

**HIGH COURT OF GAUHATI****Bench: Justice Arun Dev Choudhury****Date of Decision: 22<sup>nd</sup> May 2024**

CRIMINAL REVISION PETITION NO. 143 OF 2024

**Mujibur Rahman                      ...Petitioner****Versus****The State Of Assam                      ...Respondent****Legislation:**

Section 397 and 401 of the Code of Criminal Procedure, 1973

Sections 120(B), 379, 429 of the Indian Penal Code, 1860 (IPC)

Section 13(1), 16 of the Assam Cattle Preservation Act, 2021

**Subject:** Criminal revision petition challenging the refusal of zimma (custody) of seized cattle by the Magistrate, based on provisions under the Assam Cattle Preservation Act, 2021.

**Headnotes:**

Criminal Law – Zimma of Seized Cattle – Revision petition against order refusing zimma – Seizure made under Assam Cattle Preservation Act, 2021 – Magistrate refused zimma on grounds of necessity for further investigation – Petitioner argued cattle were

legally purchased, presented purchase receipt to Investigating Officer (I.O.) – Court held provisions of Chapter XXXIV of Cr.P.C. applicable for disposal of property during enquiry and trial – Principles of zimma as laid down in *Sunderbhai Ambala Desai v. State of Gujarat* applied – Held Magistrate erred in refusing zimma without proper consideration of legal purchase and lack of investigation need for custody – Order dated 27.03.2024 set aside – Zimma of seized cattle granted to petitioner under specified conditions. [Paras 1-29]

Power of Magistrate – Seizure and Custody – Analysis – Held – Power under Section 11 of Assam Cattle Preservation Act, 2021 relates to search and seizure, not disposal of property during trial – Disposal of property during enquiry/trial governed by Chapter XXXIV of Cr.P.C. – Subsection 5 of Section 11 of Act, 2021 only applicable to initial seizure stage – No specific disposal provision in Act, 2021 – Cr.P.C. provisions for property disposal applicable. [Paras 10-20]

Decision – Grant of Zimma – Court orders zimma of seized cattle to petitioner – Conditions include preparation of proper panchnama, bond execution, prohibition of cattle sale or cruelty, and production of cattle as required for investigation or trial. [Para 28]

**Referred Cases:**

- *Sunderbhai Ambala Desai v. State of Gujarat* (2002) 10 SCC 283
- *Shri Chatrapati Shivaji Gaushala v. State of Maharashtra* 2022 SCC Online SC 1402

- Meher Banu Begum v. State of Assam Crl Rev. P/41/2021
- Madhu Limaye v. State of Maharashtra (1977) 4 SCC 551

Representing Advocates:

Mr. N.J. Dutta for the petitioner

Mr. K.K. Parashar, Additional Public Prosecutor for the respondent

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### **JUDGMENT & ORDER (CAV)**

1. Heard Mr. N. J. Dutta, learned counsel for the petitioner. Also heard Mr. K. K. Parashar, learned Additional Public Prosecutor for the State.
2. The present application under Section 397 and 401 of the Code of Criminal Procedure, 1973 is filed assailing an order dated 27.03.2024 passed by the learned SDJM-II, Kamrup (M), Guwahati in connection with Basistha P.S. Case No. 131/2024, under Section 120(B)/379/429 IPC read with Section 13(1)/16 of the Assam Cattle Preservation Act, 2021.
3. By the impugned order dated 27.03.2024, the learned Magistrate had refused to grant zimma of the seized cattle to the petitioner on the ground that the seized cattle may be necessary for further investigation.
4. Mr. Dutta, learned counsel for the petitioner submits that the seized cattle were duly purchased from the registered cattle market and the petitioner had already produced the receipt of purchase before the

I.O., and that being the position, the learned Magistrate could not have rejected the zimma of the cattle.

5. Per contra, Mr. K. K. Parashar learned Additional Public Prosecutor referring to the provision of Section 11 of the Assam Cattle Preservation Act, 2021 (hereinafter referred to as Act, 2021) submits that in terms of sub section 5 of Section 11 of the Act, 2021, custody of cattle cannot be granted to the petitioner inasmuch as in terms of the mandate of sub Section 7 of Section 11 of the Act, 2021, the seized cattle are to be handed over, either to an institution established under Section 21 of the Act, 2021 or to any existing Gaushalas or similar institutions.
6. Referring to sub section 9 of Section 11 of the Act, 2021, Mr. Parashar, learned Additional Public Prosecutor further contends that on conviction, the seized materials shall stand forfeited to the State Government. Therefore, there is no scope for grant of custody/possession of cattle to an accused. According to him, when the cattle are transported in contravention of the Prevention of Cruelty to Animals Act, 1960 and rules framed thereunder, a person is not entitled for custody. In support of his contention, Mr. Parashar, learned Additional Public Prosecutor relies on the decision of the Hon'ble Apex Court in the case of **Shri Chatrapati Shivaji Gaushala –vs- State of Maharashtra and Others** reported in **2022 SCC Online SC 1402**. He further relies on the decision of a coordinate Bench in the case of **Meher Banu Begum –vs- State of Assam** (Crl Rev. P/41/2021).
7. Mr. Parashar, learned Additional Public Prosecutor further contends that an express provision of appeal is thereunder Section 12 of the Act, 2021 against any order passed under Section 11 of the Act, 2021

and therefore, the impugned order is an appealable order. According to Mr. Parashar, learned Additional Public Prosecutor, when an express provision of appeal is provided under the Act, the revisional power under Sections 397/401 of Cr.P.C. can not be exercised and when it comes to the exercise of power under Section 482 of Cr.P.C., the same can only be exercised in exceptional cases, where glaring illegality resulting in miscarriage of justice is shown.

8. Countering such arguments, Mr. N.J. Dutta, learned counsel for the petitioner argues that provisions mandated under sub section 5 of Section 11 of the Act, 2021 relates only to the stage of production of seized materials in terms of sub section 3 and 4 of Section 11 of the Act, 2021 and such exercise of power is not relatable to the power of disposal of the seized property as mandated under Chapter XXXIV of the Code and therefore, the disposal of seized property is required to be dealt with in terms of Chapter XXIV of the Code. The learned Counsel further contends that, when power is exercised by the Magistrate under Chapter XXXIV of the Cr.P.C., such order can not be made appealable under section 12 of the Act'2021.
9. This Court has given anxious consideration to the submissions made by the learned counsel for the parties. Also perused the materials available on record and the determination in the following paragraphs:
10. **The Assam Cattle Preservation Act, 2021 (Act'2021:**
  - I. The Act, 2021 was enacted with an object to preserve cattle Accordingly, its consumption, slaughter, illegal transportation and matters connected therewith and incidental thereto are codified in the Act, 2021.

- II. Regulation as regards transportation of cattle, is provided under Section 7 of the Act, 2021. In terms of aforesaid section, no cattle can be transported without valid permit. Further, transportation of cattle from any place within the State of Assam to another place in a district within the State, which shares an international border, is prohibited. It is further prescribed that when cattle are transported with permission, the same shall be transported as per requirements laid down under the Prevention of Cruelty to Animals Act, 1960.
  - III. An exception is carved out to the prohibition of transportation, when the cattle are transported to grazing fields or transported for agricultural or for any animal husbandry purposes. Yet another exception is for those cattle transported to and from a registered animal market for the purpose of sale and purchase.
11. **The power to enter, inspect, search, seizure and detain under the Act, 2021:**
- I. Section 11 of the Act, 2021 deals with power to enter, inspect, search, seizure and detain. The prescription made under Section 11 of the Act, 2021 can be summarised as follows:-
  - II. Only a Police Officer not below the rank of Sub Inspector is empowered to enter and inspect any premises for the purpose of enforcing the provision of the Act, 2021. In certain cases, a registered veterinary officer or any officer authorized in this behalf by the State Government are also empowered with such power.
  - III. When the aforesaid authorized officer forms an opinion that an offence under the Act, 2021, has been committed or likely to be committed, such officer can exercise such a power and can seize any

materials or cattle or vehicle or conveyance which have been or likely to be used in commission of offences under the Act,2021

- IV. Whenever, any person transports or causes to be transported cattle in contravention of subsections 1, 2 and 3 of Section 7 of the Act, 2021, such vehicle or any conveyance used in transportation along with the cattle is liable to be seized by an authorised Officer in this behalf. (Sub section 14 of Section 7 of the Act, 2021).
- V. The Police Officer once seizes the material etc., is statutorily bound to report such seizure before the jurisdictional Judicial Magistrate First Class without unreasonable delay.
- VI. In a situation, when the seizure is not made by the Police Officer but by the other officers as empowered, such officer is bound to maintain the seized cattle and hand over the other materials and the person detained to the jurisdictional police station along with a complaint. Thereafter, the officer-in-charge of the jurisdictional police station is to report such seizure without reasonable delay to the Judicial Magistrate First Class.
- VII. On receipt of the report, the Judicial Magistrate First Class is empowered to release the said seized materials, even when the Magistrate is satisfied that there is enough material to presume that a prima facie offence under the Act, is committed or intended to be committed.

However, a condition of furnishing of bank guarantee is imposed for release of such material.

An exception has been carved out so far the same relates to release of cattle inasmuch it is mandated that seized cattle are to be sent to

a Gaushala or institution established under Section 20 of the Act, 2021 or any other similar institution.

- VIII. The cost of maintenance of the seized cattle is required to be recovered from such person as per prescription of the Rules made under the Act, 2021.
  - IX. In the event of conviction, the seized materials shall stand forfeited to the State Government.
  - X. The Court is also empowered to allow the Police Officer, who seized the materials, to sale the materials except cattle, through public auction, during enquiry or trial
- 12. The power of the police officers to seize property under Chapter VII-D of Code of Criminal Procedure, 1973.**
- I. Section 102 under Chapter VII-D of Code of Criminal Procedure, 1973 deals with the power of the police officers to seize property, which is either stolen or suspected to be a part of a commission of an offence.
  - II. Section 102 of the Code of Criminal Procedure further mandates that the police officer shall report the seizure to the Magistrate forthwith.
  - III. Sub Section 3 of Section 102 of the Cr.P.C. empowers a police officer to give custody of the seized property to any person, when such property cannot be conveniently transported to the Court or where there is difficulty securing proper accommodation for the custody or where continued retention of the property in police custody may not be necessary for the purpose of investigation. However, a person taking custody is to execute a bond, undertaking to produce the materials before the Court as and when required.



- IV. When such property is subject to speedy and natural decay and ownership of such property is unknown or owner absent and value is less than Rs. 500/- such property can be sold forthwith in auction in terms of Section 457 and 458 of the Code.
13. **Disposal of property under the Code of Criminal Procedure, 1973 vis-a-vis under Act'2021:**
- I. Chapter XXXIV of the Code of Criminal Procedure, 1973 contains Sections 451 to 459 and it deals with disposal of property.
- II. Section 451 of the Code of Criminal Procedure, 1973 deals with the orders that can be passed for custody and disposal of property pending trial in certain cases. When a property is produced before any criminal Court during any enquiry or trial, the Court may order for proper custody of such property, pending conclusion of the enquiry or trial and when such property is subjected to speedy and natural decay, the Court can even pass direction to sale or for disposal of such property.
- III. Section 452 of the Code of Criminal Procedure, 1973 deals with disposal of property at conclusion of trial. Such power includes destruction, confiscation or delivery to any person entitled to possession.
- IV. Under the Act, 2021, Sub Section 9 of Section 11, prescribes for forfeiture of vehicle or conveyance etc., on conviction including forfeiture of bank guarantee. Thus, under the Act, 2021 the forfeiture is subject to the condition of conviction.
- V. Section 457 of the Code deals with the procedure, when seizure of property is reported to a Magistrate and such property is not produced before the criminal Court during an enquiry or trial. In such a case,

the competent Court/Magistrate is empowered to pass order(s) as regards disposal of such property or delivery of such property to the person entitled for possession thereof.

- VI. Under the scheme of Act, 2021, no specific provision is made regarding disposal of property during enquiry and trial, except as provided under section 11 as detailed hereinabove and unlike as has been prescribed under Chapter XXXIV of the Code.
14. From the aforesaid prescription of law, more particularly under Sub Section 14 of Section 7 of the Act, 2021, Sub Sections 3, 4 and 5 of Section 11 of the Act, 2021 and Section 102 of the Code of Criminal Procedure, 1973, it is crystal clear that the purpose of enactment of such provision is to facilitate investigation and to give the police officers the power to gather evidence to support the allegations made, which includes search, seizure and detain etc.

15. Further, under the aforesaid provisions of law, the officer empowered to made seizure is to report the seizure to the Magistrate within a reasonable time/forthwith. The police officer under Section 102 (3) of Cr.P.C. is even empowered to release the custody of the seized materials to any person on execution of a bond to produce the property before the Court as and when required, when such property seized cannot be transported to the Court conveniently. At the same time under Act, 2021, a provision for keeping the custody of the cattle under gaushala etc., is also provided. The objection of such provision is for the protection of the seized property inasmuch as cattle cannot be allowed to be kept in the police station. Further such course of action, if permitted, may also amount to cruelty to these animals under the Act'1960.

16. From the provisions of law as discussed hereinabove, this court is of the considered opinion that the mandate under Sub Section 4 of Section 11 of the Act, 2021 of reporting of the seizure to the Jurisdictional Magistrate/First Class Magistrate, is to bring to the notice of the jurisdictional Magistrate such fact of seizure. It is the further considered opinion of this Court that it is a mandatory requirement under the Act, 2021 to report to the Judicial Magistrate First Class as regard the factum of search and seizure. An obligation is imposed under Sub Section 4 of Section 11 of the Act, 2021 upon the police officers designated in this regard to report such seizure to the Judicial Magistrate First Class, the same without unreasonable delay. Law is no more res integra that when there is a prescription to report the seizure “without reasonable delay”, the same shall mean that the report of seizure is made with reasonable speed with expedition and any delay in the matter should be satisfactorily explained.
17. Text of section 102 of the Code and Sub Sections 3, 4 and 5 of Section 11 of the Act, 2021 is very clear and this Court is of the unhesitant view that the power to release the seized material under sub Section 5 of Section 11 of the Act, 2021 and under Section 102 of Cr.P.C., are relatable only to the stage of seizure under Sub Section 3 of Section 11 of the Act, 2021 and under Chapter VIII of the Cr.P.C. as the case may be. The reason is obvious that such seizure can be carried out only in a situation as envisaged under sub section 3 and 4 of section 11 of the Act’2021 and the same is without approval of the jurisdictional magistrate. Therefore, such prescription cannot be made relatable to a provision of disposal of property during enquiry and trial. Thus, such power and mandate of law also cannot be

treated to be a power and / or prescription for entire period of enquiry and trial.

18. Though a power has been granted to the Magistrate under Sub Section 10 of Section 11 of the Act, 2021 to allow sale of seized material on an application filed by the police officer having authority to make seizure, however, the Act is silent under what circumstances such permission can be granted. The provisions of forfeiture and sale including the handing over of the cattle to gaushalas are enumerated under the provision of Section 11 of the Act, 2021, which deals with power to enter, inspect, search and detain.
19. That being the position and in absence of any specific prescription in the Act'2021 as regards disposal of property during enquiry and trial or post trial or at the conclusion of trial, the provision of Chapter XXXIV of the Code, 1973 shall be applicable, so far the same relates to disposal of property seized under the provision of Section 11 of the Act, 2021. Further, the Act,2021, more particularly, Sub Section 1 of Section 11 of the Act, 2021 makes it clear that Section 11 is enacted to deal with the power of search and seizure, which has been granted for the purpose of enforcing the provision of the Act, 2021.
20. Power of search and seizure are important tools for the investigating authorities to properly investigate the case. The purpose of seizure in a criminal case is to secure and preserve evidence or items that are relevant for investigation or for prosecution of a criminal case. Thus, in the aforesaid context and the determination made hereinabove, this Court is of the unhesitant view that the provision of Chapter XXXIV of Cr.P.C., more particularly, Section 451 and 457 of Cr.P.C. shall be applicable in a case under the Act, 2021 inasmuch as it is

clear that barring the provision of Sub Section 9 of Section 11 of the Act, 2021, there is no procedure prescribed for disposal of property.

21. So far the ratio laid down in **Shri Chatrapati Shivaji Gaushala** (supra) relied on by Mr. Parashar, learned Additional Public Prosecutor, the issue involved in this that case was whether it was mandatory for Magistrate to send the seized cattle to a pinjrapole and such issue was answered that the Magistrate has a discretion to hand over interim custody of the animal to a pinjrapole, but is not bound to do so. In the considered opinion of this Court the ratio laid down in that case has no relevance in the given facts of the present case. However, the manner, in which the seized cattle are treated, can be a valid consideration while granting zimma, even under Sections 451 or 457 of the Cr.P.C.
22. The Hon'ble Apex Court in the case of **Sunderbhai Ambala Desai Vs. State of Gujrat** reported in **(2002) 10 SCC 283** , while dealing with the power of a Magistrate under section 451 and 457 Cr.P.C., regarding disposal of seized material had laid down the certain principles. Such principles can be summarised as follows:-
  - I. That the application for zimma of seized material shall be dealt expeditiously and judiciously with the object that the owner of the seized article should not suffer for it being remaining unused or by its misappropriation,
  - II. Whatever the situation be, it is of no use to keep the seized materials at police station for a long period.
  - III. It proper panchnama before handing over possession of the article is prepared, that can be used in evidence instead of it production before Court during trial.

IV. To protect the interest of the investigation/trial, the seized article can be handed over to the applicant by preparing detail and proper panchnama of such article, taking photographs of such article and a bond that such article would be produced if required at the time of trial/investigation. The Court for this purpose, may take proper security also.

Such principle shall also be made applicable, when zimma of seized material, including cattle under the Act, 2021 is sought for by filing application under Section 451 or 457 of the Cr.P.C. as the case may be.

**23. Plea of alternative remedy:**

I. Now, coming to the argument of alternative remedy, there is no doubt that the inherent power of Section 482 of Cr.P.C., should not be exercised/resorted to, if there is specific provision in the code for redressal of grievances of aggrieved party (In **Madhu Limaye – VsThe State of Maharashtra** reported in **1977 4 SCC 551**).

II. There is also no quarrel to the proposition that in terms of Section 401 of Cr.P.C., when there is a provision of appeal under the code and no such appeal is filed, a proceeding by way of revision under Section 401 of Cr.P.C., shall not be entertained at the instance of the party, who could have appealed.

III. Section 397 of the Cr.P.C. allows High Court and Session Judges to call and examine the records of criminal Courts inferior to them, within their territory to examine and make sure that the decisions of such Courts are correct, legal and fair. This Court in exercise of such power can also look into whether the Courts below had followed the right procedure. In such a proceeding, the superior Court can also call for

the records of the Courts below. However, such exercise of power shall not be resorted to, when there is an express provision of appeal.

IV. This Court has already determined hereinabove that the power under sub section 5 of Section 11 of the Act, 2021 is relatable to sub sections 3 and 4 of Section 11 and nowhere relates to disposal of property as envisaged under Chapter XXXIV of the Code.

V. Therefore, the natural corollary is that an appeal under Section 12 of the Act, 2021 shall lie against an order passed under Sub Section 5 of Section 11 of the Act, 2021, when seizure is reported by the police officer in terms of sub sections 3 and 4 of Section 11 of the Act, 2021 and an order is passed thereon in exercise of power under Sub Section 5 of Section 11 of the Act, 2021 and not against any order passed under Section 451 or Section 457 of the Code, 1973.

24. Accordingly, the following determinations are recorded in terms of the discussion and reasons given hereinabove above.

I. The prescription made under sub section 5 of Section 11 of the Act, 2021 is relatable only to a situation/stage when the authorised officer(s) exercises its power under sub sections 3 of Section 11 of the Act, 2021 or under sub section 14 of Section 7 of the Act, 221 and reports the same to the Judicial Magistrate First Class in terms of sub section 4 of Section 11 of the Act, 2021.

II. Chapter XXXIV shall be applicable to a proceeding under the Act'2021. Therefore, when an application under Section 451 or 457 of Cr.P.C. is made, such application(s) is to be determined in terms of the law laid down by the Hon'ble Apex Court in the case of **Sundarbhai Ambala** (supra).

- III. A revision either under Section 401, 397 or 482 of Cr.PC. Shall not be maintainable against an order passed in exercise of power under sub section 5 of Section 11 of the Act, 2021 and appropriate remedy shall be an appeal under Section 12 of the Act, 2021.
- IV. No appeal shall be maintainable under section 12 of the Act, 2021 when a determination is made in an application filed under Section 451 or Section 457 of the Cr.P.C. as the case may be.
- V. A Magistrate in exercise of power under Sub Section 5 of Section 11 of the Act'2021 is empowered to hand over custody of the seized materials (except cattle), even when, the Magistrate is satisfied that a prima facie case is made out.
25. Now, coming to the case in hand, the cattle were seized on 02.03.2024 and on the same date, the I.O. of the case reported before the learned Chief Judicial Magistrate, Kamrup (M), Guwahati as regards seizure of 29 numbers of cattle and death of one cow. It was further reported that as there is no place to keep the cattle in the police station, the I.O. may be permitted to keep the seized cattle at Surabhi Gaushala, Koniha, DistrictKamrup (Rural).
26. It is also stated in the petition that the cattle were purchased from Kaliapani Weekly Cattle Market (Saturday) on 24.02.2024. It is the further case of the petitioner that, a zimma petition under Section 457 of the Code of Criminal Procedure, 1973 was filed, which has been rejected by the learned Magistrate under its order dated 27.03.2024.
27. This Court called for a report from the I.O., and on instruction the learned Additional Public Prosecutor for the State had submitted that as the petitioner has submitted the due receipt, the I.O. will have no objection, if the cattle are returned to the petitioner.



28. In view of the determination made hereinabove, and the given facts of the present case as recorded hereinabove, the present revision petition stands allowed following the principles as laid down in the case of **Sundarbhai Ambala** (supra) and it is provided that zimma of the seized cattle be granted to the petitioner on the following terms and conditions:
- I. The investigating authority shall prepare proper panchnama of the cattle and take photographs of such cattle and get the signature of the owner or representative of the owner and the owner shall give a bond of Rs.7,00,000/- and undertake that such cattle shall be produced as and when called for.
  - II. The petitioner/owner shall not sale out the cattle and shall not deal with the cattle with cruelty.
  - III. The petitioner/owner shall produce the cattle before the I/O or concerned authority as and when called for the purpose of investigation or trial.
29. This criminal revision petition stands disposed of.
30. The case diary be returned back.

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