

**IN THE MAHARASHTRA ADMINISTRATIVE TRIBUNAL
MUMBAI**

ORIGINAL APPLICATION NO.435 OF 2020

DISTRICT : MUMBAI

Shri Rakesh Kisan Pawar.)
Age : 46 Yrs., Occu.: Service,)
Working as Sub-Inspector, State Excise)
and residing at 17/1134, Abhyudaya)
Nagar, MHB Colony, Kala Chowki,)
Mumbai – 400 033.)...**Applicant**

Versus

1. The State of Maharashtra.)
Through Chief Secretary,)
Mantralaya, Mumbai – 400 032.)
2. Principal Secretary.)
State Excise Department, Mantralaya)
Mumbai – 400 032.)
3. The Commissioner.)
State Excise Department,)
Old Custom House, Ground Floor,)
Shahid Bhagat Singh Marg, Fort,)
Mumbai – 400 023.)
4. Rajesh Suresh Shinde.)
Age : Adult, Occu.: Service,)
Having address at Kurla Nehru)
Nagar, Kurla (E), Mumbai – 24.)...**Respondents**

Mr. S.S. Dere, Advocate for Applicant.

Mr. A.J. Chougule, Presenting Officer for Respondents 1 to 3.

Mrs. Punam Mahajan, Advocate for Respondent No.4.

CORAM : SHRI A.P. KURHEKAR, MEMBER-J

DATE : 30.07.2021

JUDGMENT

1. The Applicant has challenged the transfer order dated 10.08.2020 whereby he was transferred from the post of Excise Sub-Inspector, W-1, Mumbai Suburb to FL01, Raigad and by way of amendment during the pendency of O.A. also challenged the proposal dated 17.12.2020 whereby the Government was requested to transfer him from FL-1, Raigad to G-1 Division, Mumbai City, invoking jurisdiction of this Tribunal under Section 19 of the Administrative Tribunals Act, 1985.

2. Shortly stated facts giving rise to this O.A. are as under :-

The Applicant is serving as Excise Sub-Inspector. He was initially posted at Talasari, District Thane and by order dated 04.07.2016, he was transferred to Mumbai and posted as Excise Inspector, W-1, Mumbai Suburb. He claims to be entitled for six years' tenure, as contemplated under proviso to Section 3 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' for brevity) which *inter-alia* provides for six years' tenure for non-secretariat services in Group 'C'. However, Applicant is transferred by impugned order dated 10.08.2020 before completion of his normal tenure of six years, only to accommodate Respondent No.4 who is posted in his place though not due for transfer.

3. Before going to the merits, at this juncture, it is necessary to mention here some of the developments, which are taken place during the pendency of O.A.

4. When the matter was taken up for admission and for consideration of interim relief, the Hon'ble Chairperson passed the following order on 10.12.2020.

“1. Heard Shri H.P. Ghadigaonkar, learned Advocate for the Applicant, Shri A.J. Chougule, learned Presenting Officer for the Respondents and Smt. Punam Mahajan, learned Advocate for the Respondent No.4.

2. Pursuing to the earlier order dated 08.09.2020, it is suggested to competent authority of Excise Department that the family problem of the Applicant that his wife is working as Nurse in Saifee Hospital, Mumbai, he has six year's old Son who is at home due to Covid-19 Pandemic and he has 75 year's old mother to be looked after this problem are found to be genuine. Therefore, the competent authority of Excise Department is suggested that if the Applicant can be accommodated anywhere in some vacant post in Mumbai or Thane City, then the issue can be resolved.

3. In the event of such vacancy, the order can be issued. 4. S.O. to 22.12.2020.”

5. In view of aforesaid order passed by the Tribunal, the Respondent No.3 – Commissioner, State Excise has forwarded the proposal to the Government on 17.12.2020 for approval to accommodate the Applicant at Mumbai in Division G-1 and in pursuance of it, the Government gave approval to the transfer and posting of the Applicant at Maharashtra Beer and Wine Centre, FL-1, Mumbai on vacant post. Admittedly, no formal orders were issued for posting of the Applicant at Mumbai.

6. However, the Applicant was not satisfied with this development and his Advocate Shri S.S. Dere submitted that the matter be decided on its merit. Accordingly, he amended the O.A. challenging the proposal dated 17.12.2020 whereby he was proposed to be transferred to G-1, Mumbai City.

7. Shri S.S. Dere, learned Advocate for the Applicant sought to assail the impugned transfer order dated 10.08.2020 on the following grounds:-

(i) The Applicant is entitled for six years' tenure in terms of first proviso to Section 3 of 'Transfer Act 2005', but he is transferred mid-tenure without compliance of Section 4(5) of 'Transfer Act 2005' which *inter-alia* requires approval of next preceding competent transferring authority for special reasons in writing. In the present case, the Applicant is transferred by order of Respondent No.3 – Commissioner, State Excise, and therefore, it is unsustainable in law.

(ii) The recommendations of Civil Services Board are not placed on record and in absence of the same, the impugned transfer order is unsustainable in view of decision of Hon'ble Supreme Court in **(2013) 15 SCC 732 (T.S.R. Subramanian and Ors. Vs. Union of India & Ors.)**.

(iii) The proposal moved during the pendency of O.A. in respect of transfer and posting of the Applicant is in fact at Maharashtra Beer and Wine Centre, FL-1, Mumbai on non-executive post causing serious prejudice to the Applicant's career.

8. Whereas, Shri A.J. Chougule, learned Presenting Officer for Respondent Nos.1 to 3 and Smt. Punam Mahajan, learned Advocate for Respondent No.4 sought to justify the transfer order dated 10.08.2020 *inter-alia* contending that the Applicant himself has given ten options and in pursuance of it, he was given Option No.9, and therefore, he is estopped from challenging the impugned transfer order. Smt. Mahajan, learned Advocate for Respondent No.4 further submits that the Government's approval dated 15.01.2021 for transferring the Applicant at Maharashtra Beer and Wine Centre, FL-1, Mumbai is not specifically challenged by the Applicant by making necessary amendment to the O.A. and in effect transfer order dated 10.08.2020 merged in the proposal dated 15.01.2021 to which there is no challenge, and therefore, O.A. itself has become infructuous.

9. Indisputably, the Respondent No.4 was posted at Shrivardhan in 2018, but made request for his transfer to Mumbai citing family difficulties. As such, there is no denying that he has not even completed three years, but he was transferred and posted in place of Applicant by another order dated 10.08.2020.

10. In view of submissions advanced at the Bar, the question posed for consideration is whether impugned transfer order dated 10.08.2020 is in consonance with the provisions of 'Transfer Act 2005' particularly Section 4(5) of 'Transfer Act 2005' and the answer is in emphatic negative.

11. Indisputably, the Applicant being in non-secretariat services (Group 'C') as per proviso to Section 3(1) of 'Transfer Act 2005', he is entitled to two full tenures (six years). This issue is already set at rest by several decisions rendered by this Tribunal and in this behalf, reference may be made to **O.A.No.679/2016 (Rajesh Bhapkar Vs. State of Maharashtra) decided on 10.11.2016** wherein the post of Excise Sub-Inspector being falling in Group 'C' (Non-secretariat) is held entitled to a tenure of six years in a post.

12. Admittedly, the Applicant was posted at Mumbai and joined on 04.07.2016. As such, he has not completed six years' tenure at the time of impugned transfer orders. This being the position, there is no escape from the conclusion that it is mid-tenure transfer.

13. True, the transfer is an incidence of service and no Government servant has vested right to claim particular post for particular period. However, now in view of implementation of 'Transfer Act 2005', the transfers are not left to the whims and caprice of the executives and are strictly governed by 'Transfer Act 2005'. Therefore, even if the transfer is an incidence of service where transfer is found in blatant violation of express provisions of 'Transfer Act 2005', the interference is inevitable and executive cannot be allowed to circumvent the provisions of law.

14. 'Transfer Act 2005' ensures fixed tenure of a Government servant in a post, but the exception is carved out under Section 4(5) of 'Transfer Act 2005' for mid-tenure transfer subject to compliance of provision mentioned therein. Section 4(5) is as follows :-

“**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 approval of immediately superior Competent Transferring Authority mentioned in the table of section 6, transfer a Government servant before completion of his tenure of post.”

15. In the present case, admittedly, there is no such case is made out to construe the same as a special case nor there is approval of immediate preceding competent transferring authority as mandated by Section 4(5) of 'Transfer Act 2005'. Indeed, the Applicant has been transferred under assumption and misconception that he is due for transfer and under that assumption, the transfer order has been issued by Respondent No.3 – Commissioner of State Excise who is admittedly not competent transferring authority for mid-tenure transfer.

16. The learned P.O. and Mrs. Mahajan, learned Advocate for Respondent No.4 sought to make much capital of the information filled-in by the Applicant at the time of transfer, wherein he gave 10 Options and on that basis, it was tried to contend that since Applicant himself has given options, it amounts to transfer on request, which is totally fallacious and misconceived.

17. In this behalf, material to note that in impugned transfer order dated 10.08.2020 itself, it is stated that these transfers are being made because of completion of normal tenure of three years. There is also reference of G.R. dated 09.04.2018 in the transfer order which in fact pertains to general transfer of a Government servant who are due for transfer on conciliation. By the said G.R. policy decision was taken to call options from the Government servants, who are due for transfer and options were required to be considered in the light of further instructions

given in G.R. Suffice to say, as rightly pointed out by learned Advocate for the Applicant Shri Dere that Respondents basically proceeded under wrong assumption that Applicant has completed his normal tenure and due for transfer.

18. It is in view of G.R. dated 09.04.2018, the options were called wherein Applicant also submitted the details of his tenures and also gave 10 options. Option Nos.1 to 8 pertain to Mumbai, Option No.9 was for Raigad and Option No.10 was for Palghar. On the basis of it, the Department processed the file and prepared the list of Government servants, who are due for transfer. Significantly, in the said list (Page No.85 of Paper Book), the Applicant is shown due for transfer. It is on the basis of this information prepared by Office, the Respondent No.3 – Commissioner, State Excise passed impugned transfer order. As such, *ex-facie*, the Department was under assumption that the Applicant is due for transfer, which is contrary to law and facts.

19. Thus, only because Applicant has submitted information as called for by the Office and gave options as required in the prescribed format, that does not take away his legal right of six years' tenure in a post. No specific document in the form of mid-tenure request transfer of the Applicant is forthcoming to substantiate that he had requested for transfer and it is on his request, the transfer order was issued. Suffice to say, the submission of information in terms of G.R. dated 09.04.2018 cannot be construed as a request transfer.

20. Needless to mention, it being the case of mid-tenure transfer, it ought to have been with prior approval of competent transferring authority, as mandated in Section 4(5) of 'Transfer Act 2005' making out a special case for mid-tenure transfer, which is totally missing in the present case.

21. As stated above, admittedly, the Respondent No.4 was not due for transfer. He joined at Shrivardhan in 2018. He made representation to transfer him to Mumbai citing personal difficulties. Before his transfer to Shrivardhan, he was posted at Mumbai. After transfer at Shrivardhan, District Raigad, again he was requested for Mumbai. It is on this background, by another separate order dated 10.08.2020, the Applicant was posted in place of Applicant. Thus, within two years, he was again brought back to Mumbai in place of Applicant which sufficiently indicates that only to accommodate him, the Applicant is displaced.

22. In so far as orders passed by the Tribunal suggesting the Respondents to explore the possibility of accommodating the Applicant at Mumbai and acceptance of the proposal by the Government to post him at Mumbai is concerned, it shall not come in the way of Applicant when impugned transfer order found totally unsustainable in law for non-compliance of Section 4(5) of 'Transfer Act 2005'. Needless to mention that often Courts/Tribunal explore the possibility of addressing the grievance of litigant as a via-media and such interim orders are always without prejudice to the rights and contentions raised by the parties in the matter. Therefore, the submission advanced by the learned Advocate for Respondent No.4 that Government tried to accommodate the Applicant in pursuance of interim orders passed by the Tribunal, and therefore, he is now estopped from challenging impugned order is totally misconceived and untenable. The contentions raised by the parties in O.A. are required to be decided on its own merit and some interim orders passed by the Tribunal and orders passed by the Department in furtherance thereto, will not take away right of the Applicant to challenge the impugned orders and rule of estoppel has no applicability. There could be no estoppel against law. It is more so, where the proposed posting sought to be given in Mumbai at Maharashtra Beer and Wine Centre, FL-1, Mumbai as proposed by letter dated 15.01.2021 is not acceptable to the Applicant, it being on non-executive post. The

Applicant was holding executive post at Mumbai and he was transferred to Raigad on non-executive post at Magnum Traders, FL-1, Raigad.

23. Indeed, no such formal order of transfer of the Applicant in view of proposal moved during the pendency of O.A. is passed. There was only proposal which has not culminated in passing final posting and transfer order. Therefore, the submission advanced by the learned Advocate for Respondent No.4 that impugned transfer order dated 10.08.2020 merged in subsequent transfer order, which was proposed during the pendency of O.A. is totally misconceived.

24. As regard recommendation of Civil Services Board (CSB) notably though there is reference of minutes of CSB in transfer order dated 10.08.2020, no such minutes of CSB are forthcoming, as mandated by Hon'ble Supreme Court in T.S.R. Subramanian's case. On that ground also, the impugned transfer order is liable to be quashed.

25. The totality of aforesaid discussion leads me to sum-up that the impugned transfer order dated 10.08.2020 as well as subsequent proposal of transfer dated 17.12.2020 is liable to be quashed and O.A. deserves to be allowed. Hence, the following order.

ORDER

- (A) The Original Application is allowed.
- (B) The impugned transfer order dated 10.08.2020 and proposal dated 17.12.2020 is hereby quashed and set aside.
- (C) The transfer order dated 10.08.2020 in favour of Respondent No.4 is consequently quashed and set aside.
- (D) The Applicant be reposted on the post he was transferred from within two weeks from today.

- (E) The Respondent Nos.1 to 3 are at liberty to pass suitable orders of transfer of Respondent No.4 at appropriate place as it deems fit.
- (F) No order as to costs.

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

Mumbai

Date : 30.07.2021

Dictation taken by :

S.K. Wamanse.

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