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Reserved On : 10/08/2026**Pronounced On : 01/09/2026****IN THE HIGH COURT OF GUJARAT AT AHMEDABAD****R/SPECIAL CRIMINAL APPLICATION (QUASHING) NO. 10949 of 2022****With****CRIMINAL MISC.APPLICATION (DIRECTION) NO. 1 of 2022****In R/SPECIAL CRIMINAL APPLICATION NO. 10949 of 2022****FOR APPROVAL AND SIGNATURE:****HONOURABLE MR. JUSTICE M. R. MENGDEY :- sd/-**

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Approved for Reporting	Yes	No
		✓

SHAIFIYA VAJIUDDIN CONTRACTOR & ORS.**Versus****STATE OF GUJARAT & ANR.****Appearance:**

MR DHRUV R THAKKAR(11280) for the Applicant(s) No. 3

MR GG SOLANKI(5562) for the Applicant(s) No. 1,2,3

MR JAYRAJ CHAUHAN(2966) for the Applicant(s) No. 2

MR. RAHIL P. JOSHI(16415) for the Applicant(s) No. 1

MR HITESH L GUPTA(3937) for the Respondent(s) No. 2

MR NAYAN L GUPTA(11798) for the Respondent(s) No. 2

MS. KRINA P. CALLA, APP for the Respondent(s) No. 1

CORAM:HONOURABLE MR. JUSTICE M. R. MENGDEY**CAV JUDGMENT**

1. By filing the present petition under Article 226 of the Constitution of India the petitioners have prayed for the following reliefs:-

(A) Your Lordships may be pleased to admit and allow

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this Special Criminal Application.

- (B) Your Lordships may be pleased to issue a writ of certiorari or any other writ, order or direction, quashing and setting aside the impugned orders i.e. order dated 09.09.2022 passed by the learned trial Court in Criminal Misc. Application No.106 of 2022 and the judgment and order dated 23.09.2022 passed by the learned Sessions Judge in Revision Application No.49 of 2022 by holding it to be illegal null and void arbitrary passed in violation of mandatory provisions of law, without jurisdiction and is passed by exercising the power beyond the jurisdiction vested in it by the statute.
- (C) Pending admission, hearing and final disposal of this petition, an interim injunction may kindly be granted by staying the operation, implementation and execution of the impugned orders i.e. order dated 09.09.2022 passed by the learned trial Court in Criminal Misc. Application No.106 of 2022 and the judgment and order dated 23.09.2022 passed by the learned District Judge in Revision Application No.49 of 2022.

2. The facts and circumstances giving rise to filing the present petition are such that the petitioners herein happen to be paternal grandmother and paternal aunts of the minor namely, [REDACTED] whereas the respondent no.2 happens to be the biological mother of the minor [REDACTED] who is said to be in the custody of the petitioners since her

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birth. The respondent no.1 herein submitted an application being Criminal Misc. Application No.106 of 2022 before learned Second Addl. Judicial Magistrate, Godhra under Section 97 of the Cr.P.C. The learned Magistrate vide order dated 09.09.2022 had directed the petitioners to handover the custody of the minor [REDACTED] to respondent no.2. Being aggrieved by the said order, the petitioners approached the learned Sessions Court, Panchmahal at Godhra by filing Criminal Revision Application No.49 of 2022 under Section 397 of the Cr.P.C. The learned Sessions Court vide order dated 23.09.2022 dismissed the said Revision Application. Being aggrieved by these orders, the petitioners are before this Court by filing the present petition. It is pertinent to note that after filing of the present petition, vide order dated 19.10.2022, the learned Coordinate Bench had granted ad-interim relief in favour of the present petitioners. Thereafter, vide order dated 21.02.2023 passed in Criminal Misc. Application No.1 of 2022, the respondent no.2 was granted permission to visit the minor child on weekly basis on every Sunday. Being aggrieved by both these orders, the respondent herein had approached the Hon'ble Apex Court by filing Criminal Appeal No.2636 and 2637 of 2023. The Hon'ble Apex Court vide order dated 29.08.2023 while disposing of these criminal appeals had directed this court to expeditiously take up the application for vacating ad-interim relief. Thereafter, vide order dated 23.02.2024, this Court had directed the petitioners herein to handover the custody of the child to the respondent no.2 within a period of two

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days, failing which, the concerned jurisdictional Police Station was directed to comply with the orders of this Court as well as the order passed by the learned trial Court. Against the said order, the petitioners again approached the Hon'ble Apex Court by filing Criminal Appeal No.1481 of 2024. The Hon'ble Apex Court vide order dated 11.03.2024 quashed and set aside the order of this Court dated 23.02.2024 and directed that till the final disposal of this proceeding, the child would remain with the petitioners herein. Thus, presently the custody of the child remains with the petitioners.

3. Learned advocate appearing for the petitioners submitted that the learned trial Court while dealing with under Section 97 of the Cr.P.C. has observed that it had no jurisdiction to decide as to who had a right to hold the custody of minor Hussaina, however, vide order dated 09.09.2022 had directed the petitioners herein to handover the custody of the minor to respondent no.2 till the proceedings under the provisions of Guardians and Wards Act were finally decided. He submitted that the petitioners herein happen to be paternal grandmother and paternal aunts of the minor. The biological mother of the minor i.e. respondent no.2 herein had abandoned the child when she was merely 13 days old and since then she is in custody of the petitioners. The provisions of Section 97 of the Cr.P.C. would come into play only when a person is illegally detained. The petitioners herein being the grandmother and aunts of the minor having the custody of minor since

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she was aged 13 days, they cannot be said to have illegally detained the minor and therefore, the provision of Section 97 of the Cr.P.C. was not attracted in the present case. Being aggrieved by the order passed by the learned trial Court, the petitioners had approached the learned Sessions Court by filing Revision Application. However, the learned Sessions Court instead calling for record from the learned trial Court, went on to decide the Revision Application against the petitioners by relying upon the provisions of Mohammeden Law. The learned Sessions Court has also relied upon the judgment of the Jammu and Kashmir High Court rendered in the case of Bashir Ahmad Mir vs. Rubin Akhtar reported in (2011) 20 RCR (Criminal) 561. The learned Sessions Court had not drawn the attention of the petitioners to the said judgment nor they were given any opportunity to deal with the said judgment. The learned Sessions Court relied upon various provisions of Mohammedan Law, more particularly, Section 352 and came to the conclusion that the custody of the minor with the petitioners was illegal and therefore, the proceedings under Section 97 of the Cr.P.C. were maintainable against the petitioners. He submitted that as per Section 353 of the Mohammedan Law, the grandmother is a valid guardian and therefore, custody of the minor with her cannot be said to be illegal. The learned Sessions Court has not considered the material facts in proper perspective. He further submitted that the respondent no.2 herein is a Bangladeshi Citizen and she is living in India illegally. Though she is not the citizen of the India, she has illegally

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obtained Adhar Card and other documents. She is not holding a valid long-term visa to stay in India. He further submitted that respondent no.2 as per her own affidavit before the learned trial Court, is earning a meager amount and therefore, she is not capable of taking care of minor child. Moreover, being a Bangladeshi citizen living in India illegally, she is always at the risk of being deported and under the circumstances, it would not be advisable to hand over the custody of the minor child to respondent no.2. He further submitted that being a Bangladeshi citizen, she was not entitled to any relief under Section 97 of the Cr.P.C. He, therefore, submitted to allow the present petition and quash and set aside the orders impugned in the present petition.

4. Learned Additional Public Prosecutor appearing for the respondent State has submitted that an appropriate order may be passed in the present petition.
5. Learned advocate Shri Hitesh Gupta appearing for respondent no.2 has opposed the petition inter alia contending that the petition is misconceived and is devoid of merit. He further submitted that the material fact has been suppressed by the petitioners from this Court that in the past, they had filed an application for the custody of minor under the Guardians and Wards Act. However, the same was withdrawn. He further submitted that during the pendency of the application before the learned trial Court under Section 97 of the Cr.P.C., the petitioners herein had

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given an undertaking to the effect that they will hand over the custody of the minor child to respondent no.2. However, despite the aforesaid undertaking being filed by the petitioners, the custody of the minor child was not handed over to respondent no.2. This conduct on the part of the petitioners is also required to be taken note of. He further submitted that the respondent no.2 is living in India on a valid long-term visa, and the fact that she is not an Indian citizen would not deprive her from claiming the relief under Section 97 of the Cr.P.C. He further submitted that the respondent no.2 herein being a biological mother of the minor, as per the settled law, it would be in the interest of the welfare of the minor, if her custody is handed over to the biological mother and the learned trial Court as well as the learned Sessions Court have taken this aspect into consideration and the custody of the minor has been handed over to respondent no.2. He further submitted that the learned Sessions Court as well as the learned trial Court cannot be said to have committed any error in passing the orders impugned in the present petition. The present petition is devoid of merits and therefore, the same should be dismissed.

6. Heard learned advocates appearing for the respective parties. Respondent no.2 herein had married to the son of the petitioner no.1. Out of the said wed lock, respondent no.2 had given birth to twins out of whom, the son expired within few days of his birth whereas, the daughter i.e. the minor in the present case survived. The husband of

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respondent no.2 unfortunately passed away. It is the case on the part of respondent no.2 that because of the death of her husband, she was required to follow Iddat and therefore, she had gone to her paternal house. The petitioners herein had retained the minor, who was 13 days old at the relevant time. After Iddat period was over, she time and again requested the petitioners to hand over the custody of the minor to her however, they did not handover the custody of the minor. On the contrary, it is the case on the part of the petitioners that respondent no.2 herein had abandoned the minor child while she was barely 13 days old and since then, she is in the custody of the petitioners. In the background of these facts, respondent no.2 submitted an application under Section 97 of the Cr.P.C. before the learned trial Court. The learned trial Court referring to the judgments of this Court as well as the judgments of different other High Courts, came to the conclusion that he has no jurisdiction to decide as to who can be the rightful person for holding the custody of the minor. However, till the issue of custody of the minor is decided by the court of competent jurisdiction under the provisions of Guardians and Wards Act, the custody of the minor was directed to be handed over to respondent no.2 vide order dated 09.09.2022. Being aggrieved by the said order, the petitioners had approached the learned Sessions Court by filing Criminal Revision Application No.49 of 2022. The learned Sessions Court in its judgment has taken into consideration the provisions of Section 352 of the Mahomedan Law and observed that as per the said

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provisions, up to the age of 7 years, custody of the minor male child remains with the mother and up to the age of puberty, custody of the minor female child will remain with the mother. The learned Sessions Court further took into consideration the decision of the Jammu and Kashmir High Court rendered in the case of Bashir Ahmed Mir (supra) and came to the conclusion that the custody of minor with the petitioners was illegal and therefore, upheld the decision of the learned trial Court and dismissed the Revision Application. In the Revision Application, the learned Sessions Court was called upon to decide as to whether the custody of the minor with the petitioners amounted to illegal confinement. It was required to decide as to whether the minor was illegally detained by the petitioners and as to whether the proceedings under Section 97 of the Cr.P.C. were maintainable in the facts of the present case. Instead of doing that learned Sessions Court has decided the issue of entitlement of custody of minor under the Mahommedan Law and has thus, dismissed the Revision Application. Learned Sessions Court has observed as under:-

“ Para 23: For the foregoing reasons, this court is of the considered opinion that since Muslim Law has comprehensively empowered the mother who has not contracted second marriage and who is not apostate or wicked or opponent failed to prove her unworthiness to hold custody of minor daughter, she is legally entitled to hold the custody of minor daughter Husaina, up to

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the age of puberty and any other person holding the custody of the minor daughter in presence of mother would be considered as wrongful confinement.”

7. It is pertinent to note that only because the Mahommedan Law entitles respondent no. 2 to hold the custody of the minor daughter till she attains the age of puberty, her custody with the petitioners cannot be termed as an unlawful confinement. Under the circumstances, the order passed by the learned Sessions Court is quashed and set aside and the matter is remanded back to the learned Sessions Court for reconsideration and fresh decision. Learned Sessions Court shall decide the matter afresh after hearing both sides as expeditiously as possible preferably within a period of six months from the date of receipt of this order. Till the learned Sessions Court decides the matter afresh, the interim arrangement enabling respondent no.2 to visit the minor every day shall continue.
8. With the aforesaid observations and directions, the present petition stands allowed. As a sequel, IA stands disposed of.

(M. R. MENGDEY,J)

NABILA