

APPELLATE CRIMINAL

Before D. S. Tewatia and Pritam Singh Pattar, JJ.

JHANDA SINGH SON OF SOHAN SINGH,—*Convict-Petitioner.*

versus

THE STATE OF PUNJAB and another,—*Respondents.*

Criminal Writ No. 61 of 1974.

April 1, 1976.

Transfer of Prisoners Act (XXIX of 1950)—Section 3—Code of Criminal Procedure 1973—Sections 432 and 433—Constitution of India 1950—Article 161—Appropriate Government to remit or commute sentence in the case of a transferred prisoner—Whether the Government in whose territory the prisoner was convicted.

Held, that the provisions of Article 161 of the Constitution of India 1950 comprehend within its ambit the power to a State Government to remit or commute the sentence of only such convicts who happen to be sentenced within its territory. According to the provisions of sub-section (2) of section 3 of the Prisoners Act 1950, the transferred prisoner has to be detained subject to the writ, warrant or order of the Court by which he has been committed. In other words, the writ, warrant or order of a Court by which he has been committed, if happens to be located in a State other than the State in whose prison the prisoner concerned is lodged, are afforded extra-territorial operational efficacy by the provisions of aforesaid Central Legislation. The expression 'discharge in due course of law' would mean the discharge in accordance with law. A prisoner becomes entitled to be discharged when he has served out his sentence which would mean that his period of detention has to be co-extensive with his sentence, that is, his period of detention can be shortened by shortening the period of sentence. The power of remission of sentence is envisaged by section 432 of the Code of Criminal Procedure 1973, to vest in the appropriate Government and the appropriate Government, as defined by clause 6(b) of Section 432 is the Government of the State within which the offender was sentenced. Therefore, section 3 of the Act would not bring into play the constitutional power of the Government of the transferee State to remit and commute the sentence of a convict prisoner transferred to its jail from the jail of another State and who had been convicted by that State. Thus, in the case of a transferred prisoner, it is the Government of the State in whose territory the prisoner had been convicted, the appropriate Government to remit or commute the sentence of such a person.

(Paras 9, 10, 14 and 16).

Jhanda Singh, son of Sohan Singh v. The State of Punjab etc.
(D. S. Tewatia, J.)

Case referred by Hon'ble Mr. Justice D. S. Tewatia on 30th July, 1974 to a Division Bench for decision of an important question of law involved in the case. The Division Bench consisting of Hon'ble Mr. Justice D. S. Tewatia and Hon'ble Mr. Justice P. S. Patkar finally decided the case on 1st April, 1976.

Petition under Articles 226/227 of the Constitution of India praying that this Hon'ble Court be pleased to :—

- (i) issue a writ in the nature of Habeas Corpus to set the petitioner at liberty forthwith from the illegal custody of the respondents ;
- (ii) the petitioner be released on bail in the event of a likely delay in the disposal of the case;
- (iii) The respondents be made accountable for contempt of this Hon'ble Court.
- (iv) the costs of the petition be awarded to the petitioner.

Balwant Singh Malik, Advocate, for the Petitioner.

D. S. Bali, Advocate for Haryana State.

T. N. Bhalla, Advocate for the Punjab State.

JUDGMENT

D. S. Tewatia, J.—(1) This petition came up for hearing before me in the first instance. On being referred by me to a larger Bench, it has been placed before us for decision.

(2) The point of law that arises for determination in this petition is, as to whether in the case of a transferred prisoner, it is the Government of the State in whose prison the convict after transfer is lodged, the appropriate Government to remit or commute the sentence of such person or that of the State in whose territory the prisoner had been convicted.

(3) Before dealing with the question of law aforesaid, the relevant facts bearing thereon and which are not in dispute, may at this stage be noticed. These can be stated thus: the petitioner, Jhanda Singh, in the first instance, was convicted by the Sessions Judge, Meerut, in Sessions trial Nos. 72 and 73 of 1952, and was sentenced,

to life imprisonment on 27th September, 1952, in each case. He was subsequently convicted by the Sessions Judge, Karnal, in Sessions trial No. 26 of 1954, and was sentenced to life imprisonment on January 8, 1955. However, his latter sentence was ordered by this Court to run concurrently with his earlier sentence. The petitioner is lodged in a prison which after the re-organisation of the erstwhile State of Punjab, happens to be located in the Punjab State. The petitioner has actually undergone a sentence of more than 22 years which when various remissions added to it, comes to about 33 years.

(4) That although, the State of Uttar Pradesh had expressed in writing that it had no objection to the petitioner being released, the Punjab Government under a mistaken view of law that unless the Government of Haryana State passes orders for the release of the petitioner after commuting or remitting his sentence, it is not legally competent to put an end to the incarceration of the petitioner, has not ordered his release. The Punjab Government under the aforesaid mistaken belief,—*vide* letter, dated 14th March, 1974 (R/2/1), sent the nominal roll and other connected papers in connection with the release of the petitioner to the Haryana Government and solicited its orders regarding his release, but the Government of Haryana State declined to pass orders for the release of the petitioner and sent an intimation to the Government of Punjab State in this regard,—*vide* letter, dated 19th April, 1974 (Annexure R/2/2). It further required the Punjab Government to resubmit the release papers of the petitioner for its consideration again after the lapse of an year.

(5) The petitioner's stand is that by virtue of the provisions of sub-section (2) of Section 3 of the Transfer of Prisoners Act, 1950 (hereinafter referred to as the Prisoners Act), a convict after his transfer from the prison of another State becomes subject to all the laws of the State to whose prison he stands transferred and happens to be confined at a given moment, and that by virtue of the aforesaid fact, it is the Government of the transferee State and not the State whose Courts had convicted the prisoner, that would have the power to pass the release orders of such a prisoner. The respondents—States of Haryana as also of Punjab, on the contrary have asserted that by virtue of the provisions of sections 432 and 433 of the Criminal Procedure Code (hereinafter referred to as the Code), the appropriate Government to remit or commute the sentence of a convict is the State Government within whose territory the offender was sentenced or who passed the orders, referred to in sub-section (6) of Section 432.

Jhanda Singh, son of Sohan Singh v. The State of Punjab etc.
(D. S. Tewatia, J.)

(6) At this stage, the relevant provisions of section 3 of the Prisoners Act of 1950 and of Sections 432 and 433 of the Code, deserve to be taken a note of and they read as under :—

“3. Removal of Prisoners from one State to another—

(1) Where any person is confined in a prison in a State,—

(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;

the Government of that State may, with the consent of the Government of any other State, by order, provide for the removal of the prisoner from that prison to any prison in the other State.

(2) The officer in charge of the prison to which any person is removed under sub-section (1) shall receive and detain him, so far as may be, according to the exigency of any writ, warrant or order of the Court by which such person has been committed, or until such person is discharged or removed in due course of law.”

“432. (1) When any person has been sentenced to punishment for an offence, the appropriate Government may, at any time, without conditions or upon any conditions which the person sentenced accepts, suspend the execution of his sentence or remit the whole or any part of the punishment to which he has been sentenced.

(2) Whenever an application is made to the appropriate Government for the suspension or remission of a sentence, the appropriate Government may require the Presiding Judge of the Court before or by which the conviction was had or

confirmed, to State his opinion as to whether the application should be granted or refused, together with his reasons for such opinion and also to forward with the statement of such opinion a certified copy of the record of the trial or of such record thereof as exists.

- (6) The provisions of the above sub-sections shall also apply to any order passed by a Criminal Court under any section of this Code or of any other law which restricts the liberty of any person or imposes any liability upon him or his property.
- (7) In this section and in section 433, the expression "appropriate Government" means,—
- (a) in cases where the sentence is for an offence against, or the order referred to in sub-section (6) is passed under, any law relating to a matter to which the executive power of the Union extends, the Central Government;
 - (b) in other cases, the Government of the State within which the offender is sentenced or the said order is passed."

The appropriate Government may, without the consent of the person sentenced, commute—

- (a) a sentence of death, for any other punishment provided by the Indian Penal Code;
 - (b) a sentence of imprisonment for life for imprisonment for a term not exceeding fourteen years or for fine;
 - (c) a sentence of rigorous imprisonment for simple imprisonment for any term to which that person might have been sentenced, or for fine;
 - (d) a sentence of simple imprisonment, for fine."
- (7) Mr. Balwant Singh Malik, learned counsel for the petitioner, sought substance for the stand taken by the petitioner, from a

Jhanda Singh, son of Sohan Singh v. The State of Punjab etc.
(D. S. Tewatia, J.)

Division Bench decision of Madhya Pradesh High Court in *Sitaram Barelal v. State of Madhya Pradesh* (1), and two Single Bench decisions of this Court, following the ratio of the aforesaid decision, in *Prisoner Rattan Singh v. State of Punjab and others* and in *Ajit Singh v. State of Punjab and others*, decided on May 13, 1971 and September 8, 1971, respectively. Mr. Malik also urged that a State Government derives the power for remitting and commuting the sentence of a convict directly from Article 161 of the Constitution of India, which is worded in such wide terms as to confer power on a State Government to remit or commute the sentences of not only such prisoners as had been convicted within its territory, but also who happen to be lodged within its prison at the relevant time.

(8) In view of this latter argument, it becomes desirable to examine, in the first instance, the scope of Article 161. This Article reads as under:—

“161. The Governor of a State shall have the power to grant pardons, reprieves, respites or remissions of punishment or to suspend, remit or commute the sentence of any person convicted of any offence against any law relating to a matter to which the executive power of the States extends.”

(9) The perusal of the aforesaid provisions of Article 161 would show that if the expression “any person” is taken in its literal sense, then it may cover even the case of a convict who after jumping the bail absconds and enters the territory of the other State, or even of a person regarding whom the orders of detention are passed in terms of sub-section (6) of section 432 of the Code by one State Government, but before he is apprehended in pursuance thereof, he crosses over to the territory of the other State. Surely, that could never have been the intention of the Parliament. Therefore, when reasonably construed, the aforesaid provisions of Article 161 can be held to comprehend within its ambit the power of a State Government to remit or commute the sentence of only such convicts who happen to be sentenced within its territory.

(10) Now the question arises whether the provisions of section 3 of the Prisoners Act, 1950 would, despite the aforesaid interpretation of Article 161 of the Constitution of India bring into play the

(1) A.I.R. 1969 Madhya Pradesh 252.

constitutional power of the Government of the transferee State to remit and commute the sentence of a convict prisoner transferred to its jail from the jail of another State and who has been convicted by that State.

(11) The answer to the above question, in my opinion, would be a negative one. But, before applying reasons for the said answer, I may deal with an ancillary argument advanced on behalf of the petitioner to the effect that an order passed by the Government of one State is legally operative within its own territory and is not legally binding on the Government of another State. While concretising his aforesaid submission, the learned counsel stressed that an order of release of the petitioner passed by the Government of Haryana State would carry no legal binding effect beyond its territory and if such an order was communicated to the Superintendent of the Jail where the petitioner is lodged, the said Officer could legally ignore it the same not being the order of the Government of Punjab State. Mr. Malik sought to buttress the aforesaid submission from a Division Bench decision of the Madras High Court, in re: *S. Mohan Kumaramangalam* (2), and drew our pointed attention to the following observations:—

“To our minds the position is clear that the State of Bombay cannot, for the purpose of the Preventive Detention Act, 1950, pass orders for detaining a person found within its territory for his activities outside that State or direct that such a person be interned outside the Bombay State. The well known case of *Rex. v. Secretary to State of Home Affairs; Ex parte O'Brien* (3), affords useful guidance for the consideration of topics like this. In that case the Court of Appeal held that after the passing of the Irish Free State Constitution Act on 5th December, 1922, by which Irish Free State was given a distinct and independent executive, the Secretary of State for Home Affairs in England cannot, under Regulation 14-B of the Regulations made in August, 1920, under the Restoration of Order in

(2) A.I.R. (38) 1951 Madras 583.

(3) (1923) 2 K.B. 361: (92 L.J.K.B. 797).

Jhanda Singh, son of Sohan Singh v. The State of Punjab etc.
(D. S. Tewatia, J.)

Ireland Act, 1920, order the internment in the Irish Free State of a person who, at the date of passing the order, was residing in England. At pages 375 and 376 are found the discussion on the subject by Berkes L. J. Similar expressions of opinion by Scrutton L. J., are seen in the report at pages 386 and 387. Though alike in certain respects, the observations of *Lord Atkin in Eshuqayi Eleke v. Officer Administering Government of Nigeria* (4), may be called in aid in support of the contention that the Bombay Government cannot arrest a person and confine him in their State and transfer him to a place outside the State for his alleged activities outside such State.

In re: Ghate (5), a Bench of the Bombay High Court held that it was not open to the Commissioner of Police, Greater Bombay, to pass an order under section 3(2), Preventive Detention Act, 1950, with regard to a prisoner who is residing outside Greater Bombay, because the Commissioner of Police cannot exercise the powers conferred upon him beyond his own jurisdiction. In that case, at the time the Commissioner of Police passed the order, the person against whom it was directed had already been detained in Yeravada Prison, Poona, outside the jurisdiction of the Commissioner of Police. At page 713 of the report the learned Chief Justice observes that the jurisdiction under the Preventive Detention Act of the Central Government and the State Governments is not, and cannot be, co-extensive and he expressed his opinion that a State Government could not make an order with regard to a person residing outside the territories of the State Government. It seems to us, therefore, that when the Commissioner of Police, Bombay, arrested the petitioner as he was wanted by the Madras Police for detention, the arrest was illegal, and the petitioner's detention was also illegal.

(4) 1931 A.C. 662 at page 670 (A.I.R. (18) 1931 P. C: 248).

(5) 52 Bom. L.R. 711. [A. I. R. (38) 1951 Bom. 161]. 52 Cr: L.J.

(12) Mr. Malik also referred us to a Supreme Court decision in, *The Bengal Immunity Company Limited v. The State of Bihar and others* (6), wherein their Lordships approvingly quoted the aforesaid Madras High Court decision and had held that on a true construction of the Explanation to Article 286(1)(a), the Bihar State was competent to levy a purchase tax and not a sales tax in respect of transactions entered into by dealers residing outside. The Explanation could not be read as extra-territorial. It must be read as consistent with Article 245. Although, the Federal Legislature had extra-territorial power under the Government of India Act, 1935, the Provincial Legislature did not have such power. The position is the same under the Constitution.

(13) There is no gain saying the fact that no State Government enjoys extra-territorial powers, and its orders and laws are legally operative within its territory, but the same cannot be said so far as Parliamentary Legislation is concerned if it otherwise conforms to the constitutional limitations. Entry Nos. 1, 2 and 4 in List III—Concurrent List, Seventh Schedule of the Constitution of India empowers the Parliament to frame legislation in regard to matters like removal from one State to another State of prisoners, accused persons and persons subjected to preventive detention for reasons specified in entry 3 of this List, and it is by virtue of the aforesaid provisions that the Parliament enacted Criminal Procedure Code as also the Transfer of Prisoners Act, 1950. The Prisoners Act provided for the transfers of prisoners of one State to the prison of another State with the latter's consent, and sub-section (2) of section 3 of the Prisoners Act authorises the Officer-in-charge of the prison to which the prisoner is removed under sub-section (1) of section 3 of the said Act to receive and detain him, so far as may be, according to the exigency of any writ, warrant or order of the Court by which such person has been committed, or until such person is discharged or removed in due course of law.

(14) As would be clear from the provisions of sub-section (2) of section 3 of the Prisoners Act, the transferred prisoner has to be detained subject to the writ warrant or order of the Court by which he has been committed. In other words, the writ, warrant or order of a Court by which he has been committed, if happens to be located

Jhanda Singh, son of Sohan Singh v. The State of Punjab etc.
(D. S. Tewatia, J.)

in a State other than the State in whose prison the prisoner concerned is lodged, are afforded extra-territorial operational efficiency by the provisions of aforesaid Central Legislation.

(15) Mr. Malik, however, hastened to add that that much extra-territorial operation potential of the writ, warrant or order of the Court which had committed the prisoner, had been preserved by the aforesaid provisions of the Prisoners Act itself, but argued the learned counsel, that would not mean that orders of release passed by a State Government in whose territory such a prisoner had been sentenced, would also become legally binding in the territory of the transferee State, in question, for the expression 'until such a person is discharged or removed in due course of law', brings into action qua such a prisoner all the laws of the State to whose prison he is confined, and that by necessary implication the laws of the State in whose territory he had been sentenced stood excluded from operation qua him *protanto*. It is in regard to this submission that Mr. Malik heavily relies for support on the following observations of Sen, J., who delivered the opinion for the Bench in Sita Ram's case (*supra*) :—

"On a reading of Section 3 of the Transfer of Prisoners Act, it would appear that the transfer of the petitioner by the State Government of Maharashtra to the Central Jail, Jabalpur, with the sanction of the Madhya Pradesh Government, did not make his subsequent release on probation, conditional upon the prior concurrence of the State Government of Maharashtra. Under sub-section (1) of Section 3 of 1950 Act, when any person is confined in any prison of a State, the Government of that State may, with the willingness of the Government of the other State concerned, direct the removal or transfer of the prisoner, from their prison to any prison in that other State. That provision applies to all classes of prisoners, including one like the petitioner, who is undergoing a sentence of imprisonment for life. In terms of this provision, no inter-Statal agreement could possibly be arrived at, which would make the subsequent release of such prisoner on probation or otherwise, by the transferee State, conditional upon the prior concurrence of the State from whose prison he had been transferred. At any rate, no such inter-Statal agreement between the States of Madhya Pradesh and Maharashtra

has been brought to our notice, nor have the State Government placed reliance on any of its terms as supporting their action.

Apart from this, it is clear upon the transfer of a prisoner from the prisons of one State to that of another, sub-section (2) of section 3 comes into play. It reads :

“(2) The Officer in charge of the prison to which any person is removed under sub-section (1) shall receive and detain him, so far as may be, according to the exigency of any writ, warrant or order of the Court by which such person has been committed, or until such person is discharged or removed in due course of law.”

On a plain construction of this provision, the Officer in charge of the prison to which a prisoner is removed or transferred under sub-section (1), has to receive and detain him in that prison, so far as may be, (i) according to the exigencies of any writ, warrant or order of the Court, by which such person had been committed; or (ii) until such person was discharged or removed in due course of law. Normally, the Superintendent of the Central Jail, Jabalpur, has, therefore, under the first part of Section 3(2), a right to detain the petitioner till the completion of his sentence of imprisonment for life, unless he is discharged or removed, in due course of law, under the second part of that section.

Now, the expression ‘in due course of law’, appearing in sub-section (2) of Section 3, in the context in which it appears, must be interpreted, as meaning ‘under some rule or enactment in force’. In the view, detention of a prisoner is governed not only by the relevant rules and regulations in the Jail Manual of that particular State where he happens to be imprisoned for the time being, but also by all the laws of that State governing all classes of prisoners. The Madhya Pradesh Prisoners Release on Probation Act, 1954, must, in our view, be regarded as a relevant law governing the subject.”

The facts involved in the case before the Madhya Pradesh High Court were that the petitioner in that case was sentenced within the

Jhanda Singh, son of Sohan Singh v. The State of Punjab etc.
(D. S. Tewatia, J.)

territory of the State of Maharashtra. He was transferred to a jail located in the State of Madhya Pradesh. As a result of the transfer, in terms of the provisions of Section 3 of the Prisoners Act of 1950, the petitioner applied to the State Government of Madhya Pradesh for his release on probation in terms of the provisions of section 2 of the Madhya Pradesh Prisoners Release on Probation Act, 1954. The State Government of Madhya Pradesh, in fact, agreed to so release him, but in compliance with Circular No. 6548, dated 2nd April, 1965, of the Inspector-General of Prisons, which envisaged the prior concurrence of the State of conviction as a condition precedent for the release of prisoners under Section 2 of the Release of Prisoners Act, consulted the State of Maharashtra which ultimately did not agree to the release of the petitioner, and that resulted in the cancellation of conditional release order passed by the Madhya Pradesh Government on 8th April, 1966. After this, the Madhya Pradesh authorities initiated steps for the petitioner's premature release under Paragraph 1018 of the Madhya Pradesh Jail Manual, but this step also proved to be still born as the State Government of Madhya Pradesh again referred the matter to the State of Maharashtra which turned down the recommendation of the premature release of the petitioner. It was thereafter that the petitioner approached the High Court of Madhya Pradesh on writ side.

(16) The perusal of the observations of Sen, J., reproduced above, would reveal that there is hardly any critical analysis by the Court of the expression 'in due course of law', for the learned Judge straightaway assumed that the expression 'in due course of law' meant the laws in operation in the transferee State. With respect, if I may say so, Sen, J., was not right in thinking that without there being an inter-Statal agreement preserving to the transferee State where the prisoner was convicted a veto on the release of the transferred prisoner, the transferer State would lose all say in regard to the release of such a prisoner. I am, on the contrary, of the opinion that subsection (2) of Section 3 of the Prisoners Act, itself preserves such a power to the transferor State, and, therefore, there existed no necessity of any inter-Statal agreement for the said purpose between the concerned two States. The expression 'discharge in due course of law' would mean the discharge in accordance with law. A prisoner becomes entitled to be discharged when he has served out his sentence which would mean that his period of detention has to be co-extensive with his sentence, that is, his period of detention can be shortened by shortening the period of sentence. Now, the question arises as to

which authority has the power of shortening the period of sentence. The power of remission of sentence is envisaged by Section 432 of the Code, to vest in the appropriate Government and the appropriate Government, as defined by clause 6(b) of Section 432, in a case like the one, with which the Madhya Pradesh High Court was concerned, or we are concerned here, is the Government of the State within which the offender was sentenced. That being so, then in Sita Ram's case (supra), the Government which was competent to remit, sentence, was the Maharashtra Government, and in the case before us, the Haryana Government. In the unamended Criminal Procedure Code, the expression 'appropriate Government' was defined only in order to delineate the jurisdiction of the Union Government and the State Governments, and it is only after the amendment of the Criminal Procedure Code by Act No. 2 of 1973, that an attempt was made to define the appropriate Government in order to delineate the jurisdiction of States *inter se* as well. And it may well be that due to lack of such a clear-cut definition of the 'appropriate Government' that Sen, J., interpreted the expression 'in due course of law' as meaning to include within its ambit the laws of the transferee States.

(17) In view of the foregoing discussion, I am of the view that the stand taken by the respondents-States of Punjab and Haryana in their respective returns to the petition that it is the Government of Haryana State that alone is competent to remit the sentence of the petitioner, and unless that is done he cannot be released by Government of the Punjab State, is correct. However, for the sake of clarity, I must observe that by virtue of the provisions of sub-section (2) of Section 3 of the Prisoners Act, the extra-territorial efficiency of only writ, warrant or order of the Courts by which the prisoner had been committed or the power of the Government of the transferor State to remit or commute the sentence of such a prisoner, is preserved which by necessary implication would mean that in regard to all other matters, the transferred prisoner would be subject to the provisions of the Jail Manual of the transferee State as also other laws bearing upon the detention of a prisoner in its jail.

(18) In the result, the writ petition is dismissed.

Pritam Singh Pattar, J.—I agree.

N. K. S.