

**IN THE MAHARASHTRA ADMINISTRATIVE TRIBUNAL
MUMBAI**

ORIGINAL APPLICATION NO.736 OF 2019

DISTRICT : THANE

Shri Sheshrao Namdeo Bade.)
Age : 47 Yrs., Occu.: Education Officer)
(Secondary), Zilla Parishad, Thane and)
residing at 1003, Vrusti – D, Dosti Vihar,)
Vartak Nagar, Thane (W).) **...Applicant**

Versus

1. The State of Maharashtra.)
Through the Secretary,)
School Education & Sports Dept.,)
Having office at Madam Cama Road,)
Hutatma Rajguru Marg, Mantralaya,)
Mumbai – 400 032.)

2. Smt. Meena H. Shendkar (Yadav).)
Education Officer, Bombay)
Municipal Corporation, Mumbai.) **...Respondents**

Mr. M.D. Lonkar, Advocate for Applicant.

Mr. A.J. Chougule, Presenting Officer for Respondent No.1.

Mr. Talekar, Advocate for Respondent No.2.

CORAM : A.P. KURHEKAR, MEMBER-J

DATE : 11.09.2019

JUDGMENT

1. The Applicant has challenged his impugned transfer order dated 26.07.2019 invoking jurisdiction of this Tribunal under Section 19 of the Administrative Tribunals Act, 1985. The matter is taken up for final hearing at the stage of admission in view of direction of Hon'ble High Court in Writ Petition (Stamp) No.21808 of 2019 to decide the O.A. within six weeks.

2. In general transfers of 2018, the Applicant was transferred and posted as Education Officer (Secondary), Zilla Parishad, Thane on vacant post and had not completed normal tenure of three years till the impugned order dated 26.07.2019. Abruptly, by impugned transfer order dated 26.07.2019, he was transferred on the post of Education Officer (Continuous Education), Zilla Parishad, Thane and in his place, the Respondent No.2 was transferred on his place though she was not due for transfer. The Applicant has, therefore, challenged the impugned transfer order dated 26.07.2019 in the present O.A. contending that the same is in blatant violation of Section 3, 4((4)(ii) and 4(5) of Maharashtra Government Servants Regulation of Transfers and Prevention of Delay in Discharge of Official Duties Act, 2005 (hereinafter referred to as the "Transfer Act 2005" for brevity).

3. Having gone through the pleadings and on hearing the submission of Shri M.D. Lonkar, learned Advocate for the Applicant, the grounds to challenge the impugned transfer order are as follows :-

- (a) The impugned transfer order is in violation of Sections 3, 4(4)(ii) and 4(5) of 'Transfer Act 2005'.
- (b) The Applicant had not completed normal tenure of three years but he was displaced and transferred only to accommodate Respondent No.2, that too, on the recommendation of Member of Parliament.

- (c) The Civil Services Board (CSB) had not recommended transfer of the Applicant on the contrary, it rejected the request transfer of the Applicant.
- (d) Absolutely no case is made out either to treat it as a special case or an administrative exigency to carve out exception, so as to cut-short normal tenure of the Applicant.
- (e) The impugned transfer order is arbitrary and colourable exercise of power.

4. The Respondent No.1 – State of Maharashtra has filed the Affidavit-in-reply (Page Nos.125 to 137 of Paper Book) and all that, it contends that the impugned transfer order has been ordered by the Hon'ble Chief Minister and in pursuance of approval, the Applicant was transferred mid-term and mid-tenure and the Respondent No.2 has been transferred and posted in his place. The Respondent No.1 admits that the CSB did not recommend the transfer of the Applicant but sought to justify the impugned transfer order only on the ground that it has been as approved by the Hon'ble Chief Minister, who is Highest Competent Authority for mid-term and mid-tenure transfer under Section 4(5) of 'Transfer Act 2005'.

5. Here, it would be apposite to reproduce Para 18 of Reply, which is as follows :-

“18. With reference to contents of paragraph no.7.2 (v), I say and submit that, the daughter of the respondent no.2 was studying in standard XII and therefore, the respondent no.2 requested to transfer her on the post of Education Officer (Secondary), Thane. The said request made by the applicant though not approved by the Civil Service Board and the competent authority i.e. Minister of Education. The Hon'ble Chief Minister, who is the next superior authority to the competent authority has approved the request of the applicant and ordered to transfer respondent no.2 as per her request and at the same time ordered that the applicant be transferred on the post of Education Officer (Continuous Education), Thane. Accordingly, the transfer order dated 26.07.2019 are issued.”

6. The Respondent No.2 has filed Affidavit-in-reply (Page Nos.21 to 45 of P.B.) *inter-alia* denying the entitlement of the Applicant to the relief claimed. The Respondent No.2 sought to contend that there were complaints against the Applicant about his functioning as Education Officer (Secondary), Zilla Parishad, Thane and one complaint was also made by the Hon'ble Member of Parliament requesting Hon'ble Chief Minister to transfer him. The Respondent No.2 admits that she was not due for transfer and also admits to have made representation / request to transfer her on the post held by the Applicant at Thane on the ground of family difficulties. As such, the Respondent No. 2 sought to contend that, because of complaints against the Applicant, he was transferred and in his place, she is posted considering her request for transfer at Thane. The Respondent No.2, therefore, denied that the impugned transfer order suffers from any legal infirmity. According to her, as it has been approved by the Hon'ble Chief Minister, the challenge to the same is without any merit and prayed to dismiss the O.A.

7. Heard Shri M.D. Lonkar, learned Advocate for the Applicant, Shri A.J. Chougule, learned Presenting Officer and Shri Talekar, learned Advocate for Respondent No.2 at length.

8. In view of pleadings and submissions advanced at the Bar, the following emerges as uncontroverted factual aspects :-

- (i) By general transfer order dated 18.05.2018, the Applicant was posted as Education Officer (Secondary), Z.P, Thane and had not completed normal tenure of three years till the passing of impugned order.
- (ii) The Respondent No.2 was also posted as Education Officer (Secondary), Z.P, Palghar by common transfer order dated 18.05.2018.

- (iii) The transfer of Respondent No.2 as Education Officer, (Secondary), Z.P, Palghar was later modified by the Government by order dated 10.08.2018 and she was posted as Director, Jawahar Bal Bhuvan, Mumbai.
- (iv) Again, the Respondent No.2 was transferred by order dated 04.06.2019 and posted as Education Officer, BMC, Mumbai but she did not join on that post.
- (v) The Respondent No.2 made representations / request by letter dated 08.02.2019 (Page No.143 of P.B.) for giving posting as Education Officer (Secondary), Z.P, Thane but it was rejected by Civil Services Board (Page No.144 of P.B.).
- (vi) The Respondent No.2 again made representation / request on 06.06.2019 (Page No. 158 of P.B.) which was again placed before the CSB but the same was rejected.
- (vii) Though CSB had twice rejected the request of the Applicant when the file was placed before the Hon'ble Chief Minister, he was pleased to accept her request and ordered to post her in place of Applicant and thereby the Applicant was sought to be transferred as Education Officer (Continuous Education), Z.P, Thane by impugned order dated 26.07.2019.

9. In view of above admitted factual aspects, the crux of the matter is whether the impugned transfer order is sustainable in law and facts and in consonance with the provisions of 'Transfer Act 2005'.

10. At this juncture, it would be apposite to borne in mind the settled legal principles holding the field in the matter of transfer.

11. Following are the guiding principles laid down by the Hon'ble Supreme Court.

“i) The courts should not interfere with the transfer orders which are made in public interest and for administrative reasons unless the transfer orders are made in violation of any statutory rule or on the grounds of malafides. (Mrs. Shilpi Bose & Ors Vs. State of Bihar & Ors. 1991 Supp, (2) SCC 659).

ii) A Government servant holding a transferable post has no vested right to remain posted at one place or the other. Transfer order issued by a Competent Authority does not violate any of his legal rights. (Shilpi Boses's case (supra).

iii) Who should be transferred where, is a matter for the appropriate authority to decide. Unless the transfer order is vitiated by malafides and is made in violation of any statutory provisions, the court cannot interfere with it. (Union of India & Ors. Vs. S.L Abbas (1993) 4 SCC 357).

iv) Transfer of an employee is not only an incidence 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. (State of Uttar Pradesh & Ors. Vs. Gobardhan Lal (2004) 11 SCC 402).

v) Transfer made even in transgression of administrative guidelines cannot also be interfered with, as it does not confer any legality enforceable rights, unless, it is shown to be vitiated by malafides or made in violation of any statutory provision and so 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 emoluments (Gobardhan Lal's case supra).

vi) The courts should not deal with transfer orders as if they are appellate authorities over such orders, which could assess the niceties of the administrative needs and requirements of the situation concerned. They cannot substitute their own decision in the matter of transfer for that of competent authorities of the State. Even allegations of malafides when made must be such as to inspire confidence in the court or based on concrete materials (Gobardhan Lal's case (supra).

vii) Allegation of malafides should not be entertained on the mere making of it or on consideration borne out of conjectures of surmises. (Gobardan Lal's case (supra).

viii) Except for strong and convincing reasons no interference could ordinarily be made with an order of transfer (Gobardhan Lal's case (supra).”

12. Here, it would be also appropriate to take note of legal position in view of enforcement of 'Transfer Act 2005' as held by this Tribunal in **O.A.900/2018 (Prashant S. Pisal Vs. The Principal Secretary, Revenue & Forest Department, State of Maharashtra, Mumbai & Ors.) decided on 20.12.2018**. In Para No.11 of the Judgment, the Hon'ble Chairman set out the position of law as follows :-

(a) Before commencement of ROT Act, 2005, matters of transfer were governed exercise of power and prerogative as regards the transfer of Government servant.

(b) The decision as regards Transfer used to be based on good and fair sense of administration as guided and interpreted by judicial pronouncement and was a matter purely governed by executive powers and administrative discretion.

(c) Even after commencement of ROT Act, 2005, even now the power of transfer and its finality continues to be a matter of absolute executive business. However, now the executive business is no more left sheerly to the absolute executive discretion or unquestionable prerogative.

(d) Though final decision continues to be a matter of absolute executive power, however, the procedure, path or locus of reaching that decision is prescribed by provisions of law, which are construed by this Tribunal as well by Hon'ble High Court to be mandatory.

(e) This Tribunal as well as Hon'ble High Court have come across patent violation of the mandatory provisions, and therefore, after taking into consideration the adverse observations of Tribunal and Hon'ble High Court it had become necessary for the Government to reiterate and re-proclaim the procedure and manner in which the decision to transfers should be reached through Government Circulars dated 31.1.2014, 19.1.2015 and 24.9.2015."

13. As such, in view of admitted factual aspects as set out above and in the light of foregoing legal position, the Tribunal is required to decide whether the impugned transfer order is sustainable in law.

14. Now to begin with, let us see the Scheme and provisions of 'Transfer Act 2005'.

"Sub-section (1) emphatically provides that no Government servant shall ordinarily be transferred unless he has completed his tenure of

posting as provided in Section 3. Sub-section (2) requires a competent authority to prepare every year in the month of January, a list of Government servants due for transfer, in the month of April and May in the year. Sub-section (3) requires that the transfer list prepared by the respective competent authority under sub-section (2) for Group A Officers specified in entries (a) and (b) of the table under section 6 shall be finalized by the Chief Minister or the concerned Minister, as the case may be, in consultation with the Chief Secretary or concerned Secretary of the Department, as the case may be. Proviso thereto requires that any dispute in the matter of such transfers shall be decided by the Chief Minister in consultation with the Chief Secretary. Sub-section (4) mandates that the transfers of Government servants shall ordinarily be made only once in a year in the month of April or May. Proviso to Sub-section (4) permits a transfer to be made any time in the year in the circumstances stated therein. Sub-clause (i) thereof permits such a transfer to be made at any time in a year to a newly created posts 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. Sub-clause (ii) thereof permits such a transfer at any time 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. Sub-section (5) of Section 4, which begins with a non obstante clause, permits the competent authority, in special cases, after recording reasons in writing and with the prior approval of the immediately superior Transferring Authority mentioned in the table of section 6, to transfer a Government servant before completion of his tenure of post.”

15. Turning to the facts, admittedly, the Applicant was not due for transfer neither Respondent No.2 was due for transfer. However, by impugned order dated 26.07.2019, the Applicant was transferred and in his place, the Respondent No.2 was posted in pursuance of her request. This being the position, there has to be compliance of Section 4(5) of 'Transfer Act 2005'. As stated above, the Applicant firstly made request by letter dated 08.02.2019 and the same was placed before the CSB. However, the CSB refused to accept her request. Then again, she made second representation on 06.06.2019. It was again placed before CSB. The CSB declined to accept representation and rejected her request. However, when the matter was placed before the Hon'ble Chief Minister, he passed the following order sans reasons.

“परिच्छेद-३ मधील अ.क्र.१ विनंती बदली सह श्री.शेषराव बडे यांची शिक्षणाधिकारी (निरंतर) जि.प. ठाणे येथे बदलीसह प्रस्ताव मान्य.”

सही
मुख्यमंत्री”

Thus, the reason or ground for transfer is totally missing.

16. It is thus manifest that though the CSB had rejected the request of Respondent No.2, it was accepted at the level of Hon'ble Chief Minister. True, the recommendations made by CSB are not binding upon the executive as submitted by learned Advocate for Respondent No.2, as the final decision is with the executive. However, such transfer should satisfy rigor and mandatory requirement of Section 4(5) of 'Transfer Act 2005', which is completely missing in the present case. There is absolutely nothing to justify how such transfer could be treated as a special case. I do not find a single sentence or word to satisfy rigor of Section 4(5) of 'Transfer Act 2005'. Needless to mention that for such mid-term and mid-tenure transfer, the Competent Authority is required to record reasons in writing to show how the transfer was necessitated and fits in Section 4(5) of 'Transfer Act 2005'. Mere approval to the transfer by the highest Competent Authority is not enough in absence of recording reasons to that effect. Suffice to say, no case is made out for such mid-term and mid-tenure transfer. On the contrary, it is manifest that the Applicant was displaced only to accommodate Respondent No.2 and there was no other reason whatsoever to transfer the Applicant. Indeed, it was at the intervention of Shri Kapil Patil, Member of Parliament who had recommended for the transfer of Respondent NO.2 in place of the Applicant.

17. Shri Talekar, learned Advocate for Respondent No.2 sought to contend that there were complaints against the Applicant, and therefore, he was required to be transferred. He had invited Tribunal's attention to the letters dated 30.01.2019 and 03.06.2019 of

Shri Kapil Patil, Member of Parliament, which are at Page Nos.68 and 70 of Paper Book. The perusal of these letters reveals that it was grievance of Hon'ble Member of Parliament that he had received several complaints against the Applicant but no action was taken against him. In the letter, he therefore, requested Hon'ble Chief Minister to transfer the Applicant and to post Respondent No.2 in his place. Indeed, if there was any such serious complaints against the Applicant, then he should have restricted his grievance to the extent of his transfer but surprisingly in the letters, he had also recommended for posting of Respondent No.2 in place of the Applicant, which is the only reason for displacing the Applicant.

18. In so far as the alleged complaints against the functioning of the Applicant is concerned, except these two letters, no other material is forthcoming. Indeed, if there were any such serious complaints, then it was required to be placed before the CSB for its recommendation. However, admittedly, the complaints were not placed before the CSB for its recommendation. Apart, the order passed by Hon'ble Chief Minister also does not indicate that the Applicant was transferred on account of complaints against him. The order is totally silent about the reasons or grounds and all that the Hon'ble Chief Minister directed to transfer the Applicant and to post Respondent No.2 in his place. It is thus manifest that it is only on recommendation of Hon'ble M.P, the Applicant was displaced from his post only to accommodate Respondent No.2.

19. At this juncture, it would be apposite to note relevant Paragraphs from Circular dated 11.02.2015 which *inter-alia* provides that the Government servant who has not completed three years should not be transferred only on the basis of complaints without ascertaining it's veracity and some enquiry is required to be undertaken before effecting the transfer. It also provides that where the Government servant who has not completed three years' service

requested for transfer on a particular post and if the Government servant functioning on that post has not completed three years' tenure, then the request should not be accepted to displace other Government servant working on the said post. Clause Nos.4 and 8 of Circular is material, which is as follows :-

“४. एखाद्या अधिकारी / कर्मचा-याने एखाद्या विशिष्ट पदाची मागणी केल्यास वा सदरहू अधिकारी/कर्मचा-याने मा.लोकप्रतिनिधी मार्फत एखाद्या विशिष्ट पदाची मागणी केल्यास व सदरहू विशिष्ट पदावर ३ वर्षांपेक्षा कमी कालावधी असलेला अधिकारी / कर्मचारी कार्यरत असल्यास संबंधीत अधिकारी / कर्मचा-याची बदली न करता मागणी करणा-या अधिकारी / कर्मचा-याची पदस्थापना अन्य पदावर करण्याची दक्षता बदली प्राधिका-याने घ्यावी.

८. एखाद्या प्रकरणात ३ वर्षांपेक्षा कमी कालावधी असलेल्या अधिकारी / कर्मचा-याच्या विरोधात गैरवर्तणुकीच्या तक्रारी प्राप्त झाल्यास केवळ तक्रारीच्या आधारे संबंधीत अधिकारी / कर्मचा-याची बदली करण्यात येऊ नये. अशा प्रकरणात संबंधीत अधिकारी / कर्मचा-यांच्या तक्रारीसंबंधातील वस्तुस्थिती जाणून घेऊन (आवश्यक तेथे अहवाल मागवून) तक्रारीमधील गांभीर्य विचारात घेऊन, संबंधीत अधिकारी / कर्मचारी त्याच पदावर ठेवणे आवश्यक आहे किंवा कसे याबाबत बदली प्राधिका-याने ठोस निर्णय घ्यावा. संबंधीत अधिकारी / कर्मचा-याच्या विरोधातील तक्रारीमध्ये तथ्य आढळून आल्यास संबंधीत अधिकारी / कर्मचा-याला त्याच पदावर ठेवून त्याच्याविरुद्ध शिस्तभंगाची कारवाई सुरु करण्याबाबत बदली प्राधिका-याने निर्णय घ्यावा. मात्र संबंधीत अधिकारी/ कर्मचा-यारी त्याच पदावर ठेवणे योग्य नाही असे बदली प्राधिका-री संबंधीत अधिकारी/ कर्मचा-याची बदली त्याच्या लगतच्या वरिष्ठ प्राधिका-याकडे प्रस्तावित करू शकतो. लगतच्या वरिष्ठ प्राधिका-याकडे असा प्रस्ताव प्राप्त झाल्यास बदली प्राधिका-याने नमूद केलेली कारणे योग्य आहेत किंवा कसे याची छाननी करून स्वतःचे मत स्पष्ट करून बदली प्राधिका-याच्या प्रस्तावाला मान्यता द्यावी किंवा बदली प्राधिका-याचा प्रस्ताव फेटाळून लावण्यात यावा. ज्या प्रकरणात बदली प्राधिका-याच्या प्रस्तावानुसार गैरवर्तणुकीच्या अनुषंगाने शासकीय अधिकारी / कर्मचारी यांची बदली करण्यात येते अशा प्रकरणात संबंधीत अधिकारी / कर्मचारी यांची बदली केल्यानंतर त्याच्या विरुद्ध शिस्तभंगाची कारवाई सुरु करण्याची दक्षता घ्यावी.”

20. Thus what transpires from the record that the Applicant was transferred on the recommendation made by Hon'ble Member of Parliament, which is indeed in defiance of the Undertaking / Affidavit submitted by the then Chief Secretary Shri Dineshkumar Jain before Hon'ble High Court in **Writ Petition No.8987/2018 (Balasaheb Tidke Vs. State of Maharashtra) disposed of on 12th December, 2018**. It was noticed by the Hon'ble High Court that the transfers are influenced by the recommendations made by the elected representatives of the people and the Hon'ble Minister who are not concerned with the process of transfers. The Hon'ble High Court, therefore, issued directions to the then Chief Secretary to file an Affidavit explaining as to how such recommendations are considered

in the matter of transfers when the transfers are to be governed strictly by the provisions of 'Transfer Act 2005'. In deference to the order of Hon'ble High Court, the then Chief Secretary had filed Affidavit dated 12th December, 2018 before Hon'ble High Court. Para Nos. 1 & 2 of the said Affidavit is as follows :-

"1. I submit that I am filing the present Affidavit for the limited purpose of stating that the process of transfer at the level of the Government will not be influenced by any recommendations made by any political leaders, members of political parties or any Hon'ble Ministers who are not part of the process of transfers.

2. I submit that all authorities who are competent to effect the transfers will be advised to strictly follow the provisions of the Maharashtra Government Servants Regulation of Transfers and Prevention of Delay in Discharge of Official Duties Act, 2005 while issuing transfer order."

21. While disposing of the Writ Petition, the Hon'ble High Court in Para No.2 stated as follows :-

"2. We accept the statements made in paragraphs-1 and 2 of the said affidavit quoted above as the Undertakings given on behalf of the State of Maharashtra. Now there is a clear assurance that all transfers will be effected strictly in accordance with the provisions of the said Act of 2005 and none of the transfers will now be influenced by the recommendations of the political leaders including the Hon'ble Ministers (who are not a part of the process of transfers). We direct that the statements made in para-1 of the said Affidavit are brought to the notice of all the concerned who have to exercise powers of transfer under the said Act of 2015 so that there will not be any attempt to make any recommendations thereby influencing the process of transfers of the Government Servants."

22. Despite the aforesaid position and the Undertaking submitted on behalf of State of Maharashtra, there seems to be no remedial measures on the part of Government and the practice is still continued unabated as demonstrated in the present case. Suffice to say, there is no compliance of Undertaking submitted on behalf of State Government and transfers are routinely made in defiance of the provisions of 'Transfer Act 2005'.

23. It is further surprising that the Government has accommodated Respondent No.2 by posting her as Education Officer (Secondary Education), Z.P, Thane despite the fact that Respondent No.2 had already worked on that post while holding additional charge of the said post and during that period, she was subjected to D.E. for alleged misconduct and punishment of withholding next increment for three years without cumulative effect was imposed by order dated 20th July, 2019. True, as pointed out by learned Advocate for Respondent No.2, she has challenged the punishment order by filing appeal and the same is subjudice. However, fact remains that the Government has totally ignored this aspect while posting her at the same place which is certainly in bad test and in conflict with the principles of good governance. All this seems to have happened only to oblige Respondent No.2 on the intervention of Hon'ble Member of Parliament though the Hon'ble High Court had frowned upon such practice. Despite the Affidavit of the then Secretary that there will be no such transfer on the political interference but in reality, the practice still seems to be in hogue.

24. The submission advanced by Shri Talekar, learned Advocate for Respondent No.2 that his client was subjected to transfer thrice within the period of one year, and therefore, she was posted at Thane considering her family difficulties has to be only heard and rejected.

25. The submission sought to be advanced by the learned Advocate for the Respondent No.2 that by impugned transfer, the Applicant is transferred from one post to another post in Thane itself, and therefore, no prejudice is caused to the Applicant holds no water. The issue is no more in *res-integra* in view of decision rendered by this Tribunal in **O.A.900/2018** (cited supra) which has been confirmed by the Hon'ble High Court in **Writ Petition No.91/2019 (Sunil Koli Vs. State of Maharashtra) decided on 4th January, 2019**. In that

case, the Applicant was transferred from the post of Assistant District Supply Officer, Pune to the post of Tahasildar, Haveli, Pune itself. However, the transfer was found in defiance of Section 4(5) of 'Transfer Act 2005', as no reasons were recorded for the impugned transfer order and the O.A. was allowed. While confirming the decision of the Tribunal, the Hon'ble High Court in Para Nos. 8 and 9 held as follows :-

“8. It could be thus be seen that recording of reasons is not an empty formality, but a safeguard is provided so that the normal rule is not deviated for an asking. The recording of reasons is also necessary, so that the Tribunals and Courts can exercise their powers of judicial review in an effective manner, so as to assess as to whether the reasons on which the midterm transfer is effected are proper or not.

9. Undisputedly, in the present case, though there is approval of Hon'ble Chief Minister, there are no reasons even for namesake, as to why the midterm transfer of the Petitioner and Respondent No.3 is effected.”

In present matter also, no reason is recorded even for namesake.

26. At this juncture, it would be also apposite to refer the decision of Hon'ble High Court in **Writ Petition No.9844/2018 (Santosh Thite Vs. State of Maharashtra) decided on 4th February, 2019** and the decision in **Writ Petition No.4565/2012 (Kishor Mhaske Vs. Maharashtra OBC Finance and Development Corporation) decided on 07.032013** wherein while dealing with the matter of transfer, the Hon'ble High Court held that under Section 4(5) of 'Transfer Act 2005', exceptions can be made to the general rule only in special cases and that too, after recording reasons in writing and reasons though in brief, must indicate as to why the case of transfer of a particular employee is a special case. It has been further held that the exceptional reasons for the said mid-term and premature transfers should not be vague hazy and meagre expression such as 'on administrative ground' cannot be compliance to be considered apt

and judicious enough in the face of mandatory statutory requirements of Section 4(5) of 'Transfer Act 2005'. It has been further held that the exercise of exceptional statutory power has to be transparent, reasonable and mandatory requirement of Section 4(5) of 'Transfer Act 2005' cannot be ignored or bye-passed. Suffice to say, the principles laid down in these decision are squarely attracted to the present case.

27. Shri Talekar, learned Advocate for Respondent No.2 sought to place reliance on the decision in **2009(4) Mh.L.J. 163 (State of Maharashtra Vs. Ashok R. Kore)** wherein the Hon'ble High Court held that the Court cannot substitute its opinion for that of competent authority of the State. In that case, the elaborate reasons were in existence in the files of the Government and in fact situation, the transfer order was upheld. Para Nos.31 and 32 of the Judgment are important, which are as follows :-

“31. It is true that Transfer Order dated 28/5/08 is issued by a statutory functionary. It is also true that being a midterm transfer order, in view of the provisions of the Transfer Act, it can be issued only after recording reasons. Unless the requirement of recording reasons is dispensed with expressly or by necessary implication, an administrative authority is required to record reasons for its decisions. However, it is equally well settled that the reasons need not be elaborate as in the decision of a court of law. (S. N. Mukherjee v. Union of India, (supra)). In the instant case, the transfer order states that the transfer is effected in public interest and on account of administrative exigencies. It is pertinent to note that similar order was struck down by the MAT after examining the file and observing that no specific reasons or exceptional circumstances were recorded. The present order is similarly worded.

32. We have already quoted the relevant extracts from the files. Thus, this is a case where the transfer order states the reasons in short there being no requirement of law to state elaborate reasons in the order. But elaborate reasons are in existence in the files of the Government. Contemporaneous record contains the reasons. Had there been no reasons recorded in the file prior to the issuance of the transfer order, we would have had to set it aside.”

28. Whereas, in the present case, not a single word is mentioned in the file indicating reasons for the impugned transfer, and therefore,

this authority is of little assistance to the Respondent No.2. Indeed, in Para No.32 of the Judgment, the Hon'ble High Court made it clear that, had there being no reasons recorded in the file prior to the issuance of transfer order, we would have had set it aside. Suffice to say, even on the principles underlying in the said Judgment, it goes against the Respondent No.2.

29. Shri Talekar further sought to place reliance on **2013 (2) Mh.L.J. 107 (Sanjeev Koli Vs. State of Maharashtra)**. I have gone through the Judgment. In that case, there were serious complaint against the Petitioner, but the transfer was effected under the caption "for administrative reason". The complaints were enquired into and proposal was approved by the Board (Police Establishment Board). However, while issuing transfer order, it was shown for administrative reasons. It is in that context, the Hon'ble High Court held that the Department would be justified in supporting its administrative action on the basis of contemporaneous record such as proposal for transferring the employee which preceded the issuance of transfer order in question. As such, on the basis of contemporaneous office record, the transfer was found supported by the record to fit in "administrative reasons". The Hon'ble High Court held that whether the reason which weighed with the authority for arriving at subjective satisfaction would qualify it as exceptional circumstance or special reasons would depends on the facts of each case and it is not possible to computerise of reduce into immutable formulae the diverse consideration on the basis of which discretion must be exercised. There could be no dispute about this exposition of law. However, in the present case, even on the touchstone of the principles enunciated in this Judgment, it is difficult to sustain the impugned transfer order, as no such reasons even for namesake are forthcoming either from the office record or from impugned order. Needless to mention that the ratio of any Judgment must be understood in the

background of the facts of that case and little difference in the facts or single additional fact may make lot of difference in the precedential value of a decision. Therefore, this Judgment, in my humble opinion, will not advance a case of Respondent No.2 a little bit.

30. Shri Talekar made a feeble attempt to justify the transfer of the Applicant on the ground that there were serious complaints against him. The facts of the matter are very peculiar, as it is Respondent No.2 who trying to justify the impugned transfer order and not Respondent No.1 who is supposed to do so. Be that as it may, there is absolutely no whisper of any complaint against the Applicant in the reply filed by Respondent No.1 neither it is figured in the note placed before Hon'ble Chief Minister for approval. On this crucial point, the entire record is silent. On the contrary, there is clear admission in reply that the transfer of the Applicant was mooted at the level of Hon'ble Chief Minister only, which is nothing but colourable exercise of power and dehors the mandatory requirement of 'Transfer Act 2005'. As stated above, no attempt is made by the Respondent No.1 to show as to how the alleged complaints against the Applicant were so grave or serious that instead of following instructions contained in Circular dated 11th February, 2015, what prompted the Government to transfer the Applicant mid-term and mid-tenure. Indeed, the record clearly spells that, only to accommodate Respondent No.2, the Applicant was displaced mid-term and mid-tenure that too, on the recommendation of Member of Parliament, which is not acceptable in law. Significantly, the CSB had declined to accept the request of Respondent No.2 and to displace the Applicant twice but the Hon'ble Chief Minister has ordered for transfer of the Applicant and to post Respondent No.2 in his place, which is in defiance of mandatory requirement of Section 4(5) of 'Transfer Act 2005'. Suffice to say, the impugned transfer order is arbitrary and issued in colourable exercise of power and liable to be struck down.

31. The totality of aforesaid discussion leads me to conclude that the impugned transfer order is in blatant violation of Sections 3, 4(5) of 'Transfer Act 2005'. The O.A, therefore, deserves to be allowed. Hence, the following order.

ORDER

- (A) The Original Application is allowed.
- (B) The impugned transfer order dated 26.07.2019 is quashed and set aside.
- (C) The interim relief granted by this Tribunal by order dated 29.07.2019 is made absolute.
- (D) No order as to costs.

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

Mumbai
Date : 11.09.2019
Dictation taken by :
S.K. Wamanse.