
(1999) 03 GAU CK 0016
In the Gauhati High Court
Case No : Civil Rule No. 304 of 1998

Santanu Bharali

APPELLANT

Vs

State of Assam and Ors.

RESPONDENT

Date of Decision : 27-03-1999

Acts Referred:

Citation : (1999) 1 GLJ 479

Hon'ble Judges : J.N.Sarma, J

Bench : Single Bench

Advocate : T.J.Mahanta, N.Dutta, B.Goswami, Advocates appearing for Parties

Judgement

1. This writ application has been filed on behalf of 24 persons named above. The petition has been filed by an Advocate, Shri S. Bharali.

2. The grievance of the petitioners are that these 24 persons, they have been detained under the National Security Act, 1980 and they have been shifted from the State of Assam to Jodhpur Jail and it is urged that the shifting of these detenu from Assam to Jodhpur is against the law. Though this writ petition was filed as far as back on 21.1.98, till today no affidavit in opposition has been filed, no record has been produced. Time was granted earlier to the authority to do the needful. Time was granted on 27.2.98, 11.3.98 and 17.3.98, but nothing was done. Hence I decided to take up the matter today.

3. I have heard Shri N. Dutta, learned Advocate for the petitioners and Shri Goswami learned Advocate for the respondents. The admitted position is that there is one Act being the Transfer of Prisoners Act, 1950 and that Act provides for removal of prisoners from one place to another of persons confined in a prisons. But the categories of prisoners who can be shifted from one State to another is that the person must be a prisoner and thereafter, he must suffer the following :

(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 fine, or

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

4. A person detained under the National Security Act can not be deemed to be a prisoner under this Act so that power shall not be available to the State. Only the power which will be available to the State is provided under section 5 of the National Security Act, 1980. Section 5 provides for power to regulate place and conditions of detention. That section is quoted below :

5. Power to regulate place and conditions of detention Every person in respect of whom a detention order has been made shall be liable

(a) to be detained in such place and under such conditions, including conditions as to maintenance, discipline and punishment for breaches of discipline, as the appropriate Govt may, by general or special order, specify and

(b) to be removed from one place of detention to another place of detention, whether within the same State or in another State by order of the appropriate Govt:

Provided that no order shall be made by a State Govt under clause (b) for the removal of a person from one State to another State except with the consent of the Government of the State.

6. That section came up for interpretation before the Apex Court in AIR 1982 Supreme Court 710 (AK Roy vs. Union of India & another) and there in paragraph 74 the Supreme Court considered section 5 of the National Security Act and laid down the law as follows :

(b) The objection of the petitioners to these provisions on the ground of their unreasonableness is not wholly without substance. Laws of preventive detention cannot, by the back door, introduce procedural measures of a punitive kind. Detention without trial is an evil to be suffered, but to no greater extent and in no greater measure than is minimally necessary in the interest of the country and the community. It is neither fair nor just that a detenu should have to suffer detention in "such place" as the Govt may specify. The normal rule has to be that the detenu will be kept in detention in a place which is within the environs of his or her ordinary place of residence. If a person ordinarily resides in Delhi, to keep him in detention in a far off place like Madras or Calcutta is a punitive measure by itself which, in matters of preventive detention at any rate, is not to be encouraged. Besides keeping a person in detention in a place other than the one where he habitually resides makes it impossible for his friends and relatives to meet him for the detenu to claim the advantage of facilities like having his own food. The requirements of administrative convenience, safety and security may justify in a given case the transfer of a detenu to a place other than that where

he ordinarily resides, but that can only be by way of an exception and not as a matter of general rule. Even when a detenu is required to be kept in or transferred to a place which is other than his usual place of residence, he ought not to be sent to any far off place which, by the very reason of its distance, is likely to deprive him of the facilities to which he is entitled. Whatever smacks of punishment must be scrupulously avoided in the matter of preventive detention.?

7. Relying on this case a Division Bench of this Court in (1983) 1 GLR 273 (Shri HK Bhattacharjee vs. State of Assam & another) has laid down the same law. There, the detenu was shifted from District Jail at Guwahati to Silchar and even that was not approved by this Court and this Court directed that the detenu should not be transferred to Guwahati District Jail. In the instant case the persons have been shifted from Assam to Jodhpur and that is not tenable in law. Nothing has been produced before this Court to show that this was done because of the administrative convenience, safety and security of the State and that this is an exceptional case as pointed out by the Apex Court in the judgment quoted above.

8. The Supreme Court further pointed out that even when there is the necessity to transfer the detenu from one place to another, he should not be transferred to a far off place. The Supreme Court pointed out that the matter must not be punitive detention. But that is, what I find in the instant case. Accordingly the petition is allowed and all these 24 persons shall be shifted from Jodhpur to any jail within the State of Assam. That will be done within a period of 15 days from the date of receipt of the certified copy of this order. The petitioner shall obtain certified copy of this order and shall produce the same before the appropriate authority to do the needful in terms of this order.