versus
STATE OF GUJARAT

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Appearance:

MR HITESH L GUPTA(3937) for the Applicant(s) No. 1
MR MUHAMMAD ISA M HAKIM(10874) for the Respondent(s) No. 2
MR MITESH AMIN, LD. PUBLIC PROSECUTOR ASSISTED BY MRS KRINA
CALLA, APP (2) for the Respondent(s) No. 1

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CORAM:HONOURABLE MR. JUSTICE ILESH J. VORA

Date : 13/10/2021

COMMON ORAL ORDER

Order in Criminal Misc. Application No.13761 of 2021

Heard Mr. Hitesh L. Gupta, learned advocate for the applicant, Mr. Mitesh Amin, learned Public Prosecutor assisted by Mrs. Krina Calla, learned APP for the respondent-State and Mr. Muhammad Isa M. Hakim, learned advocate for the respondent no.2.

In view of settlement arrived at between the informant and her husband-accused no.1 and considering the allegations alleged against the applicant, she has made out a case for interim relief.

Rule, returnable on **29.11.2021**. Learned APP waives service of rule for and on behalf of the respondent-State and Mr. Hakim, learned advocate waives service of rule for and on behalf of respondent no.2.

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Let there shall be no coercive steps (arrest) by the investigating agency against the present applicant till then. However, investigation may continue. The Investigating Officer shall not file charge-sheet without prior permission of this Court.

Order in Special Criminal Application No.7670 of 2021

1. By way of present petition under Article 226 of the Constitution of India and Section 482 of the Criminal Procedure Code, 1973, the petitioners have prayed for following substantial reliefs:

“(A) THIS HON’BLE COURT MAY BE PLEASED TO quash the FIR being CR. No. I – 11196004210480 dated 17/06/2021 registered with Gotri Police Station, Vadodara City, for the offences punishable under Sections 323, 498(A), 376(2)(n), 377, 312, 313, 504, 506(2), 120(B) and 419 of the Indian Penal Code and Sections 4, 4A, 4(2)(a), 4(2)(b) and 5 of Gujarat Freedom of Religion Act, 2003 as amended in the year 2021 and Sections 3(1)(r)(s), 3(2)(5), 3(2)(5-a), 3(1)(w)(1)(2) of the Scheduled Caste and Scheduled Tribe (Prevention of Atrocities) Act, 1989.

(C) Pending admission, hearing and final disposal of this petition, THIS HON’BLE COURT MAY BE PLEASED TO stay, execution, implementation and operation of the impugned FIR being CR. No. I – 11196004210480 dated 17/06/2021 registered with Gotri Police Station, Vadodara City, for the offences punishable under Sections 323, 498(A), 376(2)(n), 377, 312, 313, 504, 506(2), 120(B) and 419 of the Indian Penal Code and Sections 4, 4A, 4(2)(a), 4(2)(b) and 5 of Gujarat Freedom of Religion Act, 2003 as amended in the year 2021 and Sections 3(1)(r)(s), 3(2)(5), 3(2)(5-a), 3(1)(w)(1)(2) of the Scheduled Caste and Scheduled Tribe (Prevention of Atrocities) Act, 1989 and further also be pleased to order the immediate and forthwith release of the Petitioner Nos.2, 3, 4, 6,

7, 8 on appropriate conditions as may be deemed fit by the Hon'ble Court;"

2. Heard Mr. Muhammad Isa M. Hakim, learned advocate for the petitioners and Mr. Mitesh Amin, learned Public Prosecutor assisted by Mrs. Krina Calla, learned APP for the respondent-State and Mr. Hitesh L. Gupta, learned advocate for the applicant in Criminal Misc. Application No.13761 of 2021.

3. The brief facts giving rise to filing of present petition are as follows:

3.1 The petitioner no.1 – informant and petitioner no.2-accused no.1 are wife and husband respectively. Prior to filing of this FIR, the informant Divyaben daughter of Vijaybhai Jethabhai Rohit and accused no.2 – Samir Abdulbhai Qureshi came to know each other in the year 2019 and developed intimate relationship. They came into contact with each other through social media and on account of their intimate relationship, they became aware about each other's identity, character, family details and each other's religion.

3.2 In view of aforesaid relationship, the informant and accused no.1 executed an undertaking/understanding agreement dated 08.02.2021 and the said agreement was signed by the witnesses namely mother of the accused no.1 and father of the informant and as per the agreement, they have agreed to marry each other under the Special Marriage Act, 1954 by following their respective religions. Thereafter, in presence of their

parents and family members, got married as per Muslim Rites and Rituals solemnized on 16.02.2021 and also declared their marriage on oath jointly by way of affidavit wherein they have categorically stated that the marriage was without any force or coercion and out of their free will and the marriage was registered with Vadodara Municipal Corporation. On 20.02.2021, both have filed an application under Section-15 of the Special Marriage Act in form provided in Rule 30 and accordingly, marriage was registered and certificate of marriage was issued under Section 16 of the Special Marriage Act and the same was witnessed by father of the informant, mother of accused no.1 and two other witnesses.

3.3 Subsequently, due to some petty and trivial marital and matrimonial issues arose between accused no.1 and the informant, the informant had decided to left the matrimonial house and went to parental home. On 17.06.2021, the impugned FIR came to be registered with Gotri Police Station, Vadodara alleging that the accused no.1 made forcible sexual intercourse, taking obscene photographs of the informant, causing forcible miscarriage and was compelled to forcibly convert her religion and used casteist slurs. She has also alleged that there was a conspiracy amongst the accused to commit the said offences. Initially, four persons were arraigned as accused namely husband, father-in-law, mother-in-law and sister-in-law of the informant and accused no.6 to 8 were arraigned subsequently who are relatives and in-laws of the informant and witness/Kazi.

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4. In the aforesaid background of facts, the petitioners have jointly sought consent quashing of the FIR mainly on the ground that issues between husband and wife were petty and trivial matrimonial disputes which have been resolved and therefore, as they wanted to continue their matrimonial and marital relationship and therefore, the impugned FIR may be quashed with the consent of both the parties.

5. Mr. Hakim, learned advocate for the petitioners would submit that in view of settlement, the petitioners have a good prima-facie case and therefore, if the interim relief for bail as prayed for, is not granted, then, they shall suffer irreparable loss and injury by deprivation of their personal liberties whereas grant of the same shall not cause any harm or injury to the respondents.

6. On the other hand, Mr. Hitesh L. Gupta, learned advocate for the applicant - Meher Ismailbhai Malek (Criminal Misc. Application No.13761 of 2021) would submit that the applicant has not played any role in the alleged offence and she has been arraigned as an accused alleging that she is a friend of accused no.1 and accused no.1 and the informant have stayed at her home. He would further submit that instead of citing witness by the police agency, she has been wrongly arraigned as an accused in the alleged offence which is nothing but misuse of process of law.

7. Heard Mr. Mitesh Amin, learned Public Prosecutor assisted by Mrs. Krina Calla, learned APP for the

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respondent-State at length.

8. Having heard learned advocates appearing for the respective parties and upon bare perusal of the impugned FIR and material placed on record, it appears that the petitioner no.1-informant was in relationship with the accused no.1 and both of them had agreed to marry each other and had followed the procedure like performed Nikahnama, got their marriage registered under Special Marriage Act, 1954 and lived together as husband and wife. The petitioners no.2, 3, 4 and 5 are in-laws of the informant whereas petitioners no.6, 7 and 8 are the witnesses of the marriage.

9. The petitioners are facing charges for the offences punishable under the provisions of Gujarat Freedom of Religion Act, 2021 (amendment). The Act, 2003, initially brought into force in April, 2003. Section 3 of 2003 Act provides for prohibition of conversion of any person from one religion to another religion by use of force or by allurement or by any fraudulent means. By the Amendment Act, 2021, which brought into force by way of Notification dated 04.06.2021, a marriage itself is presumed to be a medium for the purposes of unlawful conversion if the marriage was by way of allurement, force or by way of fraudulent means. In the new amendment, Section 4(A) prescribes punishment of imprisonment in the range of 3 to 5 years for unlawful conversion. Section 4(B) declares marriages by unlawful conversion as void. Section 4(C) deals with offence of organizations doing unlawful conversion. Section 6 provides prior sanction of District

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Magistrate is necessary to start prosecution against the accused.

10. The vires of the Amendment Act have been challenged by N.G.O. JAMIAT-ULAMA-E-HIND GUJARAT (Special Civil Application No.10304 of 2021) wherein Division Bench of this Court vide order dated 19.08.2021 after referring the case of *Shafin Jahan vs. Ashokan* reported in (2018) 16 SCC 368, have stayed the rigors of Section 3, 4, 4A to 4C, 5, 6 and 6A observing that the provisions shall not operate merely because of marriage is solemnized by a person of one religion with a person of another religion without force or by allurement or by fraudulent means and such marriages cannot be termed as marriages for the purposes of unlawful conversion. The State has challenged the same before the Apex Court.

11. It is apt to rely and refer to the decision rendered in case of *Arnab Manoranjan Goswami versus State of Maharashtra and Others* reported in (2021) 2 SCC 427, wherein it is held that the High Court must exercise its power under Article 226 of the Constitution of India to grant interim bail with caution and circumspection, cognizant of the fact. The relevant paragraphs no.66 and 67 read thus:

“66. These principles are equally applicable to the exercise of jurisdiction under Article 226 of the Constitution when the court is called upon to secure the liberty of the accused. The High Court must exercise its power with caution and circumspection, cognizant of the fact that this jurisdiction is not a ready substitute for recourse to the remedy of bail under Section 439 of the CrPC. In the backdrop of

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these principles, it has become necessary to scrutinize the contents of the FIR in the case at hand. In this batch of cases, a prima facie evaluation of the FIR does not establish the ingredients of the offence of abetment of suicide under Section 306 of the IPC. The appellants are residents of India and do not pose a flight risk during the investigation or the trial. There is no apprehension of tampering of evidence or witnesses. Taking these factors into consideration, the order dated 11-11-2020 envisaged the release of the appellants on bail.

J Human liberty and the role of Courts

67. Human liberty is a precious constitutional value, which is undoubtedly subject to regulation by validly enacted legislation. As such, the citizen is subject to the edicts of criminal law and procedure. Section 482 recognizes the inherent power of the High Court to make such orders as are necessary to give effect to the provisions of the CrPC "or prevent abuse of the process of any Court or otherwise to secure the ends of justice. Decisions of this court require the High Courts, in exercising the jurisdiction entrusted to them under Section 482, to act with circumspection. In emphasising that the High Court must exercise this power with a sense of restraint, the decisions of this Court are founded on the basic principle that the due enforcement of criminal law should not be obstructed by the accused taking recourse to artifices and strategies. The public interest in ensuring the due investigation of crime is protected by ensuring that the inherent power of the High Court is exercised with caution. That indeed is one - and a significant - end of the spectrum. The other end of the spectrum is equally important: the recognition by Section 482 of the power inhering in the High Court to prevent the abuse of process or to secure the ends of justice is a valuable safeguard for protecting liberty. The Code of Criminal Procedure of 1898 was enacted by a legislature which was not subject to constitutional rights and limitations; yet it recognized the inherent power in Section 561A. Post- Independence, the recognition by Parliament of the inherent power of the High Court must be construed as an aid to preserve the constitutional value of liberty. The writ of liberty runs through the fabric of the Constitution. The need to ensure the fair investigation of crime is undoubtedly important in itself, because it protects

at one level the rights of the victim and, at a more fundamental level, the societal interest in ensuring that crime is investigated and dealt with in accordance with law. On the other hand, the misuse of the criminal law is a matter of which the High Court and the lower Courts in this country must be alive. In the present case, the High Court could not but have been cognizant of the specific ground which was raised before it by the appellant that he was being Section 482 of the CrPC 1973 made a target as a part of a series of occurrences which have been taking place since April 2020. The specific case of the appellant is that he has been targeted because his opinions on his television channel are unpalatable to authority. Whether the appellant has established a case for quashing the FIR is something on which the High Court will take a final view when the proceedings are listed before it but we are clearly of the view that in failing to make even a prima facie evaluation of the FIR, the High Court abdicated its constitutional duty and function as a protector of liberty. Courts must be alive to the need to safeguard the public interest in ensuring that the due enforcement of criminal law is not obstructed. The fair investigation of crime is an aid to it. Equally it is the duty of courts across the spectrum – the district judiciary, the High Courts and the Supreme Court – to ensure that the criminal law does not become a weapon for the selective harassment of citizens. Courts should be alive to both ends of the spectrum – the need to ensure the proper enforcement of criminal law on the one hand and the need, on the other, of ensuring that the law does not become a ruse for targeted harassment. Liberty across human eras is as tenuous as tenuous can be. Liberty survives by the vigilance of her citizens, on the cacophony of the media and in the dusty corridors of courts alive to the rule of (and not by) law. Yet, much too often, liberty is a casualty when one of these components is found wanting.”

12. In light of the aforesaid law laid down by the Apex Court and considering the peculiar facts and circumstances of the case more particularly the settlement arrived at between the husband and wife i.e. informant and accused no.1, the petitioners have made

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out a prima-facie case for interim relief in the nature of bail. Thus, without entering into merits of the case, it is a fit case to exercise discretion under Article 226 of the Constitution of India to grant relief. Thus, considering the nature of dispute, severity of punishment and in absence of any past antecedents of like nature and as there is no possibility of fleeing from justice, the discretion is required to be exercised.

13. Rule, returnable on **29.11.2021**. Learned APP waives service of rule for and on behalf of the respondent-State.

14. Thus, at the interim stage, without examining the merits of the case, the petitioners no.1, 6, 7 and 8 are ordered to be released on bail on executing a personal bond of Rs.10,000/- (Rupees Ten thousand only) each, with one surety of the like amount to the satisfaction of the learned Trial Court and subject to the conditions that they shall;

No.	Conditions
(a)	not take undue advantage of liberty or misuse liberty;
(b)	not act in a manner injuries to the interest of the prosecution;
(c)	surrender passports, if any, to the lower court within a week from the date of their release;
(d)	not leave India without prior permission of the Sessions Judge concerned;

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(e)	furnish latest address of residence to the Investigating Officer and also to the Court at the time of execution of the bond and shall not change the residence without prior permission of the trial Court;
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Over and above the regular mode of service, direct service through e-mode is also permitted.

TAUSIF SAIYED

(ILESH J. VORA,J)