

IN THE MAHARASHTRA ADMINISTRATIVE TRIBUNAL, MUMBAI

ORIGINAL APPLICATION NO.668 OF 2019

Smt. Disha Kesharao Pajai,)
Aged 42 years, Working as Assistant Charity Commissioner,)
being transferred as Dhule (Nashik Division) from)
Brihanmumbai office of the belownamed Respondent No.1,)
R/o. C/o. Smt. (Dr.) Pratibha Bind, Flat No.1203,)
Siddhivinayak Mahima, Sector – 34, Kamothe,)
Mansarovar, Panvel, Navi Mumbai.)... **Applicant**

Versus

- 1) The State of Maharashtra,)
Through Principal Secretary and Law Adviser,)
Law and Judiciary Department,)
Having office at Mantralaya,)
Mumbai 400 032.)
- 2) The Charity Commissioner,)
(M.S.) Mumbai, having office at Charity Commission)
Bhavan, 3rd floor, 83, Dr. Annie Beasant Road, Worli,)
Mumbai 18)...**Respondents**

Shri A.V. Bandiwadekar, learned Advocate for the Applicant.

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

CORAM : SHRI A.P. KURHEKAR, MEMBER (J)

DATE : 20.02.2020

JUDGMENT

1. The Applicant has challenged the transfer order dated 11.03.2019 invoking the jurisdiction of this Tribunal under Section 19 of the Administrative Tribunals Act, 1985.

2. Shortly stated facts giving rise to the O.A. are as follows:-

The Applicant is serving as Assistant Charity Commissioner. She was appointed by order dated 07.10.2014 on probation and was posted at Amravati. Later, by order dated 27.06.2017, she was transferred from Amravati on the establishment of Charity Commissioner, Mumbai. As such, she was not due for transfer but by impugned transfer order dated 11.03.2019 she was transferred from Mumbai to Dhule citing administrative reasons invoking Section 4(4)(ii) and 4(5) of the Maharashtra Government Servants Regulation of Transfers and Prevention of Delay in Discharge of Official Duties Act, 2005 (hereinafter referred to as 'Act 2005'). The Applicant has challenged the transfer order dated 11.03.2019 in the present O.A.

3. Shri Arvind V. Bandiwadekar, learned Counsel for the Applicant assailed the transfer order dated 11.03.2019 on the following grounds:-

(A) The transfer of the Applicant is not vetted by the Civil Services Board (CSB) though mandatory in terms of the judgment of Hon'ble Supreme Court in ***T.S.R. Subramanian & Ors. Vs. Union of India & Ors. reported in (2013) 15 SCC 732.***

(B) At the relevant time, the code of conduct for parliamentary elections were in force, and therefore, the transfer of the Applicant without prior permission of Election Commission of India is illegal.

(C) The Applicant is transferred on the ground of complaint of misconduct/misdemeanor made by the Charity Commissioner, Mumbai without following instructions issued by G.A.D., Government of Maharashtra vide Circular dated 11.02.2015 and no special case is made out to invoke Section 4(5) of 'Act 2005'.

4. Per contra, Ms S.P. Manchekar, learned Chief Presenting Officer for the Respondents retorted in reference to contention raised in reply that the transfer of the Applicant was necessitated in view of the serious complaint of misdemeanor/misconduct made by the Charity Commissioner by letter dated 13.11.2018. She submits that Applicant was in habit of making false complaints against her senior authorities and behavior as a whole was not conducive for her continuation in Mumbai. The Charity Commissioner in its letter dated 13.11.2018, therefore, requested to the Government to transfer the Applicant to maintain decency/discipline in the department which discharge quasi judicial functions. She submits that accordingly, the proposal of transfer was approved by the Hon'ble Minister of the department as well as Hon'ble Chief Minister being next preceding competent transferring authority for midterm and mid-tenure transfer. As regard want of approval of CSB, she submits that the Principal Secretary and Remembrancer of Legal Affairs and Charity Commissioner, Mumbai who are Chairman and Member of the CSB respectively have processed the matter of transfer of the Applicant and having approved the same, non placing of the matter before CSB does not render the transfer order illegal. Thus, learned C.P.O. fairly concedes that the proposal of transfer was not placed before the CSB for its approval but sought to justify the transfer order on the aforesaid ground contending that there would have been no possibility of another view by CSB. On this line of submission, she prayed to dismiss the Original Application.

5. As to ground No.(A) :-

Needless to mention that transfer of the Government servant is incidence of service and exclusively fall within the domain of the Government. Therefore, normally the transfer order should not be interfered with by the Tribunal unless it is in contravention of express provisions of law, malafide or abuse of process of law. It must not be forgotten that now the transfers are governed and regulated by the provisions of 'Act 2005' which is complete code in itself and inter-alia provides for transfer of the Government servant, procedure to be followed for general transfer and further provides mandatory requirement to be complied with in case of mid-term or mid-tenure transfer is warranted in fact situation.

6. Now turning to the facts and present case, indisputably, the proposal for transfer of Applicant was not at all placed before the CSB. There is no denying that in terms of the judgment of Hon'ble Supreme Court in **T.S.R. Subramanian's** case (supra), the CSBs were established by the Government for each department. In so far as transfers on the establishment of Charity Commissioner, Maharashtra State Government is concerned, the Law and Judiciary department by G.R. dated 25.03.2015 has constituted the CSB with following members :-

- (i) Principal Secretary and Remembrancer of Legal Affairs-
Chairman
- (ii) Charity Commissioner, Maharashtra State, Mumbai – Member
- (iii) Registrar of Firms, Maharashtra State, Mumbai – Member

As such, the proposal of transfer was required to be vetted by CSB consist of above officials. The submission advanced by the learned C.P.O. that Charity Commissioner, Maharashtra State (Member of CSB) himself requested for

transfer and the same being processed affirmatively by Principal Secretary and R.L.A. (Chairman of CSB), there was no need for placing the same before CSB, is totally misconceived and fallacious. True, the Charity Commissioner himself forwarded the report dated 13.11.2018 (Page 44 of PB) for transfer of the Applicant and thereon note was prepared by the Principal Secretary & R.L.A. but that itself cannot be equated with the decision of the CSB. The report dated 13.11.2018 made by the Charity Commissioner was in its capacity as a Charity Commissioner attributing some misdemeanor /misconduct to the Applicant and the Principal Secretary & R.L.A. being head of the Law and Judiciary Department processed the letter dated 13.11.2018 issued by Charity Commissioner in the capacity of Head of the Department of Law & Judiciary. While doing so, the Charity Commissioner as well as Principal Secretary & R.L.A. acted in different capacity, and therefore, it cannot be said that vetting by CSB was not required. As per G.R. dated 25.03.2015, the CSB of three members was established and third member is Registrar of Firms, Maharashtra Stated, Mumbai who is not at all consulted in the matter.

7. Indeed, in view of the decision of Hon'ble Supreme Court in **T.S.R. Subramanian's** case, it was mandatory on the part of Respondent No.1 to place the matter before CSB which was also under obligation to consider the report of Charity Commissioner and to make appropriate recommendation. It is not mere formality but requires the consideration of the issues involved in the matter, with an application of mind which cannot be bypassed or circumvented in this manner. It is rather really astonishing that the Law & Judiciary Department comes with such a stand of no requirement of placing the matter before CSB. Needless to mention that Law & Judiciary Department is supposed to know niceties of law and indeed it is entrusted with duties to render legal advice to the Government but in this matter acted in a manner which is in defiance of mandate of direction of Hon'ble Supreme Court.

8. The crux of the matter is whether non placing of the matter before CSB renders the impugned transfer order illegal. To appreciate this aspect, it would be necessary to see the law laid down by the Hon'ble Supreme Court in **T.S.R. Subramanian's case** as mandatory need of constitution of CSB and its recommendation has emanated from the binding precedent of the Hon'ble Supreme Court. It would be apposite to reproduced Para No. 26 to 33 thereof as follows:-

- "26. Civil servants, as already indicated, have to function in accordance with the Constitution and the laws made by the Parliament. In the present political scenario, the role of civil servants has become very complex and onerous. Often they have to take decisions which will have far reaching consequences in the economic and technological fields. Their decisions must be transparent and must be in public interest. They should be fully accountable to the community they serve. Many of the recommendations made by the Hota Committee, various reports of the 2nd Administrative Reforms Commission, 2008 and Santhanam Committee Report have high- lighted various lacunae in the present system which calls for serious attention by the political executive as well as the law makers.
27. We find it, however, difficult to give a positive direction to constitute an independent CSB at the Centre and State Level, without executive control, which Hota Committee has recommended to be statutory in nature, that too, comprising of persons from outside the Government. Petitioners placed considerable reliance on the judgment of this Court in **Prakash Singh and Others v. Union of India** (2006) 8 SCC 1 and urged that similar directions be given to insulate, to at least some extent, the civil servants from political/executive interference. Retired persons, howsoever eminent they may be, shall not guide the transfers and postings, disciplinary action, suspension, reinstatement, etc. of civil servants, unless supported by law enacted by the Parliament or the State Legislature.
28. CSB, consisting of high ranking in service officers, who are experts in their respective fields, with the Cabinet Secretary at the Centre and Chief Secretary at the State level, could be a better alternative (till the Parliament enacts a law), to guide and advise the State Government on all service matters, especially on transfers, postings and disciplinary action, etc., though their views also could be overruled, by the political executive, but by recording reasons, which would ensure good governance, transparency and accountability in governmental functions. Parliament can also under Article 309 of the Constitution enact a Civil Service Act, setting up a CSB, which can

guide and advice the political executive transfer and postings, disciplinary action, etc. CSB consisting of experts in various fields like administration, management, science, technology, could bring in more professionalism, expertise and efficiency in governmental functioning.

29. We, therefore, direct the Centre, State Governments and the Union Territories to constitute such Boards with high ranking serving officers, who are specialists in their respective fields, within a period of three months, if not already constituted, till the Parliament brings in a proper legislation in setting up CSB.
30. We notice, at present the civil servants are not having stability of tenure, particularly in the State Governments where transfers and postings are made frequently, at the whims and fancies of the executive head for political and other considerations and not in public interest. The necessity of minimum tenure has been endorsed and implemented by the Union Government. In fact, we notice, almost 13 States have accepted the necessity of a minimum tenure for civil servants. Fixed minimum tenure would not only enable the civil servants to achieve their professional targets, but also help them to function as effective instruments of public policy. Repeated shuffling/transfer of the officers is deleterious to good governance. Minimum assured service tenure ensures efficient service delivery and also increased efficiency. They can also prioritize various social and economic measures intended to implement for the poor and marginalized sections of the society.
31. We, therefore, direct the Union State Governments and Union Territories to issue appropriate directions to secure providing of minimum tenure of service to various civil servants, within a period of three months.
32. We have extensively referred to the recommendations of the Hota Committee, 2004 and Santhanam Committee Report and those reports have highlighted the necessity of recording instructions and directions by public servants. We notice that much of the deterioration of the standards of probity and accountability with the civil servants is due to the political influence or persons purporting to represent those who are in authority. Santhanam Committee on Prevention of Corruption, 1962 has recommended that there should be a system of keeping some sort of records in such situations. Rule 3(3)(iii) of the All India Service Rules specifically requires that all orders from superior officers shall ordinarily be in writing. Where in exceptional circumstances, action has to be taken on the basis of oral directions, it is mandatory for the officer superior to confirm the same in writing. The civil servant, in turn, who has received such information, is required to seek confirmation of the directions in

writing as early as possible and it is the duty of the officer superior to confirm the direction in writing.

33. We are of the view that the civil servants cannot function on the basis of verbal or oral instructions, orders, suggestions, proposals, etc. and they must also be protected against wrongful and arbitrary pressure exerted by the administrative superiors, political executive, business and other vested interests. Further, civil servants shall also not have any vested interests. Resultantly, there must be some records to demonstrate how the civil servant has acted, if the decision is not his, but if he is acting on the oral directions, instructions, he should record such directions in the file. If the civil servant is acting on oral directions or dictation of anybody, he will be taking a risk, because he cannot later take up the stand, the decision was in fact not his own. Recording of instructions, directions is, therefore, necessary for fixing responsibility and ensure accountability in the functioning of civil servants and to uphold institutional integrity.”

9. It would not be out of place to mention here that in deference to law laid down by the Hon'ble Supreme Court, the State of Maharashtra had issued the G.R. dated 31.01.2014 to constitute the CSB at all level. Despite this position, this Tribunal noticed non observance of the directions given by the Hon'ble Supreme Court in **T.S.R. Subramanian's** case (supra) in O.A. No.770/2017 decided on 09.11.2017 expressing serious displeasure. Thereafter, the then Hon'ble Chief Minister had also issued Circular for the observance of mandatory requirement of placing the matter before the CSB. The content of the letter is as follows:-

“देवेन्द्र फडणवीस
मुख्य मंत्री,
महाराष्ट्र

मंत्रालय
मुंबई ४०० ०३२

क्र.एसआ व्ही २०१८/प्र.क्र.०६/कार्या.१२

विषय : शासकीय अधिकारी / कर्मचारी यांची पदस्थापना तसेच सर्वसाधारण / मुदतपूर्व / मध्यावधी बदली करताना मा. महाराष्ट्र प्रशासकीय न्यायधिकरण, मुंबई यांच्या मूळ अर्ज क्र. ७७०/२०१७ प्रकरणी दि. ०९/११/२०१७ रोजी दिलेल्या निर्देशानुसार, मा. सर्वोच्च न्यायालयाने श्री. टी. एस. आर. सुब्रमन्यान आणि इतर विरुद्ध केंद्र शासन व इतर प्रकरणी दिलेले न्यायनिर्णय विचारात घेऊन निर्णमित केलेल्या दि.३१.०१.२०१४ व दि. १९.०१.२०१५ च्या शासन निर्णयातील आदेशांचे पालन करण्याबाबत.

महोदय/ महोदया,

मा. सर्वोच्च न्यायालयाने, श्री. टी. एस. आर. सुब्रमन्यान आणि इतर विरुद्ध केंद्र शासन व इतर प्रकरणी दिलेले न्यायनिर्णयातील तरतूदी विचारात घेऊन, शासकीय अधिकारी / कर्मचा-यांच्या सर्वसाधारण,

मध्यावधी अथवा मुदतपूर्व बदल्या करताना तसेच पदस्थापना करताना सक्षम प्राधिका-यास शिफारस करण्यासाठी दि. ३१.०१.२०१४ तसेच दि. १९.०१.२०१५ च्या शासन निर्णयान्वये नागरी सेवा मंडळ स्थापन करण्याबाबतचे निर्देश दिलेले आहेत. मा. महाराष्ट्र प्रशासकीय न्यायधिकरण, मुंबई यांनी मूळ अर्ज क्र. ७७०/२०१७ प्रकरणी दि. ०९/११/२०१७ च्या न्यायनिर्णयान्वये नागरी सेवा मंडळाच्या शिफारशी विचारात घेण्याबाबत निर्देश दिलेले आहेत. मा. महाराष्ट्र प्रशासकीय न्यायधिकरण, मुंबई यांचे निर्देश व मा. सर्वोच्च न्यायालयाने, श्री. टी. एस. आर. सुब्रमन्यान आणि इतर विरुद्ध केंद्र शासन व इतर प्रकरणी दिलेल्या न्यायनिर्णयातील तरतूदी विचारात घेऊन निर्गमित केलेले दि. ३१.०१.२०१४ व दि. १९.०१.२०१५ च्या शासन निर्णयातील तरतूदीनुसार बदल्या / पदस्थापनेच्या वेळी नागरी सेवा मंडळाच्या शिफारशी कृपया विचारात घ्याव्यात.

आपला,
Sd/-
(देवेंद्र फडणवीस)

प्रति,
सर्व मंत्री / सर्व राज्यमंत्री''

10. Indeed, the G.A.D., Government of Maharashtra had also issued Circular dated 11.02.2015 giving specific instructions to all the departments to observe mandatory requirement of placing the matter before CSB mid-term and mid-tenure transfer. Para 12 of the Circular is material which is as follows :-

“१२. शासन सेवेतील गट अ, गट ब व गट क मधील अधिकारी/कर्मचा-यांच्या पदस्थापना, बदली याबाबत सक्षम प्राधिका-यास शिफारशी करण्यासाठी नागरी सेवा मंडळ स्थापन करण्याबाबतचे आदेश दि. ३१.०१.२०१४ च्या शासन निर्णयान्वये दिले होते. तदनंतर सदर शासन निर्णयास पुढील आदेश होईपर्यंत दिनांक २०.०५.२०१४ च्या शासन निर्णयान्वये स्थगिती दिली होती. सदर स्थगिती आता दि. १९.०१.२०१५ च्या शासन निर्णयान्वये उठविण्यात आली असून सर्व प्रशासकिय विभागांनी त्यांच्या अधिपत्याखालील अधिकारी/कर्मचा-यांच्या पदस्थापना व बदल्या याबाबत सक्षम प्राधिका-यास शिफारशी करण्यासाठी नागरी सेवा मंडळ स्थापन करणेबाबत निर्देश दिलेले आहेत. सदर निर्देशानुसार अधिकारी/कर्मचा-यांच्या पदस्थापना करण्यापूर्वी नागरी सेवा मंडळाच्या शिफारशी प्राप्त करून घेण्याबाबत बदली करण्यास सक्षम असलेल्या प्राधिका-याने दक्षता घ्यावी.

१३. ज्या प्रकरणात मा.मुख्यमंत्रीमहोदय/मा.मंत्रीमहोदय हे बदली प्राधिकारी वा लगतचे वरिष्ठ प्राधिकारी असतील अशा प्रत्येक प्रकरणात मध्यावधी बदली करताना मा.मुख्यमंत्रीमहोदय यांना त्यांच्या प्रधान सचिव /सचिव यांनी तसेच मा.मंत्रीमहोदय यांना त्यांच्या संबंधित प्रशासकीय विभागाच्या अपर मुख्य सचिव/प्रधान सचिव/सचिव यांनी निःस्पृहपणे प्रकरणाची वस्तुस्थिती व बदली कायदयातील तरतूदी अवगत कराव्यात.

२. वरील सूचनांचे काटेकोरपणे पालन होईल याची सर्व बदली प्राधिकारी व त्यांच्या लगतचे वरिष्ठ प्राधिकारी यांनी कृपया दक्षता घ्यावी.”

11. It may be noted here that Chief Secretary, State of Maharashtra had also issued advisory letter dated 01.03.2018 to the secretarial staff of the Hon'ble Chief Minister and other Hon'ble Minister's offices for observance of the mandate contained in the judgment of **T.S.R. Subramanian's** case(supra).

Indeed, the Chief Secretary had also filed affidavit to that effect in **O.A. No.614/2017 (Prمود H. Sawakhande V/s. State of Maharashtra & Anr.)**, decided by the Hon'ble Chairman, M.A.T. Mumbai on 27.02.2018. In the said Affidavit-in-Reply, the Chief Secretary had stated as follows :-

“4. I say and submit that in compliance of the aforesaid order, the order of Hon'ble Tribunal brought to the notice of the Hon'ble the Chief Minister, Government of Maharashtra for appraisal about binding nature and direction; contained in the case of **T.S.R. Subramanian and others Versus Union of India and Others, decided on October 31, 2013.**

5. I say and submit that Hon'ble the Chief Minister, Government of Maharashtra issued an advisory letter bearing No.SRV/2018.C.R.no.06/Desk 12 to all Hon'ble Ministers to be vigilant in observance of the mandate contained in the judgment of T.S.R. Subramanian and others Versus Union of Indian and Others. The copy of the said advisory letter is annexed herewith an Annexure R-1.

6. I further say and submit that as directed by the Hon'ble Tribunal, I have also issued an advisory letter bearing no.SRV/2018.C.R. no.06/Desk 12 dated 01.03.2018 to the Secretarial staff of the Hon'ble the Chief Minister and other Hon'ble Ministers' offices to be vigilant in observance of the mandate contained in the judgment of T.S.R. Subramanian and others Versus Union of Indian and Others. The copy of the said letter is annexed herewith as Annexure R-2.”

12. Suffice to say, despite the aforesaid position, no meeting of CSB was conveyed and without placing the issue before CSB, the transfer order has been issued with approval of Hon'ble Chief Minister. Even if the transfer is approved by the highest competent transferring authority as contemplated under Section 4(5) of 'Act 2005', the approval by the Hon'ble Chief Minister does not wipe out material illegality of want of recommendation as the case may be, by the CSB though mandatory in view of dicta of the Hon'ble Supreme Court in **T.S.R. Subramanian's** case (supra) as well as various G.Rs and the Circulars issued by the Government itself.

13. Learned C.P.O. placing reliance on the decision on this Tribunal in ***O.A.717 to 721/2016 (Siddhartha Shelar V/s Charity Commissioner, decided on 23.01.2017 decided by the then Hon'ble Administrative Member)*** submitted that non placing of the matter before CSB is not fatal where transfer is approved by the highest competent transferring authority. I have gone through the said judgment wherein it has been held that non reference of matter to CSB in fact situation can be called an irregularity but would not vitiate the impugned transfer order. As such in fact situation, the Tribunal held that in certain situation, it can be irregularity only. Interestingly, learned Counsel for the Applicant has pointed out that the same learned Administrative Member while decided ***O.A.1159/2016 (Sujit Deokar V/s State of Maharashtra, decided on 28.02.2017)*** deviated from his finding recorded in O.A.717/2016 in following words :-

“12. The Respondent No.3 has relied on the judgment of this Tribunal in O.A.No.717 to 721 of 2016. That judgment has been delivered considering the facts and circumstances of that case. The office-bearers of Employees Association were acting in a manner to make it impossible to run that particular office and D.Es were started against all of them. The Head of Department has sent a detailed report and Secretary of the Department has also analyzed the report and submitted his recommendation to the Hon'ble Chief Minister. All the facts and circumstances which were extremely serious were mentioned in the note. In such circumstances, it was held that not placing the matter before Civil Services Board could be condoned. No ratio decidendi has been laid down. In fact, any such ratio decidendi would be contrary to law laid down by Hon'ble Supreme Court in T.S.R. Subramanian's case (supra). In the present case, note of the Respondent No.1 did not disclose all the facts and circumstances, as has been discussed above and not placing the matter before Civil Services Board was a serious lapse which cannot be rectified.”

As such, reliance placed by the learned CPO in decision of O.A.No.717/2016 is of no assistance to her.

14. At this juncture, it would be apposite to note the decision rendered by Hon'ble Chairman in ***O.A.614/2017 (Prmod Sawakhande V/s State of Maharashtra, decided on 27.03.2018)*** wherein O.A. was allowed on the

ground of non placing the matter of transfer before CSB. In Para Nos.42 and 43 of the judgment, it has been held as under:-

“42. In so far as requirement of reference to Civil Services Board is concerned those are reiterated by this Tribunal in the judgment of this Tribunal rendered in O.A.No.770 of 2017 with reference to **T.S.R. Subramanian’s case**.

43. The manner in which reply is prepared / drafted / filed by the Under Secretary, Deputy Secretary and Principal Secretary leads to creation of an impression that these officers have divorced themselves from their primary allegiance and loyalty towards law. In the pleadings, the State has failed to explain as to how G.R. क्र.एसआरखी-२०१४/ मुस-३४/प्र.क्र.३७९/१२, dated 11.02.2015, which unambiguously states that reference to Civil Services Board shall be mandatory in view of **T.S.R. Subramanian’s case (supra)**, can be ignored or neglected without being disrespectful to the dictum laid down by the Hon’ble Supreme Court. It is amazing as to how these officers wield courage to deny the mandatory requirement of placing the matter of transfer before Civil Services Board, by disregarding the judgment of the Hon’ble Supreme Court, and judgment of this Tribunal, and prefer to abdicate to wishes of executives higher in hierarchy.”

15. In this view of the matter, there is no escape from the conclusion that impugned transfer order being in blatant violation of binding precedent of the judgment of Hon’ble Supreme court in ***T.S.R. Subramanian’*** case(supra) for not referring the matter before CSB renders the impugned transfer order clearly unsustainable in law.

16. As to ground No.‘B’ :-

Indeed the discussion and finding on issue Nos. ‘B’ and ‘C’ would be of an academic exercise in view of finding recorded on ground No. ‘A’. However, in view of submission advanced by the Counsels, it is necessary to record the findings on all the issues raised so that judgment is complete in all respect.

I do not find any substance in the submission advanced by learned Counsel for the Applicant that for want of prior approval of Election Commissioner of India, the impugned transfer order is illegal. It is rightly

pointed out by the learned C.P.O. that in terms of instructions issued by Election Commission of India by letter dated 07.01.2007, the ban on transfer of officers /officials was restricted to the employees who are connected with the conduct of the election. She has further rightly pointed out that this issue is already answered in favour of the Respondents in **O.A.No.409/2019 (Dr.Babu Hamid Tadavi V/s State of Maharashtra, decided on 16.09.2019)** where one of the grounds to challenge the transfer order was absence of prior approval of Election Commission of India.

17. Learned Counsel for the Applicant has produced the copy of letter dated 07.01.2007 issued by Election Commissioner of India which makes it quite clear that those instructions are applicable for the transfer of the officers/officials connected with the conduct of the election. The list of such officials which is illustrative, is also mentioned in letter dated 07.01.2007. Thus it is obvious that object behind issuance of such instructions is not to disturb the officials who are connected with conduct of the election such as District Election Officers/Returning Officers/Assistant Returning Officers etc. to ensure that election process should be completed without any hindrance likely to be caused because of transfer of the officials who are connected with the election duties. Whereas in present case, the Applicant was serving as Assistant Charity Commissioner and admittedly no work related to election was assigned to her. I, therefore, see no illegality in transfer order on this ground.

18. Learned Counsel for the Applicant could not point out any express provision of law that in absence of prior approval of Election Commission that *ipso facto* renders the transfer order illegal.

19. Even assuming for a moment that prior approval of Election Commission of India was required in that event also at the most it would be mere irregularity and not illegality for which Government may be answerable to the Election Commission, in case, Election Commission calls for explanation for breach of its directions.

20. As to ground 'C' :-

Indisputably, the Applicant was not due for transfer but she was transferred in view of report made by the Charity Commissioner, State of Maharashtra, Mumbai who is Controlling Head of the Applicant. In report dated 13.11.2018, the Charity Commissioner attributed demeanor/misconduct to the Applicant stating that though her judicial work is withdrawn still she is creating nuisance in the office. It is further stated in the letter that she is making false accusation against her higher authorities and because of her such attitude entire atmosphere of the office is totally disturbed. The employees and officials are terrorized because of such conduct and behavior of the Applicant. The Charity Commissioner being Controlling Head of the Applicant had an opportunity to assess the performance and work of the Applicant and his assessment is outcome of objective assessment of the situation he faced and perceived being Head of the Department. As such, it is on this background, transfer of the Applicant was found necessitated to maintain decency and discipline in the administration. The department has also initiated regular D.E. for misconduct against the Applicant and the same is under way.

21. Learned Counsel for the Applicant made much clamor of non-observance of instructions given in circular issued by G.A.D. dated 11.02.2015. All that in Para No.8 of Circular, it is stated that in case of complaint against officials who has not completed three years tenure, such officials should not

be transferred without ascertaining fatal position and if necessary by calling fact finding report from the concerned authority. It further states that if the concerned authority, formed opinion that continuation of such employee is not conducive then it can recommend the transfer to the competent transferring authority who in turn would take appropriate decision. In the present case, on receipt of report of Charity Commissioner, Principal Secretary & R.L.A found that transfer of the Applicant is necessitated and accordingly, placed the matter before Hon'ble Chief Minister who approved the transfer of the Applicant being Highest Competent Transferring Authority as contemplated under section 4(5) of 'Act 2005' which inter-alia permits midterm and mid-tenure transfer as a special case after recording reasons in writing. In present case, competent authority has recorded its satisfaction that transfer of the Applicant in view of report of Charity Commissioner is must as seen from file noting from page nos.36 to 38 of PB. As such, it cannot be said that no case is made out for transfer under Section 4(5) of 'Act 2005'. Whether reasons which weighed with the authority for arriving at subjective satisfaction would qualify it as special case would depend upon facts of each case, as there would be diverse consideration for such decision of transfer. The Tribunal cannot substitute it's opinion in place of competent Transferring Authority, if it is not *malafide*.

22. At this juncture, it would be apposite to refer the decision of Hon'ble Supreme Court in ***Civil Appeal No.1010-1011 of 2004 O.A.409/201917(Union of India Vs. Sri Janardhan Debanath & Anr., decided on 13.02.2004)*** wherein it has been observed as follows :-

“12. The allegations made against the respondents are of serious nature, and the conduct attributed is certainly unbecoming. Whether there was any mis-behaviour is a question which can be gone into in a departmental proceeding. For the purposes of effecting a transfer, the question of holding an enquiry to find out whether there was mis-behaviour or conduct unbecoming of an employee is unnecessary and what is needed is the prima

facie satisfaction of the authority concerned on the contemporary reports about the occurrence complained of and if the requirement, as submitted by learned counsel for the respondents, of holding an elaborate enquiry is to be insisted upon the very purpose of transferring an employee in public interest or exigencies of administration to enforce decorum and ensure probity would get frustrated. The question whether respondents could be transferred to a different division is a matter for the employer to consider depending upon the administrative necessities and the extent of solution for the problems faced by the administration. It is not for this Court to direct one way or the other. The judgment of the High Court is clearly indefensible and is set aside. The Writ Petitions filed before the High Court deserve to be dismissed which we direct. The appeals are allowed with no order as to costs."

23. As such, in view of the legal principle enunciated by Hon'ble Supreme Court in **Janardhan Debanath's** case (cited supra), it would be inappropriate to insist for holding an elaborate enquiry for the purpose of transfer where his immediate transfer is warranted in public interest or exigencies of administration.

24. The totality of the aforesaid discussion leads me to sum that though I do not find any substance in the ground Nos.'B' and 'C' raised by learned Counsel for the Applicant, transfer order deserves to be quashed in view of finding on ground No.'A', for non-observance of placing of the matter before CSB as mandated by the Hon'ble Supreme Court in **T.S.R. Subramanian's** case. However, respondents are at liberty to pass appropriate order of transfer, if necessary, by following due process of law, after reinstating the Applicant. Original Application, therefore, deserves to be allowed. Hence, the following order.

ORDER

- (A) Impugned order dated 11.03.2019 is quashed and set aside.
- (B) Applicant be reposted on the post she is transferred from within two weeks from today.

(C) No order as to cost.

Sd/-

(A.P. KURHEKAR)
Member-J

Place : Mumbai
Date : 20.02.2020
Dictation taken by : VSM
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