

**IN THE MAHARASHTRA ADMINISTRATIVE TRIBUNAL  
MUMBAI**

**ORIGINAL APPLICATION NO.774 OF 2018**

**DISTRICT :**

Shri Nitin Narayan Kulkarni. )  
Age : 54 Yrs., Occu. : Service, Presenting working) )  
as Assistant Public Prosecutor, Kolhapur City ) )  
and residing at Flat No.104, 'Chaya' Residency, ) )  
Nr. BSNL Telephone Exchange, Deokar-Panand, ) )  
Kolhapur – 416 012. )...**Applicant**

**Versus**

1. The State of Maharashtra. )  
Through Addl. Chief Secretary, )  
Home Department, Mantralaya, )  
Mumbai – 400 032. )
2. The Deputy Secretary. )  
Home Department, POL-10, )  
World Trade Centre, 30<sup>th</sup> Floor, )  
Mantralaya, Mumbai – 32. )
3. Director, Directorate of Prosecution, )  
Khetan Bhavan, Flat No.8, 5<sup>th</sup> Floor, )  
N. Tata Road, Churchgate, )  
Mumbai - 400 020. )
4. Assistant Director & Public Prosecutor, )  
Kolhapur, Central Administrative )  
Building, 2<sup>nd</sup> Floor, Kasba Bawda Road, )  
Kolhapur – 416 003. )...**Respondents**

**Applicant in person.**

**Mr. A.J. Chougule, Presenting Officer for Respondents.**

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

**DATE** : **09.05.2019**

**JUDGMENT**

1. In the present Original Application, the challenge is to the transfer order dated 13.07.2018 issued by Respondent No.3 whereby the Applicant, who is working as Assistant Public Prosecutor at Kolhapur has been transferred from Kolhapur to Chandgad, District Kolhapur invoking jurisdiction of this Tribunal under Section 19 of the Administrative Tribunals Act, 1985.

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

The Applicant is serving as Assistant Public Prosecutor (APP) under the control of Respondent No.3 – Director, Directorate of Prosecution. In general transfers of 2016, he was posted at Panhala as Public Prosecutor in the Court of Judicial Magistrate 1<sup>st</sup> Class, Panhala by order dated 04.06.2016. However, later on health ground, he made representation for transfer to Kolhapur. Accordingly, the Respondent No.3 transferred him from Panhala to Kolhapur by order dated 07.09.2017 and since then, he was functioning as APP in the Court of Judicial Magistrate 1<sup>st</sup> Class, Kolhapur. However, abruptly, by order dated 13.07.2018, he has been transferred from Kolhapur to Chandgad and was attached to the Court of Judicial Magistrate 1<sup>st</sup> Class, Chandgad citing administrative reason. The Applicant has challenged this transfer order dated 13.07.2018 in the present O.A. contending that it being mid-term and mid-tenure transfer, the provisions 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’) are attracted and there being no compliance of the mandatory provisions of Section 4(4)(ii) and 4(5) of ‘Transfer Act 2005’, the impugned transfer is *ex-facie* illegal. He contends to have undergone Heart

Surgery, and therefore, Chandgad is not suitable for him, as he requires continuous medical treatment, which are not available at Chandgad. He has not completed normal tenure of three years contemplated under the provisions of 'Transfer Act 2005', and therefore, mid-term and mid-tenure transfer without compliance of the mandatory provisions of 'Transfer Act 2005' is illegal. On these pleadings, he prayed to set aside the impugned order.

3. On behalf of Respondents, the Respondent No.3 has filed Affidavit-in-reply (Page Nos.42 to 52 of Paper Book) thereby resisting the application and denied the entitlement of the Applicant to the relief claimed. It is not in dispute that in general transfer of 2016, the Applicant was transferred from Kankawali, District Sindhudurg to Panhala, District Kolhapur. It is also not in dispute that thereafter, on the presentation of the Applicant dated 22.08.2017 on health ground, he was transferred to Kolhapur by Respondent No.3 on 07.02.2017 and since then, he was functioning at Kolhapur. As regard impugned transfer order dated 13.07.2018, the Respondent No.3 contends that he is empowered to transfer APP within the District at any place, and therefore, by order dated 13.07.2018, he has been transferred from Kolhapur to Chandgad on administrative ground. The Respondent No.3 further contends that there were complaints of misbehavior and unruly conduct of the Applicant while he was working at Panhala as well as Kolhapur. While he was functioning at Kolhapur, oral complaints were made by the learned Judicial Magistrate 1<sup>st</sup> Class, Kolhapur about trouble-some behavior of the Applicant. Besides, there was requirement of APP at Chandgad Court, and therefore, on administrative ground, the Applicant has been transferred from Kolhapur to Chandgad.

4. Later, the Respondent No.3 again filed Additional Affidavit (Page Nos.54 to 56 of P.B.) *inter-alia* contending that, since the Applicant is working as APP under the administrative control of the judiciary, the provisions of 'Transfer Act 2005' are not applicable to his transfer in view of exemption under Section 1 Proviso of

(3) of 'Transfer Act 2005'. With these pleadings, the Respondents prayed to dismiss the O.A.

5. Heard the Applicant in person. He vehemently urged that there being admittedly no compliance of the mandatory provisions of 'Transfer Act 2005', the impugned transfer order dated 13.07.2018 is *ex-facie* illegal. He has pointed out that the Respondent No.3 at her level passed the impugned order dated 13.07.2018 without seeking approval of next higher authority i.e. the Government, and therefore, the transfer is in defiance of the provisions of 'Transfer Act 2005'. He referred to Section 4(4)(ii) and 4(5) of 'Transfer Act 2005' and contended that in case of mid-term and mid-tenure transfer, the Competent Authority in special cases only Government servant can be transferred after recording the reasons in writing and with the prior permission of immediately preceding Competent Transferring Authority mentioned in Table of Section 6 of 'Transfer Act 2005'. Thus, the sum and substance of his submission is that, his transfer is governed by the provisions of 'Transfer Act 2005' and admittedly, there being no such compliance, the impugned order is manifestly unsustainable in law.

6. The Applicant in person during the course of his oral submission sought to place reliance on following decisions :-

- (i) Judgment of Hon'ble Bombay High Court in ***Writ Petition No.5465/2012 (Kishor Mhaske Vs. State of Maharashtra) decided on 7<sup>th</sup> March, 2013.***
- (ii) Judgment of Hon'ble Bombay High Court in ***Writ Petition No.5652/2009 (Prakash Waghmare Vs. State of Maharashtra) decided on 16<sup>th</sup> October, 2009.***

- (iii) Judgment of Hon'ble Bombay High Court in ***Writ Petition No.1940/2011 (S.B. Bhagat Vs. State of Maharashtra) decided on 24<sup>th</sup> January, 2012.***
- (iv) ***O.A.No.769/2016 (Rajesh Bhapkar Vs. State of Maharashtra) decided by this Tribunal on 10<sup>th</sup> November, 2016.***
- (v) ***O.A.No.703/2014 (Raosaheb Mahale Vs. Superintending Engineer) decided by this Tribunal on 16<sup>th</sup> September, 2014.***
- (vi) ***O.A.No.770/2017 (Sunil Saundane Vs. State of Maharashtra) decided by this Tribunal on 9<sup>th</sup> November, 2017.***
- (vii) ***O.A.No.614/2017 (Prmod Sawakhande Vs. State of Maharashtra) decided by this Tribunal on 27<sup>th</sup> March, 2018.***
- (viii) ***O.A.No.343/2017 (Jitendra Kundile Vs. State of Maharashtra) decided by this Tribunal on 19<sup>th</sup> December, 2017.***

7. These authorities are pressed into service to substantiate that, in case of mid-term and mid-tenure transfer, there has to be strict compliance of Section 4(4)(ii) and 4(5) of 'Transfer Act 2005' and where the transfer is in violation of express provision of Section 4(4)(ii) and 4(5) of 'Transfer Act 2005', the same is liable to be set aside.

8. Besides, the Applicant also referred the Judgment of Hon'ble Bombay High Court in ***Writ Petition No.9781/2014 (State of Maharashtra Vs. Dr. Padmashree Bainade) decided on 17<sup>th</sup> December, 2014,*** the Judgment of Hon'ble Supreme Court in ***Civil Appeal No.7308/2008 (Somesh Tiwari Vs. Union of India) decided on 16<sup>th</sup> December, 2008,*** wherein it has been held that where transfer order by way of punishment, without enquiry or without giving any opportunity of hearing, is unsustainable in law.

9. The Applicant has also placed on record the Judgment of Hon'ble Supreme Court in ***Writ Petition (Civil) No.82/2011 (T.S.R. Subramanian & Ors. Vs. Union of India & Ors.) dated 31<sup>st</sup> October, 2013***, whereby the Hon'ble Supreme Court issued direction for the establishment of Civil Services Board for vetting transfers on promotions and other service matters of the Government servants and has also produced the G.R. dated 31.01.2014 of GAD, Government of Maharashtra, issued in compliance of directions of Hon'ble Supreme Court for the establishment of CSB at various levels.

10. Per contra, Shri A.J. Chougule, learned P.O. sought to contend that the Applicant being at the disposal of Respondent No.3 viz. Director, Directorate of Prosecution, the said Authority is empowered to transfer the Applicant within District and there is no necessity of approval of any other Authority envisaged under the provisions of 'Transfer Act 2005'. He further sought to contend that the Applicant is under the administrative control of judiciary, and therefore, in view of exemption as provided under Section 1(3) of 'Transfer Act 2005', the provisions of 'Transfer Act 2005' are not applicable.

11. Firstly, let us see whether Section 1(3) of 'Transfer Act 2005' is applicable to the present situation, which is as follows :

**"1. (1)** This Act may be called the Maharashtra Government Servants Regulation of Transfers and Prevention of Delay in Discharge of Official Duties Act, 2005.

(2) It shall come into force on such date as the State Government may, by notification in the Official Gazette, appoint.

(3) It shall apply to all Government servants in the State services including the All India Service Officers of the Maharashtra Cadre:

Provided that, Chapter II shall not apply to the employees appointed on non-transferable posts in isolated cadres and to the employees under the administrative control of the Judiciary ; and Chapter III shall not apply to the All India Service Officers of the Maharashtra Cadre."

12. Thus, as per proviso, Chapter II of 'Transfer Act 2005' shall not apply to the employees appointed on non-transferable post in isolated cadre to the employees of administrative control of the judiciary. Therefore, the question would arise whether the Applicant can be said functioning under the administrative control of the judiciary. The Applicant is working as APP whose duty is to conduct the prosecution on behalf of State Government in the Courts of law. Admittedly, they are appointed by the State Government and they are under the administrative control of State Government. They are not under the administrative control of the judiciary. Only because they function as APP in the Courts of law that *ipso-facto* does not bring them under the administrative control of the judiciary. Admittedly, their appointments and transfers are being done by Home Department, their Disciplinary Authority is State Government. The learned P.O. could not point out any provision to substantiate that the Prosecutors are under the administrative control of the judiciary. In fact, their administrative control is with Home Department and not with judiciary.

13. Long back, in pursuance of direction given by Hon'ble Apex Court, a separate and independent wing of prosecution agency has been created. Earlier, it was under the control of Director General of Police. Now, in view of separation of Prosecution Wing, the appointments are being made by the Home Department of Government of Maharashtra. Now, the Respondent No.3 – Directorate of Prosecution is a controlling authority having general control over Prosecution Wing as Head of the Department. As such, by no stretch of imagination, it can be said that the Applicant is under the administrative control of judiciary.

14. Shri A.J. Chougule, learned Presenting Officer for the Respondents referred the decision passed by this Tribunal in **O.A.No.522/2018 (Pratiksha Sonawane Vs. State of Maharashtra) decided on 07.02.2019**. In that case, the Applicant was working as Assistant Superintendent in District Consumer Disputes

Redressal Forum and was transferred on administrative ground by the President, State Consumer Disputes Redressal Commission. It is in that context, it has been held that where the employee is placed at the disposal of State Consumer Dispute Redressal Commission, which is quasi-judicial authority bar of Section 1(3) of 'Transfer Act 2005' would operate. Accordingly, in view of exemption contemplated under Section 1(3) of 'Transfer Act 2005', the transfer is held not governed by 'Transfer Act 2005' and the O.A. was accordingly dismissed. As such, the facts are totally distinguishable and this authority is of little assistance to the learned P.O. in the present case. As stated above, the employees under the administrative control of the judiciary are exempted from operation of Chapter II of 'Transfer Act 2005' and the Applicant does not come under the administrative control of judiciary. This being the position, it will have to be held that the provisions of 'Transfer Act 2005' would apply to the present situation. Here, we are dealing with the transfer of APP who is neither under the administrative control of judiciary nor quasi-judicial Authority. The submission advanced by the learned P.O. in this regard is misconceived.

15. The learned P.O. invited my attention to certain transfer orders issued by the Home Department while transferring APPs. For example, he referred one of the order dated 8<sup>th</sup> June, 2018 issued by Home Department, State of Maharashtra, whereby APPs were transferred in general transfers of 2018. It would be appropriate to refer Para Nos.2 and 3 of transfer order dated 08.06.2018 which are as follows :-

“२. महाराष्ट्र शासकीय कर्मचा-यांच्या बदल्यांचे विनियमन आणि शासकीय कर्तव्ये पार पाडतांना होणा-या विलंबास प्रतिबंध अधिनियम, २००५ मधील तरतूदीनुसार सक्षम प्राधिका-यांच्या पूर्व मान्यतेने या बदल्या करण्यात येत आहेत.

३. हे आदेश तात्काळ अंमलात येतील. बदली झालेल्या अभियोक्त्यांनी बदली नंतरच्या पदस्थापनेचा कार्यभार तात्काळ स्वीकारावा. बदली आदेशाची अंमलबजावणी तात्काळ व कार्यक्षमरित्या होण्याकरिता संचालक, अभियोग संचालनालय यांनी खालील सूचनांचे काटेकोरपणे पालन करावे.

- अ) सहाय्यक सरकारी अभियोक्ता संवर्गातील बदलीसाठी जिल्हा प्रस्तावित करण्यात आला असून जिल्ह्यात कोठेही पदस्थापना संचालक, अभियोग संचालनालय यांनी करावी.
- ब) .....



16. His emphasis was on Clause 3(a), which empowers Respondent No.3 for issuance of appropriate posting orders for posting of PPs within their District. Thus, it seems that by order dated 08.06.2018, total 121 APPs were transferred and for their new posting, District was allotted to them. However, the powers to post them within the District at any place as per the availability and suitability was given to Respondent No.3. Significant to note that, it does not say that after giving posting to the APPs, they can be again transferred at the level of Respondent No.3 at subsequent point of time. All that, it empowers Respondent No.3 to post APP at Taluka places within District as per the District allotted to APP. If the contention raised by the learned P.O. that the Respondent No.3 is empowered to make any changes of posting within District at any point of time during the tenure of APP in the concerned District is accepted, then it would be contrary and inconsistent with the mandate and express provisions of 'Transfer Act 2005'.

17. Here, pertinent to note that in order dated 8<sup>th</sup> June, 2018 referred by the learned P.O. itself, there is a reference of applicability of 'Transfer Act 2005'. In Clause No.2 of order dated 08.06.2018 as stated above, there is specific mention that these transfer orders are made in consonance and adherence to the provisions of 'Transfer Act 2005' with the approval of Competent Authority. Obviously, the Competent Authority is Hon'ble Chief Minister. This also make it clear that the provisions of 'Transfer Act 2005' are required to be followed in the matter of transfer of APP and the Government has also acknowledged and affirmed this legal position.

18. The learned P.O. sought to contend that initially, the Applicant was posted at Panhala and on his request, the Respondent No.3 transferred him to Kolhapur by order dated 07.02.2017. Adverting to this aspect, he sought to contend that the Applicant had acquiesced the authority of Respondent No.3, and therefore,

now the Applicant cannot challenge the competency or empowerment of Respondent No.3 to transfer him to Chandgad by order dated 13.07.2018. His submission is fallacious. Only because earlier, on the request of the Applicant, the Respondent No.3 transferred him from Panhala to Kolhapur that itself could not confer authority upon the Respondent No.3 much less power of mid-term and mid-tenure transfer without compliance of mandatory provisions of Section 4(4)(ii) and 4(5) of 'Transfer Act 2005'. Needless to mention that there cannot be estoppel against the statute and the acceptance of the transfer order issued by Respondent No.3 from transferring him from Panhala to Kolhapur by order dated 07.09.2017 would not estop the Applicant from challenging the legality of impugned transfer order.

19. Admittedly, the Applicant has not completed his normal tenure at Kolhapur. Even assuming that there were serious complaints of behavior of the Applicant, there has to be compliance of Section 4(4)(ii) and 4(5) of 'Transfer Act 2005' which *inter-alia* stipulates that in special cases after recording the reasons with the prior permission of Competent Transferring Authority mentioned in the Table of Section 6 of 'Transfer Act 2005', only Government employee can be transferred mid-term or mid-tenure. Admittedly, the Applicant falls in Group 'A', and therefore, for such mid-term and mid-tenure transfer, the Competent Transferring Authority is the Government.

20. In the present case, admittedly, neither the matter was not placed before the CSB for approval nor there is compliance of Section 4(4)(ii) and 4(5) of 'Transfer Act 2005'. The impugned order has been passed citing administrative reason without showing further reasons as to what prompted Respondent No.3 for such mid-term and mid-tenure transfer. The alleged oral complaint about the behavior of the Applicant while working as APP appears to be the reason for such transfer as per contention raised in reply. vSave and except the contention

raised in the pleading, no other material is produced to substantiate the nature and magnitude of the complaint about the behavior of the Applicant while he was working as APP at Kolhapur. In absence of any such material, on mere *ipse-dixit*, the transfer being punitive in nature is not sustainable in law. Admittedly, no opportunity of hearing was given to the Applicant while passing transfer order. I have, therefore, no hesitation to conclude that the impugned order is not sustainable in law and facts and deserves to be set aside. Hence, the following order.

**ORDER**

- (A) The Original Application is allowed.
- (B) The impugned order dated 13.07.2018 is hereby quashed and set aside.
- (C) The Respondents are directed to reinstate the Applicant on the post he was transferred from within two weeks from today.
- (D) No order as to costs.

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

Mumbai  
Date : 09.05.2019  
Dictation taken by :  
S.K. Wamanse.