

**IN THE MAHARASHTRA ADMINISTRATIVE TRIBUNAL
MUMBAI**

ORIGINAL APPLICATION NO.1070 OF 2018

DISTRICT : PUNE

Shri Vijay Dasharath Kakade.)
Age : 37 Yrs., Working as Police Naik,)
Residing at Bldg.No.K-11, Room No.13,)
Gokhale Nagar Police Line, Pune – 411 016.)...**Applicant**

Versus

1. The State of Maharashtra.)
Through Addl. Chief Secretary,)
Home Department, Mantralaya,)
Mumbai – 400 032.)
2. The Commissioner of Police.)
Pune City, Camp, Pune – 411 001.)...**Respondents**

Mrs. Punam Mahajan, Advocate for Applicant.

Ms. N.G. Gohad, Presenting Officer for Respondents.

CORAM : A.P. KURHEKAR, MEMBER-J

DATE : 03.04.2019

JUDGMENT

1. In the present Original Application, the challenge is to the impugned transfer order dated 29th November, 2018 whereby the Applicant (Police Constable) has been transferred from Kothrud Police Station, Pune to Head

Quarter, Pune invoking jurisdiction of this Tribunal under Section 19 of the Administrative Tribunals Act, 1985.

2. Shortly stated facts giving rise to this application are as follows :

The Applicant was posted at Kothrud Police Station, w.e.f.17.08.2015 and since then, he was serving at Kothrud Police Station. Being Police Constable, his normal tenure would be five years. However, by impugned transfer dated 29.11.2018, he has been transferred mid-term from Kothrud Police Station to Head Quarter, Pune. The Applicant has challenged the transfer order contending that it is mid-term and mid-tenure transfer in contravention of Section 22-N of Maharashtra Police Act, 2015 (hereinafter referred to 'Act 2015'). He was transferred on the ground of alleged complaints without ascertaining the veracity of the same. The Applicant, therefore, contends that the transfer is *mala-fide* and punitive. He further contends that the constitution of Police Establishment Board (PEB) suffers from material illegality, as the same is not headed by Commissioner of Police as per the requirement of law. Furthermore, there is no Notification of the constitution of PEB in Official Gazette. On these grounds, the Applicant assailed the impugned transfer order. He, therefore, prayed to set aside the impugned order and for reposting at Kothrud Police Station, Pune.

3. The Respondents resisted the application by filing Affidavit-in-reply (Page Nos.17 to 32 of Paper Book) *inter-alia* denying the allegations levelled by the Applicant. The Respondents sought to justify the impugned transfer order contending that while the Applicant was posted at Kothrud Police Station, there were complaints of involvement of corruption against him, and therefore, his transfer was necessitated. Accordingly, the PEB at Commissionerate level in its meeting dated 29.11.2018 resolved to transfer the Applicant from Kothrud Police Station to Head Quarter exercising powers under Section 22-N(2) of 'Act 2005'. As such, according to Respondents, the transfer was necessitated on account of

administrative exigency. The Respondents denied that the constitution of PEB suffers from any illegality. In reply, the Respondents referred to certain decisions in support of their contention, which will be dealt with during the course of discussion.

4. Smt. Punam Mahajan, learned Advocate for the Applicant assailed the impugned transfer order contending that, it being mid-term or mid-tenure transfer, there has to be compliance of Section 22-N(2) of 'Act 2005', which is lacking in the present matter because of illegal constitution of PEB at Commissionerate level and secondly, it is punitive transfer without proper compliance of Circular issued by Director General of Police, dated 07.10.2016. She further canvassed that, in absence of Notification of constitution of PEB in the Official Gazette, the decision taken by PEB suffers from material illegality in addition to the illegality in constitution of PEB itself.

5. Per contra, Smt. A.B. Kololgi, learned Presenting Officer sought to justify the impugned transfer order contending that, in view of complaints against the Applicant, his transfer was necessitated and accordingly, the PEB at Commissionerate level approved the decision. She, therefore, sought to contend that there is compliance of Section 22-N(2) of 'Act 2005'.

6. As regard absence of Notification of constitution of PEB in Official Gazette, she fairly stated to have no such record of its publication in Official Gazette. She also fairly concede that the PEB, which took decision to transfer the Applicant was headed by Joint Commissioner of Police and not by Police Commissioner. Despite, she made feeble attempt to justify the impugned transfer order.

7. Admittedly, the Applicant was posted at Kothrud w.e.f.17.08.2015 and had not completed 5 years normal tenure as provided in Section 22-N(1) of 'Act 2015'. This being the position, for such mid-term or mid-tenure transfer, there has to be compliance of Section 22-N(2) of 'Act 2015'. For such mid-term or mid-

tenure transfer, the Competent Authority is PEB at Commissionerate level. In this context, it would be worth to reproduce Section 22(I) of 'Act 2015', which is as follows :

“22-I. Police Establishment Board at Commissionerate Level

- (1) The State Government shall, by notification in the Official Gazette, constitute for the purposes of this Act, a Board to be called the Police Establishment Board at Commissionerate Level.
- (2) The Police Establishment Board at Commissionerate Level shall consist of the following members, namely :-
 - (a) Commissioner of Police ... Chairperson;
 - (b) Two senior-most officers in the rank ... Member;
of Joint Commissioner or Additional
Commissioner or Deputy Commissioner
of Police
 - (c) Deputy Commissioner of Police (Head ... Member-
Quarter) Secretary.

Provided that, if none of the aforesaid members is from the Backward Class, then the State Government shall appoint an additional member of the rank of the Deputy Commissioner of Police belonging to such Class.”

8. Thus, the PEB at Commissionerate level shall be headed by Commissioner of Police as a Chairperson and there has to be Notification of constitution of PEB in the Official Gazette with one of the member from the Backward Class. However, in the present case, the perusal of minutes of PEB dated 29.11.2018 (Page Nos.127 to 129 of P.B.) reveals absence of Police Commissioner in the PEB. Its perusal reveals that the PEB was headed by Joint Commissioner of Police and not by Commissioner of Police, as required under Section 22(I) of 'Act 2015'. This being the position, the constitution of PEB itself is illegal. Needless to mention, when law provides for the formation of PEB in a particular manner, then it needs to be formed in that manner only being requirement of law and no latitude is given to the Respondents to tamper with the constitution of PEB and to form the

PEB in the manner they chose. Suffice to say, the PEB was required to be headed by Commissioner of Police and none else. In the present case, admittedly, it is not headed by Commissioner of Police. There is absolutely no explanation forthcoming in this behalf. Resultantly, it will have to be held that the constitution of PEB itself is illegal and consequently, the decision taken by such PEB does not stand in law.

9. Furthermore, no material is forthcoming to establish that the PEB has been notified in the Official Gazette and one of the member was from the Backward Class. As per proviso to Section 22(I) of 'Act 2015', one of the member shall be from Backward Class. The PEB shall consists of three members and if none of them belongs to Backward Class, then the State Government is obliged to appoint additional member of the rank of Deputy Commissioner of Police belonging to such Class. There is no compliance of this legislative intent in the present matter.

10. Now, coming to the aspect of alleged complaint, though Respondents sought to justify the order of transfer on the ground of complaints, it is obvious from the record that there is no compliance of the Circular issued by Director General of Police dated 07.10.2016 wherein the guidelines have been issued to be adopted in such matters. As per this Circular, where transfer is necessitated on account of complaint, summary enquiry needs to be conducted by giving opportunity to the concerned Police Official by recording his statement, so as to observe the principles of natural justice. In the present matter, no such opportunity was given to the Applicant.

11. In the present matter, the transfer seems to have been effected because of complaint made by political Organization viz. Republic Bandhkam Kamgar Sena dated 10.01.2018. According to this complaint, the Applicant and one more Constable Dahibhate indulged in collection of bribe regularly from persons

involved in illicit liquor business, gambling, prostitution, etc. In reference to these complaints, an enquiry seems to have conducted by Senior Police Inspector of Kothrud & Warje Malwadi Police Station. Strangely, the said enquiry report is not forthcoming on record. The Respondents have produced on record the report of Additional Police Commissioner, Pune dated 07.03.2018 submitted to Police Commissioner for transfer of the Applicant wherein there is a reference of said enquiry report. However, significant to note that, as per the said enquiry report itself, nothing was substantiated against the Applicant as well as Shri Dahabhate. In the letter dated 07.03.2018, in fact, there is specific mention that the complainant themselves withdrew their complaint. Despite this position, the Additional Commissioner of Police proposed the transfer. Here, it would be useful to reproduce relevant portion of the letter dated 07.03.2018.

“वरिष्ठ पोलीस निरीक्षक, कोथरुड व वारजे माळवाडी पोलीस स्टेशन यांनी केलेल्या चौकशी दरम्यान अर्जदार यांनी त्यांच्या तक्रारी अर्ज मागे घेतुन तक्रारी अर्जातील गैरअर्जदार यांचे विरोधात कोणतीही कारवाई करू नये अशी विनंती केली आहे. वरिष्ठ पोलीस निरीक्षक कोथरुड व वारजे माळवाडी पो.स्टे. यांनी केलेल्या चौकशीमध्ये पोशी ६९२० काकडे व पोशि ८१२० दहिभाते यांचे अवैध धंदे चालकांशी संबंध असल्याचे निष्पन्न झालेले नाही. अर्जदार यांनी प्रथम तक्रारी अर्ज करून शिरसठ पिता पुत्र व पोशि काकडे व पोशि दहिभाते यांचे विरुद्ध अवैध धंद्यांकडून पैसे वसुली करित असलेबाबत तक्रार केली होती. परंतु चौकशी दरम्यान अर्जदार यांची काही तक्रार नसल्याचे व शिरसठ पिता पुत्र तसेच पोशि काकडे व पोशि दहिभाते यांचे विरोधात गैरसमजुतीने तक्रार दिल्याचे सांगुन अर्जदार यांनी त्यांचेवर कारवाई करू नये अशी विनंती केली आहे. यावरून अर्जदार यांच्या हेतु विषयी शंका निर्माण होत आहे.

तरी वारजे माळवाडी पोलीस स्टेशन हद्दीत दि. २४/०२/२०१८ रोजी केलेल्या अवैध धंद्याच्या कारवाई करून गुन्हे दाखल केले आहेत. सदरबाबत वरिष्ठ पोलीस निरीक्षक, वारजे माळवाडी पो. स्टे. यांचे पो. स्टे. हद्दीत अवैध धंद्यांवर कोणत्याही प्रकारचे नियंत्रण नाही. तसेच पोशि ६९२० काकडे व ८१२० दहिभाते ह्यांना ह्या पोलीस स्टेशन वरून त्वरीत प्रभावाने बदलणे योग्य राहणार आहे. तरी पुढील योग्यत्या कार्यवाहीस्तव सादर.”

12. When the matter was placed before the PEB, it also noted that the complaint against the Applicant was found not substantiated in view of letter of Additional Commissioner of Police, dated 07.03.2018. However, PEB resolved to transfer in view of the recommendation made by Additional Commissioner of Police in the said letter dated 07.03.2018 without bothering that complaints are not substantiated, it cannot be the basis for transfer.

13. Thus, the position emerges that, despite complaints found not substantiated, the Applicant has been transferred, which is nothing but punitive and not sustainable in law. This amounts to punishment by way of transfer on the non-existent material which is frowned upon by the Hon'ble Supreme Court in **(2009) 2 SCC 592 (Somesh Tiwari Vs. Union of India & Ors.)** wherein the Hon'ble Supreme Court 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.”

14. In view of above, suffice to say that the impugned order suffers from material illegality on account of illegal constitution of PEB, absence of its Notification in Official Gazette and transfer being punitive, and therefore, liable to be quashed.

15. The learned P.O. has referred certain decisions as referred in written statement, but those are quite distinguishable as in those cases, the transfers were approved by duly constituted PEB. The learned P.O. in this behalf referred to Judgment of Hon'ble Bombay High Court in **Writ Petition No.1227/2016 (Sanjay Deshmukh Vs. State of Maharashtra) decided on 05.05.2016**, the decision rendered by this Tribunal, Bench at Nagpur in **O.A.No.467/2017 (Vazeer Hussain Shaikh Vs. State of Maharashtra) decided on 15.11.2017**, which was confirmed by Hon'ble High Court on 15.11.2017 and decision rendered by this Tribunal in **O.A.1029/2017 (Dilip Kulkarni Vs. State of Maharashtra) decided on**

04.04.2018. In all these matters, as stated above, there was valid and legal approval to the transfer by competent PEB. However, in the present case, the facts are quite distinguishable, and therefore, none of the decision is of any assistance to the Respondents.

16. True, the transfer is an incidence of service and where it is made on administrative exigencies, it should not be interfered by the Tribunal. However, where the transfer is in blatant violation of express provisions of law or punitive then it is liable to be quashed and set aside. In the present case, for the aforesaid discussion, I have no hesitation to sum-up that the transfer needs to be quashed and set aside.

17. The necessary corollary of the aforesaid discussion leads me to conclude that the impugned order dated 29.11.2018 transferring the Applicant from Kothrud Police Station, Pune to Head Quarter, Pune is not sustainable in law and facts and hereby quashed and set aside. Hence, the following order.

ORDER

- (A) The Original Application is allowed.
- (B) The impugned order dated 29.11.2018 is quashed and set aside.
- (C) The Applicant be reposted on the original post within two weeks from today.
- (D) No order as to costs.

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

Mumbai

Date : 03.04.2019

Dictation taken by :

S.K. Wamanse.