

**IN THE MAHARASHTRA ADMINISTRATIVE TRIBUNAL,
MUMBAI**

ORIGINAL APPLICATION NO.274 OF 2020

Smt. Swati Madhav Sathe,)
Aged about 53 years, Deputy Inspector General –)
Prisons, MS and residing at 402, C. Arav CHS,)
Opposite Yashwantrao Chavan Natya Griha,)
Kothrud, Pune 411 038) **...Applicant**

Versus

Government of Maharashtra,)
Through Additional Chief Secretary,)
Home Department, MC Road, Mantralaya,)
Mumbai 32.) **...Respondent.**

Shri M.D. Lonkar, learned Advocate for the Applicant.

Ms. S.P. Manchekar, learned Chief Presenting Officer for the Respondent.

CORAM : JUSTICE SMT. MIRDULA R. BHATKAR, CHAIRPERSON

RESERVED ON : 04.12.2020

PRONOUNCED ON : 22.12.2020

J U D G M E N T

1 Heard Shri M.D Lonkar, learned Advocate for the Applicant and Ms. Swati Manchekar, learned Chief Presenting Officer for the Respondent.

2. The Applicant, Deputy Inspector General - Prisons, Pune, challenges the transfer order dated 15.6.2020 transferring her mid-tenure / mid-term from Pune to Nagpur. The applicant was working as D.I.G (Prison) at Headquarter, Pune since 17.8.2019. Earlier, she was working as D.I.G, Western Region, Yerwada, Pune.

3. Learned Counsel for the applicant has submitted that the applicant is having an excellent service record and she is the only female officer who is at present working as D.I.G, Prisons in the State of Maharashtra. He submitted that it is a mid-term / mid-tenure transfer and therefore, it was necessary for the Respondents to give special reasons for issuing the transfer order. He submitted that while placing her case before the Police Establishment Board and taking prior approval of the Hon'ble the Chief Minister the procedure under Section 3 & 4 of the Maharashtra Government Servants Regulation of Transfers and Prevention of Delay in Discharge of Official Duties Act, 2005 (hereinafter referred as ROT Act 2005 for brevity) is not properly followed. The Respondent has issued the order of transfer of the applicant dated 15.6.2020 with malice on the ground that the post at Nagpur is vacant. He submitted that the said post is vacant since long. Learned Counsel submitted that the applicant was unilaterally relieved and charge of her work was additionally entrusted to Mr. S.V Khatavkar, who is also holding charge of Principal, Jail Officer Training College, Yervada, Pune. The applicant was not due for transfer for three years from her earlier post. No special case is made out to curtail her tenure. He further stated

that the ratio laid down in the case of ***Umeshchandra V. Dighe Versus The State of Maharashtra, in O.A.No.343 of 2008, dated 29.08.2008*** under Section 4(1) & 4(2) is disregarded. There is also breach of Government Resolution (G.R.) dated 04.05.2020 issued by the Government, wherein, transfers due to Covid-19 pandemic were absolutely barred. Learned Counsel further argued that one officer Shri Zalake, D.I.G, Prison, Aurangabad was entrusted the additional charge of the post of Nagpur and he was keen for his transfer to Nagpur as his family is residing at Nagpur and thus he could have been accommodated at Nagpur. Thus, the transfer order is biased and arbitrary.

4. The transfer order issued by the Respondents is illegal, bad in law and hence required to be quashed and set aside. The learned Advocate Shri M.D. Lonkar relied on the Government Resolution (G.R.) dated 31.01.2014 on the point of formation of the Civil Services Board (C.S.B.) pursuant to the judgment of the Hon'ble Supreme Court in ***T.S.R. Subramanian & Ors Versus Union Of India & Ors on 31st October, 2013, Writ Petition (Civil) NO.82 OF 2011***. For any transfer proposal is to be placed before the competent authority or the transferring authority. In absence of proposal, no transfer can be made. In the said G.R. in its Clause 3.5 has mentioned that while placing the proposal before the C.S.B. the provisions of ROT Act 2005 are also to be pointed out. He relied on the G.R. dated 11.02.2015.

5. The learned C.P.O. has opposed this application vehemently. She justified that the transfer order is legal and valid. She has submitted that the post in Nagpur is lying vacant since 2018 and one attempt was made by the C.S.B. to transfer her to Nagpur earlier. However, the Hon'ble the then Chief Minister posted her to the present posting in Pune only. She submitted that the meeting of the C.S.B. has taken place. The proposal was also put up before the competent transferring authority. The proposal cannot be mooted by the transferring authority to C.S.B. or the Department. The submission of learned Counsel for the Applicant to that effect is erroneous. The record of meeting of C.S.B., so also noting of the present and earlier C.S.B., noting of the Department to that effect are relied and produced by the learned C.P.O. The State of Maharashtra has filed affidavit in reply of Shri Narayan Shrikrishna Karad, Deputy Secretary, Home Department, Mantralaya Mumbai. The learned C.P.O. has submitted that Government of Maharashtra has taken decision on 4.5.2020 through Finance Department that there should not be transfers in order to control the expenses during Covid-19 pandemic. The applicant was doing administrative work at Headquarter, Pune, and she has no responsibility regarding Covid-19 pandemic in the Jail premises. The bar of transfer was lifted by the Government by Resolution dated 7.7.2020 though the post of D.I.G, Eastern Region, Nagpur is vacant since 2019 and so it was necessary to be filled in.

6. The learned Advocate Mr. Lonkar raised two legal issues which are as follows :-

- (A) The employee cannot be transferred under Section 4(4)(i) of ROT Act 2005 to a vacant post without recording special reasons or exceptional circumstances, under Section 4(5) of ROT Act 2005.
- (B) Posting to vacant post itself cannot be a special case or exceptional reason under Section 4(5), but it is available only if transfer is under Section 4(4)(i).

7. A transfer can be mid-term after completion of tenure of 3 years. A transfer can be mid-tenure before completion of normal tenure. A transfer can be mid-term/ mid-tenure also. In the case of ***Tribhovandas Haribhai Tamboli vs Gujarat Revenue Tribunal And Ors on 10 May, 1991, [1991 AIR 1538]*** it is held that the proviso cannot be permitted by the interpretation to defeat the basic intent expressed in the substantive provision. The normal tenure assured to the Government servant as per Section 3 and Section 4 of ROT Act 2005 is 3 years and sometimes more for certain categories of Government servants as mentioned in Section 3. That normal tenure can be curtailed only in special cases under Section 4(5). The Section 4(5) opens with non obstante clause “notwithstanding anything contained in Section 3 or Section 4”. It specifically states that the tenure can be curtailed only after recording the reasons in special cases in writing with the prior permission of the competent transferring authority mentioned in Section 6 of ROT Act 2005. Under Section 4(4)(i) of ROT Act 2005 after completion of normal tenure the transfer other than May and April is permissible under various contingencies including filing of vacant posts.

On completion of 3 years of normal tenure, if the officer is transferred mid-term to the vacant post as per Section 4(4)(i) then no reasons are required to be recorded. The word 'before completion of his tenure' is included only in Section 4(5) of the ROT Act 2005. Thus, in case of any transfer which is mid-term or mid-tenure then special reasons are to be noted under Section 4(4)(ii) and Section 4(5) of ROT Act 2005.

8. The judgment of **Umesh Chandra Dighe (supra)** is delivered by the Single Bench of Maharashtra Administrative Tribunal on 29.08.2008. The Applicant, Forest Range Officer, not due for transfer, was transferred, hence he challenged the transfer. The D.E. was in progress against the applicant so he was transferred on administrative ground under Section 4(5) of the ROT Act 2005 without taking approval of the next higher authority. The Tribunal has addressed the issue at length. The learned Single Bench held if the reasons are not recorded while transferring under Section 4(4)(i), then Section 4(5) almost becomes redundant so he held that the intent of the law framers was that reasons were required to be given even if the transfer is made in various contingencies out-lined in Section 4(4)(i). However, it is to be noted that the learned Single Bench was dealing with Government servant not due for transfer. In other words, according to the Single Bench, Section 4(4)(i) is to be read with Section 4(5) so Section 4(5) is always attracted. By keeping the interpretation and the ratio laid down in case of **Umesh Chandra Dighe's case (supra)**, by the Single Bench of this Tribunal the two points raised by learned Advocate Shri Lonkar are answered.

9. It is useful to reproduce Section 4(4), Section 4(4)(i), Section 4(4)(ii) and Section 4(5) of ROT Act 2005 :-

- “4.
- (4) *The transfers of Government servants shall ordinarily be made only once in a year in the month of April or May :
 Provided that, transfer may be made any time in the year in the circumstances as specified below, namely –*
- (i) *to a newly created post or to the posts which become vacant due to retirement, promotion, resignation, reversion, reinstatement consequential vacancy on account of transfer or on return from leave ;*
- (ii) *Where the competent authority is satisfied that the transfer is essential due to exceptional circumstances or special reasons, after recording the same in writing and with the prior approval of the next higher authority.*
- (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 of his tenure of post.”*

There is no dispute under Section 3 and especially Section 4 that the normal tenure is of three years or as mentioned in Section 3 of the ROT Act 2005. In January the authority should prepare the list for the Government servant due for transfer in the month of April and May or as per the structure given thereon. Section 4(4) states that the transfer is to be made **only once** in a year i.e. in the month of April and May. It further states as per Section 4(4) of ROT Act 2005 the transfer can be any time in the year in the circumstances as specified below. Sub Section (i) and (ii) are exception to Section 4(4) of ROT Act 2005, i.e. about time of transfer during the year.

10. Under proviso (i) of Section 4(4) of ROT Act 2005 if a post falls vacant then any time a Government servant due for transfer can be transferred mid-term. The contingencies of vacancy should be :-

- (1) Retirement.
- (2) Promotion.
- (3) Resignation.
- (4) Reversion.
- (5) Reinstatement.
- (6) Consequential vacancy on account of transfer.
- (7) Return from leave.

Thus, if due to these 7 circumstances vacancy is created then, the Government servant due for transfer, can be transferred to that post any time in the year. For such transfer recording of reasons and permission of higher authority is not required, however formation and recommendation as CSB is required as per ratio laid down by Hon'ble Supreme Court in the judgment of ***T.S.R. Subramanian (supra)***.

The proviso (ii) of Section 4(4) of ROT Act 2005 further states if the competent authority is satisfied that the transfer is essential due to exceptional circumstances or special reasons, after recording the same in writing, with the prior approval of the next higher authority, the Government servant can be transferred. Thus the proviso (i) and (ii) of Section 4(4), are exception to transferring the Government servant due for transfer who has completed 3 years any other time during the year, than in the month of April and May.

11. The proviso (ii) is to be read along with main sub Section 4(4) as a whole and in furtherance of proviso (i). It creates another 8th

circumstance i.e. exceptional circumstance or special reason and after recording the special reason or the exceptional circumstance in writing and with prior approval of the next higher authority, the competent authority is empowered to transfer the Government servant any time in the year i.e. mid-term but who has completed normal tenure i.e. due for transfer.

12. Thus the difference between proviso (i) and proviso (ii) of Section 4(4) of ROT Act 2005 is :-

- (a) The 7 circumstances under which the Government servant can be transferred are specifically mentioned so the proviso (i) is not enumerative but exclusive.
- (b) Unlike proviso (ii) no special reasons or exceptional circumstances is to be recorded under proviso (i).
- (c) Unlike proviso (ii) in transfer under proviso (i), the competent authority is not required to take prior approval of the next higher authority.

Both the proviso facilitate the transfer of a Government servant due for transfer any time i.e. mid-term in the year. Thus Sub Section (4) of Section 4 of ROT Act 2005 deals with only the timing of the transfer i.e. when the transfer can be made during the year. It is to be noted that Sub Section (4) of Section 4 of ROT Act 2005 does not speak about the “tenure” of the Government servant, but only the Government servant who is due for transfer is considered.

13. Section 4(1) of ROT Act 2005 states that no Government servant shall ordinarily be transferred unless he has completed his tenure of posting as provided in Section 3. Thus Section 4(1) adopts the fundamental statement of the normal period of 3 years from Section 3. As held in ***Tribhovandas Haribhai Tamboli (cited supra)*** a cardinal rule of interpretation that a proviso to a particular provision of a statute only embraces the field, which is covered by the main provision. Thus, both the provisos (i) and (ii) under Sub Section (4) of Section 4 of ROT Act 2005 necessarily speak about the mid-term transfer only after completion of normal tenure as stated in Section 3 and 4 of ROT Act 2005. The legislative intent to provide the normal tenure of minimum 3 years is expressly stated in Section 3 and Section 4. Proviso 4(4)(i) and 4(4)(ii) are to be harmoniously construed to facilitate and empower the competent authority to transfer the Government servant who is already due for transfer and has continued further, any time during the year under total 7 + 1 circumstances. If a Government servant, already due for transfer, continues further, he need not be kept on the same post till April and May, so the procedure to transfer is simpler than the Government servant who is required to be transferred before completion of his normal tenure which is stated in Section 4(5) of the ROT Act 2005.

14. Sub Section (5) of Section 4 of ROT Act 2005 is the key and only Section which empowers the competent authority to curtail even the normal tenure of three years in special case. Sub Section (5) of Section 4

of ROT Act 2005 starts with non obstante clause i.e. “Notwithstanding anything contained in Section 3 or this Section”. Thus Sub Section (5) stands independently with special power despite the protection and assurance of normal tenure of 3 years given to the Government servant. As mentioned in Section 3 and Section 4, Section 4(1), Section 4(2), Section 4(3), Section 4(4), Sub Section (4)(i) and Sub Section (4)(ii) of Section 4 of ROT Act 2005 are applicable to the Government servant who has completed the normal tenure as contemplated under Section 3. While exercising the discretion powers as per Sub Section (5) of Section 4 of ROT Act 2005, of transferring the Government servant, the competent authority is required to make out the special case and the authority is bound to record the reasons in writing and after obtaining the approval of the competent transferring authority, as mentioned in the Table of 6, can transfer the Government servant before the completion of his tenure with following conditions :-

- (1) There should be special case.
- (2) The reasons are to be recorded in writing.
- (3) The approval of the competent transferring authority should be obtained as mentioned in Table of Section 6.

15. The language used in Sub Section (5) of Section 4 of ROT Act is unequivocal, unambiguous and therefore, this Section itself is an exception to both the earlier Sections i.e. Section 3 and Section 4 Sub Section (1) to (4). Thus, Sub Section (5) of Section 4 of ROT Act is only Section available to the competent authority to use the power with

discretion in mid-tenure transfer, but it should not be arbitrary and illegal. Not necessarily mid-tenure transfer should be only in April and May, but it covers even mid-term transfer. Therefore, while curtailing the normal tenure the State is required to quote only Section 4(5) of ROT Act and if mid-term then Section 4(5) and 4(4)(i) or Section 4(4)(ii) as the case may be are to be quoted.

The analysis on tabular form will clarify and articulate the issue :-

Sections	Pattern of transfers	Reasons of transfers	Requirement of transfers
Section 4(4)(i) Mid-term	After completion of normal tenure of 3 years.	Any reasons out of seven circumstances only	(a) No permission of higher authority (b) No special reasons are required in writing besides any out of seven circumstances.
Section 4(4)(ii) Mid-term	After completion of normal tenure of 3 years.	Other special reason or exceptional circumstance than mentioned in proviso (i)	(a) In writing special reasons or exceptional circumstances. (b) Permission of next higher authority to competent authority.
Section 4(5) Mid-tenure	Before completion of 3 years i.e. in the month of April- May.	Special case	(a) In writing special case to be made out. (b) Permission of competent authority mentioned in Section 6 of ROT Act 2005.
Section 4(5) with Section 4(4)(ii) Mid-tenure and mid-term	Before completion of 3 years and any time during the year.	Special case or special reason or exceptional circumstances	(a) In writing, special case or special reasons. (b) Permission of competent authority as per Section 6.

16. Thus, with all humility, I say that I am in agreement with the law laid down in the case of **Umesh Chandra Dighe (cited supra)** on the interpretation of Section 4(4)(i) of ROT Act and Section 4(5) in the event of mid-tenure transfer. However, Section 5, unlike proviso (i) of Sub Section 4(4), does not describe what can be the special case. Therefore, the competent authority in all its wisdom may consider any of the 7 circumstances in respect of vacancy as contemplated under the said proviso (i) of Section 4(4) as a special case. The wording of Sub Section (5) of Section 4 does not carve out the specific situation as a special case. Thus, it is the satisfaction of the competent authority to consider the special case. The consequential vacancy can be one of the special cases. There is no bar that a particular situation should not be considered as a special case. Thus, if the competent authority considers the vacancy particularly as a special case, it can invoke its power under Section 4(5) after recording the reasons in writing and taking approval of the competent transferring authority as per the Table in Section 6.

17. In the present case, the competent authority has considered two aspects while posting the Applicant at Nagpur.

- (i) She has stayed at one place for more than 8 years continuously.
- (ii) There is vacancy at Nagpur since August 2019.

18. The Government has power to transfer the Government servant to fill up such vacancies mentioned in Section 4(4)(i) even though a

particular Government servant has not completed his normal tenure and is not due for transfer. There is no bar to consider any of these 7 circumstances but Government has to make out special case under Section 4(5) of the ROT Act 2005. It is specifically made clear and to be noted that depending on the facts and circumstances the Government servant may challenge such order on the ground that so far as his case is concerned, 7 circumstances cannot make out a special case and his order to be cancelled. The grounds namely procedural flaw, non-compliance his genuine difficulty, sickness, family issues, malice, vengeance etc. can be raised to counter the transfer order and challenge may sustain. Thus no strait-jacket formula can be applied to justify all the transfers under Section 4(5) if made under the reasons specified under Section 4(4)(i) are valid.

19. The Applicant in case in hand has not completed normal tenure in her present posting. On perusal of the affidavit-in-reply dated 16.07.2020 and affidavit-in-sur-rejoinder dated 24.09.2020 of Shri Narayan Shrikrishna Karad, Deputy Secretary, it is found that the post of Deputy Inspector General, Eastern Region, Nagpur was vacant earlier in 2018 and now since August, 2019. Undoubtedly, the said post is very important and responsible post under which 2 Central Prisons, 10 District Prisons and 6 Open Prisons are covered. The Applicant is promoted to the post of DIG on 09.09.2011 and she has been working on various posts in Pune City since then. Earlier proposal of recommending her transfer to Nagpur, DIG, Prison was submitted to the Government on

15.05.2018. However, the then Hon'ble the Chief Minister who was the competent transferring authority decided to give her posting in Pune. She was transferred from DIG, Eastern Region, Pune to DIG (Prisons) Headquarter, Pune on 13.08.2019. Therefore as the Nagpur post when again fell vacant her transfer was proposed to Nagpur though she had completed only 10 months at her past DIG Prison Head quarters, Pune.

20. It is necessary to address one more point in the present case. It is true that the normal tenure of the applicant at the post of DIG, Prison Headquarters, Pune was not completed hence it is mid-tenure and mid-term transfer. The reason for the transfer is twofold, first that the Nagpur post is vacant and there is need to post the officer there. Secondly, she has been working in Pune at different posts since 2011. The stay of considerable longer period of a Government servant in a particular District or City can be definitely taken into account to transfer him/ her mid-tenure or mid-term coupled with, if there is vacancy at some other places and there is need to be filled-in. The object of transfer is manifold i.e. it can be for getting experience, benefit of the knowledge of different Government servants' at different places, knowledge of different working places, suitability, competency, change for clean & smooth administration etc.

21. Similarly all the Government servants should have confidence in the system that every Government servant is transferable. Transfer should not be a punishment but it is the matter of incident of service. In

every category of service there is a good posting and bad posting depending on the location, standard of living, accessibility etc. Everybody wants good posting so everybody should get good posting for some period during the total service tenure. A posting in a particular city should not be a monopoly of any particular Government servant. If the Government servant is allowed to continue at a particular place after normal tenure for a considerable longer time then it leads to dissatisfaction, unrest amongst others. Favoritism and nepotism should not have any place in the administration therefore shuffling of Government servants is required. If the post is vacant and a particular Government servant has spent longer time then if authority considers him/her to transfer to the vacant post, no malafide can be alleged. Such Government servant on the contrary should be happy for getting opportunity to serve at good place for longer period. In case of **T.S.R. Subramanian (supra)**, wherein the Hon'ble Supreme Court has express said about maintaining transparency in the issue of transfer and so that the Government servants can work / discharge their duties without insecurity, fear of instability and would not indulge into any malpractice or appeasement.

22. It is also to be noted that in Section 4(4)(i) of ROT Act 2005, the word used as "consequential vacancy on account of transfer" it implies that the consequential vacancy is genuine and it is not artificially created to accommodate some other person. It is not a case in this matter.

23. I have considered the G.R. dated 04.05.2020 relied by learned Advocate Shri Lonkar. However, the order passed by the Respondent is consistent that the said G.R. Family difficulty pleaded by the applicant i.e. searching bride groom for marriageable daughter cannot be a ground to cancel the transfer.

24. In the present case, the applicant is the only female at present in the State of Maharashtra holding such higher post of DIG. The post of DIG of Nagpur Prisons is very responsible and important post and considering the vast experience of the applicant she is transferred to Nagpur so that the said Division should get the benefit of her efficient, supervision and able guidance. No illegality or malafide is made out in the present case. Hence, Original Application is dismissed.

Sd/-

**(MRIDULA BHATKAR, J.)
CHAIRPERSON**

prk