
(2003) 02 PAT CK 0062
In the Patna High Court
Case No : Cr.W.J.C. No. 466 of 2002

Barmeshwar Nath Singh @ Mukhiya Jee	APPELLANT
Vs	
The State of Bihar and Others	RESPONDENT

Date of Decision : 10-02-2003

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 268, 417
Prisoners Act, 1900 — Section 29(2)

Citation : (2003) 51 BLJR 563 : (2003) 4 PLJR 448 : (2003) 1 PLJR 759

Hon'ble Judges : Narayan Roy, J

Bench : Single Bench

Advocate : Prakash Narayan Pandey, for the Appellant; S.D. Yadav, for the Respondent

Final Decision : Allowed

Judgement

Narayan Roy, J.—Heard Counsel for the parties.

2. This writ application under Article 226 of the Constitution is directed against the order as contained in Annexure-6 dated 21-11-2002 whereby an whereunder the petitioner is being transferred from Beur Central Jail, Patna to Central Jail, Bhagalpur in purported exercise of power u/s 29(2) of the Prisoners Act, 1900 (hereinafter referred to as the Act) read with Section 417 of the Code of Criminal Procedure (hereinafter referred to as the Code) and at the same time the State Government has also exercised its power u/s 268 of the Code.

3. Learned Counsel for the petitioner questions the correctness and propriety of the order impugned on the ground that the order of transfer of the petitioner from Beur Central Jail to Central Jail, Bhagalpur in purported exercise of powers of the State Government u/s 29(2) of the Act and Section 417 of the Code is wholly without jurisdiction as the powers under Section 29(2) of the Act is exercisable at post conviction stage whereas power u/s 417 of the Code is exercisable only when there is no other law providing for the custody of a prisoner and in view of provisions made in Prisoners Act, 1900, this power cannot

be exercised and at the same time the purported exercise of the power of the authorities u/s 268 of the Code is also without jurisdiction inasmuch as that this provision deals with confinement of the prisoner and to frustrate the provision of Section 267 of the Code.

4. Learned Counsel for the petitioner submits that Section 268 of the Code empowers the State Government to exclude certain persons from the operation of Section 267 of the Code and in no way this power can be exercised for transfer of a prisoner from one jail to another.

5. Learned Government Advocate appearing on behalf of the respondents very frankly conceded to the first part of the submission of learned Counsel for the petitioner saying that Section 29(2) of the Act and Section 417 of the Code would not apply in the facts and circumstances of this case but the power of the State Government u/s 268 of the Code has correctly been exercised in transferring the petitioner from Beur Central Jail to Central Jail, Bhagalpur and the impugned order is well sustainable in law:

6. To appreciate rival submissions of the parties, it would be necessary to notice Section 29(2) of the Act and Section 417 of the Code. Section 29 of the Act reads as follows :

"29. Removal of Prisoners.--(1) The (State Government) may, by general or special order, provide for the removal of any prisoner confined in a prison-

(a) under sentence of death, or

(b) under, or in lieu of, a sentence of imprisonment or transportation, or

(c) in default of payment of a fine, or

(d) in default of giving security for keeping the peace or for maintaining good behaviour,

to any other prison in (the state)

(2) (Subject to the orders, and under the control, of the State Government), the Inspector-General of Prisons may, in like manner, provide for the removal of any prisoner confined as aforesaid in a prison in the State to any other prison in the (State)."

7. On bare reading of Section 29 of the Act as a whole, it appears that Subsection (2) of Section 29 of the Act is exercisable when a prisoner has been confined in a prison under sentence of death, a sentence of imprisonment or transportation or in default of payment of fine or in default of giving security for keeping peace or for maintaining good behaviour. This power, as noticed above, however, cannot be exercised at pre-trial stage. The petitioner, as it appears from the record, has been detained in Beur Central Jail, at pre-trial stage. The provision as laid down under Sub-section (2) of Section 29 of the Act, therefore, has no application in this case.

8. Section 417 of the Code reads as follows :

"417. Power to appoint place of imprisonment.--(1) Except when otherwise provided by any law for the time being in force, the State Government may direct in what place any person liable to be imprisoned or committed to custody under this Code shall be confined.

(2) If any person liable to be imprisoned or committed to custody under this Code is in confinement in a Civil Jail the Court or Magistrate ordering the imprisonment or committal may direct that the person be removed to a Criminal Jail.

(3) When a person is removed to a Criminal Jail under Sub-section (2), he, shall, on being released therefrom, be sent back to the Civil Jail, unless either-

(a) three years have elapsed since he was removed to the Criminal Jail, in which case he shall be deemed to have been released from the Civil Jail u/s 58 of the Code of Civil Procedure, 1908 (5 of 1908) or Section 23 of the Provincial Insolvency Act, 1920 (5 of 1920), as the case may be; or

(b) the Court which ordered his imprisonment in the Civil Jail has certified to the officer in charge of the Criminal Jail that he is entitled to be released u/s 58 of the Code of Civil Procedure, 1908 (5 of 1908) or u/s 23 of the Provincial Insolvency Act, 1920 (5 of 1920), as the case may be."

9. On reading of Section 417 of the Code, it appears that Sub-section (1) of Section 417 of the Code can come into operation only when there is no other law providing for the custody of a prisoner. Prisoners Act, 1900 makes ample provision for detention of every person committed to custody by a Court of law and in this view of the matter, Section 417 of the Code has no application in the facts and circumstances of this case.

10. Section 268 of the Code reads as follows :

"268. Power of State Government to exclude certain persons from operation of Section 267.--(1) The State Government may, at any time having regard to the matters specified in Sub-section (2), by general or special order, direct that any person or class of persons shall not be removed from the prison in which he or they may be confined or detained and thereupon, so long as the order remains to force, no order made u/s 167, whether before or after the order of the State Government, shall have effect in respect of such person or class of persons.

(2) Before making an order under Sub-section (1), the State Government shall have regard to the following matters, namely :

(a) the nature of the offence for which, or the grounds on which the person or class of persons has been ordered to be confined or detained in prison;

(b) the likelihood of the disturbance of public order if the person or class of persons is allowed to be removed from the prison;

(c) the public interest, generally."

11. Section 268 of the Code provides power to the State Government to exclude certain persons from operation of Section 267 of the Code. Section 267 of the Code is the power of the Criminal Court to require attendance of prisoners. Under Subsection (1) of Section 268 of the Code, the State Government may, at any time having regard to the matters specified in Sub-section (2), by general or special order, direct that any person or class of persons shall not be removed from the prison in which he or they may be confined or detained and thereon, so long as the order remains in force, no order made u/s 267 of the Code whether before or after the order of the State Government, shall have effect in respect of such person or class of persons. From reading of the entire provision of Section 268 of the Code, it further appears to me that a prisoner should not be allowed to be removed from the prison in public interest where there is likelihood of disturbance of public order on account of his removal from the prison and in case this power is exercised to transfer a prisoner from one prison to another, it will negate the object of this provision as it is to ensure maintenance of public peace.

12. It appears that by the impugned order as contained in Annexure-6, the petitioner is being removed from Beur Central Jail, Patna to Central Jail, Bhagalpur and at the same time the power u/s 268 of the Code is also exercised. The order impugned, in this view of the matter, appears to be a composite one. The power as exercisable u/s 268 of the Code could have been exercised independent of the other provisions of the Code or the Prisoners Act in public interest. Learned Government Advocate, however, submitted that the order impugned may be confined only to Section 268 of the Code and at the same time, submitted that a prisoner can also be transferred under the provisions of Section 268 of the Code and in this regard learned Counsel places reliance to the case of Sanjay Singh alias Sanjay Kumar Singh alias Munna Singh v. State of Bihar and Ors., (Cr. W.J.C. No. 203/2002). In the case of Sanjay Singh (supra) the validity of the order passed u/s 268 of the Code read with Section 29(2) of the Act was challenged and this Court, dismissed the writ application holding :

"After hearing the learned Counsel for the parties, I am unable to hold that the State Government, in view of the power conferred upon it u/s 268(1) of the Code of Criminal Procedure could not exercise its power proposing transfer of the petitioner after taking into consideration the provisions contained u/s 268(2)(b) (c) of the Code of Criminal Procedure, I am not going in detail just avoid making any unnecessary remarks against the petitioner. The petition is dismissed."

13. At the face of the provision u/s 268 of the Code, as noticed above, I have no doubts in my mind that this power, in no way, deals with a case of transfer of a prisoner from one Jail to another rather it talks that person or class of persons shall not be removed from the prison in which he or they may be confined or detained to avoid public disturbance. In this view of the matter, I am unable to accept the submission of learned Government Advocate and I find force in submission of learned Counsel for the petitioner.

14. The State authorities since have exercised divergent powers as noticed above, the order impugned must be held to be composite one and not sustainable in law.

15. For the reasons and discussions aforementioned, it is further held that the power as exercised by the State Government u/s 29(2) of the Act and Sections 417 and 268 of the Code is wholly without jurisdiction and liable to be set aside.

16. In the result, this application is allowed and order impugned as contained in Annexure 6 is quashed.