

**IN THE MAHARASHTRA ADMINISTRATIVE TRIBUNAL
MUMBAI**

ORIGINAL APPLICATION NO.483 OF 2019

DISTRICT : MUMBAI

Shri Sachin Arvind Repal)
Occ. Govt. Service.)
R/at Type IV, DFO Quarter, Near Navapada,)
Sanjay Gandhi National Park, Borivali (E),)
Mumbai 400 066.)...**Applicant**

Versus

1. The State of Maharashtra.)
Through Principal Secretary (Forest),)
Revenue & Forest Department,)
Mantralaya, Mumbai – 400 032.).....**Respondents**

Shri U. V. Bhosale, Advocate for Applicant.

Shri A. J. Chougule, Presenting Officer for Respondents.

CORAM : A.P. KURHEKAR, MEMBER-J

DATE : 07.10.2019

JUDGMENT

1. The Applicant has challenged the impugned transfer order dated 27.05.2019 whereby he is transferred mid-term and mid-tenure invoking the jurisdiction of this Tribunal under Section 19 of the Administrative Tribunal Act, 1985.

Shortly stated facts are as follows:-

2. The applicant was serving as Divisional Forest Officer (Wild Life-1), Sanjay Gandhi National Park, Borivali (East), Mumbai. He was posted at that place by order dated 12.12.2018 and hardly completed five months till the date of passing of impugned order. By

order dated 27.05.2019, he was abruptly transferred to the post of Divisional Forest Officer (Mangroves), Mumbai. In impugned transfer order, he is shown posted in the place of Shri Jagtap in view of his retirement. In transfer order, there is also reference of Section 4(4) 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 'Act 2005'). The Applicant has challenged the impugned transfer order contending that it is in contravention of provision of 'Act 2005', contending that no special case or administrative exigency is made out for his mid-term transfer and though the other officials were available who have completed normal tenure, they were not disturbed but the Applicant was picked up for mid-tenure transfer. The impugned order is further challenged on the ground that there is no prior approval of highest competent authority namely, the Hon'ble Chief Minister as mandated by Section 4(5) of 'Act 2005'. With these pleadings, the Applicant contends that the impugned transfer order is unsustainable in law.

3. The Respondents resisted the application by filing reply *inter-alia* denying that transfer order suffers from any illegality and sought to justify the impugned transfer order contending that in view of the retirement of Shri Jagtap, it was incumbent to post some competent officer in his place and the Applicant being found well experienced and competent official, he was posted in place of Shri Jagtap with approval of Civil Services Board (CSB) as well as Hon'ble Minister. As regard, the discrimination, the Respondents contend that the Applicant was suitable for the said posting and in view of PIL No.87/2006 pending before the Hon'ble High Court immediate posting of the competent officer was required, and therefore, the Applicant was posted in place of Shri Jagtap. The Respondents submit that transfer was approved by CSB as well as of the Hon'ble Minister on 27.05.2019. As regard approval of Hon'ble Chief Minister, the Respondents submit that he was not available, and therefore, *ex-post*

facto approval was obtained on 04.06.2019. With this pleading, the Respondents sought to justify the impugned transfer order.

4. Heard Shri U. V. Bhosale, learned Counsel for the Applicant and Shri A. J. Chougule, learned Presenting Officer for the Respondents.

5. There is no denying that the Applicant was not due for transfer and hardly completed five months when he was transferred by order dated 27.05.2019. Needless to mention that the order of transfer is an administrative matter and it should not be interfered unless it is found in contravention of mandatory provisions of law or suffers from malice or arbitrariness on the part of authority concerned.

6. The crux of the matter is whether impugned transfer order dated 27.05.2019 is in consonance with Section 4(5) of 'Act 2005'.

7. True, in view of the retirement of Shri V.R. Jagtap who was serving as Divisional Forest Officer, Mangrove, Mumbai, the said post was required to be filled in immediately, in view of litigation pending before the Hon'ble High court in PIL No.87/2006. Undoubtedly, it is prerogative of the Government to see suitability of the concerned person of the appointment to the post on particular post. However, at the same time transfers being regulated and governed by the "Act 2005", the Government is required to comply the provisions of 'Act 2005' in the matter of transfer of government servant.

8. Let us see the provision of Section 4 of 'Act 2005' which are as follows:-

"Sub-section (1) of Section 4 of the Act 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.”

9. Here, it would apposite to reproduce Section 4(5) of ‘Act 2005’ which 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.”

10. As such, in case of mid-term transfer, the competent authority is empowered to transfer the government servant in special case after recording reasons in writing with the prior permission of immediately preceding competent authority. In the present case, admittedly, immediately preceding competent authority is Hon’ble Chief Minister.

11. In so far as the administrative reason for mid-term transfer is concerned, needless to mention that in view of the retirement of Shri Jagtap, the said post was required to be filled in and such situation qualify administration exigency in service jurisprudence. The post was required to be filled in immediately from the point of administration particularly in view of ongoing litigation over illegal destruction Mangrove in PIL No.87/2006. In CSB Minutes, the matter was discussed and in view of the retirement of Shri Jagtap on 31.05.2019, the CSB resolved to post the Applicant in his place. Furthermore, the note placed before the CSB also makes it quite clear that there exist administrative exigency. The note prepared by the Principal Secretary (Forest) is as follows:-

“A competent officer is required to be posted as DFO (MMCU), Mumbai which is falling vacant on 31.05.2019 due to retirement of Shri V. R. Jagtap. This post is responsible for protection of mangroves, as per Hon. H.C. directions may be appd.”

12. Accordingly, the CSB recommended to transfer the Applicant on the post which was falling vacant due to retirement of Shri Jagtap. The file was then placed before the Hon’ble Minister who approved the CSB Minutes on 27.05.2019. Consequently, the transfer order was issued on same day i.e. on 27.05.2019.

13. In so far as the ground of discrimination raised by the learned Counsel is concerned, I see no substance therein for the simple

reason that it is always prerogative of the government as to who should be placed at particular place and only because some other officials were available and some of them had expressed desire to occupy the post of Shri Jagtap that itself cannot be the ground of discrimination. It is always for the Government to take appropriate decision about suitability of particular person for the post falling vacant on account of retirement of government servant holding the said post. If the Government thought it appropriate to post the Applicant in place of Shri Jagtap considering his past performance and suitability, it per se cannot be termed arbitrary or illegal.

14. Admittedly, there was no prior approval of the Hon'ble Chief Minister to the transfer as contemplated u/s 4(5) of 'Act 2005'. Learned P.O. fairly submits that the approval of Hon'ble Chief Minister was obtained on 04.06.2019. In such situation, now the question comes whether the transfer can be held legal for want of prior approval of the Hon'ble Chief Minister.

15. Learned P.O. sought to contend that the Hon'ble Chief Minister was out of station, and therefore, his approval was taken later. He, therefore, submits that *ex-post facto* approval is obtained and there is compliance of Section 4(5) of the 'Act 2005'.

16. Per contra, Shri U. V. Bhosale, learned Counsel for the Applicant submits that the law requires prior approval of the highest competent authority i.e. the Hon'ble Chief Minister and admittedly, it being not so, the transfer order is *ex-facie* illegal.

17. As stated above Section 4(5) of 'Act 2005' mandates prior approval of the Hon'ble Chief Minister for mid-tenure transfer, there is no provision in 'Act 2005' for obtaining *ex-post facto* approval. On the contrary, it is explicit from the language used in Section 4(5) of 'Act 2005' that there has to be prior permission of immediately preceding competent authority. Needless to mention that when the

law requires performance of certain act in particular manner, then it has to be done in that manner only and there cannot be any latitude to the concerned authority otherwise very object of the act would be defeated.

18. This is not a case where extreme urgency was prevailing, so as to pass the transfer order without prior approval of the Hon'ble Chief Minister. The transfer order was issued immediately and later, after 4-5 days *ex-post facto* sanctioned was obtained. It cannot be termed as mere irregularity which could be rectified by *ex-post facto* approval of the competent authority. It is illegality going to the root of the matter in view of the mandates of Section 4(5) of 'Act 2005', which requires prior permission of immediately preceding competent transferring authority, as a condition precedent.

19. Thus, the Respondents attempted to execute the order without compliance of mandatory requirement of law and then attempted to rectify illegality by obtaining *ex-post facto* approval which cannot be countenanced by the Court.

20. Learned P.O. could not point out how *ex-post facto* approval would rectify the material illegality which goes to the root of the matter.

21. At this juncture, it would be apposite to refer the decision of the Hon'ble Supreme Court in ***AIR 1986 SC 1814 (Tejpal Singh V/s State of Uttar Pradesh)*** wherein *ex-post facto* approval given for the decision was held illegal. It was a case of premature retirement of judicial officer on the recommendation of Administrative Judge of Hon'ble High Court. The decision of the Hon'ble Administrative Judge was approved by the Hon'ble Governor. However, it is only after the Governor passed order on the basis of recommendation, the matter was placed before the administrative committee for approval.

Judicial Officer challenged retirement order wherein the Hon'ble High Court held that such absence of prior approval is not mere irregularity, which can be cured by *ex-post facto* approval. Accordingly, premature retirement is declared void and ineffective due to absence of prior approval of Administrative Committee. In present case also *ex-post facto* approval is obtained after issuance of transfer order. As such, ratio of this judgment is clearly attracted.

22. For the aforesaid reasons, I have no hesitation to sum up the absence of prior approval of the Hon'ble Chief Minister to the mid-tenure transfer of the Applicant is fatal and it renders impugned transfer order illegal.

23. The necessary corollary of aforesaid discussion leads me to conclude that the impugned transfer order issued without prior approval of highest competent authority is bad in law and deserves to be quashed.

ORDER

(A) Original Application is allowed.

(B) Impugned transfer orders dated 27.05.2019 is quashed and set aside.

(C) The interim relief granted by the Tribunal by order dated 30.05.2019 is made absolute.

(D) No order as to costs.

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