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Court : Allahabad

Decided On : Oct-05-1990

Reported in : 1991CriLJ903

Judge : A.N. Varma and ;R.K. Gulati, JJ.

Acts : Criminal Law (Amendment) Act - Sections 7; Arms Act - Sections 25 and 30; Prisons Act; Prisoners Act - Sections 4, 5 and 7; Code of Criminal Procedure (CrPC) , 1974 - Sections 107, 116, 141 and 167(2); Indian Penal Code (IPC) - Sections 120B, 147, 148, 149, 201, 224, 225, 302, 307, 332 and 353; Constitution of India - Article 21 and 22

Appeal No. : Habeas Corpus Writ Petn. No. 21606 of 1990

Appellant : Balram Singh Yadava and ors.

Respondent : State of U.P. and ors.

Advocate for Def. : Standing Counsel

Advocate for Pet/Ap. : Kirpa Shankar, Adv.

Disposition : Petition dismissed

Judgement :

A.N. Varma, J.

1. This petition for a writ of habeas corpus was presented initially on behalf of five individuals. Subsequently, two petitioners withdrew from the array of petitioners and, as a result, upon a motion made in that behalf by their counsel, the petition was dismissed as withdrawn on their behalf. That left only three petitioners out of whom Raghuvir Singh has, according to the information conveyed to the Court by the learned Additional Government Advocate, since been released. Thus, only two petitioners, namely, Darshan Singh Yadav and Hargovind Singh Yadav remain in the field.

1A. At the outset we may mention that Sri P.P. Yadav, learned counsel representing these two petitioners conceded that in this petition neither the orders of remand nor the extension thereof passed from time to time by the Judicial Magistrate Under Section 167(2) Cr. P.C. taking them in judicial custody are being challenged. The submission in the main was that even if their detention was initially valid being supported by valid remand orders their continued detention was rendered illegal as a result of their transfer from the District Jail at Etawah to the Jails of other districts. It was urged that the transfer of these two persons was wholly unauthorised in law not being sanctioned by any statute nor by the Judicial Magistrate Under Section 167(2).

2. We will elaborate the contention urged by counsel for the petitioners and the learned Additional Government Advocate a little later. First the essential facts. Darshan Singh was arrested on 12-8-1990 at Etawah in pursuance of an FIR lodged on 11-8-1990 at Police Station Chaubia in Crime No. 89 of 1990 Under Sections 147/148, 149, 307, 224, 225, 353 and 332 IPC and Section 7 Criminal Law amendment Act. On 13-8-1990 he was produced before the Additional Chief Judicial Magistrate IV, Etawah and after being taken into judicial custody were sent to the District Jail, Etawah in the custody of the Superintendent of that jail for being produced on 25-8-1990. The same night he was transferred to the District Jail, Hardoi. He arrived and was lodged in the District Jail, Hardoi on 14-8-1990 and remained there upto 20-8-1990. On 21-8-1990 he was transferred from Hardoi Jail to the Central Jail Bareilly. From 22-8-1990 till date he has been in the Central Jail, Bareilly. In between, the order of remand has been extended by the concerned Judicial Magistrate from time to time. This is amply established by

Annexure 2 to the affidavit of M.L. Ananad, the Deputy Jailor, Central Jail. Bareilly, and the jail warrants produced before the Court in the course of arguments. It is, however, noteworthy that for every extension of remand Darshan Singh would be brought to Etawah Jail and presented before the Judicial Magistrate on the date fixed in the remand order by the jail authorities of District Jail, Etawah. It appears that in connection with the investigation of Crime No. 89 of 1990 on the alleged recovery of illicit arms, another case being Crime No. 226 of 1990 Under Sections 25/30 Arms Act was also registered against Darshan Singh for which a warrant of remand was prepared and orders obtained when Darshan Singh was produced before the Additional Chief Judicial Magistrate on 25-8-1990. This warrant was for extension from 25-8-1990 to 1-9-1990 which was subsequently extended from 2-9-1990 to 20-9-1990.

3. There was yet another case in which both Darshan Singh and Hargovind Singh, who are brothers, were wanted, being crime No. 32 of 1985 Under Sections 147, 148, 149, 302, 201 and 120B I.P.C. On coming to know of the arrest of these persons, the Investigating Officer in Crime Case No. 32 of 1985 made an application to the Chief Judicial Magistrate, Etawah, stating that the accused are already in jail and that they might be taken into custody in the present case as well and the requisite remand order be prepared and served on them. The application was allowed by the Chief Judicial Magistrate by his order dated 18-8-1990 as a consequence of which one Additional Chief Judicial Magistrate was sent to Ballia where Hargovind Singh was then lodged and another Magistrate was sent to Hardoi were Darshan Singh was confined for the purpose of serving remand orders on them. The relevant remand orders served on these two petitioners have been annexed as Annexures CA-2 and CA-3 to the affidavit of Sri D.S. Rawat, Dy. Superintendent of Police, Etawah.

4. The position with respect to Hargovind Singh is that he was arrested on 16-8-90 and produced before the Sub-Divisional Magistrate, Etawah in connection with Crime No. 249 of 1990 Under Sections 141/107/116 Cr. P.C. Police Station Viadpura, district Etawah and he was remanded to the custody in District Jail, Ballia. On 23-8-90 he was transferred to the Central Jail, Bareilly, under the direction of the Inspector General of Prisons. He was received and lodged in the

Central Jail, Bareilly on 25-8-90. On 21-8-90 while in the District Jail at Ballia, a magistrate from Etawah went to Ballia, prepared warrants in the aforesaid crime case No, 32 of 1985 and served the same on the said petitioner for the period 21-8-90 to 3-9-90 again from 3-9-90 to 7-9-90 and 7-9-90 to 20-9-90. Thus Hargovind Singh is lodged in the Central Jail, Bareilly, under two warrants, first, in the case Under Sections 107/116 and, second, in Crime Case No. 32 of 1985. It was not disputed by the learned counsel for the petitioner that in regard to him as well valid orders of remand had been passed by the concerned Judicial Magistrate and that the said orders of remand or extension thereof are still in operation.

5. At this point it is necessary to mention that for the transfer of these two petitioners to other District/Central Jails, requisite orders had been obtained/passed by the Inspector General of Prisons. The basis for the transfer of the petitioners from the District Jail, Etawah has been elaborated in the counter affidavit of Sri Markande Singh, the Deputy Jailor at District Jail, Etawah and that of Sri M.L. Anand, Dy. Jailor, Central Jail, Bareilly and other counter affidavits filed on behalf of the respondents. In the affidavit of Sri Markandey Singh. It has been asserted that the total capacity of the District Jail at Etawah is only 340 prisoners. One barrack has fallen down and is wholly unfit for lodging the prisoners. On 13-8-90 the number of prisoners had swollen to 879 giving rise to numerous problems, such as, making arrangements for meals and water and other amenities and standard of cleanliness prescribed under the Jail Manual. The Inspector General of Prisons was fully aware of this problem. He accordingly issued radiograms for the transfer of prisoners from the District Jail, Etawah to other jails and consequently when the petitioners and other prisoners were received in the District Jail at Etawah they were transferred with all the remand orders and warrants of custody concerning the petitioners to the transferee jail authorities. This was done in pursuance of the order of the Inspector General of Prisons. These facts are fully established by the counter affidavits filed on behalf of the jail authorities as well as the Dy. Superintendent of Police, Etawah. The radiogram issued by the Inspector General of Prisons on 13-8-90 read as follows :

'Some agitators from Etawah are likely to be transferred to your jail. They should be admitted on their arrival and necessary arrangements may please be made

accordingly.'

6. On receiving this radiogram, the District Magistrate/S.S.P., Etawah, sent a telegraphic intimation to the jails to which the prisoners to be transferred from Etawah District Jail were to be lodged. A copy of this intimation is Annexure 2 to the affidavit of Sri Markandey Singh.

7. These facts may, therefore, be taken as established. The petitioners are being detained under valid orders of remand issued by the concerned Judicial Magistrate from time to time Under Section 167(2). The remand orders have been extended from time to time and are still in operation. On each date fixed in the remand order the petitioners were produced before the Judicial Magistrate by the jail authorities at Etawah to which the custody of the petitioners was committed under proper custody warrants. Indeed the jail warrants indicate that before each date fixed in the remand orders the petitioners were brought to the District Jail Etawah for compliance with the remand orders. The Judicial Magistrate was aware of the fact that though initially entrusted to the custody of the Superintendent, District Jail, Etawah, the petitioners were transferred to other jails. This is apparent from the endorsements made on the jail warrants. Extensions were being granted by the Judicial Magistrate despite this awareness. The detention of the petitioners in other jails has thus the approval of the Judicial Magistrate.

8. We now revert to the contentions urged in support of the petition. The first and the main ground of challenge to the detention was that the transfer of the petitioners from District Jail, Etawah, to other District/ Central Jails was illegal and unauthorised in law. We find no merit in this contention. Paragraph 128 of the Jail Manual provides :

'128. Transfer of convicts from one prison to another --

The transfer of convicts from one prison to another within the State shall be directed by the Inspector General, subject to the orders and the control of the State Government.'

9. The next relevant provision is paragraph 137 under which the petitioners have been transferred. It reads:

'137. Transfer of prisoners to relieve over crowding --

As soon as the number of prisoners confined in a jail exceeds its capacity, the Superintendent shall submit to the Inspector General a nominal roll, in the prescribed form, of convicts whom he recommends for transfer to another jail to relieve overcrowding. The nominal roll shall be accompanied by a memorandum showing the jail population, the authorised capacity of the jail and the number of prisoners of each class confined in the jail.

Only such convicts as are in good health and of good character shall, as far as possible, be recommended for transfer. If absolutely necessary, convicts in different health may be included up to the limit of 10 per cent. Note :

Nominal rolls of different Classes of convicts shall be prepared separately.'

Paragraph 138 is also relevant. It provides:

'138. Transfer of convicts for local or disciplinary reasons --

The Superintendent may recommend the transfer, to another jail, of any convict whose detention in the prison is considered to be inexpedient for local or disciplinary reasons or for any other sufficient cause. The reasons for transfer should always be communicated to the Superintendent of the Jail to which the convict is transferred and should also be recorded in the history ticket of the convict concerned.'

10. We then turn to paragraph 409-A of Chapter XVIII of the Jail Manual which states:

'Except as provided in this Chapter, the rules in the Jail Manual applicable to superior and ordinary classes of convicts shall apply to superior and ordinary classes of under trial prisoners also.'

11. There is nothing in the rest of Chapter XVIII of the Jail Manual which may militate against the transfer of undertrial prisoners from one jail to another for temporary accommodation in the exigencies mentioned in paragraph 137 quoted above. It must follow, therefore, that the rules in the Jail Manual applicable to superior and ordinary classes of convicts are attracted to the undertrial prisoners as well. This will necessarily bring in the application of all the rules of the transfer of convicts from one prison to another.

12. There is hence no doubt that Rule 137 of the Jail Manual pertaining to transfer of prisoners for relieving overcrowding was available in regard to the petitioners. The transfer of the petitioners from the District Jail, Etawah, was thus fully authorised by law.

13. It was, however, urged for the petitioners that the rules incoporated in the Jail Manual have no statutory sanction or force and that neither the Prisons Act nor the prisoners Act authorised the transfer of a prisoner committed to the custody of a prison in pursuance of an order of remand passed Under Section 167(2) Cr. P.C. from one jail to another.

14. The contention is devoid of any merit. Section 4 of the Prisoners Act makes provision for the accommodation of prisoners. It states that the State Government shall provide for the prisoners in the territories under such government, accommodation in prisons constructed and regulated in the manner laid down in the Act. Section 5 of the same Act lays down :

'Inspector General. (1) An Inspector General shall be appointed for the territories subject to each State Government and shall exercise, subject to the orders of the State Government, the general control and superintendence of all prisons situated in the territories under such Government.

(2) The State Government may also appoint one or more Deputy Inspectors General of Prisons, and they shall perform such of the functions of the Inspector General under this Act or under any other law for the time being in force as may be entrusted to them by or under the rules made under Act.'

15. The Inspector General has thus been armed with the power to exercise general control and superintendence of all prisons in the State. This power, in our opinion, is wide enough to include the power to make provisions for temporary accommodation of the prisoners to meet over-crowding in any jail. This has been made further explicit by Section 7 of the Prisoners Act which provides that whenever it appears to the Inspector General that the number of Prisoners in any prison is greater than can be conveniently or safely be kept therein and it is not convenient to transfer the excess, number to some other prison he may make provision for temporary shelter and custody of the prisoners in such manner as the State Government may direct. Section 7, in our considered view, clearly and unmistakably supports the premise that the Inspector General does posses the power to make provision for the transfer of prisoners to another jail where it appears to him that the excess number of the prisoners cannot be conveniently lodged in the jail. Paragraph 137 of the Jail Manual is thus clearly referable to the power conferred on the Inspector General of Prisons under the Prisoners Act to make provision for temporary accommodation of prisoners who are in excess, i.e., to make provision for relieving overcrowding. It is, therefore, wrong to suppose that paragraph 137 does not have any support in the statute.

16. In any case, even if these rules are merely administrative instructions not having the force of a statute, we think that the same may be applied in the absence of any statute to the contrary for dealing with the situation arising out of over crowding provided that the jail authorities to which the custody of the prisoner remanded Under Section 167(2) is committed shall stand charged with the responsibility of producing the prisoner before the Judicial Magistrate on the date fixed in the order of remand. There is no complaint in the present case that the jail authorities at Etawah have not produced the petitioners before the Judicial Magistrate on the date or dates fixed in the order of remand.

17. We are further of the opinion that once it is found that the detention of the petitioners is supported by valid orders of remand and there are valid custody warrants issued against them, the mere transfer of the petitioners from one jail to another would not per se and without more render the detention illegal. We are aware of the contrary view expressed in the case of Hari Prasad Dubey Tyagi v.

District Magistrate, Farrukhabad reported in 1976 All LJ 62. In this case, the Bench held that the transfer of a prisoner from one jail to another without obtaining an order from the Judicial Magistrate was illegal. This decision has been expressly overruled by a Full Bench of this Court in the case of Surjeet Singh v. State of Uttar Pradesh reported in 1984 All LJ 375. It is, however, important to note that the Division Bench did not notice either paragraph 137 or paragraph 409 A of the Jail Manual both of which, if read along with the provisions of the Prisoners Act referred to above, completely negative the premise that the transfer for temporary accommodation from one jail to another on account of overcrowding is not authorised by law. It is, however, unnecessary to dilate on this point further in view of the fact that Tyagi's case (supra) has been overruled by the Full Bench.

18. That takes us to the next ground of challenge urged by Sri. P.P. Yadav. It was submitted that Section 167(2) Cr. P.C. necessarily implies the mandate that a person committed by the Judicial Magistrate Under Section 167(2) to a particular jail authority cannot be altered during the period of remand without the permission or concurrence or approval of the Judicial Magistrate and that transfer of a prisoner from one jail to another would ipso facto be infringement of the order of remand, if the transfer is effected without the permission or approval of the Judicial Magistrate.

19. We refrain from expressing any concluded opinion on this aspect of the case in view of the fact that in the present case even if such a requirement could be read into Sub-section (2) of Section 167 the same stood amply satisfied. As mentioned above, the concerned Judicial Magistrate was aware of transfer of the prisoners from one jail to another during the period of remand. This is fully borne out by the custody warrants filed or produced in the case by the respondents. In spite of this, the Judicial Magistrate has been granting/extending the remand of the petitioners. We would, therefore, be entitled to assume that the transfer of the petitioners from one jail to another for temporary accommodation has received the approval of the Judicial Magistrate. Under the circumstances, the custody of the petitioners with the jails to which they have been transferred would tantamount to 'transferred custody' a concept which has received the approval and recognition of the Supreme Court in several decisions See AIR 1971 SC 178 : (1971 Cri LJ 244) and

AIR 1971 SC 62 and AIR 1978 SC 1675 : (1978 Cri LJ 1741).

20. Our conclusion, therefore, is that the detention of both the .petitioners, Darshan Singh and Hargoind Singh, is legal and proper, being supported by valid orders of remand and extension thereof passed by the concerned Judicial Magistrate Under Section 167(2). We further hold that their detention in the jail is backed by valid custody warrants as well as orders of transfer issued by the Inspector General of Prisons in accordance with law.

21. We should not, however, be taken to have laid down that the transfer of a prisoner from one jail to another in accordance with the Jail Manual or Prisoners Act would take the matter beyond the purview of Judicial review. Even the orders of transfer for temporary accommodation of prisoners are subject to scrutiny by the Courts to ensure that there is no infraction of Article 21 and 22 of the Constitution of India. We have not the least doubt that this Court is perfectly competent to examine whether the transfer of a prisoner and his detention in the 'transferee' prison conforms to the tests laid down by the Supreme Court and this Court for the purpose of satisfying itself that the rights of prisoners guaranteed under Articles 21 and 22 of the Constitution are neither curtailed nor side tracked. Learned counsel for the petitioner, however, did not press the allegations made in the petition that they are being subjected to any torture or inconvenience or ill-treatment or that they are not being extended the facilities in conformity with human dignity. The few allegations made in the petition in a half-hearted manner have been specifically denied in the counter affidavit filed by the jail authorities.

22. Before concluding, however, we may add that the transfer in the present case was ostensibly effected for relieving over crowding in the District Jail, Etawah. It naturally follows that as soon as the pressure on the District Jail, Etawah ceases out, the petitioners must be brought back to that jail. We may at this point refer to some pertinent observations made in Mrs. Geetinder Kaur's case reported in AIR 1985 SC 1409 : (1985 Cri LJ 1640) in which His Lordship R.S. Pathak, J. (as the learned Chief Justice then was) speaking for the Court made the following observations in paragraph 3 of the judgment:

'While it is ordinarily desirable that a detenu- should be detained in the environment natural to him in point of climate, language, food and other incidents of living. in the actual decision concerning the place of detention, these considerations must yield to factors related to, and necessitated by the need for placing him in preventive detention.'

(Emphasis supplied)

23. Though these observations were made in the context of preventive detention they apply with equal validity to cases of detention under the ordinary law as well. We think that it is desirable that unless the administrative considerations warrant other wise, the detenu should be detained in any environment natural to him in point of climate, language, food and other incidence of life and living. These factors should be kept in mind. This is however not to say that even if there is overcrowding in a jail a prisoner cannot be transferred from one jail to another in accordance with Paragraph 137 for temporary accommodation.

24. With these observations, the petition is dismissed. In regard to the fifth respondent Chaudhri Raghuraj Singh, the petition stands dismissed as having become infructuous. The first two petitioners have already withdrawn from the contest and had their petition dismissed vide this Court's order dated 27-8-90.

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