The State Of Maharashtra And Etc. Etc vs Saeed Sohail Sheikh Etc. Etc on 2 November, 2012

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Bench: Fakkir Mohamed Ibrahim Kalifulla, T.S. Thakur

REPORTABLE

IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NOS. 1735-1739 OF 2012
(Arising out of S.L.P. (Crl.) Nos. 6390-6394 of 2010)

The State of Maharashtra & Ors. etc.etc. …Appellants

Versus

Saeed Sohail Sheikh etc. etc. …Respondents

J U D G M E N T

T.S. THAKUR, J.

1. Leave granted.

2. These appeals have been filed by the State of Maharashtra and senior officers in the Department of Prisons, Government of Maharashtra against a common judgment and order dated 21st July, 2009 passed by a Division Bench of the High Court of Judicature at Bombay whereby a batch of criminal writ petitions filed by the respondents have been allowed, transfer of the respondents-prisoners from Arthur Road Jail in Bombay to three other jails in the State of Maharashtra held to be illegal and the appellants directed to transfer the prisoners back to the jail at Bombay. The High Court has expressed the view that jail authorities having used force against undertrial prisoners for no fault of theirs and since such force was used for extraneous reasons and was excessive, the Chief Secretary of the State of Maharashtra shall initiate a disciplinary inquiry

against all those involved in the incident. The High Court has further held that if need be in addition to departmental inquiry, criminal action be also taken against the concerned officers including an inquiry into the conduct of the jail doctors for dereliction of their duty and alleged fudging of the records.

3. The factual matrix relating to the transfer of the prisoners from Bombay Central Prison to other prisons in the State and use of force causing injuries to some of them has been set out in the order passed by the High Court at some length. We need not, therefore, recount the same over again except to the extent it is necessary to do so for the disposal of these appeals.

4. Superintendent of the Bombay Central Prison appears to have addressed a letter to the Special Judge under The Maharashtra Control of Organised Crime Act, 1999 (hereinafter referred to as the MCOC Act) requesting for permission to transfer accused persons in three different Bombay blast cases being MCOC cases No.16/2006, 21/2006 and 23/2006. The request for transfer was proceeded on two distinct grounds namely (i) that against a capacity of 840 prisoners, the Bombay jail had as many as 2500 prisoners housed in it resulting in over-crowding and consequent problems of management in the jail and (ii) that proceedings in the on-going cases in question had been stayed with the result that the presence of the accused persons involved in the said cases was no longer required in the near future.

5. In response to the request aforementioned the Special Judge passed an order dated 26th March, 2004, inter alia, stating that:

> "xxxxxxxx It is true that Honourable Supreme Court has granted stay to entire further proceedings of above referred cases and therefore, presence of accused is no more required in near future. It is total domain of Jail Authorities to transfer accused to other jails due to scarcity of premises or for security purpose. As the presence of accused is not required immediately, you are at liberty to take action of transfer of above referred accused to other jails as per rules and regulations."

6. Administrative approval for the transfer of 37 undertrial prisoners involved in the above three cases was also obtained from the Inspector General of Prisons who directed the Superintendent, Bombay Central Prison, to keep in mind the criminal background of the prisoners while allocating them to different jails in the State.

7. On 22nd June, 2008 the jail authorities appear to have sent a requisition for an escort to the police headquarters which police escort was provided and reached the jail premises on 28th June, 2008 at 9.00 a.m. An announcement was then made requesting thirty-two undertrial prisoners to gather near Lal Gate in the prison premises out of whom seven prisoners were transferred to Ratnagiri Special Jail around 11.40 a.m. The other nineteen undertrials were said to be sitting outside while two other undertrial prisoners named Kamal Ahmad Vakil Ansari and Dr. Tanveer Mohd. Ibrahim Ansari refused to leave their cell to join the escort party despite persuasions by the jail authorities. The case of the appellants is that these undertrial prisoners refused to listen to the jail authorities and started abusing and misbehaving with the jail officials including Mrs. Swati

Madhav Sathe, the Jail Superintendent. Not only that, the undertrial prisoners started shouting anti-national and provocative slogans. After hearing these slogans from the high security cell, 21 undertrial prisoners who had gathered near the Lal Gate also started giving similar slogans and charged towards the jail officials, Wardens and watchmen and started assaulting them with bricks and stones. The version of the appellants is that these 21 undertrial prisoners also tried to approach the High Security Cell and tried to open its gate while they continued shouting slogans. Apprehending that the situation may go out of hand, the alarm bell was sounded in the jail and force reasonable enough to bring the situation under control used for that purpose. The appellants contend that because of the assault by the undertrial prisoners, the jail guards and prison officers sustained injuries.

8. A report regarding the incident in question was submitted on 30th June, 2008 to the Deputy Inspector General of Prison with a copy to the Principal Judge, City Sessions Court, Greater Bombay, Registrar Special- Judge, under MCOC Act apart from other officers in the prison hierarchy. Such of the prisoners as had received injuries were forwarded to the jail medical officers who examined them and issued medical certificates, regarding injuries sustained by them. The appellants allege that there was no violation of any statutory provision of law nor any other act of impropriety or illegality committed by them.

9. In the writ petitions filed by the respondents before the High Court, allegations regarding use of excessive force and inhuman treatment were made against the jail officials including the Superintendent of the Central Jail. The respondents alleged that the use of force was without any provocation and justification apart from being inspired by reasons extraneous to the need for maintaining peace and order within the jail. The nature of the allegations made in the writ petitions was found by the High Court to be sufficient to call for an inquiry into the violent incident. This inquiry was assigned to the Sessions Judge, Greater Bombay who was asked to report whether use of force by the jail authorities on 28th June, 2008 was excessive and whether, force was used for any extraneous reasons other than for maintaining discipline in terms of the Discipline Rules, 1963 of the Jail Manual. The Sessions Judge was also asked to enquire into the circumstances in which the prisoners had access to bricks and stones as claimed by jail authorities in the counter- affidavit filed before the High Court.

10. An inquiry pursuant to the directions of the High Court was accordingly conducted by the learned Sessions Judge, Greater Bombay in which the Sessions Judge recorded the statements of the injured as also the jail officials besides some other inmates of the jail. The report submitted by the Sessions Judge concluded that the cause underlying the incident of 28th June, 2008 was the resistance offered by Kamal Ahmad Vakil Ansari and Dr. Tanveer Mohd. Ibrahim Ansari to their transfer from the prison. The Inquiry Officer observed:

> "....The inquiry revealed that Tanvir and Kamal had resisted the jail staff on that day and they were not ready to go out of the High Security Zone. Inquiry further revealed that the jail staff was required to use force against them for taking them out of the room, then from barrack and then from the circle itself....

> xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx Statements of prisoners sent to Kolhapur and Nagpur jails and the statement of the jail staff if considered together, are sufficient to infer that Tanvir and Kamal offered maximum resistance to jail staff and they had refused to come out of High Security Zone but they were not taken out of their respective rooms and so there is no convincing statement given by anybody in respect of other two prisoners. It can be said that they were removed after the main incident was over. If the exaggeration made by other prisoners who were brought from Kolhapur jail is ignored, and the facts which can be called as common from the statements given by the jail staff and the prisoners are considered, it can be said that shouts of Tanvir who was assaulted inside of High Security Zone were heard by the prisoners who had gathered outside, in the open space. Material is also sufficient to infer that Kamal came out though without stick and he instigated the 20 prisoners who were sitting outside in the open space."

11. The Inquiry Officer further found that the resistance offered by Kamal Ahmad Vakil Ansari and Dr. Tanveer Mohd. Ibrahim Ansari required use of force against them but since both of them started shouting slogans other prisoners who were gathered outside in the open portion of the jail gate got agitated and rushed towards the High Security Cell to see as to what was happening. The Inquiry Officer held that hearing the anti-national slogans, the jail officers lost their calm and ordered use of force leading to breach of disturbances within the jail. The Inquiry Officer has specifically noted that the disturbances had started on account of instigation given by Kamal Ansari and slogans shouted by him and that there were reasons for the jail authorities to bring the situation under control. The following passage in the inquiry report is, in this regard, relevant:

> "xxxxxxxxxxxxxx There is possibility that after hearing the shouting of Tanvir and after hearing from Kamal that Tanvir was being beaten in High Security Zone and after hearing slogans given by Tanvir, prisoners who had gathered outside became disturbed. It can be said that they must have rushed towards the High Security Zone to see as to what was happening. There is a clear possibility that after hearing of the slogans which were given against India, officers outside became angry and then order was made to use force. Aforesaid circumstances have created probability that there was breach of discipline in view of the Rules framed under the Maharashtra Prison (Discipline) Rules of 1963 and there was disturbance to some extent. I have no hesitation to come to the conclusion that due to the instigation given by Kamal and slogans given by him, disturbance was caused and there was reason for the jail authority to order use of force. Force was used to bring the situation under control. But it needs to be ascertained as to whether there was excessive use of force or there was some extraneous reason also for excess use of force against these prisoners."

12. Having identified the cause of disturbances the Inquiry Officer next examined the question whether the force used by the jail authorities was excessive and came to the conclusion on the basis of the medical records of the injured namely, Tanveer, Kamal, Ehatesham, Sayed Asif, Abdul Wahid, Mohd. Zuber, Mushtaq Ahmed, Mohd. Zahid, Zameer Ahmad, Riyaz Ahmed and Mohd. Mujaffar that the use of force by the jail authorities was excessive. The Inquiry Officer further held that the

injured were not given medical aid. They were not properly examined by the doctors from the Bombay Central Police. Speaking about the conduct of the doctors in Bombay Central Prison the Inquiry Officer observed:

> "This conduct of the doctors of Mumbai Central Prison speaks volume about the general approach of the jail authority and the doctors working in the jail. It can be said that the doctors helped the jail authority in falsifying everything and screening illegal actions of the officers. It is surprising for the jail authority also that when under Chapter 11 of the Prison Act, action could have been taken against the prisoners if they had committed prison offence by assaulting officers, no record in that regard was created and no such action was proposed. Instead of that, jail authority hurriedly transferred the prisoners to other jails."

13. On a consideration of the report received from the Sessions Judge, the High Court found it necessary to direct the Government to hold a departmental inquiry against the officials who had used excessive force in bringing the situation in the jail under control. The High Court found that the order transferring the respondents-undertrial prisoners from Bombay Central Jail to other jails in the State was illegal and unacceptable inasmuch as the request for transfer had been dealt with at an administrative level without affording an opportunity to the undertrials to oppose the same. The High Court rejected the contention urged on behalf of the appellants that Section 29 of the Prisoners Act, 1900 empowers the State Government or the Inspector General of Prisons to transfer the undertrials. The power to transfer the undertrials was, according to the High Court, exercisable only by the Court under whose orders the prisoners were remanded to judicial custody in a given jail. Inasmuch as the court concerned had faltered in taking appropriate action on the request for transfer by treating the request to be only an administrative matter, the sanction for transfer of the undertrials to other jails was vitiated.

14. Appearing for the appellants Mr. Shekhar Naphade, learned senior counsel, made a three-fold submission before us. Firstly, it was contended that the undertrial prisoners had no enforceable right to demand that they should be detained in a prison of their choice or to resist their transfer from one jail to the other if the court under whose orders they were remanded to such custody permitted such transfer. He argued that although Section 29(2) of the Prisoners Act, 1900 permitted the Inspector General of Prisons to remove any prisoner from one prison to another in the State even if that power was not available qua undertrial prisoners, there was no impediment in such removal after the court under whose orders the prisoners were committed to jail had permitted such a transfer.

15. Secondly, it was argued by Mr. Naphade, that the power exercisable by the court in the matter of permitting or refusing the transfer of a prisoner was ministerial in character and that the prisoner had no right to demand a notice of any such request nor an opportunity to oppose the same. It is a matter entirely between the jail authorities on the one hand and the court concerned on the other in which the prisoner had no locus standi to intervene.

16. Thirdly, it was argued by Mr. Naphade that the High Court had fallen in a palpable error in holding that the use of force by the jail authorities was excessive, which called for any administrative or disciplinary action against those responsible for using such excessive force. He contended that what would constitute reasonable force to restore discipline and peace within the jail depends largely upon the nature of the incident, the extent of disturbances and the gravity of the consequences that would flow if force was not used to restore order. It was not, according to Mr. Naphade possible to sit in judgment over the decision of the jail authorities who were charged with maintenance of discipline and peace within the jail and determine whether force was rightly used and, if so, whether or not the use of force was excessive.

17. Mr. Naphade also urged that the underlying cause of the incident in the instant case was resistance put up by the undertrials involved in heinous offences against the society threatening the very sovereignty and integrity of the country. It was not open to the concerned prisoners, argued Mr. Naphade to resist their transfer from one jail to the other and to create a situation in which the jail authorities found it difficult to effectuate their transfer. It was also contended by Mr. Naphade that the reports submitted by the Sessions Judge was at best a preliminary fact finding report which has neither afforded an opportunity to all concerned to defend themselves against the insinuations or to examine witnesses in their defence. No such report could, therefore, be made a basis by the High Court to issue a mandamus to the State to institute disciplinary action against the officials concerned as though the finding that the use of force was excessive was unimpeachable and could constitute a basis for any such direction.

18. On behalf of the respondents Mr. Amrender Saran, learned senior counsel, argued that the transfer of a prisoner especially an undertrial from one prison to the other was not inconsequential for the prisoner and could not, therefore, be dealt with at a ministerial level. A prisoner was entitled to oppose the transfer especially if the same adversely affected his defence. It was also contended that Section 29 did not empower the Government or the Inspector General of Prisons to direct transfer of undertrials. It was argued that while the inquiry conducted by the Sessions Judge was not a substitute for a regular inquiry that may be conducted by the State, yet the exercise undertaken by a senior officer like the Sessions Judge under the orders of the High Court could furnish a prima facie basis for the High Court to direct an appropriate investigation into the case, and to initiate proceedings against those who may be found guilty of any misconduct on the basis of any such investigation.

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-
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> (a) under sentence of death, or
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> (b) under, or in lieu of, a sentence of imprisonment or transportation, or
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> (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]"

20. 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 undertrial prisoners who do not answer the description given therein.

21. Reliance upon sub-section (2) of Section 29, in support of the contention that the transfer of an undertrial is permissible, is also of no assistance to the appellants in our opinion. Sub-section (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 undertrials who could not have been transferred in terms of the orders of the Inspector General of Prisons under Section 29 extracted above.

22. We may at this stage refer to Prison Act, 1894 to which our attention was drawn by learned counsel for the appellants in an attempt to show that the Government could direct transfer of the undertrials from one prison to another. Reliance, in particular, was placed upon the provisions of Section 26 of the Act which reads as under:

> "26. Removal and discharge of prisoners. – (1) All prisoners, previously being removed to any other prison, shall be examined by the Medical Officer.
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> (2) No prisoner shall be removed from one prison to another unless the Medical Officer certifies that the prisoner is free from any illness rendering him unfit for removal.
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> (3) No prisoner shall be discharged against his will from prison, if labouring under any acute or dangerous distemper, nor until, in the opinion of the Medical Officer, such discharge is safe."
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> 23. The above, does not, in our opinion, support the contention that the Inspector General of Prisons could direct removal of undertrial from one prison to other. All that Section 26 provides is that before being removed to any other prison the

> prisoner shall be examined by the medical officer and unless the medical officer certifies that the prisoner is free from any illness rendering him unfit for removal, no such removal shall take place.

Section 26 may, therefore, oblige the prison authorities to have the prisoner, whether a convict or an undertrial, medically examined and to remove him only if he is found fit but any such requirement without any specific power vested in any authority to direct removal, cannot by itself, be interpreted to mean that such removal can be ordered under the order either by the Inspector General of Prisons or any other officer for that matter.

24. That leaves us with the question as to whether undertrials can be transferred to any prison with the permission of the court under whose orders he has been committed to the prison. Reference in this connection may be made to Sections 167 and 309 of the Code of Criminal Procedure, 1973. Section 167(2) empowers the Magistrate to whom an accused 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. It reads:

> "167. Procedure when investigation cannot be completed in twenty- four hours (1) xxxxxxxxxxxxx (2) The Magistrate to whom an accused person is forwarded under this section may, whether he has or has not jurisdiction to try the case, from time to time, authorise the detention of the accused in such custody as such Magistrate thinks fit, a term not exceeding fifteen days in the whole; and if he has no jurisdiction to try the case or commit it for trial, and considers further detention unnecessary, he may order the accused to be forwarded to a Magistrate having such jurisdiction:
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> Provided that—
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> (a) the Magistrate may authorise the detention of the accused person, otherwise than in the custody of the police, beyond the period of fifteen days, if he is satisfied that adequate grounds exist for doing so, but no Magistrate shall authorise the detention of the accused person in custody under this paragraph for a total period exceeding—
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> (i) ninety days, where the investigation relates to an offence punishable with death, imprisonment for life or imprisonment for a term of not less than ten years;
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> (ii) sixty days, where the investigation relates to any other offence, and, on the expiry of the said period of ninety days, or sixty days, as the case may be, the accused person shall be released on bail if he is prepared to and does furnish bail, and every person released on bail under this sub-section shall be deemed to be to so released under the provisions of Chapter XXXIII for the purposes of that Chapter;
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> (b) no Magistrate shall authorise detention in any custody under this section unless the accused is produced before him;

> (c) no Magistrate of the second class, not specially empowered in this behalf by the High Court, shall authorise detention in the custody of the police."

25. 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 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.

26. Both Mr. Naphade and Mr. Saran had no serious quarrel on the above proposition. It was all the same argued that if the provisions of the Prisoners Act, 1900 and the Prisons Act, 1894 did not empower the Inspector General of Prisons to transfer the undertrial, the only other mode of such transfer was with the permission of the court and pursuant to whose warrant of remand the undertrial is held in a particular jail.

27. 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 on-going trial. That transfer of an undertrial 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 v. Delhi Administration AIR 1980 SC 1579, where this Court observed:

> "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."

28. The expressions 'ministerial', 'ministerial office', 'ministerial act', and 'ministerial duty' have been defined by Black's Law Dictionary as under:

> "Ministerial, Adj. (16c) of our relating to an act that involves obedience to instructions or laws instead of discretion, judgment, or skill the court clerk's ministerial duties include recording judgments on the docket.
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> Ministerial office. An office that does not include authority to exercise judgment, only to carry out orders given by a superior office, or to perform duties or acts required by rules, statutes, or regulations.
>
> Ministerial act. An act performed without the independent exercise of discretion or judgment. If the act is mandatory, it is also termed a ministerial duty.
>
> Ministerial duty. A duty that requires neither the exercise of official discretion nor judgment."

29. Prof. De Smith in his book on 'Judicial Review' (Thomson Sweet & Maxwell, 6th Edn. 2007) refers to the meaning given by Courts to the terms 'judicial', 'quasi-judicial', 'administrative', 'legislative' and 'ministerial' for administrative law purposes and found them to be inconsistent. According to the author 'ministerial' as a technical legal term has no single fixed meaning. It may describe any duty the discharge whereof requires no element of discretion or independent judgment. It may often be used more narrowly to describe the issue of a formal instruction, in consequence of a prior determination which may or may not be of a judicial character. Execution of any such instructions by an inferior officer sometimes called ministerial officer may also be treated as a ministerial function. It is sometimes loosely used to describe an act that is neither judicial nor legislative. In that sense the term is used interchangeably with 'executive' or 'administrative'. The tests which, according to Prof. De Smith delineate 'judicial functions', could be varied some of which may lead to the conclusion that certain functions discharged by the Courts are not judicial such as award of costs, award of sentence to prisoners, removal of trustees and arbitrators, grant of divorce to petitioners who are themselves guilty of adultery etc. We need not delve deep into all these aspects in the present case. We say so because pronouncements of this Court have over the past decades made a distinction between quasi-judicial function on the one hand and administrative or ministerial duties on the other which distinctions give a clear enough indication and insight into what constitutes ministerial function in contra- distinction to what would amount to judicial or quasi-judicial function.

30. In Province of Bombay v. Khusaldas Advani (AIR 1950 SC 222) this Court had an occasion to examine the difference between a quasi-judicial order and an administrative or ministerial order.

Chief Justice Kania, in his opinion, quoted with approval an old Irish case on the issue in the following passage:

> ".....the point for determination is whether the order in question is a quasi-judicial order or an administrative or ministerial order. In Regina (John M'Evoy) v. Dublin Corporation [1978] 2 L.R. Irish 371, 376, May C.J. in dealing with this point observed as follows:
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> "It is established that the writ of certiorari does not lie to remove an order merely ministerial, such as a warrant, but it lies to remove and adjudicate upon the validity of acts judicial. In this connection, the term 'judicial' does not necessarily mean acts of a judge or legal tribunal sitting for the determination of matters of law, but for the purpose of this question a judicial act seems to be an act done by competent authority, upon consideration of facts and circumstances, and imposing liability or affecting the rights of others." This definition was approved by Lord Atkinson in Frome United Breweries Co. v. Bath Justices [1926] A.C. 586, 602, as the best definition of a judicial act as distinguished from an administrative act."

31. In Khushaldas Advani's case (supra) the Court was examining whether the act in question was a ministerial/administrative act or a judicial/quasi-judicial one in the context of whether a writ of certiorari could be issued against an order under Section 3 of the Bombay Land Requisition Ordinance, 1947. The Court cited with approval the observation of L.J. Atkin in The King v. The Electricity Commissioner [1924] 1 K.B. 171 that laid down the following test:

> "Whenever anybody of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, act in excess of their legal authority they are subject to the controlling jurisdiction of the King's Bench Division exercised in these writs."

32. The Court quoted with approval the decision in The King v. London County Council [1931] 2 K.B. 215 according to which a rule of certiorari may issue; wherever a body of persons (1) having legal authority (2) to determine questions affecting rights of subjects and (3) having the duty to act judicially (4) act in excess of their legal authority-a writ of certiorari may issue.

33. Justice Fazl Ali, in his concurring opinion in Khushaldas' case (supra) made the following observations as regards judicial and quasi- judicial orders:

> "16. Without going into the numerous cases cited before us, it may be safely laid down that an order will be a judicial or quasi- judicial order if it is made by a court or a judge, or by some person or authority who is legally bound or authorised to act as if he was a court or a judge. To act as a Court or a judge necessarily involves giving an opportunity to the party who is to be affected by an order to make a representation, making some kind of enquiry, hearing and weighing evidence, if any, and considering all the facts and circumstances bearing on the merits of the controversy before any

> decision affecting the rights of one or more parties is arrived at. The procedure to be followed may not be as elaborate as in a court of law and it may be very summary, but it must contain the essential elements of judicial procedure as indicated by me.
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> xxx xxx xxx xxx xxx xxx ... The mere fact that an executive authority has to decide something does not make the decision judicial. It is the manner in which the decision has to be arrived at which makes the difference and the real test is: Is there any duty to decide judicially?"

34. The detailed concurrent opinion of Justice Das, in the same case, also agreed with the above test for determining whether a particular act is a judicial or an administrative one. Das J., observed:

> "The real test which distinguishes a quasi-judicial act from an administrative act is the third item in Atkin L.J.'s definition, namely the duty to act judicially."

35. In State of Orissa v. Dr. Binapani Dei (AIR 1967 SC 1269) Justice Shah, speaking for the Court observed that the duty to act judicially arose from the very nature of the function intended to be performed. It need not be shown to be superadded. The Court held:

> "If there is power to decide and determine to the prejudice of a person, duty to act judicially is implicit in the exercise of such power."

36. In A.K. Kraipak v. Union of India (1969) 2 SCC 262, Hegde, J., as His Lordship then was, recognised that the dividing line between an administrative power and a quasi-judicial power was fast vanishing. What was important, declared the Court, was the duty to act judicially which implies nothing but a duty to act justly and fairly and not arbitrarily or capriciously. The Court observed:

> "13. The dividing line between an administrative power and a quasi- judicial power is quite thin and is being gradually obliterated. For determining whether a power is an administrative power or a quasi-judicial power one has to look to the nature of the power conferred, the person or persons on whom it is conferred, the framework of the law conferring that power, the consequences ensuing from the exercise of that power and the manner in which that power is expected to be exercised. Under our Constitution the rule of law pervades over the entire field of administration. Every organ of the State under our Constitution is regulated and controlled by the rule of law. In a welfare State like ours it is inevitable that the jurisdiction of the administrative bodies is increasing at a rapid rate. The concept of rule of law would lose its vitality if the instrumentalities of the State are not charged with the duty of discharging their functions in a fair and just manner. The requirement of acting judicially in essence is nothing but a requirement to act justly and fairly and not arbitrarily or capriciously. The procedures which are considered inherent in the exercise of a judicial power are merely those which facilitate if not ensure a just and fair decision. In recent years the concept of quasi-judicial power has been undergoing a radical change. What was considered as an administrative power some years back is

now being considered as a quasi-judicial power."

37. To the same effect is the decision of this Court in Mohinder Singh Gill. v. Chief Election Commission (1978) 1 SCC 405 where Krishna Iyer, J. speaking for the Court observed:

> "48. Once we understand the soul of the rule as fairplay in action — and it is so — we must hold that it extends to both the fields. After all, administrative power in a democratic set-up is not allergic to fairness in action and discretionary executive justice cannot degenerate into unilateral injustice. Nor is there ground to be frightened of delay, inconvenience and expense, if natural justice gains access. For fairness itself is a flexible, pragmatic and relative concept, not a rigid, ritualistic or sophisticated abstraction. It is not a bull in a china shop, nor a bee in one's bonnet. Its essence is good conscience in a given situation:
>
> nothing more — but nothing less. The "exceptions" to the rules of natural justice are a misnomer or rather are but a shorthand form of expressing the idea that in those exclusionary cases nothing unfair can be inferred by not affording an opportunity to present or meet a case. Text-book excerpts and ratios from rulings can be heaped, but they all converge to the same point that audi alteram partem is the justice of the law, without, of course, making law lifeless, absurd, stultifying, self-defeating or plainly contrary to the common sense of the situation."

38. Recently this Court in Jamal Uddin Ahmad v. Abu Saleh Najmuddin (2003) 4 SCC 257 dealt with the nature of distinction between judicial or ministerial functions in the following words:

> "14. The judicial function entrusted to a Judge is inalienable and differs from an administrative or ministerial function which can be delegated or performance whereof may be secured through authorization."The judicial function consists in the interpretation of the law and its application by rule or discretion to the facts of particular cases. This involves the ascertainment of facts in dispute according to the law of evidence. The organs which the State sets up to exercise the judicial function are called courts of law or courts of justice. Administration consists of the operations, whatever their intrinsic nature may be, which are performed by administrators; and administrators are all State officials who are neither legislators nor judges." (See Constitutional and Administrative Law, Phillips and Jackson, 6th Edn., p. 13.) P. Ramanatha Aiyar's Law Lexicon defines judicial function as the doing of something in the nature of or in the course of an action in court. (p. 1015) The distinction between "judicial" and "ministerial acts" is: If a Judge dealing with a particular matter has to exercise his discretion in arriving at a decision, he is acting judicially; if on the other hand, he is merely required to do a particular act and is precluded from entering into the merits of the matter, he is said to be acting ministerially. (pp. 1013-14). Judicial function is exercised under legal authority to decide on the disputes, after hearing the parties, maybe after making an enquiry, and the decision affects the rights and obligations of the parties. There is a duty to act judicially. The

> Judge may construe the law and apply it to a particular state of facts presented for the determination of the controversy. A ministerial act, on the other hand, may be defined to be one which a person performs in a given state of facts, in a prescribed manner, in obedience to the mandate of a legal authority, without regard to, or the exercise of, his own judgment upon the propriety of the act done. (Law Lexicon, ibid., p. 1234). In ministerial duty nothing is left to discretion; it is a simple, definite duty."

39. 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 undertrials 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 undertrials 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.

40. That leaves us with the only other aspect namely whether the High Court was justified in directing the Government to hold an inquiry against those responsible for using excessive force and for dereliction of duty by the medical officer. As noticed earlier by us the said direction has been issued entirely on the basis of the report submitted by the Sessions Judge. That report besides being preliminary is flawed in many respects including the fact that the same does not comply with the basic requirement of a fair opportunity of hearing being given to those likely to be affected. It is true that the statements of some of the jail officials have also been recorded in the course of the inquiry but that is not enough. Those indicted in the report were entitled to an opportunity to cross-examine those who alleged misconduct against them. Not only that the Sessions Judge has not named the officers responsible for the alleged use of excessive force which was essential for any follow up or further action in the matter. The Sessions Judge has observed:

> "I am avoiding naming the officers of the jail against whom allegations of use of force are made as I am expected to give findings only on the aforesaid five points and as officers who took part in the action, officers who gave orders of or the officers who did not oppose the action cannot be segregated."

41. So, also the report clearly states the officials concerned have not been allowed to examine any witness although a request was made by them to do so. Such being the position, some of the observations made by the High Court that give an impression as though the misdemeanour of the jail officers had been proved, do not appear to be justified. It was at any rate not for the High Court to record a final and authoritative finding that the force used by the jail authorities was excessive or that it was used for any extraneous purpose. It was a matter that could be determined only after a proper inquiry was conducted and an opportunity afforded to those who were accused of using such excessive force or abusing the power vested in them. Consequential directions issued by the High Court in directing the State Government to initiate disciplinary inquiry against all the officers involved in the incident were, therefore, premature. We say so because the question whether any disciplinary inquiry needs to be instituted against the jail officials would depend upon the outcome of a proper investigation into the incident and not a preliminary enquiry in which the Investigating Officer, apart from statements of the respondents, makes use of information discreetly collected from the jail inmates. The report of the Sessions Judge could in the circumstances provide no more than a prima facie basis for the Government to consider whether any further investigation into the incident was required to be conducted either for disciplinary action or for launching prosecution of those found guilty. Beyond that the preliminary report could not in view of what we have said above serve any other purpose.

42. In a country governed by the rule of law police excesses whether inside or outside the jail cannot be countenanced in the name of maintaining discipline or dealing with anti-national elements. Accountability is one of the facets of the rule of law. If anyone is found to have acted in breach of law or abused his position while exercising powers that must be exercised only within the parameters of law, the breach and the abuse can be punished. That is especially so when the abuse is alleged to have been committed under the cover of authority exercised by people in uniform. Any such action is also open to critical scrutiny and examination by the Courts. Having said that we cannot ignore the fact that the country today faces challenges and threats from extremist elements operating from within and outside India. Those dealing with such elements have at times to pay a heavy price by sacrificing their lives in the discharge of their duties. The glory of the constitutional democracy that we have adopted, however, is that whatever be the challenges posed by such dark forces, the country's commitment to the Rule of Law remains steadfast. Courts in this country have protected and would continue to protect the ideals of the rights of the citizen being inviolable except in accordance with the procedure established by law.

43. In the result we allow these appeals but only in part and to the extent that the Government shall treat the report submitted by the Sessions Judge as a preliminary inquiry and take a considered decision whether or not any further inquiry, investigation or proceedings against those allegedly responsible for using excessive force while restoring discipline in the Central Jail at Bombay on 26th June, 2008 needs to be conducted. We make it clear that if the Government decides to hold any further inquiry or investigation into the matter on the basis of the preliminary findings in the report submitted by the Sessions Judge or institute any departmental proceedings against any one of those found guilty in any such further inquiry or investigation, the observations made by the High Court in regard to the use of force or the extent thereof shall not prejudice the parties concerned or the outcome of any such inquiry nor shall any such observation be treated to be a final expression of

opinion regarding the guilt or innocence of the concerned. The parties are left to bear their own costs.

... . J . (T . S . T H A K U R)
.....J. (FAKKIR MOHAMED IBRAHIM KALIFULLA)
New Delhi November 2, 2012