

**IN THE MAHARASHTRA ADMINISTRATIVE TRIBUNAL
MUMBAI**

ORIGINAL APPLICATION NO.1038 OF 2018

DISTRICT : MUMBAI

Shri Sanjay Dinkarrao Mankar.)
Age : 49 yrs., Occu.: Service, Working as)
Deputy Director Boilers, Solapur.)...**Applicant**

Versus

1. The State of Maharashtra.)
Through Principal Secretary (Labour),)
Industries, Energy and Labour Dept.,)
Mantralaya, Mumbai 400 032.)

2. Shri Dhaval P. Antapurkar.)
Age : 50 Yrs., Working as Director of)
Steam Boilers, having office at Kamgar)
Bhavan, Bandra (E), Bandra-Kurla)
Complex, Mumbai – 400 051.)...**Respondents**

Mr. N.P. Dalvi, Advocate for Applicant.

Ms. S.P. manchekar, Chief Presenting Officer for Respondent No.1.

Mr. M.M. Sudame with Mr. Piyush Pande, Advocates for Respondent No.2.

CORAM : A.P. KURHEKAR, MEMBER-J

DATE : 29.03.2019

JUDGMENT

1. The Applicant has challenged the impugned transfer order dated 20.11.2018 whereby his posting on promotion has been changed from Nagpur to

Solapur 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 was serving as Deputy Director Boilers (Group 'A') at Solapur. He was promoted to the post of Joint Director and was asked to submit options for the posting. Accordingly, he had given option giving preference as Joint Director, Nagpur. Accordingly, the matter was placed before the Civil Services Board (CSB) wherein he was proposed to be posted as Joint Director, Solapur. However, the Government in its wisdom accepted the option of the Applicant of Nagpur and accorded sanction for his posting as Joint Director, Nagpur. Consequently, the Government had issued transfer order dated 29.09.2018. Accordingly, the Applicant had submitted joining report to Respondent No.2 (Director of Steam Boilers) stating that he had assumed the charge of Joint Director, Nagpur on 05.10.2018 and requested to assign the charge of his post of Deputy Director, Solapur to other. However, the Respondent No.2 by letter dated 5th October, 2018 informed the Applicant that taking the charge of the post of Joint Director, Nagpur is not in accordance to Rules. He, therefore, reprimanded the Applicant for taking over the charge of Joint Director, Nagpur directly and asked him to continue on his post at Solapur and to submit explanation for breach of Rules. The Applicant submitted his explanation on 6th October, 2018. The Respondent No.2, however, by letter dated 9th October, 2018 refused to grant *ex-post facto* sanction for taking over the charge of the post of Joint Director, Nagpur.

3. On the above background, the Applicant contends that the Respondent No.2 was hurt and nurtured grudge against him. He further contends that the Respondent No.2 played pivotal role by utilizing his patronage and mislead the Government for changing his posting from Nagpur to Solapur. The Respondent

No.2 was holding additional charge of 3 posts i.e. Joint Director, Nagpur, Joint Director, Mumbai and Director of Boilers and as such, he warned to wield power and control over the entire State, and therefore, he did not like the act of taking charge of the Applicant on the post of Joint Director, Nagpur. It is on his influence, the Respondent No.1 – State of Maharashtra issued transfer order dated 20.11.2018 changing his posting of Nagpur and he was posted as Joint Director, Solapur which is under challenge in the present O.A. The Applicant contends that the impugned transfer order dated 20.11.2018 suffers from malice as well as in contravention of Section 4(4)(ii) and 4(5) 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”) as no reasons much less justifiable are recorded for the change of posting within a period of one and half month. He, therefore, prayed to set aside the impugned order dated 20.11.2018 and to restore the order dated 29.09.2018 whereby he was posted at Nagpur.

4. The Respondent No.1 resisted the application by filing Affidavit-in-reply (Page Nos.36 to 46 of Paper Book). The Respondent No.2 had also filed Affidavit-in-reply (Page Nos.20 to 35 of P.B.). They have raised common defence and denied the allegation made by the Applicant. The factum of issuance of order dated 29.09.2018 and subsequent order dated 20.11.2018 are not in dispute. The Respondent sought to contend that after issuance of order dated 29.09.2018, the Applicant was required to wait till he is relieved from his post of Deputy Director, Solapur and the charge was not to be handed over unilaterally. However, the Applicant had unilaterally left the charge of the post held by him i.e. Deputy Director, Solapur and straightaway tried to join as Joint Director, Nagpur without waiting for relieving order which was to be issued by Respondent No.2, and therefore, this act of Respondent is in breach of Rule 31 of Maharashtra Civil Services (General Conditions of Services) Rule, 1981 (hereinafter referred to as “Rules 1981”). Therefore, the Respondent No.2

rightly called his explanation and rejected his request to regularize the act of taking over the charge of the post of Joint Director, Nagpur. The Respondent No.2, therefore, denied that he had any grudge or malice against the Applicant and further denied to have played any role in subsequent change of posting from Nagpur to Solapur.

5. The Respondent No.1 sought to justify the impugned order dated 20.11.2018 for changing the posting of Applicant from Nagpur to Solapur contending that in 2017 while the Applicant was posted at Nagpur, there were complaints about his functioning. When he was promoted to the post of Joint Director and the matter was placed before the CSB for posting in view of earlier complaints against the Applicant, the CSB proposed to post him at Solapur, but Hon'ble Minister ordered to post him at Nagpur and the same was approved by Hon'ble Chief Minister. Accordingly, the transfer order dated 29.09.2018 was issued. Thereafter, having found that the Applicant had tried to assume the charge of Joint Director, Nagpur in breach of Rule 31 of 'Rules 1981', the matter was again placed before the Hon'ble Minister who was pleased to post the Applicant as Joint Director, Solapur and the same has been approved by Hon'ble Chief Minister. Consequently, the Government had issued fresh order dated 20.11.2018 posting the Applicant at Solapur in place of Nagpur. According to Respondent No.1, the change was necessitated in view of complaints against the Applicant during his earlier tenure at Nagpur. The Respondent No.1, therefore, denied that the impugned transfer order suffers from any malice or illegality. The Respondents thus sought to justify the impugned transfer order contending that it is in consonance with the provisions of 'Transfer Act 2005' and prayed to dismiss the application.

6. Shri N.P. Dalvi, learned Advocate for the Applicant strenuously urged that, once as per the option given by the Applicant he was posted on promotion at Nagpur by order dated 29.09.2018, there was absolutely no reason to change the

posting by impugned order dated 20.11.2018 by posting the Applicant at Solapur. He emphasized that, it is only because of the grudge and malice nurtured by Respondent No.2 having hurt and it is he who played pivotal role in getting the order changed. He has further pointed out that the ground raised by the Government that because of alleged complaint, the posting was required to be changed to Solapur was already considered and turned down by Hon'ble Minister as well as Hon'ble Chief Minister while posting him at Nagpur, and therefore, the said ground is non-existent. He further emphasized that absolutely no reasons are recorded while changing the posting, and therefore, the order is in contravention of Section 4(4)(ii) and 4(5) of 'Transfer Act 2005' and also suffers from malice. On this line of submission, he prayed to allow the application.

7. Per contra, Ms. S.P. Manchekar, learned Chief Presenting Officer sought to contend that the Applicant tried to assume the charge of the post of Joint Director, Nagpur without following the procedure laid down in Rules 29 and 31 of 'Rules 1981' and the act of Applicant to relinquish the charge of Solapur post unilaterally amount to misconduct. She further sought to contend that during the earlier tenure of the Applicant, there were complaints against him, and therefore, the Government thought it appropriate to change the order dated 29.09.2018 by issuing fresh order dated 20.11.2018 posting the Applicant at Solapur and there is no contravention of the provisions of 'Transfer Act 2005'.

8. Whereas, Shri Sudame, learned Advocate for Respondent No.2 urged that the allegation made by the Applicant against Respondent no.2 about malice are totally unfounded and reiterated the submission advanced by learned C.P.O. He canvassed that the Respondent No.2 had no role to change the posting of the Applicant. To drive home his point, he sought to place reliance on the Judgment of Hon'ble Supreme Court as follows :

- “(i) **1981 AIR (SC) 1577 (Shanti Kumari Vs. Regional Deputy Director)** wherein it has been held that where the transfer of Government servant has been effected due to exigencies of service or due to administrative reason, the Court should not interfere.
- (ii) **1993 AIR (SCW) 520 (Rajendra Roy Vs. Union of India)** wherein it has been held that, unless such order is *malafide* or in violation of the Rules of service or guidelines for transfer without any proper justification, the Court or the Tribunal should not interfere with the order of transfer. In a transferable post, an order of transfer is normal consequence and personal difficulties are matters for consideration of the department. In an appropriate case, it is possible to draw reasonable inference of malafide action from the pleadings and antecedent facts and circumstances. But for such inference there must be firm foundation of facts pleaded and established. Such inference cannot be drawn on the basis of insinuation and vague suggestions.
- (iii) **2001 AIR (SCW) 3548 (national Hydroelectric Power Corporation Ltd. Vs. Shri Bhavan & Anr.)** wherein in Para No.5, the Hon’ble Supreme Court held as follows :

“5. On a careful consideration of the submissions of the learned counsel on either side and the relevant rules to which our attention has been invited to, we are of the view that the High Court was not justified in interfering with the impugned orders of transfer. It is by now well-settled and often reiterated by the Court that no Government servant or employee of public undertaking has any legal right to be posted forever at any one particular place since transfer of a particular employee appointed to the class or category of transferable posts from one place to other is not only an incident, but a condition of service, necessary too in public interest and efficiency in the public administration. Unless an order of transfer is shown to be an outcome of mala fide exercise of power or stated to be in violation of statutory provisions prohibiting any such transfer, the courts of the tribunals cannot interfere with such orders as a matter of routine as though they are the appellate authorities

substituting their own decision for that of the management, as against such order passed in the interest of administrative exigencies of the service concerned.”

(iv) **2009(9) SCC 337 (Airports Authority of India Vs. Rajeev Ratan Pandey & Ors.)** wherein there was no whisper of malafide against the authority and the said allegation was found not convincing and on that ground, the challenge to the transfer was rejected.

(v) **(2004) 11 SCC 402 (State of U.P. vs. Gobardhan Lal)** wherein Hon'ble Supreme Court held as follows :

“Allegations of mala-fides must inspire confidence of the Court and ought not to be entertained on the mere asking of it or on consideration borne out of conjectures or surmises and except for strong and convincing reasons, no interference would ordinarily be made with an order of transfer. That the burden of proving mala-fides is on a person leveling such allegations and the burden is heavy, admits of no legal ambiguity. Mere assertion or bald statement is not enough to discharge the heavy burden that the law imposes upon the person leveling allegations of mala-fides; it must be supported by requisite materials. In the present case, as noticed above, at the threshold, no allegations of mala-fides have been pleaded in the writ petition. It is only by way of a supplementary affidavit that allegations of mala-fides have been put forth by the Respondent No.1 but even such allegations are not supported by any material whatsoever. In a matter such as the present one where plea of mala-fides is not made in the writ petition which too is not supported by any convincing and cogent material, the plea of mala-fides hardly deserved acceptance, prima facie, justifying stay of operation of a transfer order.”

(vi) **(2011) AIR (SCW) 5972 ((Registrar General High Court of Judicature at Madras Vs. R. Perachi & Ors.))**. This matter relates to the transfer of Judicial Officer by the order of Hon'ble Chief Justice. The transfer order was challenged by Judicial Officer on the ground that it is punitive. The Judicial officer was transferred on the basis of report of Vigilance Department. In fact situation, the Hon'ble Court upheld the order of transfer.

9. Thus, the conspectus of the aforesaid decisions is that the Government servant holding a transferable post has no vested right to remain posted at one place and Courts or Tribunals should not interfere with the transfer orders which are made in public interest and for administrative reasons unless the transfer orders are made in violation of any statutory rule or on the ground of *malafides*. It is also well settled that it is for the appropriate authority to decide who should be transferred at particular place and unless the transfer order is vitiated by *malafides* or is made in violation of any statutory provisions, the Court or Tribunal should not interfere with it.

10. Needless to mention that, every decision is the outcome of assessment of facts in totality *vis-à-vis* legal principles applicable to the facts. Therefore, even single additional fact or variance in the factual situation may make a lot of difference in the precedential value of a decision. It has said long ago that a case is a authority for what it actually decides and not what logically follows from it. This being the settled position of law, the present matter needs to be decided on the basis of facts emerging on record in the light of provisions of 'Transfer Act 2005'.

10. In view of pleadings and submissions advanced at the Bar, the following factors emerges uncontroverted.

- (a) As per the first option given by the Applicant, he was posted at Nagpur on promotion as Joint Director vide order dated 29.09.2018.
- (b) The Applicant proceeded to assume charge of the post of Joint Director, Nagpur and submitted charge report by e-mail to Respondent No.2 on 05.10.2018.
- (c) The Respondent No.2 by his letter dated 05.10.2018 reprimanded the Applicant for leaving charge of Solapur without his approval and

for assuming the charge of Joint Director, Nagpur without obtaining his approval and directed him to resume at Solapur by letter dated 05.10.2018.

- (d) The Applicant had submitted his explanation by letter dated 06.10.2018 and requested Respondent No.2 to grant *ex-post facto* sanction to his letter dated 05.10.2018.
- (e) The Respondent No.2 rejected the request of the Applicant for *ex-post facto* sanction by letter dated 09.10.2018.
- (f) The Respondent No.1 cancelled earlier posting order dated 29.09.2018 and posted the Applicant at Solapur by impugned transfer order dated 20.11.2018.

11. Needless to mention that, before enforcement of 'Transfer Act 2005', subject of transfer was exclusively within the domain of executive to be considered in the light of judicial pronouncement and administrative discretion. However, after enforcement of 'Transfer Act 2005', the transfers are now strictly regulated and those are not left to the absolute executive discretion of the Government. In view of various Judgments passed by this Tribunal as well as by Hon'ble High Court observing patent violation of the mandatory provisions of 'Transfer Act 2005', the Government had issued various Circulars directing the authorities to observe the provisions of 'Transfer Act 2005' while effecting the transfers or Government servants. Suffice to say, after the commencement of 'Transfer Act 2005', the transfers will have to be in strict compliance of the Act and where the same is found in violation of the provisions of Act or suffers from malice or punitive, the same is liable to be struck down. Whether the transfer order is questionable and liable to be set aside is purely the question of fact, which differs from case to case, and therefore, one is required to assess the factual position to see whether the impugned order is sustainable in law and fact.

12. Bearing in mind the aforesaid settled legal position and the principles of law enunciated in the various Judgments of Hon'ble High Court referred to above, now the material question comes whether the impugned order in view of allegations of malice made by the Applicant, the subsequent change of posting is in compliance of provisions of 'Transfer Act 2005' and the answer is in negative.

13. At the very outset, it is necessary to mention that the Applicant has made specific allegation of malice and arbitrariness in the pleadings. He has made a specific and categorical pleading that the Respondent No.2 wanted to detain the charge of 3 posts and has played pivotal role in effecting the change of posting by misleading the Government. This specific averment needs to be considered in the context of correspondence made in between Applicant and Respondent No.2 when Applicant assumed to take charge of post at Nagpur. It is very much clear from correspondence exchanged between them that the Respondent No.2 was annoyed because of act of Applicant assuming charge at Nagpur without waiting for the orders from Respondent No.2. Though the Applicant has requested to grant *ex-post facto* sanction, the Respondent No.2 rejected his request and reprimanded him for leaving the post of Solapur unilaterally. The Respondent No.2 also called the explanation of the Applicant which he had submitted. As such, this is not a case where the allegations of *mala-fides* are unfounded or vague as tried to contend by learned Advocate for Respondent No.2.

14. The important question would be what made the Respondent No.1 to change the posting of the Applicant from Nagpur to Solapur. The learned C.P.O. tried to contend that during the earlier tenure of the Applicant at Nagpur, there were some complaints of high-handedness against him which was not brought to the notice of concerned authority, and therefore, later Respondent No.1 modified the order of posting the Applicant at Solapur. The submission advanced by learned CPO is fallacious and contrary to the facts on record.

15. Material to note that, at the time of issuance of order of posting on promotion, the CSB of which the Respondent No.2 was one of the member proposed the posting of the Applicant at Solapur due to alleged complaints during the earlier tenure of the Applicant at Nagpur as seen from the minutes of CSB. The note was accordingly placed before the Hon'ble Minister with the special note, recommendation of Secretary. The Applicant has filed the copy of note dated 20.03.2018 which he obtained under R.T.I. The said note was prepared in pursuance of report dated 23.02.2018 submitted by Respondent No.2 to the Government in respect of alleged complaints of the Applicant. It seems that, in view of some complaints, the report of Respondent No.2 was called and it is in pursuance of it, the note was placed before the Secretary. It appears that the enquiry was made by Shri Patil, Joint Director on the instructions given by Respondent No.2. The report submitted by Shri Patil dated 16.11.2017 is at Page No.59 of P.B. The sum and substance of the report submitted by Shri Patil is that the Applicant speaks arrogantly and gives insulting treatment to the Officers of factories. The explanation of the Applicant was also taken wherein he stated that those complaints were made only to obstruct his promotion. As such, those complaints seems to be about behavior of the Applicant. Material to note that when the said note was placed before the Secretary, he made the following endorsement.

“सदर प्रकरणी निनावी तक्रारी प्राप्त झाल्या आहेत. त्यामुळे साप्रविच्या दि. २५/०२/२०१५ रोजीच्या परिपत्रकातील तरतुदीनुसार निनावी पत्रांवर अधिकार कार्यवाहीची आवश्यकता नाही. तसेच पृ.३१/पविवरील पत्रानावे श्री निवास कॅटरिंगचे श्री. जितेंद्र ठाकूर यांनी श्री. मानकर यांनी बेकायदा वॉचमनर्स वरतीच कार्यवाही केली असून श्री. मानकर यांचेविरोधात तक्रार करण्यासाठीच संचालनालयासाठीच कंत्राटी तत्वावर कंपनीतील बायकांची कामे करणा-या कंपनीच्या सुपरवायझरने श्री ठाकूर यांना श्री. मानकर यांचेविरोधात तक्रार करण्याचा आग्रह केला होता व वारंवार दबाव टाकत होता असे नमूद केले आहे. तरीही श्री. मानकर हे योग्य पध्दीतीने काम करित असल्याने त्यांची तक्रार केली नाही व तसेच मा. प्रधान सचिवांना घडलेल्या प्रकरणाबाबत कळविले आहे.

सबब सदर प्रकरणी निनावी तक्रारी व श्री. मानकर हे उत्तम काम करित असल्याबाबत अशा दोन्ही स्वरूपाची पत्रे प्राप्त झाली आहेत. तसेच प्रभारी संचालकांनी काही गंभीर तक्रारीच्या अनुषंगाने श्री. मानकर यांना समज दिले असल्याचे कळविले आहे. तरी सदर प्रकरणी अधिक कार्यवाहीची आवश्यकता नाही असे वाटते. तरी आदेशार्थ सादर.’’

16. With the above note, in view of proposal of CSB when the matter was placed with the recommendation of CSB for posting of the Applicant at Solapur, the Hon'ble Minister turned down the proposal of CSB for posting the Applicant at Solapur and ordered for giving him posting as Joint Director, Nagpur. It was then approved by the Hon'ble Chief Minister. This being the position, it cannot be said that the alleged complaints were not part of record while giving posting to the Applicant at Nagpur. It is crystal clear that, in view of note of Secretary, there was no necessity to go further about the complaints and Hon'ble Minister as well as Hon'ble Chief Minister ordered for posting the Applicant at Nagpur. Therefore, it cannot be said that the complaints were not considered by the concerned authorities. Once those complaints which are about the behavior only were considered and found not warranting any action and by conscious decision, the posting was given to Nagpur, it is incomprehensible to say that those complaints were the ground to change the posting subsequently. This is not a case where some new material was brought on record for change of posting. Therefore, the submission advanced by the learned C.P.O. that the complaints were the reason for change of posting has to be rejected.

17. Now, let us see the event which leads to the change of posting. In this behalf, the perusal of record reveals that because of act of Applicant to assume charge of Joint Director, Nagpur directly without issuance of relieving order by Respondent No.2, note was again placed before the Hon'ble Minister for direction to take necessary action for the alleged misconduct of the Applicant. Thus, the note dated 06.10.2018 was placed by Desk Officer for seeking direction for the action to be taken about the alleged misconduct of the Applicant for relieving the post of Solapur unilaterally and taking over the charge at Nagpur without prior approval of Respondent No.2. On the said note, however, the Hon'ble Minister passed two line cryptic order as follows :

“श्री. सं.दि. मानकर यांना सहसंचालक, सोलापुर या पदावर पदस्थापना देण्यास मान्यता असावी.”

18. The Hon'ble Chief Minister approved the endorsement made by the Hon'ble Minister. Thus, the note placed by Desk Officer was pertaining to proposed disciplinary action for alleged misconduct, but instead of passing further orders in that regard, the order of transfer to Solapur has been passed. There is absolutely no reason recorded in the order for change in posting from Nagpur to Solapur. The order passed by Hon'ble Minister does not reflect that the posting was changed due to complaints. Had it been the reason, it would have reflected in the order, but it is not so.

19. The contention of learned C.P.O. that the impugned order dated 20.11.2018 is about posting on promotion only, and therefore, it does not require recording of reasons is misconceived. Once the Applicant was given posting at Nagpur on consideration of entire material on record, there has to be very cogent and strong reasons to modify earlier order.

20. As state above, the note placed by Desk Officer was for soliciting direction about the alleged misconduct of the Applicant for taking charge directly and that be so, at the most, it may invite the disciplinary action. However, instead of taking disciplinary action, the Applicant was transferred from Nagpur to Solapur apparently by way of punishment, which is not permissible in law.

21. At this juncture, it would be apposite to reproduce the observation made by the Hon'ble Supreme Court in **(2009) 2 SCC 592 (Somesh Tiwari Vs. Union of India & Ors.)** which is 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."

22. As cost of repetition, it is again necessary to highlight that, earlier complaints were already considered by the Secretary as well as Hon'ble Minister and being highest authority, the Hon'ble Chief Minister and on consideration of the same, the Applicant was posted at Nagpur and the said decision was conscious decision. This being the position, the ground of alleged misconduct because of relieving the post of Solapur and haste to assume the charge of Nagpur, could have been used at the most for disciplinary action and not for transfer. Therefore, the principle enunciated in **Somesh Tiwari's** case (cited supra) is clearly attracted. There are reasons to say that the Respondent No.2 was not happy with the Applicant and was instrumental in getting the posting and transfer order of the Applicant changed. There has to be consistency in the administrative decision and once the conscious decision is taken, it cannot be changed unless very strong and convincing reasons or material surfaced later otherwise such change in administrative decision has effect of prejudice to the right of Government servant, once accrued in his favour by way of posting at particular place of posting. True, the transfer is an incidence of Government service, but where it is by way of punishment or punitive, then it must be struck down, as happened in the present matter.

23. The totality of aforesaid discussion leads me to conclude that the impugned order dated 20.11.2018 is not sustainable in law and facts and deserves to be quashed. Hence, the following order.

ORDER

- (A) The Original Application is allowed.
- (B) The impugned order dated 20.11.2018 is hereby quashed and set aside.
- (C) The Applicant be posted in terms of order dated 29.09.2018 within two weeks from today.
- (D) No order as to costs.

Sd/-
(A.P. KURHEKAR)
Member-J

Mumbai

Date : 29.03.2019

Dictation taken by :

S.K. Wamanse.

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