

**HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT SRINAGAR**

**WP (C) No. 1991/2022
CM No. 4980/2022**

Reserved On: 28th of March, 2023.
Pronounced On: 27th of April, 2023.

Nayeem Rasool

... Petitioner(s)

Through: -
Ms Ruqaya Siddique, Advocate.

V/s

Union Territory of Jammu and Kashmir & Ors.

... Respondent(s)

Through: -
Mr Mohsin-ul-Showkat Qadri, Sr. AAG with
Ms Maha Majeed, Advocate.

CORAM:

HON'BLE MR JUSTICE M. A. CHOWDHARY, JUDGE.

(JUDGMENT)

01. This Petition, under Article 226 of the Constitution of India, is filed seeking a direction in the name of the Respondents to transfer/ shift one undertrial, namely, Nayeem Rasool, back from District Jail, Poonch and keep him in Central Jail, Srinagar or in any other jail near his home to meet the ends of justice.

02. The Petitioner is claimed to be an accused and facing trial in connection with case bearing FIR No. 54 of 2017 registered by Police Station, Uri (Baramulla) for the commission of offences punishable under Sections 8/21/29 of the Narcotic Drugs and Psychotropic Substances Act (for short 'the NDPS Act'). It is pleaded that the said undertrial is in judicial custody since his arrest in the aforesaid case in July, 2017 and that, after filing of the charge sheet, the trial of the case is going on in the Court of learned 1st Additional Sessions Judge, Baramulla. It is further stated that the undertrial was earlier lodged in Sub Jail, Baramulla, where the Petitioner

used to visit him as and when required, however, in the month of March, 2022, when the Petitioner's mother approached the authorities in the Sub Jail, Baramulla to see her son there, she was told that the undertrial has been shifted to District Jail, Poonch on the directions of the Respondent No.2. Thereafter, the Petitioner claims to have approached the Director General of Police, Prisons, J&K, by filing an application seeking shifting/ transfer of the undertrial to District Jail, Srinagar, being the nearest place of residence of the Petitioner so that his mother can see/ visit her son easily, however, no response was given to the said so request made by the Petitioner. In those circumstances, the Petitioner is stated to have approached the learned trial Court with an application for seeking change in custody of the undertrial from Poonch to any other jail in Kashmir Division, however, the said application stands dismissed vide Order dated 13th of May, 2022. Feeling aggrieved thereby, the Petitioner has filed the instant Petition seeking transfer/ shifting of the custody of her son from District Jail, Poonch to Central Jail, Srinagar or any other jail near his home.

03. Objections stand filed on behalf of the Respondents, wherein it is stated that the custody of the undertrial in question has been ordered on the basis of his behaviour/ attitude/ illegal activities and also in the interest of security and smooth functioning of the jail. It is further submitted that the Department of Prisons, Jammu and Kashmir, is looking after more than 5000 inmates approximately and never recommends/ orders shifting of prisoners to any other jail, except some inmates because of their abnormal behaviour in jail. It is also stated that during the course of lodgement of the aforesaid undertrial in Sub Jail, Baramulla, he was found involved in breach of discipline, conspiracies against jail staff, resistance against routine barrack frisking and was trying to create a law and order situation in the jail which adversely affected the smooth functioning and management of the jail.

04. Learned Counsel for the Petitioner submits that with the change in the lodgement of the undertrial, the trial of the case pending before the trial Court has got adversely affected. It is pleaded that transfer on humanitarian grounds is envisaged in Section 50 of the Manual for

Superintendence and Management of Jails in J&K, which stipulates that it is desirable that prisoners convicted in a State other than the one where their home is situated should, as far as possible, serve their sentence in prisons nearer to their homes. It is contended that the Respondent No.2, in law, has no authority to change the lodgement of the undertrial prisoner from one jail to another which is in the exclusive domain of the trial Court, where the trial of the undertrial is going on. It is averred that the shifting of the undertrial from Sub Jail, Baramulla to District Jail, Poonch, in the present case, amounts to punishing not only the undertrial but also his family as well, especially his old aged and ailing mother.

05. Learned Counsel for the Respondents submits that in terms of provision 23.44 of the J&K Manual for Superintendence and Management of Jails, 2022 does authorize the Director General of Police, Prisons, Jammu and Kashmir to make transfer of inmates on administrative grounds. It is further submitted that Section 417 of the Code of Criminal Procedure also mandates the Government to direct at what place a particular prisoner is to be imprisoned/ committed to custody, as such, the Petition filed by the Petitioner is liable to be dismissed. The learned Senior Additional Advocate General has further argued that insofar as the grievance of the Petitioner, projected through her mother, that the trial is being delayed and it is difficult for the family to have interview with the Petitioner is concerned, there is provision of online presence of the Petitioner as an accused from his jail to the trial Court, as such, no delay in proceedings can be there on account of his lodging at a distant jail. He has contended that there is also sufficient arrangement of *e-mulaaqat* for the families of the detainees in the jail form their own places and they need not travel physically to meet the detainees at their place of lodgement.

06. Heard learned Counsel for the parties, perused the pleadings on record and considered the matter.

07. At the outset, it shall be advantageous to have a glance to the relevant provisions of Chapters IX and XXIII of the Prison Manual, 2022-

For the Superintendence and Management of Prisons in the Union Territory of Jammu and Kashmir, which read as under:

“9.01: Prisoners will be transferred from one prison to another for the following reasons:

- i. For custody and treatment in a suitable institution in accordance with the classification procedure;
- ii. For attendance in Court for the purpose of standing trial or giving evidence;
- iii. On medical grounds;
- iv. On humanitarian grounds, in the interest of their rehabilitation;
- v. For post-release vigilance by the police;
- vi. For providing essential services;
- vii. On grounds of security, expediency, etc.;
- viii. To be nearer to his/ her home district;
- ix. For imparting training in other Jails (Districts/ Sub Jails) as a skilful Prisoner; and
- x. For other special reasons, if any.

23.44 During an emergency or on administrative grounds, the HoPD is authorized to transfer under trial prisoners from one prison to another, within the Union Territory of Jammu and Kashmir, provided that if a prisoner is transferred to a place outside the jurisdiction of the court concerned, prompt intimation should be sent to the court. The prisoner shall be produced before the Court on the due date.”

08. Section 29 of the Prisoners Act, 1900, provides for removal of prisoners, however, this provision has been made applicable to the persons who have been detained: (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 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.

09. Section 26 of the Prison Act, 1894, provides for removal and discharge of prisoners, providing therein that all prisoners, previously being removed to any other prison, shall be examined by the Medical Officer and, without such examination, no prisoner shall be removed from one prison to another and no prisoner shall be discharged against his will from prison.

10. Both the aforesaid provisions are not applicable to the case on hand since the Petitioner does not fall in any of the categories, as mentioned in sub-section (1) of Section 29 from (a) to (d) or that his medical examination may not have been conducted before his removal from the prison. An undertrial prisoner, as the Petitioner is, is a person who is committed to the prison, either in terms of Section 167 or Section 309 of the Code of Criminal Procedure, 1973. Section 167 (2) empowers the Magistrate, to whom the custody of the undertrial is forwarded, whether or not he has jurisdiction to try the case, to authorize his detention in such custody as the Magistrate deems fit for a term not exceeding 15 days in the whole; whereas, Section 309 of the Code, *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.

11. The Hon'ble Apex Court in a case titled '**The State of Maharashtra & Ors. v. Saeed Sohail Sheikh etc. etc.**', reported as '**2013 AIR SC 168**', while discussing Sections 167 and 309 of the Code, in Paragraph No.25, has held as under:

“25. 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 concerned court 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.”

12. The Hon’ble Supreme Court, in the Judgment (**supra**), also held that the power exercisable by the Court, while permitting or refusing transfer, is “judicial” and not “ministerial” and that the 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. It was further held that transfer of an undertrial to a distant prison may adversely affect his right to defend himself and also isolate him from the society of his friends and relations.

13. The Hon’ble Apex Court in another case titled ‘**Sunil Batra v. Delhi Administration**’, reported as ‘**AIR 1980 SC 1579**’, in Paragraph No. 48, has observed as under:

“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.”

14. A Coordinate Bench of this Court in case titled ‘**Abdul Wahid Mir v. State of Jammu and Kashmir & Ors.**’, rendered in HCP No. 178/2018; decided on 12th of February, 2019, while relying upon the Judgment passed by the Apex Court in case titled *State of Maharashtra & Ors. v. Saeed Sohail Sheikh etc. etc.* (**supra**), held that the detenu is an undertrial prisoner and, until the pendency of the criminal case, his custody

is to be regulated by the trial Court and that the prison authorities have no authority to change the lodgement of the detenu.

15. Another Coordinate Bench of this Court, in an identical case titled '**Bashir Ahmad Mir & Anr. v. State & Ors.**', reported as '**JKJ Online 69830**', however, in Paragraph No. 25, held as under:

“25. In the conclusion, it is held that the function performed by the Inspector General Prisons in relation to shifting of undertrials from one prison to another in case of an emergency or on administrative reasons is administrative in nature and, therefore, there is no place for providing an opportunity of being heard to the undertrial, which does not have any right to choose a prison of his choice for lodgement during trial. Since permission of the Court before shifting of the undertrial from one prison to another within the State is not mandatory and trial Court is only required to be intimated, as such, the Court in such situation also does not perform any judicial or quasi-judicial function, which may necessitate hearing of the undertrial before granting permission.”

It appears that the Judgment passed by the Coordinate Bench in HCP No. 178/2018 titled '**Abdul Wahid Mir v. State of Jammu and Kashmir & Ors.**' (**supra**) was not brought to the notice of the later Coordinate Bench, which, without referring the same or to be referred to a larger Bench, took a different view in the matter.

16. In view of the Judgments passed by the Hon'ble Supreme Court, as discussed hereinabove, it is clearly discernible that the power to remand or transfer of an undertrial prisoner from one jail to another is to be exercised by the Court by passing a judicial order, obviously after providing opportunity of being heard and that the change in the place of detention would be permissible only with the permission of the Court under whose warrant the undertrial has been remanded to custody. Though Section 417 of the Code of Criminal Procedure provides for appointment of the place of imprisonment by the State Government, however, in view of the interpretation by the Hon'ble Apex Court, as aforesaid, the power to direct transfer of the undertrial prisoner from one jail to another clearly vests with the Magistrate/ Court which had remanded the detenu to a certain prison.

17. Here, in this case, it has been ordered by the HoD of Prisons, having been authorized by the Government of Jammu and Kashmir, that the Petitioner shall be removed to District Jail, Poonch and its information was transmitted to the trial Court. In the considered opinion of this Court, in a case of an undertrial, who has already been remanded to custody by the trial Court in the name of the Superintendent of a particular jail, can only be removed from that jail by seeking a judicial order from the trial Court. The Petitioner, in this case, has been shifted from Sub Jail Baramulla to a distant prison which is at the farthest place in Jammu Division at Poonch. The Petitioner's family, in case they require to meet the Petitioner as undertrial in District Jail, Poonch, have to travel all along from Kashmir to Jammu and then from Jammu to Poonch for almost two days. The instant Petition has been filed by the Petitioner through his widowed mother and it will be difficult for her to go to Poonch to meet her son. The contention of the Respondents that the Petitioner, as an undertrial, is entitled to meet his family members telephonically or virtually through the system adopted in the jail called *e-mulaaqat* and that the undertrial is also presented before the trial Court on each and every date of hearing through Video Conferencing, does not suffice, so as to allow the Petitioner to prepare defence of his case from District Jail, Poonch.

18. Coming to the ground whereby the Petitioner has been removed from Sub Jail, Baramulla to District Jail, Poonch that he was not a disciplined prisoner and that he had misbehaved with the jail staff and created law and order situation in the jail, the Respondents have failed to place on record as to what were the jail offences that he committed and how he had been proceeded against. Merely saying that he had been an undisciplined prisoner creating difficulties for the jail staff shall not suffice in the matter, so as to warrant his transfer from District Baramulla to a distant place at Poonch.

19. Having regard to what has been said and done hereinabove, the instant Petition is **allowed** and the Respondents, by 'Writ of Mandamus', are directed to shift the Petitioner from District Jail, Poonch and keep him

