

(2021) 07 JH CK 0019

In the Jharkhand High Court

Case No : Writ Petition (Criminal) No. 106, 122 Of 2021

Sanjeev Singh And Others

APPELLANT

Vs

State Of Jharkhand And Others

RESPONDENT

Date of Decision : 23-07-2021

Acts Referred:

Constitution Of India, 1950 — Article 19, 21, 142, 226, 358
Indian Penal Code, 1860 — Section 120B, 302, 307
Arms Act, 1959 — Section 27
Code Of Criminal Procedure, 1973 — Section 167, 309, 344
Prisoners Act, 1900 — Section 29, 29(a), 29(b), 29(c), 29(d)
Companies Act, 1956 — Section 446(1)
Army Act, 1950 — Section 3

Citation : (2021) 07 JH CK 0019

Hon'ble Judges : Sanjay Kumar Dwivedi, J

Bench : Single Bench

Advocate : Ajit Kumar, Chanchal Jain, P.A.S. Pati

Final Decision : Allowed/Disposed Of

Judgement

Sanjay Kumar Dwivedi, J

1. Heard Mr. Ajit Kumar, the learned Senior counsel assisted by Mr. Chanchal Jain, the learned vice counsel appearing on behalf of the petitioner and

Mr. P.A.S. Pati, the learned counsel appearing on behalf of the respondent-State.

2. These writ petitions have been heard through Video Conferencing in view of the guidelines of the High Court taking into account the situation

arising due to COVID-19 pandemic. None of the parties have complained about any technical snag of audio-video and with their consent this matter

has been heard.

3. In both the writ petitions, the common judgment has been questioned and

that is why both the writ petitions have been heard together.

4. Firstly, the facts of W.P.(Cr) No.106 of 2021 is being taken up.

5. State of Jharkhand through Superintendent, District Jail, Dhanbad has filed this petition for quashing the order dated 25.02.2021 passed in

S.T.No.276/2017 by learned District and Additional Sessions Judge-IV, Dhanbad whereby the Superintendent of Jail, Dhanbad has been directed to

shift prisoner Sanjeev Singh from the Central Jail, Dumka to Divisional Jail, Dhanbad. The prayer is also made to recall the order dated 25.02.2021

passed in S.T.No.276/2017 and pass a fresh and appropriate order granting permission to shift prisoner Sanjeev Singh from Divisional Jail, Dhanbad to

Central Jail, Dumka as there is serious threat of life of prisoner in view of report of Deputy Commissioner, Dhanbad and report of Senior

Superintendent of Police, Dhanbad. The Senior Superintendent of Police, Dhanbad submitted a confidential report to the Deputy Commissioner,

Dhanbad vide his letter dated 20.02.2021 along with report of Special Branch that there is serious threat/danger to the life of prisoner Sanjeev Singh

who himself is Ex-MLA of Jharia Vidhan Sabha and is a big face in crime field of Dhanbad area. The Deputy Commissioner, Dhanbad submitted a

confidential report in view of report of Senior Superintendent of Police, Dhanbad vide his letter dated 20.02.2021 to Inspector General of Prison,

Jharkhand, mentioning therein that there is serious threat/danger to the life of prisoner Sanjeev Singh. The Deputy Commissioner, Dhanbad has also

pointed out about the activity of different criminal gang of Dhanbad in that report. In view of the report of Deputy Commissioner, Dhanbad, the

Government of Jharkhand decided to take immediate steps for safety of life of the Prisoner and accordingly after due permission of the Government

passed the order dated 20.02.2021 to transfer the prisoner from District Jail, Dhanbad to Central Jail, Dumka and directed the Deputy Commissioner,

Dhanbad and Senior Superintendent of Police, Dhanbad to ensure transfer of prisoner. After receiving the order of the Inspector General (Prison), the

Superintendent, District Jail, Dhanbad by letter dated 21.02.2021 informed the learned trial court and sought the consent for transfer of prisoner

Sanjeev Singh from District Jail, Dhanbad to Central Jail, Dumka on the point of security. The learned District and Additional Sessions Judge-IV,

Dhanbad passed the order dated 25.02.2021 directing the Superintendent of Jail,

Dhanbad for shifting of prisoner Sanjeev Singh from Central Jail, Dumka to Divisional Jail, Dhanbad at once. In view of this, the State of Jharkhand has preferred this W.P.(Cr.) petition.

6. The facts of W.P.(Cr) No.122 of 2021 are:

In this writ petition, prayer has been made for commanding upon the court below i.e., the learned court of Additional Sessions Judge-IV, Dhanbad in

S.T. Case No.276/2017 arising out of Saraidhela P.S.Case No.48/2017 to immediately and forthwith take up the petition dated 01.03.2021 filed by and

on behalf of the petitioner whereby he has complained of violation/non-compliance and non-implementation of the order dated 25.02.2021 passed by

the said learned court and has also prayed for initiation of criminal contempt proceeding against the respondent nos.6 and 7 for violation, disobedience

and non-compliance of the order dated 25.02.2021 passed in S.T.Case No.276/2017. A prayer is also made for commanding upon the respondent

nos.2, 3 and 4 to immediately and forthwith comply the order dated 25.02.2021 passed in S.T.Case No.276/2017 by Additional Sessions Judge-IV,

Dhanbad in its letter and spirit by transferring/shifting the petitioner from Central Jail, Dumka to Divisional Jail, Dhanbad.

7. Saraidhela P.S.Case No.48/2017 was instituted on the written complaint of the informant Abhishek Singh alleging inter alia that on 21.03.2017 at

about 03.30 PM the deceased Niraj Singh along with Ashok Yadav, Munna Tiwari, Aditya Raj and driver Jhalu Mahto went to the office at Katras

More in a Fortuner Vehicle bearing Registration No.JH-10AR-4500. At about 07:00 PM called on mobile of the informant and told him that bullet has

been fired upon the deceased Niraj Singh at Steel Gate, upon which informant immediately rushed towards Steel Gate from wrong direction then he

saw to Jainendar Singh @ Pintu and Sanjeev Singh are coming from the opposite direction in a motorcycle and stopped and told to the informant that

we committed the murder of Niraj Singh. Sanjeev Singh was sitting as pillion rider having a rifle covered with a cloth. Since informant's brother got

bullet injury that is why the informant did not give heed on Sanjeev Singh. When the informant reached near place of occurrence he came to know

that the deceased has been taken to Central Hospital, where the deceased was declared dead. It is further alleged that Aditya Raj told to the

informant that as soon as the vehicle of the deceased arrived at Steel Gate and

vehicle was slow down due to speed breaker 08-10 persons having Pistol and Cerbine among them Jharia MLA Sanjeev Singh, Gaya Singh and Mahatab Singh were identified, moved towards the deceased and on instruction of Sanjeev Singh opened fire and resultantly Niraj Singh, Ashok Yadav, Munna Tiwari and Thalu Mahto died and Aditya Raj got injury. It is further alleged that Sidharth Gautam @ Manish Singh under criminal conspiracy and committed the murder of the deceased Niraj Singh by Sanjeev Singh, Jainandar Singh @ Pintu Singh, Gaya Singh, Mahant Pandey and Sidharth Gautam. On the basis of the aforesaid written complaint, F.I.R has been registered against the petitioner and other named accused for the offence under section 307/302/120B IPC and section 27 of the Arms Act.

After investigation charge sheet was submitted against the petitioner and other accused persons and thereafter cognizance was taken on 27.06.2017.

After commitment of the case, charges were framed against the petitioner and other accused persons and trial commenced. During the course of investigation, the petitioner was arrested and remanded in the case on 11.04.2017 and sent to Divisional Jail, Dhanbad.

8. Inspector General (Prison), Jharkhand directed the Jail Superintendent, Divisional Jail, Dhanbad to transfer the petitioner from Divisional Jail, Dhanbad to Birsa Munda Central Jail, Hotwar, Ranchi after taking permission from the court below. The Jail Superintendent, Divisional Jail, Dhanbad respondent no.3 sought permission from the learned court of Chief Judicial Magistrate, Dhanbad vide letter dated 19.04.2017. The learned Chief Judicial Magistrate, Dhanbad granted permission vide letter dated 19.04.2017 with direction to produce the accused through video-conferencing on the date fixed in the case as contained in Annexure-3. The order dated 19.04.2017 was challenged before this Court in Cr.M.P. No.2304/2017. By order dated 16.01.2018, this court quashed the order dated 19.04.2017 of the Chief Judicial Magistrate, Dhanbad and remanded back the matter to the learned Chief Judicial Magistrate, Dhanbad with a direction to pass the order afresh in accordance with law. After the order of this Court dated 16.01.2018, the Additional Sessions Judge-VII, Dhanbad by order dated 14.02.2018 passed in S.T.No.276/2017 directed the respondent no.3 to transfer the petitioner immediately from Birsa Munda Central Jail, Hotwar, Ranchi to Divisional Jail, Dhanbad. The order dated 14.02.2018 was not

complied with and the respondent no.3 sat tight over the matter and did not take any action for transferring the petitioner from Birsa Munda Central Jail, Hotwar, Ranchi to Divisional Jail, Dhanbad. Order dated 14.02.2018 attained finality and this order was not challenged. The petitioner filed a petition for issuing show-cause and taking appropriate action upon the respondent no.3 for deliberate and willful non-compliance of the order dated 14.02.2018. By order dated 23.02.2018, the court below has called for the report from the respondent no.3 as to why the order dated 14.02.2018 has not been complied. The respondent no.2, by letter dated 20.02.2021 directed to transfer the under-trial accused Sanjeev Singh from Divisional Jail, Dhanbad to Central Jail, Dumka assigning the reason of security of the petitioner. In the said letter it was also stated to inform the learned court below about shifting of the petitioner instead of taking permission from the court below. The petitioner was transferred from Divisional Jail, Dhanbad to Central Jail, Dumka by order dated 20.02.2021 and by letter dated 21.02.2021 it was informed to the Additional Sessions Judge-IV, Dhanbad about shifting of the petitioner. After that, the petitioner filed two petitions, both dated 22.02.2021 for directing the respondent no.3 to immediately shift the petitioner from Central Jail, Dumka to Divisional Jail, Dhanbad and for issuing show cause notice to respondent no.3 and to take appropriate action against him for willful and deliberate violation of mandate of the Supreme Court as well as order of remand of the learned court. The learned Additional Sessions Judge-IV, Dhanbad vide order dated 23.02.2021 directed the respondent no.3 to file show cause as to under what circumstances the under-trial prisoner Sanjeev Singh was transferred to Central Jail, Dumka without permission of that Court. Rejoinder was filed to that effect by the State. The Additional Sessions Judge-IV, Dhanbad vide order dated 25.02.2021 allowed the petition of the petitioner and directed the respondent no.3 to shift the petitioner from Central Jail, Dumka to Divisional Jail, Dhanbad at once under cover of proper and adequate security as per the Jail Manual. The said order was not complied with and thereafter the petitioner filed a petition dated 01.03.2021 praying to take appropriate action and initiation of criminal contempt proceeding against the respondent no.6 and 7 for violation, disobedience and non-compliance of the order dated 25.02.2021. No order was passed on the petition dated 01.03.2021. Aggrieved with this, the petitioner had filed this criminal writ petition.

9. Mr. P.A.S. Pati, the learned counsel appearing on behalf of the State of Jharkhand-petitioner, in W.P.(Cr) No.106/2021, had submitted that it is not

necessary to take prior permission of the Court for shifting any prisoner from one jail to another jail. The learned Additional Sessions Judge-IV,

Dhanbad while passing the order dated 25.02.2021 vehemently relied on the judgment of the Hon'ble Supreme Court in the case of *State of*

Maharashtra v. Saeed Sohail Sheikh, (2012) 13 SCC 192. He submitted that in that judgment, it has not been considered that for shifting a prisoner

to another jail, prior permission of the court is necessary. He submitted that the court is required to apply its mind fully and objectively to the

circumstances in which the transfer is being prayed. To buttress his this argument, he relied in the case of *Asha Ranjan v. State of Bihar*,

(2017) 4 SCC 397 and referred to paragraph nos.32, 64, 67, 85 and 86 of the said judgment, which are quoted hereinbelow:

32. In the ultimate analysis, the Court in Saeed Sohail case arrived at the conclusion that any order that the Court may make on a request for

transfer of a prisoner is bound to affect him prejudicially, and, therefore, 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.

64. The next limb of controversy relates to exercise of power and jurisdiction. The plea that is propounded by Mr Naphade is that in the absence

of any provision in the 1950 Act, there cannot be any direction for shifting. According to him, any State action which prejudices the right of an

individual has to be backed by the authority of law and in the absence of law, such an order is not permissible. In this regard, he has drawn inspiration

from a passage from the State of M.P. v. Bharat Singh. It reads as follows: (AIR p. 1173, para 5)

5. All executive action which operates to the prejudice of any person must have the authority of law to support it, and the terms of Article 358

do not detract from that rule. Article 358 expressly authorises the State to take legislative or executive action provided such action was competent for

the State to make or take, but for the provisions contained in Part III of the Constitution. Article 358 does not purport to invest the State with arbitrary

authority to take action to the prejudice of citizens and others: it merely provides that so long as the proclamation of emergency subsists laws may be

enacted, and exclusive action may be taken in pursuance of lawful authority, which if the provisions of Article 19 were operative would have been

invalid.â??

67. The aforesaid decision in Committee for Protection of Democratic Rights case compels us to repel the submission of Mr Naphade on this score

which is to the effect that when no power is conferred under the 1950 Act, the Court cannot exercise the power or when the power is curtailed, the

Court cannot issue directions. The controversy in the Constitution Bench pertained to direction by the High Court to transfer the investigation to CBI

in respect of the crime that occurs within the territory of the State and this Court held that the High Court has the authority to so direct despite the

prohibition contained in the Special Police Act. Therefore, the non-conferment of power under the 1950 Act would not prohibit the High Court, in

exercise of its power under Article 226 to transfer a case from one jail to another inside the State depending upon the circumstances.

85. It is fruitful to note that in Praful B. Desai it has been clearly held that recording of evidence by way of videoconferencing is valid in law.

86. In view of the aforesaid analysis, we record our conclusions and directions in seriatim:

86.1. The right to fair trial is not singularly absolute, as is perceived, from the perspective of the accused. It takes in its ambit and sweep the right of

the victim(s) and the society at large. These factors would collectively allude and constitute the Rule of Law i.e. free and fair trial.

86.2. The fair trial which is constitutionally protected as a substantial right under Article 21 and also the statutory protection, does invite for

consideration a sense of conflict with the interest of the victim(s) or the collective/interest of the society. When there is an intra-conflict in respect of

the same fundamental right from the true perceptions, it is the obligation of the constitutional courts to weigh the balance in certain circumstances, the

interest of the society as a whole, when it would promote and instil Rule of Law. A fair trial is not what the accused wants in the name of fair trial.

Fair trial must soothe the ultimate justice which is sought individually, but is subservient and would not prevail when fair trial requires transfer of the

criminal proceedings.

86.3. A wrongful act of an individual cannot derogate the right of fair trial as that interest is closer, especially in criminal trials, to the Rule of Law. An

accused cannot be permitted to jettison the basic fundamentals of trial in the name of fair trial.

86.4. The weighing of balance between the two perspectives in case of fair trial would depend upon the facts and circumstances weighed on the scale

of constitutional norms and sensibility and larger public interest.

86.5. Section 3 of the 1950 Act does not create an impediment on the part of the court to pass an order of transfer of an accused or a convict from

one jail in a State to another prison in another State because it creates a bar on the exercise of power on the executive only.

86.6. The Court in exercise of power under Article 142 of the Constitution cannot curtail the fundamental rights of the citizens conferred under the

Constitution and pass orders in violation of substantive provisions which are based on fundamental policy principles, yet when a case of the present

nature arises, it may issue appropriate directions so that criminal trial is conducted in accordance with law. It is the obligation and duty of this Court to

ensure free and fair trial.

86.7. The submission that this Court in exercise of equity jurisdiction under Article 142 of the Constitution cannot transfer the accused from Siwan Jail

to any other jail in another State is unacceptable as the basic premise of the said argument is erroneous, for while addressing the issue of fair trial, the

Court is not exercising any kind of jurisdiction in equity.â??

10. He further submitted that for shifting a prisoner from one jail to another, prior permission is not necessary and that can be taken post-facto also.

To buttress this argument, he relied in the case of â??V.L.S. Finance Ltd. v. Union of India, (2013) 6 SCC 278.

Paragraph nos. 10 and 17 of the said judgment are quoted hereinbelow:

â??10. Section 621-A of the Act, as stood at the relevant time and relevant for our purpose reads as follows:

â??621-A. Composition of certain offences.â??"(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), any

offence punishable under this Act (whether committed by a company or any officer thereof), not being an offence punishable with imprisonment only,

or with imprisonment and also with fine, may, either before or after the institution of any prosecution, be compounded byâ?

(a) the Company Law Board; or

(b) where the maximum amount of fine which may be imposed for such offence does not exceed five thousand rupees, by the Regional Director, on

payment or credit, by the company or the officer, as the case may be, to the Central Government of such sum as that Board or the Regional Director,

as the case may be, may specify:

Provided that the sum so specified shall not, in any case, exceed the maximum amount of the fine which may be imposed for the offence so

compounded:

Provided further that in specifying the sum required to be paid or credited for the compounding of an offence under this sub-section, the sum, if any,

paid by way of additional fee under sub-section (2) of Section 611 shall be taken into account.

* * *

(4)(a) Every application for the compounding of an offence shall be made to the Registrar who shall forward the same, together with his comments

thereon, to the Company Law Board or the Regional Director, as the case may be.

(b) Where any offence is compounded under this section, whether before or after the institution of any prosecution, an intimation thereof shall be given

by the company to the Registrar within seven days from the date on which the offence is so compounded.

(c) Where any offence is compounded before the institution of any prosecution, no prosecution shall be instituted in relation to such offence, either by

the Registrar or by any shareholder of the company or by any person authorised by the Central Government against the offender in relation to whom

the offence is so compounded.

(d) Where the composition of any offence is made after the institution of any prosecution, such composition shall be brought by the Registrar in

writing, to the notice of the court in which the prosecution is pending and on such notice of the composition of the offence being given, the company or

its officer in relation to whom the offence is so compounded shall be discharged.

* **

(7) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974)â??

(a) any offence which is punishable under this Act with imprisonment or with fine, or with both, shall be compoundable with the permission of the

court, in accordance with the procedure laid down in that Act for compounding of offences;

(b) any offence which is punishable under this Act with imprisonment only or with imprisonment and also with fine shall not be compoundable.

(8) No offence specified in this section shall be compounded except under and in accordance with the provisions of this section.â??

17. Ordinarily, the offence is compounded under the provisions of the Code of Criminal Procedure and the power to accord permission is conferred on

the court excepting those offences for which the permission is not required. However, in view of the non obstante clause, the power of composition

can be exercised by the court or the Company Law Board. The legislature has conferred the same power on the Company Law Board which can

exercise its power either before or after the institution of any prosecution whereas the criminal court has no power to accord permission for

composition of an offence before the institution of the proceeding. The legislature in its wisdom has not put the rider of prior permission of the court

before compounding the offence by the Company Law Board and in case the contention of the appellant is accepted, same would amount to addition

of the words â??with the prior permission of the courtâ?? in the Act, which is not permissible.

11. On the ground of grant of leave of the court and the safeguard of the interest of the petitioner, he relied in the case of â??Erach Boman Khavar

v. Tukaram Shridhar Bhat, (2013) 15 SCC 655.

Paragraph nos. 21 and 22 of the said judgment are quoted hereinbelow:

â??21. In State of J&K v. UCO Bank, while interpreting Section 446(1) of the 1956 Act, the Court opined that a suit cannot be instituted once a

winding-up order is passed except by leave of the court. The two-Judge Bench referred to the earlier decision rendered in Bansidhar Shankarlal v.

Mohd. Ibrahim, wherein the leave had been obtained at the time of filing of the suit and the question was whether fresh leave ought to be obtained

before proceeding under Section 446(1) of the 1956 Act before institution of

execution proceedings. The Court considered the contrary views expressed by different High Courts on the effect and purport of Section 446(1) of the 1956 Act and came to the conclusion that the view that failure to obtain leave prior to institution of suit would not debar the court from granting such leave subsequently and that the only consequence of the same would be that the proceedings would be regarded as having been instituted on the date on which the leave was obtained from the High Court.

22. We have referred to the aforesaid decisions solely for two purposes. First, grant of leave of the court is not a condition precedent for initiation of a civil action or the legal proceedings. It is because the section does not expressly provide for annulment of a proceeding that is undertaken without the leave of the court. There can be no shadow of doubt that leave of the winding-up court can be obtained even after initiation of the proceeding.

Second, the seminal object behind engrafting of the said provision is to see that the interest of the company is safeguarded so that it does not face deprivation of its right and claims are adjudicated without the knowledge of the Company Court and further the court has a discretion to see whether leave should be granted and, if so, with what conditions or no condition. That apart, the court may grant leave if it felt that the company should not enter into unnecessary litigation and incur avoidable expenditure.â??

12. Relying on these judgments, he fortified his arguments and submitted that the order dated 25.02.2021 passed by Additional Sessions Judge-IV,

Dhanbad is not in accordance with law. He submitted that transfer of prisoner is administrative order and the State in the light of the report had rightly

shifted the petitioner to Dumka Jail. He submitted that the respondent no.3 has not bye-passed the authority of the court. On this ground, he submitted

that the order dated 25.02.2021 is fit to be interfered with by this Court.

13. Mr. Ajit Kumar, the learned Senior counsel appearing on behalf of the petitioner in W.P.(Cr.) No.122 of 2021 submitted that once the order has

been passed by a competent court in this regard the State was obliged to comply that order. He submitted that the first order is dated 14.02.2018

whereby the respondent no.3 was directed to transfer the petitioner from Birsa Munda Central Jail, Hotwar, Ranchi to Divisional Jail, Dhanbad.

Inspite of that order, the respondent no.3 has not taken any action for transferring the petitioner and only on the direction of the respondent no.2 dated

20.02.2021, the petitioner has been shifted from Divisional Jail, Dhanbad to Central Jail, Dumka assigning the reason of security of the petitioner. He

further submitted that subsequent order dated 25.02.2021 was passed pursuant to application filed by the petitioner and this was on ground of violation

of section 29 of the Prisoners Act, 1900. He submitted that this Court in Cr.M.P.No.2304 of 2017 by order dated 16.01.2018 has already remanded

the matter to the court below for passing a fresh order. By way of quashing the order dated 19.04.2017 of the learned Chief Judicial Magistrate,

Dhanbad and the matter was remanded back to the learned Chief Judicial Magistrate, Dhanbad with a direction to pass a fresh order in accordance

with law. Thereafter, the order dated 14.02.2018 was passed which was not complied and subsequent order dated 25.02.2021 has been passed. He

submitted that the report of the Deputy Commissioner is dated 01.03.2021 wherein the petitioner has already been shifted to Dumka Jail on

20.02.2021. He submitted that this report was after shifting of the petitioner in Dumka Jail and only due to made out a case of security concern. He

relied in the case of *State of Maharashtra v. Saeed Sohail Sheikh*, (2012) 13 SCC 192 referring to paragraph nos.18, 19, 20, 21, 23 and 35,

which are quoted hereinbelow:

18. On behalf of the respondents Mr Amarendra Sharan, learned Senior Counsel, argued that the transfer of a prisoner especially an undertrial

from one prison to the other was not inconsequential for the prisoner and could not, therefore, be dealt with at a ministerial level. A prisoner was

entitled to oppose the transfer especially if the same adversely affected his defence. It was also contended that Section 29 did not empower the

Government or the Inspector General of Prisons to direct transfer of the undertrials. It was argued that while the inquiry conducted by the Sessions

Judge was not a substitute for a regular inquiry that may be conducted by the State, yet the exercise undertaken by a senior officer like the Sessions

Judge under the orders of the High Court could furnish a prima facie basis for the High Court to direct an appropriate investigation into the case, and

to initiate proceedings against those who may be found guilty of any misconduct on the basis of any such investigation.

19. Section 29 of the Prisoners Act, 1900 reads as under:

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.??

It is evident from a bare glance at the above provision that removal of any prisoner under the same is envisaged only at the instance of the State

Government in cases where the prisoner is under a sentence of death or under or in lieu of a sentence of imprisonment or transportation or is

undergoing in default of payment of fine or imprisonment in default of security for keeping the peace or for maintaining good behaviour. Transfer in

terms of sub-section (1) of Section 29 (supra) is thus permissible only in distinct situations covered by clauses (a) to (d) above. The provision does not,

it is manifest, deal with undertrial prisoners who do not answer the description given therein.

20. Reliance upon sub-section (2) of Section 29, in support of the contention that the transfer of an undertrial is permissible, is also of no assistance to

the appellants in our opinion. Sub-section (2) no doubt empowers the Inspector General of Prisons to direct a transfer but what is important is that any

such transfer is of a prisoner who is confined in circumstances mentioned in sub-section (1) of Section 29. That is evident from the use of words

—any prisoner confined as aforesaid in a prison—. The expression leaves no manner of doubt that a transfer under sub-section (2) is also

permissible only if it relates to prisoners who were confined in circumstances indicated in sub-section (1) of Section 29. The respondents in the present

case were undertrials who could not have been transferred in terms of the orders of the Inspector General of Prisons under Section 29 extracted

above.

21. We may at this stage refer to the Prisons Act, 1894 to which our attention

was drawn by the learned counsel for the appellants in an attempt to show that the Government could direct transfer of the undertrials from one prison to another. Reliance, in particular, was placed upon the provisions of

Section 26 of the Act which reads as under:

26. Removal and discharge of prisoners. (1) All prisoners, previously being removed to any other prison, shall be examined by the medical officer.

(2) No prisoner shall be removed from one prison to another unless the medical officer certifies that the prisoner is free from any illness rendering him unfit for removal.

(3) No prisoner shall be discharged against his will from prison, if laboring under any acute or dangerous distemper, nor until, in the opinion of the medical officer, such discharge is safe.

The above, does not, in our opinion, support the contention that the Inspector General of Prisons could direct removal of undertrial from one prison to

other. All that Section 26 provides is that before being removed to any other prison the prisoner shall be examined by the medical officer and unless

the medical officer certifies that the prisoner is free from any illness rendering him unfit for removal, no such removal shall take place. Section 26

may, therefore, oblige the prison authorities to have the prisoner, whether a convict or an undertrial, medically examined and to remove him only if he

is found fit but any such requirement without any specific power vested in any authority to direct removal, cannot by itself, be interpreted to mean that

such removal can be ordered under the order either by the Inspector General of Prisons or any other officer for that matter.

23. Reference may also be, at this stage made, to Section 309 of the Code which, inter alia, empowers the court after taking cognizance of an offence

or commencement of the trial to remand the accused in custody in cases where the court finds it necessary to postpone the commencement of trial or

inquiry. The rationale underlying both these provisions is that the continued detention of the prisoner in jail during the trial or inquiry is legal and valid

only under the authority of the Court/Magistrate before whom the accused is produced or before whom he is being tried. An undertrial remains in

custody by reasons of such order of remand passed by the court concerned and such remand is by a warrant addressed to the authority who is to hold

him in custody. The remand orders are invariably addressed to the Superintendents of Jails where the undertrials are detained till their production before the court on the date fixed for that purpose. The prison where the undertrial is detained is thus a prison identified by the competent court either in terms of Section 167 or Section 309 of the Code. It is axiomatic that transfer of the prisoner from any such place of detention would be permissible only with the permission of the court under whose warrant the undertrial has been remanded to custody.

35. 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 undertrials 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 undertrials 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 undertrials 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.â??

14. He further relied in the case of â??Vikash Tiwary v. State of Jharkhandâ??, 2016 SCC Online Jhar. 1017. Paragraph no.12 of the said judgment is

quoted hereinbelow:

12. The factual matrix in the backdrop of the provisions regulating transfer of a prisoner and the judicial pronouncement which has been extracted

above suggests that the learned court below cannot decide or accede to an application in a strait jacket formula. The learned court has to consider

such application in a judicious manner as an under trial prisoner is in custody under the authority of the learned court and, therefore, the necessity and

the situational demand of such transfer and other factors must weigh on the mind of the learned Magistrate. The order dated 30.10.2015 merely

allowed the transfer of the petitioner in view of the contents of the letter dated 29.10.2015. The subsequent application submitted by the petitioner was

also disallowed merely on the ground that such transfer is a prerogative of the State/District Administration. Such ground cannot be construed to be

sufficient reasonings as once again the learned Magistrate did not take a considered view on the objections made by the prisoner (Petitioner). The

orders impugned do not contain sufficient reasons so as to reflect independent application of judicial mind and such orders in absence of reasoning

becomes unsustainable.

15. He also relied in the case of *Abdul Wahid Mir v. State of J&K*, 2019 SCC Online J&K 111 and referred to paragraph nos.14 and 15 of

the said judgment which are quoted hereinbelow:

14. At the cost of repetition, it may have to be reiterated that the respondent No. 2 has not been able to show how the authority which was vested

in him in exercise of powers under Section 29 of the Prisons Act read with para 18.59 of the Jail Manual was used in the present case and so the

action taken for shifting of detainee from District Jail, Baramulla to District Jail, Udhampur, cannot be saved. The respondents have to depict, to the

satisfaction of the Court, that shifting was done to meet any administrative exigency or emergency. May be presumption of being lawful and fair is

attributed to the administrative actions in ordinary circumstances but where malafides to such an action are imputed, it would be for such authority

which has exercised the power to show that it was not so. Moreover, the power to be exercised in terms of Section 29 of the Act read with para

18.59 of the Jail Manual in no case can override the power of a regular criminal court to order for remand during trial in terms of Section 344 Cr. P. C

or frustrate proceedings in a pending trial or militate the right of an accused to defend himself meaningfully.

15. I, as such, am of the opinion that the petitioner has been able to carve out a case for grant of relief. Accordingly, by issuance of a Writ of

Certiorari, order No. 126 of 2018 dated 28.02.2018, directing shifting of the detinue to District Jail, Udhampur, is quashed. The petitioner shall be

produced before the trial Court forthwith and further orders for his custody if any needed be solicited by the respondents from the trial court. The

authorities concerned having control over the prisons and having power to regulate and control the prisons and to manage prisoners, may pass such

orders as may be necessary to meet any exigency but same should be subject to approval of the concerned criminal court where the case is pending.

In case the concerned criminal court is approached by such authorities with any memo or prayer for remanding the undertrial to any prison other than

located nearer to his place of residence, the said court shall consider the same under the relevant provisions and rules having regard to the object

sought to be achieved and dispose of same by passing speaking orders.â??

16. He further relied in the case of â??Bharatsinh Gumansinh Jadeja v. State of Gujaratâ??, 2017 SCC Online Gujarat 2415. Paragraph nos.10 and 11

of the said judgment are quoted hereunder:

â??10. There can be no dispute on the proposition of law emerging from the case of State of Maharashtra v. Saeed Sohail Sheikh (Supra) that the

under-trial prisoners cannot be transferred by jail authorities under the provisions of Prisons Act, 1990 and the Prisons Act, 1894 and that the transfer

of under-trial prisoners from one jail to another can be made only under Sections 167 and 309 of the Cr.P.C. and that orders under the said provisions

are not ministerial in nature, such orders are either judicial or quasi judicial orders obligating the Court concerned to hear the prisoner, who may be

adversely affected thereby. It is settled legal position that in judicial or quasi judicial proceedings, the charge against the prisoner must be specifically

stated and he must be called upon to defend himself to the said charge. Stating of the charge would only mean that the prisoner must be confronted

with the accusation and must be asked to show against the proposed transfer and the decision can be taken only after considering the cause shown by

person concerned. Thus, relevant material relied upon against under-trial

prisoner must be produced before the Court and the Court would after hearing both the parties, pass the order either permitting or declining the transfer of the under-trial prisoner.

11. Viewed in the light of the above well settled principles, it appears that the petitioner was not specifically stated the charge against him. He was also not supplied with material relied upon against him and was not called upon to defend himself on the said charges. The charges against the accused as indicated above criticized his conduct and behaviour within and outside the jail. It was therefore, not for the administrative reasons that he was sought to be transferred, but the transfer was sought to be affected with the above stated stigma and therefore, there were all the more reasons to hear him.â??

17. Relying on these judgments, Mr. Ajit Kumar, the learned Senior counsel appearing for the petitioner submitted that the State by way of violating the orders dated 14.02.2018 and 25.02.2021 had shifted the petitioner from Dhanbad Jail to Dumka Jail which is interference with the majesty of law and the concerned officers of the State are liable for contempt of court.

18. In view of the above facts and the submissions of the learned counsels appearing on behalf of the parties, the Court has gone through section 29 of the Prisoners Act, 1900 which reads as under:

â??29. Removal of prisoners.â?"(1) The State Government may, by general or special order, provide for the removal of any prisoner confined in a prisonâ?" (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.â??

19. In the case of â??State of Maharashtra â?? (supra), on examining section 29 of the Prisoners Act, 1900, it is held as follows:

â??23. Reference may also be, at this stage made, to Section 309 of the Code which, inter alia, empowers the court after taking cognizance of an

offence or commencement of the trial to remand the accused in custody in cases

where the court finds it necessary to postpone the commencement of trial or inquiry. The rationale underlying both these provisions is that the continued detention of the prisoner in jail during the trial or inquiry is legal and valid only under the authority of the Court/Magistrate before whom the accused is produced or before whom he is being tried. An undertrial remains in custody by reasons of such order of remand passed by the court concerned and such remand is by a warrant addressed to the authority who is to hold him in custody. The remand orders are invariably addressed to the Superintendents of Jails where the undertrials are detained till their production before the court on the date fixed for that purpose. The prison where the undertrial is detained is thus a prison identified by the competent court either in terms of Section 167 or Section 309 of the Code. It is axiomatic that transfer of the prisoner from any such place of detention would be permissible only with the permission of the court under whose warrant the undertrial has been remanded to custody.

25. 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 â??judicialâ? and not

â??ministerialâ?? 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 ongoing trial. That transfer of an undertrial 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 (2) v. Delhi Admn.* wherein this Court observed: (SCC p. 510, para 48)

â??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 unappealable, 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.â??

35. 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 undertrials 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 undertrials 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 undertrials 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.

20. On perusal of section 29 of the Prisoners Act, 1900, it transpires that removal of any prisoner under the same is envisaged only at the instance of

the State Government in cases where the prisoner is under sentence of death, or under, or in lieu of, a sentence of imprisonment or transportation, or

in default of payment of a fine, or in default of giving security for keeping the peace or for maintaining good behaviour, to any other prison in the State.

Thus, it is clear that transfer can take place under condition (a) to (d) only of Section 29 of the Prisoners Act, 1900. There is no doubt that State

Government can take decision on administrative side which required to be approved by the concerned court. In the cases of such exigencies, decision

of shifting a prisoner can be made but that is in accordance with law. Rule 770(b) of the Jail Manual, speaks of power of Inspector General on

sufficient ground of shifting of the prisoner from one jail to another jail. Rule 770(b) of Jail Manual is quoted hereinbelow:

“(b) Long-term prisoners on admission to District Jails, who are certified fit to travel by the Medical Officers may be transferred to the affiliated

Central Jails, irrespective of their age.

Nothing in this rule contained, shall be deemed in any way to interfere with the power of the Inspector General for sufficient reason, in his discretion,

by general or special order to direct that any class or class of prisoners shall be confined in or transferred to any jail or class of jails.”

21. In the case in hand, this Court remanded the matter to the Chief Judicial Magistrate, Dhanbad by order dated 16.01.2018 passed in

Cr.M.P.No.2304/2017. Pursuant thereto, the Additional Sessions Judge-VII, Dhanbad passed the order dated 14.02.2018 and directed to shift the

petitioner immediately from Birsa Munda Central Jail, Hotwar, Ranchi to Dhanbad Jail. This order was not challenged by the State as this order has

attained finality and the court by order dated 23.02.2018 called for report from the respondent no.3 for non-compliance of that order. The respondent

no.2 by letter dated 20.02.2021 directed to shift the petitioner to Dumka Jail. On further petition, the order dated 25.02.2021 was passed by the court

below and it was incumbent upon the State to comply the order of the learned Additional Sessions Judge, Dhanbad. The law has been well laid down

considering Rule 29 of the Prisoners Act, 1900 which has been taken care of while deciding the earlier Cr.M.P petition filed by the petitioner being

Cr.M.P. No.2304 of 2017 in light of case of “State of Maharashtra and Ors. v. Saeed Sohail Sheikh and Others” (supra), the State has not

complied the order dated 14.08.2018 and 25.02.2021. Section 29 of the Prisoners Act speaks that in cases where the prisoner who has been sentenced of death, or under, or in lieu of sentence of imprisonment or transportation as the petitioner is under-trial could not have been transferred in terms of the order of the Inspector General of Prison in light of Section 29 of the Prisoners Act as held in paragraph no.20 of the judgment in the case of *State of Maharashtra and Ors. v. Saeed Sohail Sheikh and Others* (supra) by the Hon'ble Supreme Court. In paragraph no.23 of the said judgment, it has been held that the continued detention of the prisoner in jail during the trial or inquiry is legal and valid only under the authority of the Court/Magistrate before whom the accused is produced or before whom he is under-tried. An under-trial remains in custody by reasons of such order of remand passed by the court concerned. It has been held in that case that transfer of the prisoner from any such place of detention would be permissible only with the permission of the court under whose warrant the undertrial has been remanded to custody. In the case in hand, the case of the petitioner has not been concluded and he has not been sentenced and it was incumbent upon the State to take permission of the court to transfer the petitioner from one jail to another. Thus, it is crystal clear that in utter disregard of the order dated 14.02.208 and 25.02.2021, the State has shifted the petitioner from Dhanbad Jail to Dumka Jail which amounts to interference with the administration of justice. Had there would have been any exigency as of shifting of the petitioner to another jail it was incumbent upon the State to take prior permission of the concerned court. In the judgment relied by Mr. Pati, the learned State counsel in the case of *V.S.L. Finance Limited v. Union of India and Others* (supra), arising out of Companies Act and the Hon'ble Supreme Court was considering the compounding of the case in that case and held that the permission for compounding is not required, this case is not helping the State. In the case of *Asha Ranjan v. State of Bihar and Others* relied by Mr. Pati, the learned counsel, Hon'ble Court has held that the court is required to consider the circumstances having regard to the objections which the prisoner may have to offer. There is no doubt that in that case the Court has also held that Article 226 of the Constitution of India can be exercised by the High Court to transfer a case from one jail to another inside the State depending upon the circumstances. Thus, the State is required to make out a case of

interference under Article 226 in a bona fide manner. This case is also not helping the State. In the case of Erach Boman Khavar v. Tukaram

Shridhar Bhat And Another (supra), relied by Mr. Pati, the learned State counsel, the Hon'ble Supreme Court was considering two aspects, out of

that one was with regard to conditions precedent of initiation of civil action or legal proceeding with leave of the court in winding-up proceeding can be

obtained was held even after initiation of the proceeding by the court that was in the interest of the company to safeguard so that it does not face

deprivation of its rights and claim. This judgment is on different footing. This judgment is also not helping the State. There is no doubt that the

fundamental right of an under-trial prisoner under Article 21 of the Constitution is not absolute. His rights of visitations as also other rights are provided

in Jail Manual. This is not a case and nowhere it has been alleged in either of the petitions that the petitioner was not maintaining internal discipline of

the jail. The normal rule is that the detenu will be kept in detention in a place which is within environs of his or her ordinary place of residence. If a

person ordinarily resides in a particular place to keep him in detention in a far of place, is a punitive measure by itself which is not being encouraged by

the Court. In appropriate cases, the Court has interfered to shift a prisoner from one jail to another and for that it was ordered in the particular facts

and circumstances of the cases. Thus, the Court can exercise its powers under Article 226 of the Constitution of India. Had it been demonstrated

before this Court that the petitioner is violating the order of the authorities in the jail premises, which is lacking in the case in hand; no case of violation

of law has been made out against the petitioner, who is in custody. Orders dated 14.08.2018 and 25.02.2021 of the learned Additional Sessions Judge,

Dhanbad was required to be complied with which has not been done in the case in hand. After shifting of the petitioner in Dumka Jail a further report

has been sought which suggest that it was after thought of the authorities to circumvent the two orders passed by the Additional Sessions Judge-IV,

Dhanbad. The case of shifting of the prisoner from one jail to another has been considered by the Hon'ble Supreme Court in the case of State of

Maharashtra and Ors. v. Saeed Sohail Sheikh and Others (supra) and by this Court and other High Courts in the cases of Bharatsinh

Gumansinh Jadeja, Abdul Wahid Mir and Vikash Tiwary @ Vikash Nath Tiwary @ Bikash Tiwari @ Bikash Nath Tiwary (supra).

No case of violation of any law by the petitioner has been made out.

22. As a cumulative effect of the above discussions, W.P.(Cr.) No.122 of 2021 succeeds and the respondent-State is directed to comply the order of

the trial court in its letter and spirit within two weeks from the date of receipt/production of a copy of the order. W.P.(Cr.) No.106/2021 is dismissed.

However, liberty is kept with the respondent-State to move before the trial court if such exigency arises in accordance with law.

23. W.P.(Cr) No.122 of 2021 is allowed and disposed of, and W.P.(Cr) No.106 of 2021 is dismissed.

24. I.A., if any, stands disposed of.