

**(2015) 01 AHC CK 0024**  
**In the Allahabad High Court**  
**Case No : Misc. Single No. 7677 of 2014**

Ram Shlok Pandey

APPELLANT

Vs

State of U.P.

RESPONDENT

**Date of Decision :** 15-01-2015

**Acts Referred:**

Criminal Procedure Code, 1973 (CrPC) — Section 167, 309  
Penal Code, 1860 (IPC) — Section 147, 148, 149, 302, 307

**Citation :** (2015) 3 ADJ 175 : (2015) 88 ALLCC 851 : (2015) 2 ESC 1153

**Hon'ble Judges :** Vishnu Chandra Gupta, J.

**Bench :** Single Bench

**Advocate :** Rakesh Pathak, for the Appellant

**Final Decision :** Allowed

## Judgement

Vishnu Chandra Gupta, J.—Heard Shri Rakesh Pathak, learned counsel for the petitioner and the learned AGA.

2. By means of the present petition, the petitioner, who is under trial prisoner has prayed for issuing a writ in the nature of certiorari quashing the impugned order dated 28.11.2014 passed by the Chief Judicial Magistrate, Pratapgarh, whereby permission has been granted to transfer the petitioner alongwith three under trial prisoners from District Jail, Pratapgarh to District Jail, Raebareli on the basis of allegations made in letter dated 24.11.2014 of Superintendent, District Jail, Pratapgarh, and further prayed for issuance of writ in the nature of mandamus commanding the opposite parties directing them that the petitioner may be kept in District Jail, Pratapgarh during his judicial custody in relation to case crime no. 264 of 214 under sections 147, 148, 149, 307 and 302 IPC P.S. Aaspur Devsara, District Pratapgarh.

3. The letter dated 24.11.2014 of Superintendent, District Jail, Pratapgarh transpires that petitioner Ram Shlok Pandey and other under trial prisoners are detained in District Jail, Pratapgarh relating to case crime no. 264 of 2014 under

sections 147, 148, 149, 307 and 302 IPC P.S. Aaspur Devsara, District Pratapgarh. The present petitioner alongwith three other associates Ram Kailash Yadav, Brajesh Yadav and Kallu Dubey are most indisciplined and hard core criminal of the district. They create hurdle in administrative work. Some of the persons of rival group of them are also detained in District jail, Pratapgarh. There is only one circle in the jail which is used by all prisoners for taking out meal, water and treatment etc. Though the aforesaid prisoners are kept in separate Barracks for the purpose of their security, but there remains apprehension of some mis-happening when they come in circle. It has been brought to the notice of the jail authority that lives of the aforesaid under trial prisoners are in danger from their rival groups who are also detained in jail. Therefore, if the aforesaid prisoners are allowed to remain in District Jail, Pratapgarh, any untoward incident or violence would occur, by which security, discipline and peace of jail may be disturbed. Hence a request has been made to the Chief Judicial Magistrate, Pratapgarh for transfer of the aforesaid prisoners from this Jail to another jail.

4. By means of impugned order the Chief Judicial Magistrate, after satisfying with the report submitted with regard to conduct and behaviour of the aforesaid prisoners and also the aforesaid letter permitted the Superintendent, District Jail, Pratapgarh to transfer the petitioner and his associates, who are under trial prisoners from District Jail, Pratapgarh to District Jail, Raebareli.

5. It has been contended by the learned counsel for the petitioner that under trial prisoners cannot be transferred from one jail to another jail except in accordance with order passed by the judicial authority under whose orders they are detained in judicial custody in particular jail. It is further contended that jail authority has no jurisdiction to transfer the under trial prisoners on administrative ground. It is further submitted that in case of transfer of the under trial prisoners before passing the order of transfer an opportunity of hearing should have been provided to the under trial prisoners and if no such hearing is provided to them, the order of transfer would be vitiated as held in State of Maharashtra Vs. Mohd. Saeed Sohail Sheikh reported in 2012 Law Suit (SC) 741.

6. On the strength of the aforesaid authority, it has been submitted by the learned counsel for the petitioner that in this case before passing impugned order no opportunity of hearing has been provided to the petitioner. Hence the impugned order is violative of principles of natural justice and cannot be allowed to sustain.

7. Per contra, learned AGA submitted that there is no statutory provision to give any hearing before permitting transfer of accused to a particular judicial custody. He referred the provisions of sections 167 and 309 Cr.P.C. to this effect. It is further submitted that it is the choice of Magistrate or the court under whose orders, the under trial prisoner has been lodged in judicial custody. The under trial prisoner has no right to remain in particular judicial custody of his own

choice. It is further contended that judgment cited hereinabove relates to a convicted person and shall not extend help to the petitioner.

8. It is not in dispute that under trial prisoners cannot be transferred from one jail to another jail under administrative order of jail authority. They could only be transferred under the order of judicial authority under whose order they are detained in particular judicial custody.

9. Now, the question remains for consideration before this Court whether judicial authority while passing the order transferring the under trial prisoners is under any obligation to give an opportunity of being heard to them before their transfer to another jail. This question has been dealt with elaborately in the case of Saeed Sohail Sheikh (Supra), relevant paragraphs 27 and 39 of which are reproduced here below :-

"27. The forensic debate at the Bar was all about the nature of the power exercisable by the court while permitting or refusing transfer. We have, however, no hesitation in holding that the power exercisable by the court while permitting or refusing transfer is "judicial" and not "ministerial" as contended by Mr. Naphade. Exercise of ministerial power is out of place in situations where quality of life or the liberty of a citizen is affected, no matter he/she is under a sentence of imprisonment or is facing a criminal charge in an on-going trial.

That transfer of an under trial to a distant prison may adversely affect his right to defend himself but also isolate him from the society of his friends and relations is settled by the decision of this Court in Sunil Batra Vs. Delhi Administration and Others etc., , where this Court observed: "48. Inflictions may take many protean forms, apart from physical assaults.

Pushing the prisoner into a solitary cell, denial of a necessary amenity, and, more dreadful sometimes, transfer to a distant prison where visits or society of friends or relations may be snapped, allotment of degrading labour, assigning him to a desperate or tough gang and the like, may be punitive in effect. Every such affliction or abridgment is an infraction of liberty or life in its wider sense and cannot be sustained unless Article 21 is satisfied.

There must be a corrective legal procedure, fair and reasonable and effective. Such infraction will be arbitrary, under Article 14 if it is dependent on unguided discretion, unreasonable, under Article 19 if it is irremediable and unappeasable , and unfair, under Article 21 if it violates natural justice. The string of guidelines in Batra set out in the first judgment, which we adopt, provides for a hearing at some stages, a review by a superior, and early judicial consideration so that the proceedings may not hop from Caesar to Caesar. We direct strict compliance with those norms and institutional provisions for that purpose."

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"36. Applying the above principles to the case at hand and keeping in view the fact that any order that the Court may make on a request for transfer of a

prisoner is bound to affect him prejudicially, we cannot but hold that it is obligatory for the Court to apply its mind fairly and objectively to the circumstances in which the transfer is being prayed for and take a considered view having regard to the objections which the prisoner may have to offer. There is in that process of determination and decision-making an implicit duty to act fairly, objectively or in other words to act judicially.

It follows that any order of transfer passed in any such proceedings can be nothing but a judicial order or at least a quasi-judicial one. Inasmuch as the trial court appears to have treated the matter to be administrative and accordingly permitted the transfer without issuing notice to the under-trials or passing an appropriate order in the matter, it committed a mistake.

A communication received from the prison authorities was dealt with and disposed of at an administrative level by sending a communication in reply without due and proper consideration and without passing a considered judicial order which alone could justify a transfer in the case. Such being the position the High Court was right in declaring the transfer to be void and directing the re-transfer of the under trials to Bombay jail. It is common ground that the stay of the proceedings in three trials pending against the respondents has been vacated by this Court. Appearance of the under trials would, therefore, be required in connection with the proceedings pending against them for which purpose they have already been transferred back to the Arthur Road Jail in Bombay. Nothing further, in that view, needs to be done by this Court in that regard at this stage."

10. Perusal of the aforesaid paragraphs cited hereinabove leaves no room to doubt that before passing the order impugned an opportunity of being heard should have been given to the petitioner who is an under trial prisoner. Since it has not been done, the order impugned would be vitiated.

11. Admittedly, in the case in hand, before passing the order impugned, opportunity of being heard before considering the request made by the jail authority has not been given to the present petitioner. Therefore, the order impugned cannot be allowed to sustain and is liable to be set aside.

12. The petitioner, if has not yet been transferred back to District Jail, Pratapgarh, he shall again be admitted to District Jail, Pratapgarh. The order to this effect if necessary be obtained. The Chief Judicial Magistrate, Pratapgarh to pass the order in this regard.

13. However, it is provided that if the jail authorities are still intending the transfer of the petitioner from District Jail, Pratapgarh for any valid reason, he may approach the competent judicial authority under whose order the petitioner is detained in judicial custody and in such situation the competent judicial authority will pass order after giving an opportunity of being heard to the petitioner, in accordance with law.

14. In view of what has been discussed above, the writ petition is allowed. The

order impugned dated 28.11.2014 passed by the Chief Judicial Magistrate, Pratapgarh is hereby set aside.