

**IN THE MAHARASHTRA ADMINISTRATIVE TRIBUNAL
MUMBAI**

ORIGINAL APPLICATION NO.831 OF 2019

DISTRICT : THANE

Smt. Anita Ramdas Supare/Deotale)
Aged : 43 years, Occu : Service,)
as Asstt. Public Prosecutor,)
R/o. Flat No.703, Vrundavan Palms,)
Near Aarati Nagari, Wayle Nagar,)
Khadapada, Kalyan (W),)
Dist. Thane)...**Applicant**

Versus

1. The State of Maharashtra.)
Through its Secretary,)
Home Department, Mantralaya,)
Mumbai 400 032.)
2. The State of Maharashtra,)
Through its Deputy Secretary,)
Home Department, POL-10, World)
Trade Center, 30th Floor,)
Mantralaya, Mumbai 400 032.)
3. The Chief Secretary,)
The Competent Authority of)
Transfer (Hon'ble Chief Minister),)
Maharashtra State, Mumbai.)
4. Directorate Prosecution, through its)
Director, Khetan Bhawan, Flat No.8,)
5th floor, N. Tata Road, Church)
Gate, Mumbai 20)
5. Assistant Director and Public)
Prosecutor, Mumbai, Police colony,)
Near, Chiragnagar, Ghatkopar (w),)
Mumbai.)...**Respondents**

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Applicant in person.

Smt. K.S. Gaikwad, Presenting Officer for Respondents.

CORAM : SHRI A.P. KURHEKAR, MEMBER-J

DATE : 27.08.2020

JUDGMENT

1. The Applicant has challenged the transfer order dated 08.06.2018 whereby she was transferred from Mumbai to Gondia invoking jurisdiction of this Tribunal under Section 19 of Administrative Tribunals Act, 1985.

2. Briefly stated facts giving rise to this application are as under :-

The Applicant is serving as Assistant Public Prosecutor. She was posted in Mumbai District and the Court of Metropolitan Magistrate, Vikhroli was assigned to her. At the time of general transfers of 2018, she was due for transfer having served for 3 years and 4 months in Mumbai. The options were called by Respondent No.4 – Director of Prosecution from Prosecutors due for transfer in general transfers of 2018. The Applicant's husband is in private service in Thane. She also claimed to be suffering from osteoarthritis and Tennis Elbow. Therefore, citing these reasons, she gave options of Kalyan, Ulhasnagar and Thane City. However, none of her option was considered and she was transferred at the other end of Maharashtra in Gondia District, which is near about 1000 k.m. from Mumbai. She has, therefore, challenged the transfer order dated 08.06.2018 *inter-alia* contending that it is in violation of provisions of 'Maharashtra Government Servants Regulation of Transfers and Prevention of Delay in Discharge of Official Duties Act, 2005 (hereinafter referred to as 'Transfer Act 2005' for brevity) and subjected to gross discrimination at the hands of Respondents. Initially, the application was filed along with condonation of delay vide

M.A.No.653/2019 wherein delay was condoned and O.A. was taken up for hearing on merit.

3. The Applicant who is appearing in person vehemently urged that though the transfer orders ought to have been issued in the month of May as a general transfer as per provisions of 'Transfer Act 2005' but the Respondents issued transfer orders of Assistant Public Prosecutors in State of Maharashtra by order dated 08.06.2018, and therefore, it has to be construed as mid-tenure transfer attracting rigor of Section 4(5) of 'Transfer Act 2005' and the same being not complied with, her impugned transfer order is unsustainable in law. She has further pointed out that as her husband is in private service in Thane in terms of policy adopted by Government vide G.R. dated 19.08.1975, she was required to be accommodated in Thane District where her husband resides. She has further pointed out that she is subjected to gross discrimination by denying options given by her and on the other hand, accommodating several other Prosecutors by giving extension at the same place or by giving transfer in nearby district. She, therefore, submits that the impugned transfer order is totally unsustainable in law.

4. Per contra, Smt. K.S. Gaikwad, learned P.O. in reference to reply filed on behalf of Respondents 1, 2, 4 and 5 (Page Nos.147 to 159 of Paper Book) submits that, as the Applicant is Group 'A' Officer and due for transfer, it was prerogative of the Government to transfer her at any place throughout Maharashtra and the Applicant cannot insist for a particular place of her choice. She further submits that there were complaints against the Applicant for not attending the Courts of Metropolitan Magistrate assigned to her and was not performing her duties diligently. She further submits that the Applicant did not join at Gondia though the period of more than two years is over and choose to remain absent on duty and thereby committed serious misconduct. She, therefore, sought to justify the impugned transfer order.

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5. Indisputably, the Applicant was due for transfer in general transfers of 2018 and had given options of Kalyan, Ulhasnagar and Thane City. While giving options, she stated that she is suffering from osteoarthritis and Tennis Elbow and her husband being serving in Thane, her options be considered. True, the transfer being incident of service, the Government servant cannot seek retention as of right nor claim particular place as of right. Undoubtedly, it is prerogative of the Government where to transfer the Government servant considering the requirement and administrative exigencies, if any. At the same time, the Government is also required to act in fair, reasonable and transparent manner.

6. Now, the transfers are governed by the provisions of 'Transfer Act 2005' which inter-alia provides complete mechanism for transfer of a Government servant. As per Section 4(4) of 'Transfer Act 2005', the transfers of Government servants shall ordinarily be made only once in a year in the month of April or May. Where mid-tenure or mid-term transfer of a Government servant is necessitated, it can be done in special case after recording reasons with prior permission of highest competent authority. Whereas, in the present case, the transfer orders are issued on 08.06.2018, which is little beyond the period prescribed under the provisions of 'Transfer Act 2005'. As such, the Respondents failed to adhere the provisions of 'Transfer Act 2005' by not issuing transfer orders in the month of April or May. Even if some concession or latitude is given to the Respondents that the transfer orders were already processed in the month of May, but orders were delayed by 8 days and it is termed as 'general transfer', in that event also, in my considered opinion, the impugned transfer order qua the Applicant is totally unsustainable in law for the reasons to follow.

7. The Applicant has placed on record a G.R. dated 19.08.1975 (Page No.145 of P.B.) and Circular issued by G.A.D, Government of Maharashtra dated 16.07.1985 (Page No.137 of P.B.) whereby the

Government has taken policy decision to accommodate married woman as far as possible at the place where her husband is in service. Para No.2 of G.R. dated 19.08.1975 is material, which is as follows :-

“2. In order to ensure the moral safety of the married women employees, Government has accepted the principle that they should not be separated from their husbands. It has therefore, been decided by Government that a married woman employee should be posted, as far as possible, to the place of her husband. It is not necessary that the husband be in Government service, for this purpose.”

Furthermore, by Circular dated 16.06.1985, the Government instructed the Departments to consider the options given by the Government servant while transferring him. Clause Nos.3 and 4 of Circular dated 16.07.1985 are material, which are as follows :-

“३) नियतकालिक बदल्यासंबंधी निर्णय घेताना शासकीय सेवाकांनी कळविलेली पंसती विचारात घेतली जावी.

४) सक्षम प्राधिका-यांनी प्रशासकीय सोय व कर्मचा-यांची वैयक्तिक पंसती या दोन्ही बाबी विचारात घेऊन बदल्यासंबंधी निर्णय घ्यावे.”

8. The learned Presenting Officer did not dispute the aforesaid position/policy of Government. True, subsequently, the Government of Maharashtra has enacted 'Transfer Act 2005' to ensure fix tenure and to have transparency, fair and reasonableness in transfer matters and it is not left to the whims, caprice or autocracy of executive.

9. Now, let us see the minutes of Civil Services Board (CSB) (Page Nos.164 to 170 of P.B.) which sufficiently demonstrate favoritism to certain set of employees and arbitrary use of powers. The then Principal Secretary, Home Department was Chairperson of CSB and the transfers were recommended in its meeting dated 16.05.2018. In all 202 Assistant Public Prosecutors were due for transfer. The perusal of minutes of CSB reveals that, out of 202 Assistant Public Prosecutors, 70 Prosecutors were given extension at the same place though they were overdue for transfer. Some of them were serving at one place from 2012 and 2013. As such there is no denying that though they were overdue for transfer, they were given extension and retained at same place for one year. It

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appears that the Respondent No.4 - Director of Prosecution recommended for their retention and CSB mechanically accepted the same. Whereas, in the matter of Applicant, the Respondent No.4 - Director of Prosecution proposed for her transfer at Gondia and CSB mechanically accepted it without application of mind. The Respondents have not placed on record the proposal or recommendations made by Director of Prosecution to CSB to know the reasons for giving extension of 70 Prosecutors and for throwing the Applicant at Gondia, which is at the other end of Maharashtra. No reasons whatsoever for not considering the options given by the Applicant are forthcoming neither reasons for giving extension to 70 Prosecutors is forthcoming. The Tribunal is, therefore, left with no alternative except to hold that the transfers are made in very unfair and arbitrary manner throwing the guidelines issued by Government to the wind that the women should be accommodated as far as possible at the place of her husband.

10. I am aghast to note that Prosecutors to whom extension was granted in transfers of 2018, again extension for one year was granted to at least 6 Prosecutors out of them viz. Shri Pasarkar, Shri Padvi, Shri Kasture, Shri Koli, Shri Deshmukh and Shri Davale, as seen from letter of extension issued by Government dated 10th June, 2019 (Page No.136 of P.B.). This is again without assigning any reason for accepting the request of extension. As such, favoritism, discrimination and arbitrary use of powers is writ at large.

11. Material to note that as rightly pointed out by the Applicant that almost all Prosecutors were transferred in adjoining District or in same region and not a single Prosecutor is thrown at the distance of 1000 k.m. However, the Applicant is singled ^{out} ~~out~~ and transferred to remote place at Gondia, which is at the other end of State of Maharashtra without giving any reasons as to why she was not given any one of the options from the options given by her or not accommodated in nearby District.

12. To assert that the Government has prerogative where to transfer a Government servant, and therefore, the Applicant cannot challenge her transfer order, rather reflect autocracy, arbitrary use of power on the part of executive and untenable particularly when gross discrimination is *ex-facie*. Only because Government has prerogative to transfer the Applicant at any place, it does not mean Government can act arbitrarily and highhandedly. Where the Government had adopted a policy of extension to certain set of employees, then all other identically situated persons needs to be treated alike by extending the same benefit and not doing so would amount to discrimination and would be violative of Article 14 of the Constitution of India. The principle of equality for law needs to be complied in service matters more effectively and emphatically in view of service jurisprudence evolved by Hon'ble Supreme Court from time to time, that, similarly situated persons should be treated similarly.

13. Needless to mention that CSBs are established in view of decision of Hon'ble Supreme Court in ***Writ Petition (Civil) No.82/2011 (T.S.R. Subramanian & Ors. Vs. Union of India & Ors.) dated 31st October, 2013*** to ensure that the transfers are made in fair and transparent manner. As such, the CSB was under obligation in law to see that the transfers are made in fair and reasonable manner and in consonance with the policy of the Government and it should not act as a puppet so as to mechanically accept the proposal forwarded by Director of Prosecution. In the present case, the CSB mechanically accepted the proposal forwarded by Director of Prosecutor, without application of mind thereby giving extension to 70 Prosecutors without bothering to see as to why extension or options claimed by the Applicant was not considerable. The Government again mechanically accepted the recommendation made by CSB and issued transfer orders. Suffice to say, gross discrimination and arbitrary use of powers is clearly spelt out.

14. There is another aspect of the matter which also renders impugned order unsustainable. Feeble attempt was made by the learned P.O. that

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on account of some complaints of irregular attendance probably she was not considered for the options given by her. The learned P.O. has placed on record a letter dated 06.07.2017 (Page No.160 of P.B.) and one more letter (date is not clear at Page No.161 of P.B.). There were 6 Courts of Metropolitan Magistrates at Vikhroli and only 3 Prosecutors were available. These seems to be the letters' written by learned Magistrate informing to the Assistant Director of Prosecution about irregular attendance of the Applicant in Court No.73, Vikhroli. As per the contents of letter itself, some other Courts of Metropolitan Magistrates, Vikhroli were also assigned to the Applicant. As per order issued by Assistant Director and Public prosecutor dated 10.07.2017 (Page Nos.41 and 42 of P.B.), Court No.72, Vikhroli with additional charge of Court No.50 was assigned to the Applicant. It seems that there were changes in the assignments from time to time and it is not a case that only one Court was assigned to the Applicant. Applicant has pointed out that at a time more than one court was assigned to her and she was not given any opportunity to explain her side. This being the position, if the Applicant is transferred on the basis of complaints without ascertaining the factual position, it amounts to punishment and the impugned transfer order has to be termed 'punitive'. Thus, *ex-facie* without ascertaining factual position and the veracity of complaints, she is deliberately transferred 1000 k.m. away from the Mumbai in remote area at Gondia without hearing her. It is one thing to contend that the Government is entitle to transfer an employee on administrative exigencies, but it is totally another thing if the order of transfer is passed in lieu of punishment. Where such transfer is in lieu of punishment, the same is totally unsustainable in law and on that ground also, the impugned transfer order is liable to be quashed in view of ratio laid down by Hon'ble Supreme Court in **(2009) 2 SCC 592 (Somesh Tiwari Vs. Union of India & Ors.)** wherein it has been held as under :-

“An order of transfer is an administrative order. Transfer, which is ordinarily an incident of service should not be interfered with, save in cases where inter alia malafides on the part of the authority is proved.

Mala fides are of two kinds – first, malice in fact and second, malice in law. The order in question would attract the principle of malice in law as it was not based on any factor germane to passing of an order of transfer and based on an irrelevant ground i.e. on the allegations made against the appellant in an anonymous complaint. It is one thing to say that the employer is entitled to pass an order of transfer in administrative exigencies but it is another thing to say that the order of transfer is passed in lieu of punishment, the same is liable to be set aside being wholly illegal. No vigilance enquiry was initiated against appellant. Transfer order was passed on material which was non-existent. The order suffers not only from non-application of mind but also suffers from malice in law.”

15. Material to note that after impugned transfer order, the Applicant made various representations to modify the transfer order and to accommodate her at the options given by her (representations are at Page Nos.56, 69, 81, 83, 90 and 118 of P.B.). She had requested considering her illness and husband being residing at Thane, she be accommodated at any place in Thane District. One more ground was that her daughter was serving in CBSE Board in 9th Standard and to facilitate completion of 9th Standard and 10th Standard at one place, she be retained at Vikhroli or be accommodated at any place in Thane District. Surprisingly, her representations were simply turned down as “rejected” without assigning any reason for not accepting the same. This again shows arbitrary functioning of the concerned department.

16. An attempt was made to justify the impugned transfer order attributing misconduct to the Applicant for not joining at Gondia. The Applicant did not join at Gondia till date. When specific query was raised to the Applicant, she states that due to aforesaid difficulties as elaborated in representations, it was not possible for her to leave family and to go Gondia alone to join the posting. Be that as it may, the subsequent alleged misconduct for non-joining at Gondia cannot be the ground to disentitle the Applicant for the relief claimed where discrimination, favoritism and arbitrary use of powers is obvious as concluded above. Admittedly, till date no action is initiated for alleged misconduct. Needless to mention the legality of transfer order has to be tested on the basis of circumstances and material existed at the time of

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transfer and subsequent alleged misconduct for non-joining at Gondia is not relevant for the decision of the O.A.

17. The totality of aforesaid discussion of law and facts leads me to conclude that the impugned transfer order is totally indefensible and unsustainable in law and it is liable to be quashed. As the Applicant is subjected to gross discrimination, which is outcome of arbitrary use of power, she was constrained to file the present O.A. She is, therefore, entitled to cost of litigation quantified at Rs.10,000/-. As the O.A. deserves to be allowed, the learned P.O. Smt. Gaikwad was asked to know the vacancy position, so that while reposting the Applicant, no other Prosecutor should be displaced. On instructions, she submits that the Applicant can be accommodated at Kalyan without disturbing anybody else. Hence, the following order.

ORDER

- (A) The Original Application is allowed.
- (B) The impugned transfer order dated 08.06.2018 qua the Applicant is quashed and set aside.
- (C) The Respondents are hereby directed to consider the options viz. Kalyan, Ulhasnagar and Thane City given by the Applicant and to post her at any one of such place within a month from today.
- (D) Respondents shall pay cost Rs.10,000/- to the applicant jointly and severally.

Sd/-

(A.P. KURHEKAR)
Member-J