

**(1976) 09 CAL CK 0027**

**Calcutta High Court**

**Case No:** Matter No. 506 of 1976

Barun Sengupta

APPELLANT

Vs

State of West Bengal and Others

RESPONDENT

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**Date of Decision:** Sept. 17, 1976

**Acts Referred:**

- Constitution of India, 1950 - Article 226

**Citation:** 81 CWN 1126

**Hon'ble Judges:** Sabyasachi Mukharji, J

**Bench:** Single Bench

**Advocate:** N.N. Goopta and Indrajit Sen, for the Appellant; Dipankar Gupta, Advocate General and S.B. Mukherjee, for the Respondent

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### **Judgement**

Sabyasachi Mukherji, J.

Sree Barun Sengupta, the petitioner herein, has been detained by virtue of an order dated 6th of October, 1975 made under subsection (1) of section 3 of the Maintenance of Internal Security Act, 1971 (Act 26 of 1971) hereinafter called MISA. He was arrested at Delhi on 24th of January, 1976 and was lodged in the Presidency Jail, Alipore as a Group B prisoner. He was, thereafter, transferred to the Alipore Central Jail. It appears that there was an order on the 19th of March, 1976 by the State Government directing his transfer from the Alipore Central Jail to Purulia District Jail. Though the petitioner had not been at the relevant time served with the order but he had apprehended transfer and therefore on the 22nd of March, 1976 he made an application under Article 226 of the Constitution for being considered as a group C prisoner, as well as, for not transferring the petitioner from Calcutta. He moved the application and obtained a rule nisi being C.R. No. 3582 (W) of 1976. On the 29th of March, 1976 the aforesaid matter was disposed of by consent of the parties, wherein it was recorded as follows :

"Due to good office of Mr. Gupta Standing Counsel this matter has, been settled out of court on Government's agreeing to classify the petitioner herein in group C as contained in the West Bengal Maintenance of Internal Security Order, 1971, being rules under the Act. This rule is, therefore disposed of. There will be no order as to costs. This order is without prejudice to the rights and contentions of the parties and without prejudice to the contentions of the Government that this matter is not justiciable by the Court."

On the 4th of April, 1976, the petitioner was transferred in a police van to the Purulia District Jail. In the affidavit-in-opposition filed on behalf of the respondents and affirmed by one Nalini Kumar Chakraborty, Assistant Secretary, Home (Special) Department, Government of West Bengal on the 21st of June, 1976 in Paragraph 7 it has been stated that before such transfer the condition of the health of the detainee was checked by the Senior Medical Officer, Alipore Central Jail on the 3rd of April 1976 and the B.C.G. was seen by Dr. Amal Chakraborty and he was of the opinion that the detainee was fit to undertake the journey. In subsequent affidavit the said reports of the medical examination have been annexed. Thereafter it appears that the petitioner was examined by Dr. Amal Chakraborty at Purulia pursuant to the direction of this Court and he suggested that as better facilities were available at Bankura the detainee might be transferred to the Bankura District Jail on the 18th of June, 1976 and he was accompanied by a Doctor during his transfer and he was also examined by the doctor before his transfer to find out whether he was in a condition to undertake the journey. The doctor found that he was in a condition to undertake the journey. In this application under Article 226 of the Constitution the petitioner has challenged the original transfer to Purulia District Jail and has asked for a writ of mandamus directing the respondents to transfer the petitioner to a Central Jail like the presidency Jail, Alipore or the Alipore Central Jail where according to the petitioner proper arrangements and facilities exist for keeping Group C prisoners in accordance with Law.

2. As mentioned hereinbefore the first challenge to the order of transfer is on the ground that the said order was passed mala fide. The petitioner submitted that the order of transfer was made to circumvent the order of this Court whereby the petitioner has been given the facilities of group C prisoner. I am unable to accept this contention. As mentioned hereinbefore the order of transfer was made prior to the petitioner moving the Court for being afforded the facilities of Group C prisoner. Indeed the petitioner challenged in the application that he first made the proposed transfer of the petitioner from Calcutta to a outside Jail. The petitioner did not obtain any order restraining the transfer of the petitioner from Calcutta. Even if there is no res judicate on the question of the Government's right to transfer the petitioner outside Calcutta as no order on that basis was made by this court though the transfer was challenged, as contended on behalf of the respondents it appears to me that it cannot be in any event be said that the order of transfer was passed to circumvent the order passed by this court granting the petitioner group C facility.

Indeed as has been noticed such order was passed on Government's agreeing to grant the petitioner group C facilities. Further more it appears that the petitioner had moved this Court in contempt for alleged violation of the order of this Court by transferring the petitioner and this court has declined to issue a rule nisi on that basis. It was then contended that Group C prisoners were not liable to be transferred to any jail which was not a Central Jail. I am also unable to accept this contention. Section 5 of the Maintenance of Internal Security Act, 1971, provides that every person in respect of whom a detention order has been made shall be liable to be detained in such place or under such conditions including conditions as to maintenance of discipline, arrangement for breaches of discipline, as the appropriate government may by general or special order specify and it further provides that such person may be removed from one place of detention to another place of detention, whether within the same State or any other State by an order of the appropriate Government. The West Bengal Maintenance of Internal Security Order, 1972 being rules framed by virtue of Clause (a) of Section 5 of the Maintenance of Internal Security Act, 1971 regulates the conditions of detention of prisoners under the Act and Clause (3) of the said order provides that every Central " Jail, Special Jail, District or Subsidiary Jail in West Bengal shall be a place where any person in respect of whom a detention order has been made shall be liable to removed or detained. In view of the clear provisions of Clause (5) of the said order which authorises detenuess under the said Act to be detained inter alia, in any district jail or subsidiary jail, in my opinion, it cannot be contended that a group C Prisoner under MISA cannot be transferred to a District Jail.

3. Where powers are conferred on public authorities to exercise the same when "they are satisfied" or when "it appears to them" or when "in their opinion" a certain state of affairs exists, or when powers enable public authorities to take such action as they think fit in relation to a subject matter, the Courts will not readily defer to the conclusiveness of an executive authority's opinion as to the existence of a matter of law or of fact upon which the validity of the exercise of the power is predicated see the observations of the Supreme Court in the case of M.A. Rashid v. State of Kerala A. I. R 1974 S.C. Page 2249 at paragraph 7 of the report. But in the instant case the power of transfer of the detenuess both u/s 5 of the Act and Clause 3 of the order is not circumscribed by any condition precedent. Therefore in my opinion, no question, of this Court enquiring in a writ application whether any conditions were fulfilled before the order of transfer was made or given effect to, can arise at all. It has, however, to be emphasized that administrative decision in exercise of powers even if conferred in subjective terms are to be made in good faith on relevant consideration. On behalf of the respondents, it was contended before me that there were reasons for transfer. Learned Junior Standing Counsel was prepared to submit for my examination the reasons for such transfer but he was not prepared to show the said reasons to the petitioner or his Counsel. In those circumstances I declined to look into the reasons which the petitioner would have

no opportunity to know. In a judicial review, I am of the opinion, that except where specific statutes so require a Judge should not look into facts which one of the parties has no opportunity to know. But as mentioned hereinbefore it is sufficient that there are some reasons. As the power to remove the detenues or transfer detenues under the Act is not conditional upon any factors, I am not competent to enquire whether the conditions precedent for the order of transfer were fulfilled. Of course executive orders can always be challenged on the ground of mala fide. Now in this case from the averments made and from the facts narrated before, in my opinion, the allegation that the order was passed by the respondent authorities mala fide cannot be accepted. Counsel for the petitioner drew my attention to the decision of the Supreme Court in the case of Bhutnath v. State of West Bengal AIR 1974 S. C, page 806 as well as on the decision of the Supreme Court in the case Sk. Hanif v. State of West Bengal AIR 1974 S.C. page 679. I am of the opinion that the ratio of the aforesaid decision and the context in which the observations of the Court were made in those decisions cannot give much assistance to the petitioner in the present contention that the order of transfer was bad or mala fide. Administrative orders must however be fair and just as was observed by the Supreme Court in the case of A.K. Kripak v. Union of India AIR 1970 S.C. page 150. Subject to the examination of the contention of the petitioner that a Group C Prisoner could not be transferred to any jail other than the Central Jail because he was entitled to certain privileges and benefits under the Jail Code which were not available anywhere else, a contention which will be examined in detail later, there is nothing as I have mentioned hereinbefore which establishes that the order in question was passed in any vindictive or (sic) mala fide manner against the petitioner.

4. Counsel for the petitioner drew my attention to several provisions of the Jail Code as contained in the Rules for the Superintendence and Management of Jail and Subsidiary Jail in West Bengal. He drew my attention to Rule 1068 first in support of the contention that a Group C Prisoner must be lodged in a Central Jail. He also drew my attention to Rule 840, Sub clause (viii) dealing with the conditions of transfer. Reliance was placed on Rules 843, 844, 542, 861, 862, 873, 553 and 558. I am of the opinion that none of these, rules will have any application to detenues under the Maintenance of Internal Security Act, in view of the provisions of section 5 and specific provision of sub-clause (iv) of clause 5 of the West Bengal Maintenance of Internal Security Order. In Clauses (3), 6, 7, 8, 9, 10 (a), 11, 12, 13, 14, 15, 16, 17, 18, 19; 20, 29, 38 and 38 (a) of the West Bengal Maintenance of Internal Security Order, 1972 separate provisions on the matters complained of have been made for MISA prisoners and these; provisions would be inconsistent with provisions of the Jail Code upon which reliance was placed. On these matters the petitioner must be guided by the provisions of the Order in preference to the Jail Code.

5. Petitioner's main grievance seems to be firstly that the petitioner was transferred both from Calcutta to Purulia and thereafter from Purulia to Bankura without proper examination by the appropriate medical officers and without proper safeguard for

his health. In view of the facts and circumstances of this case as disclosed in the affidavit I am unable to accept the contention. The petitioner's next grievance is that, the petitioner could not have been transferred outside Calcutta. That contention also cannot in my opinion be accepted as indicated before. Petitioner's third grievance is that there were no proper facilities for Group C prisoners in the District Jail of Bankura or of Purulia. These were not meant to lodge Group C Prisoner and therefore the petitioner was not getting the facilities that the petitioner was entitled as a Group C Prisoner. This I am also unable to accept.

6. There is, however, other aspects of the matter. (A) The petitioner's condition of health is not satisfactory. That is borne out by the reports of Sri A. K. Chakraborty. The Petitioner is now in Bankura District Jail. As a matter of fact petitioner was so transferred at the suggestion of Dr. Chakraborty, who had examined the petitioner at Purulia. I, therefore, direct that the petitioner should be periodically and not beyond every 10 days examined by the Professor and Head of the Department of Medicine of the Bankura Sanmilani Medical College and all arrangements for the medical treatment of the petitioner should be made as per suggestion and recommendation of the said Professor of Medicine of the Bankura Sanmilani Medical College. The said Professor and the Head of the Department of Medicine will also examine the petitioner as and when the said professor considers it fit and proper to do so on medical grounds. (B) The petitioner would be at liberty to take his meals from the medical kitchen of the Bankura District Jail and if the petitioner wishes to have his own meals cooked or prepared by his attendants either in the medical kitchen or in the general kitchen of the jail he should be afforded all reasonable and proper facilities by the Superintendent for such purposes. If, however, the petitioner prefers to continue the present system of having his meals prepared in his cell the system may be continued. (C) The Professor and Head of the Department of Bankura Sanmilani Medical College along with the doctor of the Jail Hospital will inspect the cell of the petitioner to examine whether in view of the location of the latrine and privy the petitioner's living conditions are sufficiently healthy and hygienic and if to make the conditions healthy and hygienic and alteration of the arrangement is required such alteration would be made by the jail authorities. (D) So far as the books are concerned the same are guided by Rule 29 of the West Bengal Maintenance of Internal Security Order, 1972 but as under the Jail Code the petitioner would have been entitled to the use of library facilities if the petitioner was lodged in a jail having library facilities which I understand are not available in the Bankura District Jail. I think it would be appropriate if the petitioner is furnished a copy of the list of the books available at the Alipore Central Jail and if petitioner desires to have any books from the said list then the petitioner may be supplied such books on such terms as the Superintendent may direct after borrowing such books from the Alipore Central Jail. This facility would be in addition to the facility the petitioner is entitled to under clause 29 of the West Bengal Maintenance of Internal Security Order 1972.

7. The aforesaid directions would apply so long as the petitioner continues to be detained in the Bankura District Jail.

8. Before I conclude I must observe that on behalf of the respondents it was contended that in view of the decision of the Supreme Court on the case of A.D.W. Jabbalpore v. S. Sukla A I. R. 1976 S.C. page 1267 this implication was not maintainable. On the other hand on behalf of the petitioner it was contended that the aforesaid being a decision of a Bench consisting of five learned Judges and there was a previous decision consisting of seven learned Judges to the contrary, according to the petitioner in the case of Makhar Singh v. State of Punjab A I R. 1971 S.C. 831, Counsel for the petitioner agreed on the authority of the Supreme Court decision in the case of Matulal v. Radhalal A I. R 1974 S.C. page 1596 that the former decision should be followed. For the purpose of this (sic) need not enter into this question because I am of the opinion that on the ratio of the decision of the Supreme Court in the case of A.D.M. Jabbalpore v. Skula. AIR 1974 page 1207 in cannot be contended that this application was not maintainable, in this application the petitioner is not challenging the detention order as such. The petitioner is challenging his transfer and detention at a district jail on the ground that the provisions of the Act and the order framed under the Act had not been fulfilled. For the reasons mentioned aforesaid this Rule is disposed of with the directions indicated before. There will be no order as to costs.