
(2015) 05 AHC CK 0019

In the Allahabad High Court

Case No : Criminal Misc. Writ Petition No. 10050 of 2015

Sagar Malik

APPELLANT

Vs

State of Uttar Pradesh and Others

RESPONDENT

Date of Decision : 01-05-2015

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 267, 268, 417(1)

Citation : (2015) 2 ACR 2292 : (2015) 5 ADJ 489 : (2015) 3 ALJ 788 : (2015) 90 ALLCC 547

Hon'ble Judges : Amreshwar Pratap Sahi, J;Vijay Lakshmi, J

Bench : Division Bench

Advocate : Zia Naz Zaidi and Rajul Bhargava, for the Appellant

Final Decision : Dismissed

Judgement

1. This petition questions the order of the Chief Judicial Magistrate dated 25.2.2015 whereby the learned Magistrate has passed an order granting permission to transfer the petitioner to some other Jail from the District Jail at Muzaffarnagar where he had been detained.

2. Learned A.G.A. for the respondent - State Sri Nitin Sharma had been called upon to obtain instructions as well in the matter. A written instructions signed by the Superintendent of Jail, Muzaffarnagar, dated 27.4.2015 has been placed before the Court.

3. The petitioner was arrested on 16.2.2015 in the circumstances as indicated in the F.I.R. It appears that one Vikky Tyagi, an alleged gang leader, had gone to attend his case in the Court of Xth Addl. District Judge, Muzaffarnagar, on 16.2.2015 when he was attacked by several persons including the petitioner, who allegedly fired shots leaving him dead in the court premises. It is in this background that the petitioner is alleged to have indulged into a gang war as Vikky Tyagi himself is narrated to be one of the leaders of the gang and came to be taken into custody.

4. This background led to the moving of an application by the Superintendent of Jail for transferring the petitioner to some other Jail and it is this application, which has been disposed of as a misc. application by the order impugned dated 25.2.2015. The Court has recorded that after receipt of the said application, the same was served on the petitioner calling upon him to give a reply to the same by 21.2.2015. The petitioner admitted having received the said application on 20.2.2015 and thereafter moved an application on 21.2.2015 itself in the shape of an objection, a certified copy whereof is Annexure No. 3 to the writ petition, wherein the petitioner has stated that the petitioner's uncle and other relatives are already detained in Muzaffarnagar Jail and, therefore, he is safe with his family members hence he should not be transferred to any other Jail. He is alleged to have moved another application on 23.2.2015 praying for time to give a further reply and also to file documents with regard to his juvenility.

5. Learned Counsel for the petitioner Ms. Zaidi and Mr. Rajul Bhargava have urged that without giving any further opportunity, the impugned order was passed and, therefore, the same is in violation of principles of natural justice.

6. The court below has recorded that several other accused of the gang of Vikrant alias Vikky Tyagi are lodged in the same Jail and there is every likelihood of a serious gang war. The petitioner himself has disclosed his age to be about 19 years and, therefore, it is not necessary at this stage to consider any plea of juvenility. It has further been recorded that in the aforesaid background if the petitioner is transferred to some other Jail, then no prejudice will be caused and rather it would be in the interest of the petitioner and his security.

7. The Court further recorded that in view of the Apex Court decision in the case of *The State of Maharashtra and Others Vs. Saeed Sohail Sheikh etc. etc.*, AIR 2013 SC 168 : (2013) CriLJ 214 : (2013) 1 RCR(Criminal) 200 : (2012) 10 SCALE 660 , opportunity has been given to the petitioner who has filed his objection and, as such, natural justice having been complied with, permission was granted to transfer the petitioner to some other Jail. Directions were issued to take ample security measures and medical care of the petitioner while doing so.

8. It is this impugned order, which has been challenged contending that the order is in violation of principles of natural justice as no further time had been granted and secondly it violates the fundamental rights of the petitioner for which reliance has been placed on the decision in the case of *Francis Coralie Mullin Vs. Administrator, Union Territory of Delhi and Others*, AIR 1981 SC 746(1) : (1982) 52 CompCas 554 : (1981) CriLJ 306 : (1981) 1 SCALE 79 : (1981) 1 SCC 608 : (1981) SCC(Cri) 212 : (1981) 2 SCR 516 and the decision in the case of *State of Maharashtra and others v. Saeed Sohail Sheikh and others* (supra).

9. The contention of the learned Counsel for the petitioner is that the petitioner would not be able to meet his relatives or engage a Counsel of his choice if transferred to a far off Jail as the petitioner has now been sent to a Jail at

Varanasi almost 800 kms. away and, therefore, if transfer is necessary, he may be shifted to a Jail in some nearby district.

10. The written instructions that have been produced by the learned A.G.A. are extracted here under:-

11. A perusal thereof clearly indicates about the possibility of a gang war in the Jail at Muzaffarnagar. This fact has also been noticed by the Court. It has also been noticed that the petitioner was given an opportunity to file an objection as indicated above. In paragraph No. 4 of the instructions, it has been categorically stated that the facility of Video Conferencing has to be made available and, as such, he has been transferred to Varanasi where such facilities are available.

12. What is more revealing is that the State government has issued a Government Order on 26.2.2015 for transferring the petitioner from Muzaffarnagar to Varanasi Jail. To our mind, this power has been exercised in terms of Section 417(1) of the Criminal Procedure Code, extracted herein below:-

"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."

13. The Uttar Pradesh Jail Manual provides for a complete procedure for lodging of prisoners and their transfer from one prison to another. For this, one has to turn to the Prisoners Act, 1900 and the U.P. Jail Manual.

14. Sri A.K. Sand, learned A.G.A., has provided assistance to the Court by pointing out the Decision Bench in the case of Raghuraj Pratap Singh alias Raja Bhayya and another v. State of U.P. and others, Writ Petition No. 6719 (M/B) of 2002, decided on 11.12.2002 that took stock of a previous Division Bench judgment in the case of Balram Singh Yadav v. State of U.P. and others, 1991 JIC 95, and extensively dealt with the provisions under the Prisons Act and the Prisoners Act read with the provisions of U.P. Jail Manual to point out that paragraph No. 8 of Chapter II of the U.P. Jail Manual lays down the powers indicating lodging of under trials and specially to para 409-A of the said Manual which extends the applicability of all rules in the Jail Manuals to under trial prisoners as in the case of convicts. The Court then went on to discuss paras 137 and 138 of the Jail Manual relating to transfer and held that the power so exercised for transfer from one prison to another is well within the competence of the authorities empowered to do so. The power, therefore, vests with the State Government to transfer and such power appears to have been exercised with the passing of the Government Order dated 26.2.2015.

15. The provision that empowers that courts to issue directions to the officer-in-charge of a prison is Section 267 of the Cr.P.C. under Chapter XXII thereof, but at the same time Section 268 Cr.P.C. again empowers the State Government to refuse removal of a prisoner subject to the conditions enumerated in sub Section

(2) thereof. Apart from this, it is the judgment in *State of Maharashtra v. Saeed Sohail Sheikh* (supra) that spells out the necessity of the courts granting permission for such transfer.

16. The petitioner has nowhere challenged the said order dated 26.2.2015 passed by the State Government and as indicated in the instructions received from the State Government. The Court/Magistrate concerned has only granted permission but the place of imprisonment has been fixed by the State Government in exercise of such powers.

17. In the absence of any challenge to the order of the State Government, the only question remains as to whether the permission granted by the Court is justified or not.

18. In our opinion, the Magistrate has only given a permission for transfer to another Jail and the reasons given are the existence of an eminent possibility of a gang war. Apart from this, the petitioner in his objection had only taken a plea that since his uncle and relatives are lodged in the same Jail, he should not be transferred. No other plea has been taken in the said objection. Thus, principles of natural justice have been complied with and the petitioner had filed an objection which has been noticed where after the impugned order has been passed by the learned Magistrate. Merely because the relatives of the petitioner are lodged in the same Jail, the same cannot be a ground to refuse transfer and, therefore, the order of the Magistrate does not suffer from any infirmity or perversity calling for an interference. The said order has now been already executed with the issuance of a Government Order on 26.2.2015 which has not been challenged. In the aforesaid circumstances, when the principles of natural justice have been complied with and sufficient reasons have been indicated in the order permitting transfer, we do not find any good ground to interfere with the same at least at this stage.

19. Now one of the grounds which has been additionally argued before us is about the distance of the transferred prison namely to Varanasi which according to the petitioner will not only cause inconvenience but would also violate his fundamental rights. Having given our anxious consideration the background in which the petitioner has been shifted cannot be ignored. Secondly, the system of Video Conferencing is already available at Varanasi and, therefore, the question of any long journey being undertaken by the petitioner at this stage affecting his rights does not arise. To the contrary at Muzaffarnagar his rival gang is also lodged in the same Jail which itself is an impending danger. Thirdly, the question of engaging a Counsel of his choice at this stage cannot be an impediment and would not violate any of his fundamental rights inasmuch as the petitioner is not being prohibited from engaging any Counsel of his choice. The transfer to a far off Jail can also be countenanced with the fact that the district of Varanasi itself has a large number of lawyers practising on the criminal side, who can cater to and give proper advice in such a case. After all whenever a litigant enters the portals of a Court, he has to opt and choose a lawyer as it cannot be supposed

that all litigants have retainer lawyers from before. The choice of lawyers does not get limited nor does their engagement get prohibited. The petitioner is well within the State of U.P. This argument even otherwise would not be available to the petitioner inasmuch as the learned Counsel have time and again stated that they do not oppose the transfer of the petitioner to any nearby district. Thus, this plea also does not in any way help the petitioner in assailing the impugned order as he would still have to engage a lawyer whenever required.

20. Consequently, the shifting of the petitioner is in his own interest and for the time being does not prejudice his cause occasioning any miscarriage of justice or failure of justice. The order passed by the Magistrate, therefore, has to be upheld.

21. The issue of interference with such orders has also been dealt with by a Division Bench in the case of State of U.P. through Principal Secretary (Prison), U.P., Lucknow v. Fast Track Court No. 2, Maharajganj, and others, 2008 (63) ACC 317 , that has followed the ratio in the case of Kalyan Chandra Sarkar Vs. Rajesh Ranjan @ Pappu Yadav and Another, AIR 2005 SC 972 : (2005) CriLJ 1441 : (2005) 2 JT 450 : (2005) 3 SCC 284 .

22. It goes without saying that if and when any necessity arises or in such circumstances exists that may indicate the re-transfer of the petitioner from one Jail to another, it would be open to the competent authority to exercise such powers in accordance with law which may be necessary on the basis of material on record.

23. In view of the aforesaid reasons and the circumstances of the case, we do not find any fundamental rights of the petitioner being violated so as to cause interference inasmuch as the Court had applied it's mind fairly and objectively and after giving an opportunity to the petitioner. Paragraph No. 35 of the judgment in the case of State of Maharashtra and others v. Saeed Sohail Sheikh and others (supra) is the ratio of the said judgment and which appears to have been complied with by the Magistrate while passing the order which has now taken the shape of the Government Order dated 26.2.2015 whereupon the petitioner has been transferred to Varanasi.

24. Consequently, there is no merit in the writ petition. The writ petition is dismissed.