
(2016) 03 JH CK 0034
In the Jharkhand High Court
Case No : Cr.M.P. No. 2267 of 2015.

Vikash Tiwary

APPELLANT

Vs

State of Jharkhand

RESPONDENT

Date of Decision : 08-03-2016

Acts Referred:

Prisoners Act, 1900 — Section 29

Citation : (2016) 161 AIC 867 : (2016) 3 AIRJharR 340 : (2016) CriLJ 3687 :
(2016) 3 ECrC 697 : (2016) 2 JBCJ 455 : (2016) 2 JLJR 641 : (2017) 1 PCCR 67

Hon'ble Judges : Rongon Mukhopadhyay, J.

Bench : Single Bench

Advocate : Indrajit Sinha, Advocate, for the Appellant; Suraj Verma, A.P.P, for the Respondent

Final Decision : Allowed

Judgement

Rongon Mukhopadhyay, J. - In this application, the petitioner has prayed for quashing the order dated 30.10.2015 passed by the learned CJM, Ramgarh whereby and where under on the prayer made by the Inspector General (Prison), Jharkhand the petitioner has been directed to be transferred from Lok Nayak Jay Prakash Narayan Central Jail, Hazaribagh to Dumka Central Jail. A further prayer has been made for quashing the order dated 02.11.2015 by which the prayer of the petitioner not to shift to any other jail from Hazaribagh Central Jail has been rejected.

2. In connection with Patratu P.S. Case No. 309 of 2014 which was instituted for the offences punishable under Sections 364/34 of the Indian Penal Code the petitioner was arrested and was lodged at Hazaribagh Central Jail as an under trial prisoner. A letter bearing no. 5116 of 2015 dated 29.10.2015 along with Memorandum bearing no. 2699 dated 28.10.2015 was issued by the Inspector General of Prisons, Jharkhand in which a request was made to the learned trial court for transferring the petitioner from Lok Nayak Jay Prakash Narayan Central Jail, Hazaribagh to Dumka Central Jail.

3. The learned Chief Judicial Magistrate, Ramgarh vide order dated 30.10.2015 was pleased to pass an order allowing such prayer made. Since the petitioner was apprehending a threat to his life, he filed an application on 30.10.2015 before the learned Chief Judicial Magistrate, Ramgarh not to shift him from Hazaribagh Central Jail to Dumka Central Jail. However, in terms of the order dated 02.11.2015 the prayer made by the petitioner was rejected.

4. Heard Mr. Indrajit Sinha, learned counsel appearing for the petitioner and Mr. Suraj Verma, learned A.P.P., for the State.

5. Mr. Indrajit Sinha, learned counsel appearing for the petitioner, has submitted that the impugned orders have been passed without application of mind and without assigning any reasons. It has been submitted that merely on the request of the Inspector General (Prison), Jharkhand, Ranchi and based on confidential letter the petitioner was directed to be transferred from Central Jail, Hazaribagh to Central Jail, Dumka, when admittedly there is immense threat on the life of the petitioner and which has been brought to the knowledge of the court below in his petition dated 30.10.2015. Learned counsel further submits that neither the Prisoners Act nor the Prison Act provide for any transfer of an under trial prisoner and, therefore, in absence of any such provision the impugned order deserves to be quashed and set aside. To fortify his argument, learned counsel has referred to the judgment in the case of State of Maharashtra and Others v. Saeed Sohail Sheikh And Others reported in (2012) 13 SCC 192.

6. Mr. Suraj Verma, learned A.P.P., in support of the state action in seeking transfer of the petitioner from Central Jail, Hazaribagh to Central Jail, Dumka has stated that the transfer of a prisoner from one Jail to another is prerogative of the State Government which can be undertaken on administrative reasons as well as on other factors. Learned counsel submits that Rule 30 and 770 (B) of the Jharkhand Jail Manual does give the power to the Inspector General (Prison) seeking transfer of a prisoner from one jail to another. Considering such circumstance, no illegality has been committed by the learned Chief Judicial Magistrate, Hazaribagh in the impugned orders dated 30.10.2015 and 02.11.2015 and, therefore, learned A.P.P. seeks dismissal of the present application.

7. The foundation for passing the impugned orders dated 30.10.2015 and 02.11.2015 is a confidential letter issued by the Superintendent of Police, Hazaribagh dated 10.10.2015 and letter no. 5116 of 2015 dated 29.10.2015 along with memorandum bearing no. 2699 dated 28.10.2015 issued by the Inspector General (Prison), Jharkhand. The prayer as it seems have been allowed by the learned court below in its order dated 30.10.2015 in a routine manner. When the petitioner filed an application not to shift him to any other jail, taking a leaf out of the earlier order dated 30.10.2015 such prayer was also rejected.

8. Now it is to be seen on the context of the various provisions underlining the transfer of prisoners from one jail to another and the judicial pronouncement on

the subject to test the legality of the impugned orders so passed. The Prisoners Act, 1900 which was enacted to consolidate the law relating to prisoners confined by an order of a court deals with the transfer of a prisoner and Section 29 of the Act is reproduced herein 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."

9. Section 29 of the Prisoners Act, 1900 is only confined to inter State transfer of a prisoner and the Transfer of Prisoners Act, 1950 deals with intra State transfer of prisoners which has been dealt with in Section 3 of the said Act. Section 29 of the Prisoners Act, 1900 deals with various categories of prisoners including a convict and excludes by necessary implication an under trial prisoner. The Bihar Jail Manual which consists of Rules for Superintendence and Management of jails in Bihar and which after the reorganisation of the State was made applicable to the State of Jharkhand have a statutory force. Rules 30 and 770 (B) of the Jharkhand Jail Manual have been much stressed upon by the learned A.P.P. and for appreciating his contentions the same are quoted below:-

"30. Under section 29(2) of Act III of 1900 as amended by Act I of 1903, he has been vested with the power of ordering the transfer of prisoners from any jail in Bihar to another jail within the State or, in accordance with general or special orders issued by the Government to a jail in any other State. He is also authorised to sanction the removal of prisoners from the permanent buildings of any jail into temporary quarters during epidemics.

770. (a) Subject to the limitation as to classification and the length of sentence as prescribed in the annexed table, all prisoners shall ordinarily be confined for the purpose on undergoing their sentences, in the jail to which they are in the first instance committed, or in the jail to which they are transferred from time to time in accordance with the rules in this chapter."

10. The provisions quoted above clearly spells out that they flow from the Prisoners Act, 1900 and is confined to a convicted prisoner.

11. In the case of State of Maharashtra and Others v. Saeed Sohail Sheikh And

Others (Supra) the Hon"ble Supreme Court while considering the power of the court to permit a prisoner to be transferred from one jail to another and whether such power can be exercised by the court by way of an administrative act it was held as follows:-

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 under trial 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 under trial is permissible, is also of no assistance to the appellants in our opinion. Subsection (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 under trials who could not have been transferred in terms of the orders of the Inspector General of Prisons under Section 29 extracted above.

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 under trial 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 under trials are detained till their production before the court on the date fixed for that purpose. The prison where the under trial 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 under trial 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 "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 ongoing 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(2) v. Delhi Admn.* wherein this Court observed: (SCC p. 510, para 48)

"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 abridgement 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."

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 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.

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 reasoning's 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.

13. In view of the discussions enumerated above, this application is allowed and the orders dated 30.10.2015 as well as 02.11.2015 passed by the learned Chief Judicial Magistrate, Ramgarh in Patratu P.S. Case No. 309 of 2014 are, hereby, quashed and set aside and the matter is remanded back to the learned Chief Judicial Magistrate, Ramgarh with a direction to pass a fresh order in accordance with law.