

IN THE MAHARASHTRA ADMINISTRATIVE TRIBUNAL, MUMBAI

ORIGINAL APPLICATION NO.535 OF 2017

(Subject : Transfer)

DISTRICT : MUMBAI

Dr. A.R. Bhivapurkar)
R/o. Flat No.2, Dhanvantari Building No.2,)
J J Hospital Campus, Byculla,)
Mumbai 400 008)

....APPLICANT.

Versus

1. The State of Maharashtra,)
Through the Principal Secretary,)
Medical Education and Drugs Department,)
Mantralaya, Mumbai.)
2. Grant Government Medical College,)
Through its Dean, Byculla, Mumbai.)
3. Government Medical College Aurangabad.)
Through its Dean, Aurangabad.)
4. Dr. Krishnarao N. Bhosle,)
Government Medical College, Aurangabad)
Alternate Address :)
Dr. Krishnarao N. Bhosle,)
Grant Government Medical College,)
Byculla, Mumbai.)

....RESPONDENTS.

Shri G.S. Shukla, the learned Advocate for the Applicant.

Ms. S. Suryawanshi, the learned Presenting Officer for the Respondents No.1 to 3.

Shri M.D.Lonkar, the learned Advocate for the Respondent No.4.

CORAM : SHRI P.N. DIXIT, MEMBER(A)

RESERVED ON : 09.07.2018.

PRONOUNCED ON : 11.07.2018.

J U D G M E N T

1. Heard Shri G.S. Shukla, the learned Advocate for the Applicant, Ms. S. Suryawanshi, the learned Presenting Officer for the Respondents No.1 to 3 and Shri M.D.Lonkar, the learned Advocate for the Respondent No.4.

2. Submissions by the petitioner are as under:-

“(a) The Applicant was working as Professor, Cardio Vascular Thoracic Surgery at Mumbai and has been transferred on 07.06.2017 by Respondent No.1 from Mumbai to Government Medical College at Aurangabad.

(b) This is a mid-term/mid-tenure transfer and he, therefore, prays to quash the order vide prayer clause 10(b).”

He challenges the impugned order by making following averments in paragraphs 7.11 to 7.15 (page 9A to 9C) as under :-

“para 7.11 : It is humbly submitted that the impugned order of transfer has been made in pursuance of respondent no.4’s representation dated 01.03.2017 and therefore the same is malafide and not in administrative exigency.

It is submitted that the order passed malafide to accommodate respondent no.4 is not justifiable and fails the scrutiny of law even if the applicant had completed three years at one place and assuming that he was due for transfer. It is most humbly submitted that such an order passed in colourable exercise of power deserves judicial interference.

para 7.12 :

It is humbly submitted that the Civil Services Board has not recommended the transfer of the applicant and it is evident from the record that the record has been camouflaged. The applicant raises the following points in relation to absence of recommendation and non compliance with the provisions of sections 4(4)(ii), 4(5) and 6 of the Maharashtra Government Servants Regulation of Transfers and Prevention of Delay in Discharge of Official Duties Act, 2005 (in short referred to as the Transfer Act, 2005).

- (i) The impugned order dated 07th June 2017 has been issued without approval of the Hon’ble Chief Minister, which approval has been obtained on 27.06.2017. The approval is only to the recommendations at pages 1 to 4 which do not contain the name of the applicant.*
- (ii) There is no reference to the name of the applicant in the minutes of the Civil Services Board.*
- (iii) The unsigned pages 17 and 19 have no sanctity and authenticity which also apparently have been added after the approval from the Hon’ble Chief Minister and therefore they do not bear any Officers’ or Minister’s signatures.*
- (iv) It is humbly submitted that Column No.6 which contained “reasons for transfer” is missing from pages 17 and 19 and thus even assuming but no admitting that the approval has been obtained in relation to pages 17 and 19 by making an endorsement at the foot of pages 4, there is deviation from the settled procedure, as is resorted to in others’ cases, which speaks of ulterior motive.*

- (v) *No reasons have been assigned to transfer the applicant and thus there is not compliance with sections 4(4)(ii) and 4(5) of the Transfer Act.*
- (vi) *It is humbly submitted that for the names considered for transfer or denial of transfer is one meeting of Civil Services Board dated 12.05.2017, there are various sheets of recommendations prepared in peace-meal, which demonstrates that what did not form part of the civil services board meeting, has been subsequently added in the minutes.*
- (vii) *It is further humbly submitted that the last one unsigned page containing names of the respondent no.4 and the applicant has been added subsequently, which also does not bear anybody's signature and so the same can be legitimately styled as "manufacture: of record.*

A copy of C.S.B. minutes is marked as exhibit "G".

para 7.13 :

For all these reasons, it indisputably appears that the requirement of obtaining recommendation from Civil Services Board has not been complied with. There is flagrant disregard and violation of the guidelines laid down by the Hon'ble Supreme Court in T.S.R. Subramanian's case.

para 7.14 :

It is submitted that the respondent no.4 was transferred to Aurangabad vide order dated 25th June 2015 (exhibit B to O.A.). However, in order to continue working at Mumbai in defiance of his order of transfer, he managed to obtain an order of "additional charge" dated 05.09.2015 from the respondent no.2- the Dean of Grant Government Medical College, Mumbai.

The respondent no.2 Dean had no authority to handover additional charge to the respondent no.4 even in the face of an order to that effect from the Director of Medical Education, who too did not have any authority to pass such an order of entrustment of additional charge, since it is only the State Government which can pass such orders.

para 7.15 :

It is most humbly submitted that the respondent no.4 is holding "additional charge" and he is not working on "deputation" at Mumbai. It is submitted that there can not be "deputation" within the same department. The order of "additional charge" cannot be called or styled as an order of "deputation" as the same does not comply with the relevant provisions of law in relation to "deputation".

- (c) *Learned Advocate for the Applicant contends that the Applicant's transfer has been affected to accommodate the request made by Respondent No.4.*

(d) According to him, this transfer order is not fair. In this connection he refers to reply given by Respondent No.1 in paragraph 11 (ii), page 60 which is as under :-

“11(ii) Due to his age, retirement, medical background and family reasons Respondent No.4 has requested his last posting by transfer to Grant Govt. Medical College, Mumbai on 01-03-2017.”

3. Learned Advocate for the Applicant refers to paragraph 5 of the reply to the effect which 'admits' that name of the Applicant was not included in the minutes of Civil Services Board, paragraph 6 of page 176 which states as under :-

“6. With reference to contents of amended paragraph Nos.7.12(iii) to (v), I say as follows : As mentioned in reply to point No.7.12(i), the Competent Authority has made certain changes in recommendations of Civil Services Board. The names of professors and Dean which are placed on page No.17-T & 19-T were approved by Competent Authority.”

4. Learned Advocate for the Applicant contends that no reasons for the transfer have been mentioned even though it was mid-term and mid-tenure transfer. According to the learned Advocate for the Applicant recommendation of the Civil Services Board which is available from page 22-A to 22-D do not contain the name of the Applicant for transfer. Learned Advocate for the Applicant refers to 22-R which contains the name of the Applicant and Respondent No.4. According to him, the same was not placed before the C.S.B. as well as Hon'ble Chief Minister and it is not signed by the responsible officer. He therefore contends that this has been done by the Department to favour Respondent No.4. He therefore pleads that the request made by co-employee cannot be considered as administrative exigency to effect the transfer to displace him from the place where he was working. In this connection, he has cited the judgment of Hon'ble High Court in W.P.(L) No.1940 of 2011, S.B. Bhagwat vs. State of Maharashtra and others, decided on 24.01.2012, and relevant portion of the same is as under :-

“The matter of transfers has been brought within a regulatory framework laid down in the statute enacted by the State Legislature. Section 4(5) permits as an exceptional situation, a transfer to be carried out, notwithstanding anything contained in section 3 or in section 4. The exceptional power must be exercised strictly in accordance with sub-section (5) of section (4). The petitioner had not completed three years in the erstwhile post at Sangli District, he was transferred as a special case by the third respondent in terms of the directions of the respondent No.2. Merely calling a case a special case does not constitute sufficient reason. The rationale why the legislature has required that reasons be recorded in writing for transferring an employee even before completing his tenure is to bring objectivity and transparency to the process of transfers. The fourth respondent was sought to be transferred from Nashik to Sangli at his request. The petitioner is sought to be displaced. The manner in which the power has been exercised leaves no manner of

doubt that the exercise was carried out not in public interest, but with a view to accommodate the request of the fourth respondent. The mandatory statutory provision of recording reasons in writing for justifying recourse to the exceptional power conferred by sub-section (5) of section 4 has not been fulfilled. There is a clear breach of the statutory provisions. The petition is, therefore, allowed, by quashing and setting aside the impugned order dated 29th August, 2011 (Paras 8 to 11).

He therefore contends that the impugned order may be quashed.

5. Learned Advocate for Respondent No.4, Shri M.D. Lonkar opposes the contention made by the Applicant on following grounds, through his averment in paragraph 3 of page 24 which reads as below :-

“3. At the very outset I submit that the Petitioner has not approached this Hon’ble Tribunal with clean hands and therefore the Original Application is liable to be dismissed without providing any further opportunity to the Petitioner.”

6. Learned Advocate for Respondent No.4, Shri M.D. Lonkar further points out that Respondent No.4 was brought in to take care of the patients since the Applicant did not join at the place of his posting. Paragraph 8 at page 27 of his averments reads as under:-

“8. I submit that subsequently Government issued order dated 25.06.2015 by which the Petitioner was posted in Mumbai and I came to be transferred to Aurangabad. I submit that however as the Petitioner never joined at Aurangabad there was an issue of obtaining relieving order so as to enable the Petitioner to report for duties at Mumbai. I submit that thereafter the Government issued order dated 4.11.2015 cancelling order dated 25.06.2015 and accorded regular posting in favour of the present Petitioner. Although the Petitioner did not report for duties from 9.10.2014 and remained absent, however the said period is treated as extraordinary leave without pay. Subsequently Corrigendum came to be issued on 10.11.2015 correcting the date of appointment of the Petitioner from 1.07.2014 to 15.09.2014. Hereto annexed and marked at EXHIBIT-A-3 is the copy of the order dated 4.11.2015 and EXHIBIT –A-4 is the Corrigendum dated 10.11.2015.”

7. Learned Advocate for Respondent No.4 contends that there was no occasion to consider the name of Respondent No.4 and the Petitioner by the CSB. But the Hon’ble Minister made necessary changes in his capacity and affected the same. In this connection he refers to the noting at page 22(Q), which states that the Hon’ble Minister has proposed this change and it was approved by the Hon’ble Chief Minister.

8. Learned Advocate contends that the order is free from malafides, but is issued in the interest of public health / public interest. He therefore mentions there should be no interference from this Tribunal.

9. Learned P.O. for the Respondents Ms. S. Suryawanshi opposes the prayer on following grounds as mentioned in the reply in affidavit by the Respondents 1 to 3 at paragraph 4(i), page 56 :-

*“4(i) Ordinarily, orders of transfer are made in the exercise of administrative authority to meet the exigencies of service and in public interest. It is submitted that if found that the applicant’s attendance and performance is very poor. Applicant’s biometric attendance is annexed hereto and marked as **EXHIBIT “R-1”** and **EXHIBIT “R-2”**. The applicant is attaining the office very late and at the time of exigencies of the services, applicant is not available. Whereas the Respondent No.4 performing his duty very sincerely and honestly. The section of Cardio Vascular Thoracic Surgery is very important and exigencies in the view of hospital administration as well as patients case. The Respondent No.4 is performing his duties late night and he handled very critical cases skillfully. In view of smooth hospital administration and exigencies of patients, the services of Respondent No.4 is very important.”*

10. In support of the above, learned P.O. refers to Exhibit-R-1, where the Applicant has been shown as absent in the status column. Reply in affidavit paragraph 7 page 57 reads as under :-

“7. With reference of Para 6.1, I say as follows : The applicant was appointed on the post of Professor vide Govt. order dated 15-09-2014 at Govt. Medical College, Aurangabad vide recommendation letter dated 28-05-2014 of M.P.S.C. According to appointment order dated 15/09/2014 J.J. Medical College, Mumbai had relieved him on 09-10-2014 (A.N) to join at Govt. Medical College, Aurangabad. But Applicant never joined on this post. He remained absent from 10-10-2014 to 07-11-2015 (B.N.)

Before that the applicant was working at Grant Govt. Medical College Mumbai as follows :-

Sr. No.	Post held	Period
1.	Lecturer (Locam)	17/07/2003 to 13/11/2003
2.	Lecturer (DSB)	20/11/2003 to 27/03/2008 (by giving 364 days order)
3.	Lecturer (MPSC)	28/03/2008 to 07/05/2009
4.	Associate Professor (MPSC)	08/05/2009 to 08/10/2014

7(i) Thus, applicant has been posted and worked at Grant Govt. Medical College Mumbai since 2003 on Temporary basis and since 28/03/2008 in continuity through M.P.S.C. It is misleading to state that applicant was first time posted in permanent position at G.G.M.C., Mumbai.”

11. Learned P.O. for the Respondents further refers to paragraph 16, page 62 of the affidavit which is as under :-

“16. With reference to Ground 7.2 I say as follows : The applicant was posted and working at Grant Govt. Medical College Mumbai as follows :

<i>Sr. No.</i>	<i>Post held</i>	<i>Period</i>
1.	<i>Lecturer (Locam)</i>	<i>17/07/2003 to 13/11/2003</i>
2.	<i>Lecturer (DSB)</i>	<i>20/11/2003 to 27/03/2008 (by giving 364-364 days order)</i>
3.	<i>Lecturer (MPSC)</i>	<i>28/03/2008 to 07/05/2009</i>
4.	<i>Associate Professor (MPSC) (Group A)</i>	<i>08/05/2009 to 08/10/2014 (Extra ordinary leave from 09/10/2014 to 07/11/2015)</i>
5.	<i>Professor (MPSC) (Group A)</i>	<i>08/11/2015 upto date of relieving i.e. 09/06/2017</i>

“16 (i) He is in continuously regular posted at various positions at Grant Govt. Medical College, Mumbai since 2008. Thereby, he is working for more than 9 years without break or transfer at Grant Govt. Medical College, Mumbai. Hence the 3 years tenure provision of ROTA act is not violated.”

12. Learned P.O. for the Respondents contends that even though the Applicant was transferred to Aurangabad in 2014 he did not join there. Learned P.O. refers to page no. 22-D which mentions the proposal for transfer of Applicant and Hon’ble Minister and Hon’ble Chief Minister have approved the same. She states that the changes referred above have been proposed by the Hon’ble Minister and approved by Hon’ble Chief Minister. The same is confirmed from the noting on page 22-Q which states that the Hon’ble Minister and the Hon’ble Chief Minister have approved the changes proposed at 17/T and 19/T.V.

13. In this connection learned P.O. relies on the judgment by Hon. High Court at Bombay in W.P.(L) NO.1428, 1429 and 1430 of 2007 decided on 23.08.2007 page 73, Exhibit R-3, which reads as under :

“Ordinarily, orders of transfer are made in the exercise of administrative authority to meet the exigencies of service and in public interest. How the Administration has to run its affairs is not a matter which squarely falls in the judicial domain. Unless the orders of transfer were in conflict with Rules and were made for ulterior motives or in patent arbitrary exercise of powers, the Court would decline to interfere in such matter. The transfers could be due to exigencies of service or due to administrative reasons. The petitioners in the present case have failed to demonstrate as to how the order of transfer has been passed for collateral purposes or is a patent arbitrary exercise of power. The authorities concerned have made a class of persons against

whom disciplinary action is contemplated. If the authorities have taken a view that they need to transfer the Officers upon whom show cause notices were served and disciplinary action is contemplated that decision cannot be termed as arbitrary or mala fide. It is a decision obviously taken for administrative reasons and there is no occasion for the Court to go behind the order and examine, like an Appellate Authority, whether or not such order needs to be passed. The discretion is vested in the authorities to make an exception of tenure of two and three years wherever special circumstances exist. Special circumstances should be understood in the concept of service jurisprudence and not in its literal sense. Conditions of service make transfer as a necessary incidence of service. The Rules give protection to an employee to stay at the place of posting for three years but this is subject to the exception that, where in the wisdom of the authority concerned, he should, for administrative and exceptional circumstances, even be transferred during that period. In the present case there is no fault in exercise of such power. There are no patent mala fides or arbitrariness in exercise of power by the respondents."

14. Respondents 1 and 2 in their affidavit at Paragraph No.11(i), (ii) (iii) and 12(i) state as under :-

"11. With reference to Para 6.5, I say as follows: - Transfer order under reference though issued on request of Respondent No.4, it also has administrative reasons.

11(i) Respondent No.4 is 63 years old and completed 34 years of Govt. Service. He is cardiac patient having undergone Angioplasty for his ischaemic Heart Diseases at Sir J.J. Group of Hospital, Mumbai. He is also operated for major cervical spine injury at Sir J.J. Hospital Mumbai. Respondent No.4 is under treatment at Sir J.J. Hospital, Mumbai for above. Respondent's family is settled in Mumbai with working members.

11(ii) Due to his age, retirement, medical background and family reasons Respondent No.4 has requested his last posting by transfer to Grant Govt. Medical College, Mumbai on 01-03-2017.

11(iii) I say that as per the provisions contained in section 4(4)(ii) & 5 of the Maharashtra Government Servants Regulations of Transfers and Prevention of Delay in official Duties Act, 2005, the Respondent No.1 vide their order dated 07.06.2017 transferred the Respondent No.4 on his request as well as the applicant on administrative ground.

12. With reference to Para 6.6, I say as follows: Respondent No.4 is having experience in C.V.T.S. superspeciality of over 35 years. He is Post graduate teacher for 27 years and has held various faculty and advisory position at Mumbai University, Maharashtra University of Health Sciences and other teaching organization.

12(i) it is wrong to state that applicant is only Professor available and he is indispensable or cannot be replaced. Respondent No.4 is much higher in experience, performance and teaching as well as Research activities. He is actively involved in community medical programme."

15. Learned P.O. for the Respondents, therefore states that the order has been issued without any mala fides and is without going out of the way. She therefore states that O.A. should be dismissed.

16. Learned Advocate for the Applicant contends that the Applicant has joined as Professor on 08.11.2015 as mentioned by Respondent No.1 in paragraph 16 at page 62, quoted at paragraph 11 of the foregoing paragraph. He therefore reiterates it is mid-term and mid-tenure transfer.

17. Learned Advocate for the Applicant refers to Exhibit R-2 at page 72 which shows that the Applicant had completed 41 operations. He further mentions that he has done 198 operations as in charge, which was allotted to him by Respondent No.4. He further states that the biometric record quoted by Respondent no.1 shows him as absent for 30 days. However in the manual register at Exhibit G, from page 95 onwards it shows his presence on all days. He therefore contends that there is no proof to indicate that his performance was poor. No memorandum was however issued against him. All this indicates that it is not performance based transfer, but to accommodate the request made by Respondent No.4.

18. In this connection learned Advocate for the Applicant relies on the judgment given by the Tribunal in judgment O.A.No.770 of 2017, Shri S.M. Saundane Versus State of Maharashtra, dated 09.11.2017 from page name 201 to 205 of the compilation. He also refers to the circulation issued by the Chief Secretary, page 206 to 209 directing all the concerned to comply with the directions in the case of TSR Subramanian and other Versus Union of India and others, decided on October 31, 2013 by Apex Court at page 213 of compilation.

19. Learned Advocate for the Applicant mentions that the judgment relied upon at page 73 of the Hon'ble High Court in case of V.B. Gadekar Versus Maharashtra Housing and Area Development Authority and another, W.P. (L) Nos.1428, 1429 and 1430 of 2007 decided on 23-8-2007, is not relevant as the facts are different, in the said case the special circumstances existed, which is not the case in the present O.A. He therefore pleads that the O.A. should be allowed.

20. In view of the foregoing the issues for consideration before this Tribunal are as under :-

- (a) Whether the Applicant has been transferred mid-term and mid-tenure?
- (b) Whether the Applicant has been transferred to accommodate Respondent No.4?
- (c) Whether the impugned transfer order is issued with approval of the Competent Authority?
- (d) Whether the impugned order is issued illegally and with mala fides intentions?

21. Findings :-

(a) The record produced by the Respondents confirms that since 2003 the Applicant is working at Mumbai in different ranks. His last assignment was as Professor from 08.11.2015. All these earlier assignments have been at Grant Government Medical College, Mumbai and he is working there for more than nine years in a regular manner. Therefore, calculating his assignments after becoming Professor i.e. from 08.11.2015 is misleading. In view of his uninterrupted tenure at Mumbai for over nine years, the impugned transfer cannot be considered as mid-term/mid-tenure. I do not propose to go into the allegations that the Petitioner manipulated the powers that be in his favour and remained at Mumbai continuously. But the fact is he remained at Mumbai all along and continues to resist transfer out even though, it is part of the government assignment.

(b) Respondent No.4 is due to retire on superannuation by end of October, 2018. He was working at Aurangabad from 02.07.2015 to 09.06.2017. As no responsible medical Officer was available to handle this particular department in J.J. Group of Hospitals, Mumbai, Respondent No.4 while working at Aurangabad was also directed to work additionally at Mumbai. This is justified by him by completing large no of operations and promoting public health.

In view of his impending retirement, Respondent No.4 submitted his representation on 01.03.2017 stating that he has undergone angioplasty and operated for major cervical spine injury. He therefore requested for posting at Mumbai. As the Applicant had completed his tenure, the competent authority has justifiably transferred him for public interest.

(c) The available record shows that the approval for transfer of the applicant is available on page 17/T and 19/T.V. As seen from page 22-D, the proposal has approval of Hon'ble Chief Minister. Thus the proposal by the competent authority is issued after approval of the Hon'ble Chief Minister.

(d) As can be seen from the above, the competent authority with the approval of the Hon'ble Chief Minister has considered the proposal to transfer the applicant and post Respondent No.4 in his place. Moreover as per record the Respondent No.4 is retiring by October 2018 and is having certain health problems being treated at Mumbai. Posting him at Mumbai when he is on the verge of retirement and transferring the applicant, who has not left Mumbai even once out of Mumbai since 2003, cannot be construed as order with mala fides.

(e) I have gone through the judgments cited by the Petitioner, but find these are not relevant in the present case as discussed above.

22. I therefore, do not find any merit in the O.A. for the above mentioned reasons and I am of the opinion that judicial interference in the impugned order is not warranted. Hence, Original Application is dismissed without any costs.

SD/-

**(P.N. Dixit)
Member (A)**

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