

**IN THE MAHARASHTRA ADMINISTRATIVE TRIBUNAL
MUMBAI**

ORIGINAL APPLICATION NO.176 OF 2018

DISTRICT : MUMBAI

Dr. Shruti Dhale.)
Age : 38 Yrs., Occu.: Service,)
R/at : Swastik Building No.4,)
Quarter No.27, 6th Floor, J.J. Hospital)
Campus Quarter, Near Central Canteen,)
Byculla, Mumbai - 400 008.)...**Applicant**

Versus

1. The State of Maharashtra.)
Through its Secretary, Medical)
Education & Drugs Dept., 9th Floor,)
G.T. Hospital, Mumbai.)
2. Grant Medical College & Sir J.J.)
Group of Hospitals, Through its)
Dean, J.J. Marg, Nagpada-Mumbai)
Central, Off Jijabhoy Road,)
Mumbai 400 008.)...**Respondents**

Shri A.A. Desai, Advocate for the Applicant.

Shri N.K. Rajpurohit, Presenting Officer for Respondents.

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

Closed on : 28.06.2018

Pronounced on : 29.06.2018

J U D G M E N T

1. Heard Shri A.A. Desai, learned Advocate for the Applicant and Shri N.K. Rajpurohit, learned Presenting Officer (P.O) for the Respondents.

2. Brief facts of the case are as under :-

(a) Vide the impugned order issued on 25.01.2018, the Applicant was transferred from Mumbai to Government Medical Collage at Jalgaon.

(b) Applicant is working without break at J. J. Group of Hospital, Mumbai as Assistant Professor from 19.04.2009 and promoted as Associate Professor on 05.06.2015. From the date of her promotion, she has completed two years and six months. Hence, this is considered as mid-term transfer.

3. Learned Advocate for the Applicant submits as follows:-

(a) This being a mid-term transfer, approval should have been obtained by the Competent Authority.

4. Learned Advocate for the Applicant states that under the Transfer Act, 2016, Section 4(5) states:-

“4(5) : Notwithstanding anything contained in Section 3 or this section, the competent authority may, in special cases, after recording reasons in writing and with the prior permission of the immediately preceding Competent Transferring Authority mentioned in the table of Section 6, transfer a Government servant before completion his tenure of post.”

5. Learned Advocate contends, the same has not been observed. He draws attention to the judgment given by this Tribunal in O.A.Nos.15 & 21 of 2018, dated 26.04.2018. The same is taken on record and marked as ‘X’ for identification. As per the facts stated therein, the order was set aside, as it did not comply Section 4(5) of the Act.

6. In this regard, learned Advocate for the Applicant cites another judgment given by the Hon’ble High Court in **Kishor S. Mhaske Vs. Maharashtra OBC Finance and Development Corporation & Ors, (2013) 0 Supreme (Mah) 554, dated 07.03.2013.** In which, the Hon’ble High Court has insisted that there should be compliance of Section 4(5).

7. Learned Advocate for the Applicant draws attention to the Para 11 of the O.A. and mentions that the order is malafide and arbitrary as there is another candidate namely Subhash Walinjkar who is working for longer period in Mumbai, but not posted out.

8. According to the learned Advocate for the Applicant, it is pick and choose policy and the transfer is not as per seniority.

9. In support, learned Advocate for the Applicant cites a judgment of the Hon'ble High Court in the matter of **Sheshrao Nagorao Umap (Dr.) Vs. State of Maharashtra & Ors. (Writ Petition No.3426 of 1983, dated 11.07.1984).** The same is taken on record. He, therefrom quotes relevant paragraph No. 5 from the Judgment referred above, which reads as under :-

“5. A provision for transfer is intended to check creation of vested interest, nepotism and corruption. It is true that nobody has a right to say that he cannot be transferred without his consent. However, like any other Executive or administrative power, the power of transfer must be exercised in good faith and as per the guide lines laid down in that behalf. The Government is bound by its own policy decision and must enforce it faithfully. While implementing the policy it cannot pick and choose. It is equally true that such executive instructions of a policy decision cannot confer any enforceable legal right nor an order issued in breath of it, will become per se illegal. These instructions could be directory

in nature. There could be exceptions to the general rule due to exigencies of service or due to some administrative reasons, but the exception cannot be permitted to become a rule. It is equally well settled that Courts should not interfere with the orders of transfers, which are issued in the exigencies of service and in discharge of administrative or executive power. However, if the order is issued mala fide or in colourable exercise of power then the Court is bound to interfere, since the mala fide exercise of power is not considered to be legal exercise of power. Once a policy is laid down by the Government it must apply equally to every employee. In this context a reference could usefully be made to the observations of the Supreme Court in *E. P. Royappa v. State of Tamil Nadu and Others*. [1974-I L.L.J. 172] which reads as under :-

‘Art. 16 embodies the fundamental guarantee that there shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State. Though enacted as a distinct and independent fundamental right because of its great importance as a principle ensuring equality of opportunity in public employment which is so vital to the building up of the new classless egalitarian society envisaged in the Constitution, Art.16 is only an instance of the application of the concept of equality enshrined in Art.14. In other words, Art.14 is the genus while Art.16 is a species. Art.16 gives effect to the doctrine of equality in all matters relating to public employment. The basic principle which therefore, informs both Arts. 14 and 16 is equality and inhibition against discrimination. Now, what is the content and reach of this great equalizing principle ? It is a founding faith, to use the words of Bose, J., 'a way of life' and it must not be subjected to a narrow pedantic or lexicographic approach. We cannot countenance any attempt to truncate its all-embracing scope and meaning, for to do so would

be to violate its activist magnitude. Equality is a dynamic concept with many aspects and dimensions and it cannot be 'cribbed, cabined and confined' within traditional and doctrinaire limits. From a positivistic point of view, equality is antithetic to arbitrariness. In fact equality and arbitrariness are sworn enemies, one belongs to the rule of law in a republic while the other, to the whim and caprice of an absolute monarch. Where an act is arbitrary, it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violative of Art.14, and if it effects any matter relating to public employment, it is also violative of Art.16. Arts. 14 and 16 strike at arbitrariness in State action and ensure fairness and equality of treatment. They require that State action must be based on valid relevant principles applicable alike to all similarly situate and it must not be guided by any extraneous or irrelevant considerations because that would be denial of equality. Where the operative reason for State action, as distinguished from motive inducing from the antechamber of the mind, is not legitimate and relevant but is extraneous and outside the area of permissible consideration. It would amount to mala fide exercise of power and that is hit by Arts. 14 and 16. Mala fide exercise of power and arbitrariness and different lethal radiations emanating from the same vice, in fact the latter comprehends the former. Both are inhibited by Arts. 14 and 16.

These observations of the Supreme Court equally apply to the policy regarding the transfers of public servants. It is an accepted principle that in public service transfer is an incident of service. It is also an implied condition of service and appointing authority has a wide discretion in the matter. The Government is the best judge to decide how to distribute and utilise the services of its employees. However this power must be exercised honestly,

bona fide and reasonably. It should be exercised in public interest. If the exercise of power is based on extraneous considerations or for achieving an alien purpose or an oblique motive it would amount to mala fide and colourable exercise of power. Frequent transfers, without sufficient reasons to justify such transfers, cannot, but be held as mala fide. A transfer is mala fide when it is made not for professed purpose, such as in normal course of in public or administrative interest or in the exigencies of service but for other purpose, than is to accommodate another person for undisclosed reasons. It is the basic principle of rule of law and good administration, that even administrative actions should be just and fair. Frequent unscheduled and unreasonable transfer can uproot a family, cause irreparable harm to the employee and drive him to desperation. It disrupts the education of the children and leads to numerous other inconvenience and problems and results in hardship and demoralisation. Therefore, the policy of transfer should be reasonable and fair and should apply to everybody equally. It cannot be forgotten that so far as superior or more responsible posts are concerned, continued posting at one station or in one department of the Government is not conducive to good administration. It creates vested interests. That is why we find that even from the time of British Rule the general policy has been to restrict the period of posting for a definite period. The position of Class III and Class IV employees is somewhat different. Therefore taking into consideration this salient feature of a good, efficient and smooth administration, the Government rightly decided to lay down general policy in relation to transfers. It has also specified the procedure for the same. Such a policy is helpful to streamline the administration. An accommodation on personal grounds for a short period of one year or so, can very well be appreciated but an employee who avoided normal transfers or maneuvers to get it

cancelled can safely be styled as an employee who is not willing to serve anywhere in the State, which is one of the essential conditions of service. Dr. Patil respondent No. 4 is a glaring example, of this. He wanted to stick to Bhusawal only. In case of such an employee, the Government will be well advised to take a note of this in his confidential service records, since this circumstance is relevant for deciding the question of his promotion etc. Such a rule will also help to check unwanted and unwarranted interference in the administration. We are constrained to make these observations since this Court is flooded with writ petitions wherein allegations of mala fides, nepotism and political interference are made in the matters of transfers. It is no doubt true that the allegations of mala fides, are often more easily made than proved and it is easy to make such allegations but difficult to prove. But it cannot be forgotten that when Government departs from its avowed policy, and issues orders of transfer or its cancellation in an unusual manner, then people get an opportunity to make allegations of mala fides. We feel that this all can very well be avoided if an uniform policy is laid down and scrupulously followed. The case in hand is a telling example of flagrant abuse of power. In our opinion it is now high time, that the Chief of the Administrative machinery should personally took into the matter and stop this abuse of power.

10. Learned Advocate for the Applicant states that other medical officers who were transferred along with the Petitioner have been reversed. He, therefore, requests that the order issued in respect of the Petitioner should be strictly followed as per Section 4(4) and 4(5) of the Transfer Act. He reiterates that no prior approval has been obtained from the next superior authority.

11. According to the learned Advocate for the Petitioner, Affidavit-in-Reply does not state that the approval was obtained prior to the order issued. He draws attention to the colleague of the Petitioner namely Subhash Walinjkar who has been granted a date of seniority as 12.03.2010 and due to retire on 31.12.2019 (Exb. 'D', page 16). However, he states that the Applicant who is at Sr. No.15 at page 18, Exb. 'D' has been granted date of seniority as 03.06.2015 and due to retire on 31.12.2039. Learned Advocate for the Applicant, therefore, contends that Dr. Walinjkar being senior has remained at Mumbai for more number of years. He should have been considered for transfer rather than the Petitioner. He, therefore, submits that the order is vitiated and malafide. It is on the basis of pick and choose policy. In addition, he submits that the Applicant should have been considered sympathetically in view of the medical ground of her daughter.

12. Learned P.O. for the Respondents contends that the transfer order can be challenged on the following grounds:-

- (a) The transfer order is not issued by the competent transferring authority;
- (b) The transfer order is issued by violating the statutory provision of law;
- (c) The transfer order is issued with malafide intention.

13. In support of the same, the learned P.O. cites the Judgment in the case of **State of U.P. Vs. Gobardhan Lal : AIR 2004 Supreme Court 2165.** Para No.8 of the same is as under:-

“8. It is too late in the day for any Government Servant to contend that once appointed or posted in a particular place or position, he should continue in such place or position as long as he desires. Transfer of an employee is not only an incident inherent in the terms of appointment but also implicit as an essential condition of service in the absence of any specific indication to the contra in the law governing or conditions of service. Unless the order of transfer is shown to be an outcome of a malafide exercise of power or violative of any statutory provision (an Act or Rule) or passed by an authority not competent to do so, an order of transfer cannot lightly be interfered with as a matter of course or routine for any or ever type of grievance sought to be made. Even administrative guidelines for regulating transfers or containing transfer policies at best may afford an opportunity to the officer or servant concerned to approach their higher authorities for redress but cannot have the consequence of depriving or denying the competent authority to transfer a particular officer/servant to any place in public interest and as is found necessitated by exigencies of service as long as the official status is not affected adversely and there is no infraction of any career prospects such as seniority, scale of pay and secured employment. This Court has often reiterated that the order of transfer made even in transgression of administrative guideline cannot also be interfered with, as they do not confer any legally enforceable rights, unless, as noticed supra, shown to be vitiated by malafides or is made in violation of any statutory provision.”

14. Learned P.O. for the Respondents states that the Applicant has not pointed out that the transfer is malafide. Applicant has not alleged that competent transferring authority has not issued the said transfer order. The only contention of the Applicant is that there is violation of Transfer Act.

15. Learned P.O. for the Respondents reiterates that the provision of Section 4(4) and 4(5) of the Transfer Act have been adhered and there is no violation of law.

16. Learned P.O. for the Respondents draws attention to the Minutes of Civil Services Board recommendation, which is at Page Nos.43 to 47 of the O.A.

17. Learned P.O. for the Respondents mentioned that the order of transfer was issued on 25.01.2018 after getting approval from the Hon'ble Chief Minister. Therefore, contention contrary to this is not correct.

18. Learned P.O. draws attention to Page No.47 of the O.A. mentioning that the Secretary, Medical Education had sent the proposal on 20.01.2018 and file was returned on 23.01.2018 from the Office of Hon'ble Chief Minister as per the stamp on Page No.47 of the O.A.

19. According to the learned P.O, the Applicant has worked at J.J. Group of Hospital from 19.04.2009 initially as

Assistant Professor and subsequently promoted as Associate Professor in 2015.

20. Learned P.O. for the Respondents stated that the Head Quarter of the Applicant was not changed even after promotion and remained posted at same place for more than nine years and he states that the tenure of both periods, needs to be clubbed together.

21. In support of this, learned P.O. cites Judgment of this Tribunal in **O.A.No.495 & 496 of 2010 (Mrs. Usha A. Babar & Anr. Vs. The State of Maharashtra & Ors., dated 15.04.2011)**. Para No.5 of the same is as under:-

“5. As per recent decision of the Hon’ble High Court in Writ Petition No.8898/2010, internal transfer at the same headquarters should not be treated as transfers in the normal meaning. What has been guaranteed to a Government Officer under the Act is the minimum tenure at a particular station/headquarter. Viewed from this angel, the tenure of the Applicants as P.S.I. and A.P.I. will be clubbed together since it was at the same headquarter. Thus, the impugned order not been issued mid tenure, but on completion of three years.”

22. According to the learned P.O. the stand mentioned by the learned Advocate for the Applicant that the Respondent No.3 has not followed the procedure, which has been replied in various Paras of Affidavit-in-reply including Para No.2(ii) (Exh. ‘R-3’) at Page No.28 and Para No.4.

23. Learned P.O. for the Respondents refers to the arguments made by the learned Advocate for the Applicant regarding pick and choose policy and discrimination against Dr. Subhash Walinjkar. He refers to Exh. 'R-5' (Page No.52) in which the names of Dr. Walinjkar and Applicant have been considered.

24. The name of Dr. Walinjkar was earlier recommended. However, the revised recommendation was regarding the Applicant. The reason given is that the Applicant was senior-most and due for transfer.

25. Learned P.O. for the Respondents draws attention to the Table at Page No.41 and states that Dr. Subhash Walinjkar was working for 7 years and 8 months as Assistant Professor while, the Applicant has been working for more than 8 years.

26. Learned P.O. states that the Applicant has been transferred to Government Medical College, Jalgaon which was to start from Academic Years 2018-2019 and it was necessary to remove the deficiency pointed by M.C.I. which is at Page No.40 and he states that, in view of this, there is no discrimination and there is no malafide and it has been issued by the competent authority by following due procedure of the Transfer act and he requests that the O.A. needs to be dismissed.

27. Learned Advocate for the Applicant refutes the contention. Learned Advocate for the Applicant contends that Dr. Walinjkar has been in J.J. Group of Hospital for seven years and eight months. According to him, the Applicant has been promoted and working from 03.06.2015 and she is junior and the period of Applicant is less than Walinjkar. He reiterates that the order is malafide and needs to be quashed. He contends that Section 4(4) and 4(5) should have been invoked in proper spirit.

28. The issue in this matter is to be decided is as under:-

- (i) Whether the Applicant has been transferred by competent authority ?
- (ii) Whether the due process has been followed by the competent authority in transferring the Applicant ?
- (iii) Whether there is malafide and pick and choose policy adversely affecting the Applicant ?.

29. The Findings with reasons are as under : -

- (i) The impugned transfer order has been issued by the authority after obtaining approval from the

Minister and Hon'ble Chief Minister under Section 4(4) and 4(5) of the Transfer Act;

(ii) The authority have followed due process before issuing the impugned order and as per the Transfer Act;

(iii) The competent authority have taken into account the tenure of the Applicant as well as Walinjkar. The Applicant is in Mumbai for longer period than Walinjkar. The contention, therefore, that the order is mala fide and is on the basis of pick and choose policy is factually erroneous.

(iv) Further, the O.A. does not contain any mention of malafide against any authority and has not made any party by name to the O.A.

(v) The competent authority have stated that the impugned order has been issued to fulfill the requirements pointed out by Medical Council of India before starting the new Medical College at Jalgaon for the academic session 2018-19.

(vi) As far as the request made by the Applicant to consider her representation and cancelling the same, the competent authority is at liberty to look into the same. Moreover, the Applicant has not

sought any relief to direct the competent authority in this regard in the O.A.

30. For the reasons stated above, I find that the order has been issued legally on the basis of reasons and facts without any malafide. Hence, the Original Application is dismissed without costs.

Sd/-

(P.N. Dixit)
Member-A
29.06.2018

Mumbai

Date : 29.06.2018

Dictation taken by :

S.K. Wamanse.

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