IN THE MAHARASHTRA ADMINISTRATIVE TRIBUNAL
MUMBAI BENCH

ORIGINAL APPLICATION NOS 453, 454, 455 & 456/2017

DISTRICT : PUNE

1. ORIGINAL APPLICATION NO. 453 OF 2017

Shri Sidram Dadarao Dhavane,)
Working as Inspector of Legal Metrology,)
R/at Plot No. 249, Indraprastha C.H S,)
Phast-1, Hadapsar, Pune 411 028.)...**Applicant**

Versus

1. The State of Maharashtra)
Through Chief Secretary,)
Mantralaya, Mumbai 400 032.)
2. Principal Secretary,)
Food, Civil Supply and Consumer)
Protection Department,)
Madam Cama Marg,)
Hutatma Rajguru Chowk,)
Mantralaya, Mumbai 400 032.)
3. Shri A.Y Ingole)
Inspector of Legal Metrology,)
Kolhapur-3 Division,)
1845, C-Ward, Hattimahal Road,)
Near Matan Market,)
Bindu Chowk, Kolhapur 416 012.)...**Respondents**

2. ORIGINAL APPLICATION NO. 454 OF 2017

Shri Rajendra Dattatraya Jadhav,)
Working as Inspector of Legal Metrology,)
R/at Plot No. 9, Shivdham Society,)
Solapur Road, Hadapsar,)
Gadital, Pune 411 028.)...**Applicant**

Versus

1. The State of Maharashtra)
Through Chief Secretary,)
Mantralaya, Mumbai 400 032.)
2. Principal Secretary,)
Food, Civil Supply and Consumer)
Protection Department,)
Madam Cama Marg,)
Hutatma Rajguru Chowk,)
Mantralaya, Mumbai 400 032.)
3. Shri S.R Mahajan)
Inspector of Legal Metrology,)
Ahmednagar-1 Division,)
Behind Ahmednagar Gas Agencies,)
Shahaji Road, Tambatkar Lane,)
Ahmednagar 414 001.)...**Respondents**

3. ORIGINAL APPLICATION NO. 455 OF 2017

Shri Hemant Prabhakar Kulthe,)
Working as Inspector of Legal Metrology,)
R/at A-802, S.No. 62 & 63)
Astoniya Royale, Narhe Ambegaon Road,)
Ambegaon Budruk, Pune 411 046)...**Applicant**

Versus

1. The State of Maharashtra)
Through Chief Secretary,)
Mantralaya, Mumbai 400 032.)
2. Principal Secretary,)
Food, Civil Supply and Consumer)
Protection Department,)
Madam Cama Marg,)
Hutatma Rajguru Chowk,)
Mantralaya, Mumbai 400 032.)
3. Shri V.V Kasale)
Inspector of Legal Metrology,)
Haveli-1,)
820, Sathe Biscuit Compound)
Bhavani Peth, Pune 411 042.)...**Respondents**

4. ORIGINAL APPLICATION NO. 456 OF 2017

Shri Jitendra Raghunath Amrute,)
Working as Inspector of Legal Metrology,)
R/at A/304, Sun Orbit, Sun City Road,)
Anandnagar, Pune 411 051.)...**Applicant**

Versus

1. The State of Maharashtra)
Through Chief Secretary,)
Mantralaya, Mumbai 400 032.)
2. Principal Secretary,)
Food, Civil Supply and Consumer)
Protection Department,)
Madam Cama Marg,)

Hutatma Rajguru Chowk,)
Mantralaya, Mumbai 400 032.)

3. Shri T.K Patil)
Inspector of Legal Metrology,)
Pune-5 Division,)
820, Sathe Biscuit Compound,)
Near Bhavani Mata Mandir,)
Bhavani Peth, Pune 411 042.)...**Respondents**

Smt Punam Mahajan, learned advocate for the Applicants.

Shri N.K Rajpurohit, learned Presenting Officer for the Respondents.

Shri A.V Bandiwadekar, learned advocate for Respondent no. 3 in O.A 456/2017.

Shri C.T Chandratre, learned advocate for applicant in M.A 251/2017 in O.A 455/2017.

CORAM : Shri Justice A.H Joshi (Chairman)

RESERVED ON : 09.01.2018

PRONOUNCED ON : 29.01.2018

O R D E R

1. Heard Smt Punam Mahajan, learned advocate for the Applicants, Shri N.K Rajpurohit, learned Presenting Officer for the Respondents, Shri A.V Bandiwadekar, learned advocate for Respondent no. 3 in O.A 456/2017 and Shri C.T Chandratre, learned advocate for applicant in M.A 251/2017 in O.A 455/2017.

2. These group of five Original Applications wherein orders of transfers are challenged were heard together.

3. Though separate orders are issued, the decision to transfer all the applicants is a part of common decision.

4. The case was heard for sometime and various points were argued and different affdiavits have come on record. Ultimately, when the cases were taken up for final hearing, learned advocate for the applicants has restricted the submission only on one point, namely, whether impugned transfer is bad because it has been ordered:-

(a) Without recording due and proper reasons;

(b) Whether completion of 3 or six years consisting 365 days in each year is mandatory condition for reckoning of computing the tenure of each year at a particular place.

(c) Without approval of the authority above the competent authority, because the impugned transfer is mid-tenure transfer since the applicants have not completed statutory tenure of 3 years to which they are entitled as a matter of right created under statute.

5. Adjudication of question Nos 2 & 3 is required or even if done is contingent upon answer to third question, namely, whether 3 years must mean 36 months.

6. Facts of the case are in totality admitted and do not need reference at length. It shall suffice to mention that all five applicants have served at their respective posts for less than 3 years with reference to the date of impugned transfer order. Their transfers were not proposed by the Department nor were vetted by the Civil Services Board. After the proposal of the Department for general transfers was placed before Hon'ble Minister, he wrote a note and has decided to transfer the officers and based on that decision, impugned orders has been issued by the department.

7. The department as well as Hon'ble Minister have treated subject matter transfer as general transfer done on the periodicity and hence the procedure of seeking approval of next higher authority, i.e. Hon'ble Chief Minister has not been resorted to. The reasons are contained in the decision recorded by the Hon'ble Minister.

8. Sufficiency of reasons or legality thereof is not called in question. During the submission, though, Original Application contained some suggestive reference to the challenge on that ground.

9. In view that the matter revolve around limited question of tenure, parties have relied upon judgment governing that issue.

10. The judgment will be discussed hereinafter. However, it has to be mentioned that Division Bench of this Tribunal constituted of Shri Justice A.B Naik, Hon'ble Ex-Chairman and Shri R.B Budhiraja, Hon'ble Ex. Vice-Chairman had decided on 4th October 2007 in O.A no 376/2007 & Ors (Shri Murlidhar Changdeo Patil Vs. Government of Maharashtra & Ors), in which after detailed discussion a view is taken that the period of 3 years contemplated by ROT Act 2005 is a mandatory provision and any short fall therein would amount to curtailing the statutory right.

11. There are few other judgments referred by Members of this Tribunal sitting singly keeping in with the view taken by Division Bench of this Tribunal in Shri Murlidhar C. Patil's case supra, however, without referring to that judgment.

12. Learned Advocate for the Applicants has cited certain judgments of this Tribunal where Single Member of this Tribunal

took a view that adherence to three years tenure or six years, as the case may be, is mandatory. Those judgments are as follows:-

(a) Judgment of this Tribunal dated 22.9.2006 in O.A 459/2006 (Dr. Tulsidas Abarao More Vs. Principal Secretary, Public Health Department).

(b) Judgment of this Tribunal dated 4.10.2007 in O.A 376/2007 & Ors (Shri Murlidhar C. Patil Vs. State of Maharashtra & Ors).

(c) Judgment of this Tribunal dated 23.6.2009 in O.A 694/2009 (Shri V.K Pawar Vs. State of Maharashtra & Ors).

(d) Judgment of this Tribunal dated 28.1.2016 in O.A 392/2015 (Shri R.G Ilawe Vs. State of Maharashtra & Ors).

13. Learned Advocate Shri A.V Bandiwadekar for Respondent no. 3 in O.A 455/2017 has relied on certain judgments to urge that adherence to three years is not mandatory. Those judgments are as follows:-

(a) Judgment of this Tribunal dated 7.1.2013 in O.A 366/2012 (Shri M.M Jorwekar Vs. State of Maharashtra & Ors.

(b) Judgment of this Tribunal dated 17.8.2010 in O.A 950/2009 (Shri S.R Chavan Vs. State of Maharashtra & Ors).

(c) Judgment of this Tribunal dated 26.11.2009 in O.A 869/2009 (Shri N.D Bhat Vs. Government of Maharashtra & Ors).

14. Learned Presenting Officer has relied on the following judgments:-

(a) Judgment of Hon'ble High Court dated 11th October, 2010 in Writ Petition No. 3301 of 2010, Shri Ramesh P. Shivdas Vs. The State of Maharashtra & Ors.

(b) Judgment of Hon'ble High Court dated 30th November, 2010 in Writ Petition No. 8898 of 2010, Shri Rajendra S. Kalal Vs. The State of Maharashtra & Ors.

15. Neither of the parties have cited in judgment of Hon'ble High Court or Hon'ble Supreme Court wherein the period of 3 years prescribed under the ROT Act be construed to mean completed 36 months or it should be read to mean 36 months approximately with allowance of deficiency/short fall of few days or few months.

16. Both parties have relied upon other judgments. However, those judgments would be referred, if need arises.

17. Admittedly there is one judgment of the Division Bench of this Tribunal, namely O.A 376/2007 & ors, Shri Murlidhar C. Patil Vs. State of Maharashtra & Ors, on the point of construction of the statutory term and it is laid down in unambiguous term that it should be of complete 3 years. Though the words "36 months" is not employed, yet complete 3 years implies completed 36 months, and not even one day less.

18. Learned Presenting Officer Shri Rajpurohit has fervently argued that:-

(a) The judgment of Division Bench of this Tribunal was delivered before 10 years. At that time the statute was new and its workability was still to undergo trial of practical life. It is now tested to time, that the duration of 3 years if construed to mean completed 365 days in each year, it is shown to present in practical life of working various difficulties. The purpose and object of which ROT Act was enacted, gets defeated.

(b) In later judgment of Hon'ble Member sitting singly be considered to be a view which is reasonable and taken for advancing the aim and object of the statute.

19. This Tribunal has given peaceful consideration to rival submissions and the judgments cited at bar.

20. If the totality of scheme of ROT Act and judgment thereof by this Tribunal and Hon'ble High Court are seen, it would emerge that the Act has been enacted to introduce transparency and ensure fairness in administration and good governance. It needs to be decided as to whether assured tenure means each year, is main or ancillary object of the ROT Act, though ratio of Shri M.C. Patil's case supra leads to construe the tenure as main object.

21. Therefore, I am of the view that though the judgment is delivered by the Division Bench, it be construed as a prima facie view of the matter and considering the discussion contained in the judgment of Hon'ble Member of this Tribunal sitting singly, though the judgments of Hon'ble Single Member of this Tribunal took the view without noticing the judgment of Division Bench, yet the judgment of Division Bench in Shri M.C. Patil's case supra requires to be viewed as a possible view, and Single Member's judgment as another available and equally possible view.

22. The rule as to what is the object of the Act and what was the mischief to be re-medied may be taken into account. The frequent interference in the functioning of the services thereby hampering larger public interest apart from victimizing the Government servants or keeping them constantly shuffling and shifting for political agenda and political figures.

23. In the event for rightful administrative reasons if the tenure is cut down the rigid interpretation that three years must be completed with arithmetic procedure would not operate to advance the cause of remedying the mischief. Hence the construction done

by the Hon'ble Members of this Tribunal sitting singly may be accredited the worth of precedence because those are well considered judgments and have been rendered recent in time.

24. Arithmetic precision of term of three years does not seem to be the object of the Act, hence a doubt arises as to whether view taken by Division Bench in Shri Murlidhar C. Patil's case lays down the law correctly and coherently with the aim and object.

25. Therefore, the correct interpretation of the term Tenure as to whether the fixed statutory tenure of 3 years and 6 years be construed as mandatory, including 365 days in each year imperatively and as a rule, needs reconsideration.

26. Registry is directed to place the papers before the Chairman in the Chamber for passing administrative order as to constituting of bench consisting of three Members.

27. Hence, I am of the view that the judgment delivered by Division Bench in Shri Murlidhar C. Patil's case (O.A 376/2007 & Ors), requires reconsideration, by a larger bench.

28. Hence following questions are framed for reference to a larger bench.

Question:-

(1) Whether the judgment in Shri Murlidhar C. Patil's case, i.e O.A 376/2007 decided on 4.10.2007 requires reconsideration?

(2) Whether the statutory tenure of 6 years for 'C' category of Government servants and 3 years for 'B' category is required to be adhere to with arithmetic precision of 365 days in each year or deficiency of few months qua

the transfer season or academic year be construed as permissible?

29. Registry is directed to process the case within one week on administrative side for order for constitution of larger bench.

Sd/-
(A.H. Joshi, J.)
Chairman

Place : Mumbai
Date : 29.01.2018
Dictation taken by : A.K. Nair.

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IN THE MAHARASHTRA ADMINISTRATIVE TRIBUNAL

MUMBAI BENCH

ORIGINAL APPLICATION NO 392 OF 2015

DISTRICT : THANE

Shri Raviraj Ganpat Ilawe,)
B2/504, Vihang Garden,)
Pokharan Road No. 1, Vartak Nagar)
Thane [W] 400 606. ...**Applicant**

Versus

The Principal Secretary,)
Industries, Energy and Labour)
Department, State of Maharashtra,)
Mantralaya, Mumbai 400 032.)...**Respondents**

Smt Punam Mahajan, learned advocate for the Applicant.

Smt Kranti S. Gaikwad, learned Presenting Officer for the Respondent.

CORAM : Shri Rajiv Agarwal (Vice-Chairman)

DATE : 28.01.2016

ORDER

1. Heard Smt Punam Mahajan, learned advocate for the Applicant and Smt Kranti S. Gaikwad, learned Presenting Officer for the Respondent.

2. This Original Application has been filed by the Applicant challenging his transfer order dated 28.5.2015 transferring him from Tarapur to Nagpur. In the alternative, the Applicant is seeking transfer to any vacant post of Assistant Labour Commissioner at Kalyan or Thane.

3. Learned Counsel for the Applicant argued that the Applicant was posted as Assistant Commissioner of Labour at Tarapur from 5.6.2012. He was transferred to Nagpur in the same post by order dated 28.5.2015, before he has completed 3 years tenure at Tarapur. The period of 3 years has to be calculated in exact manner and short fall of a few days cannot be ignored. Learned Counsel for the Applicant argued that the Applicant has been working at Tarapur, which is in Palghar Tahsil, which is in the Tribal Sub Plan area. An officer, who has worked in Tribal area for 2 years is given incentives. As per G.R dated 6.8.2002 even Group 'A' & 'B' officers are eligible to be given posting in a district of their choice after completion of 2 years in a Tribal area. Learned Counsel for the Applicant contended that he has given

his choice that he may be posted in any vacant post in Thane/Kalyan. However, the Respondents have ignored his request and posted him to Nagpur.

4. Learned Presenting Officer (P.O) argued on behalf of the Respondents that the Applicant had completed his tenure of 3 years at Tarapur. During the general transfer of 2015, he was transferred to Nagpur. Learned Presenting Officer argued that the transfer order dated 28.5.2015 was in full compliance of the provisions of the Maharashtra Government Servants Regulation of Transfers and Prevention of Delay in Discharge of Official Duties Act, 2005 (the Transfer Act). Learned Presenting Officer argued that the Applicant was transferred to Tarapur by order dated 14.5.2012 and completed 3 full years there when he was transferred to Nagpur by order dated 28.5.2015. Learned Presenting Officer further argued that Tarapur is a big Industrial town and no hardship is caused to a officer on being posted there. It is declared as Group 'A' industrially developed area by G.F dated 1.4.2013, by the Government. As such, the facility available to Government servants working in Tribal areas are not available to those posted at Tarapur. Learned Presenting Officer argued that there is no merit in the present Original Application.

5. The Applicant has challenged his transfer by orders dated 28.5.2015 on the ground that he was posted

to Tarapur by order dated 5.6.2012 and has not completed his full tenure of 3 years. The claim of the Respondents is that the Applicant was posted to Tarapur by order dated 14.5.2012 and he has completed his full tenure of 3 years when transfer order dated 28.5.2015 was issued. It is seen that by order dated 14.5.2012, the Applicant was transferred to the office of the Labour Commissioner at Bombay in the post becoming vacant due to transfer of Shri More, who was transferred by order dated 5.6.2012 as Assistant Labour Commissioner, Tarapur by modifying order dated 5.6.2012. The contention of the Applicant that he was transferred to Tarapur by order dated 5.6.2012 has to be accepted. In O.A no 694 of 2009, by order dated 23.6.2009, this Tribunal has held that period of 3 years has to be construed strictly and short fall of a few days cannot be ignored. The Applicant was granted interim relief on this count by order dated 1.6.2015 by this Tribunal. The Applicant has challenged the orders as mid tenure' which has been issued without complying with the requirement of section 4(5) of the Transfer Act making out a special case. It is seen that the impugned order dated 28.5.2015 reads:-

" कामगार आयुक्त, मुंबई यांच्या आस्थापनेवरील सहाय्यक कामगार आयुक्त, गट - अ संवर्गातील खाली नमूद अधिकाऱ्यांची नियतकालिक बदली करण्यात येत आहे."

It is, therefore, clear that the transfer order of the Applicant is issued as a general transfer order. It is, however, found that he had not completed his tenure of 3 years when this order was issued and it was in fact, a mid-tenure order, which could not be passed without complying with the requirement of section 4(5) of the Transfer Act. In the affidavit in reply dated 12.6.2015 and the affidavit-in-rejoinder dated 19.8.2015, there is no mention that a special case was made out for mid tenure transfer of the Applicant. The impugned transfer order is not sustainable on this count.

6. The Applicant has claimed that he has been working in a Special Component Plan/Tribal Sub Plan area for more than 2 years, as Tarapur is in Palghar Tahsil, which is included in Tribal Sub Plan area. The Applicant claims that he is entitled to be given a posting of his choice, as he has worked in Tribal area for more than 2 years. The Respondents have not denied that Tarapur is in a Tribal Sub Plan area. However, it is stated by the Respondents that a Government servant will be eligible to get benefit of G.R dated 6.8.2002, if he is working for the upliftment of Tribal people. Labour Department does not have any such people oriented scheme, and Tarapur is classified as Group 'A' industrially developed area as per G.R dated 1.4.2013. The Applicant is, therefore, not eligible for any incentive as per G.R dated 6.8.2002. The Applicant has placed on

record voluminous material in support of his contention that Tarapur is covered by G.R dated 6.8.2002. As per information supplied to one Shri G.B Jondhale, under the Right to Information Act, Tribal Development Department has confirmed that:-

(i) Tarapur is included in Tribal Sub Plan area as per G.R dated 9.3.1990.

(ii) All Government servants working in Tarapur are eligible to get benefits of G.R dated 6.8.2002.

6. The Applicant has been held eligible for benefits of G.R dated 6.8.2002. The contention of the Respondents that officials posted at Tarapur, which is industrially developed area, who are not implementing any development scheme, should not be given benefits of G.R dated 6.8.2002 appears to be logical. However, this mater must be decided by the State Government and unless G.R dated 6.8.2002 is amended, it has to be held that the Applicant is entitled to its benefits. However, this facility of choice posting is not for a particular place as claimed by the Applicant, who is seeking a posting in Kalyan/Thane. In fact, he is required to give choice of 3 'districts' and he may be given posting in any one of the districts as per convenience of the authorities. The Applicant is also required to fulfil the conditions in the aforesaid G.R dated 6.8.2002 to get this benefit.

7. Having regard to the aforesaid facts and circumstances of the case, transfer order of the Applicant dated 28.5.2015 is quashed and set aside. If the Applicant gives choice of 3 districts for posting in accordance with G.R dated 6.8.2002,the Respondents ~~may~~ shall take action as provided in the aforesaid G.R. This Original Application is allowed in these terms with no order as to costs.

Sd/-

(Rajiv Agarwal)
Vice-Chairman

Place : Mumbai
Date : 28.01.2016
Dictation taken by : A.K. Nair.

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IN THE MAHARASHTRA ADMINISTRATIVE TRIBUNAL MUMBAI

ORIGINAL APPLICATION NO.366 OF 2012

DISTRICT : SOLAPUR

Shri Shrikant Laxman Pawar.)
Aged Adult, Occu.: Govt. Service as)
Co-operative Officer, Grade-I, presently)
posted in the office of the Assistant)
Registrar, Co-operative Societies, Barshi,)
District : Solapur.)
Address for Service of Notice :)
Shri Bhushan A. Bandiwadekar, Advocate)
having office at 9, "Ram-Kripa", Lt. Dilip)
Gupte Marg, Mahim, Mumbai 400 016.)**...Applicant**

Versus

1. The State of Maharashtra.)
Through the Principal Secretary,)
(Co-operation), Co-operation,)
Marketing and Textile Department,)
having office at Mantralaya,)
Mumbai - 400 032.)

2. The Commissioner for Co-operation)
and Registrar, Co-operative)
Societies, M.S, Pune, having office at)
Central Building, Pune – 1.)

3. The Divisional Joint Registrar,)
Co-operative Societies, Pune Division)
Pune, having office at Sakhar Sankul)
Shivaji Nagar, PUne – 5.)...**Respondents**

Shri A.V. Bandiwadekar, Advocate for Applicant.

Smt. Kranti S. Gaikwad. Presenting Officer for Respondents.

CORAM : SHRI RAJIV AGARWAL (VICE-CHAIRMAN)
SHRI R.B. MALIK (MEMBER-J)

DATE : 01.09.2014

PER : SHRI R.B. MALIK (MEMBER-J)

JUDGMENT

1. The Applicant, upon his transfer from Maharashtra Public Service Commission (M.P.S.C) to the post of Co-operative Officer, Grade-I (present post) was required to compulsorily wait on administrative ground for actual posting. He was given all the arrears and the post retirement benefits also were safeguarded. His seniority, however, was directed to be counted from the actual date of appointment to the present post. The dispute is with regard to the last mentioned aspect. A deemed date of seniority is being hereby claimed.

2. The Applicant assumed the charge of the post of Assistant in M.P.S.C. by direct appointment. The Government concurred for the appointment of the Applicant by transfer to the post of Auditor, Grade-I by the orders dated 14.6.2006 and 30.6.2006. The copies of the said orders are not there on record, but it seems to be a common ground that the orders may have been made as claimed by the Applicant. On 30th June, 2006, the MPSC, however, straightway issued an order effectively relieving the Applicant from the post of Assistant, without waiting for an order from the Government with regard to the posting of the Applicant. That order in the realm of some branches of administration is also called "movement order". That order of the MPSC is at Exh.'A' and is dated 30th June, 2006. It reads as follows :

> '' उपरोक्त विषयासंदर्भात असे कळविण्याचे आदेश आहे की, शासनाने क्र. एएससी-१४०६/९०६/१४-अ, दिनांक १४ जून, २००६ व समक्रमांकाच्या दिनांक ३० जून, २००६ च्या पत्रान्वये आयोगाच्या कार्यालयातील सहायक श्री. श्री.ल.पवार यांची लेखा परीक्षक, श्रेणी-१ या पदावर बदलीने नियुक्ती करण्यास सहमती असल्याचे कळविले आहे. सहकार, पणन व वस्त्रोद्योग विभागाने पत्र क्र. सहक-१००२/प्र. क्र.९०/१२-स, दिनांक २३ जानेवारी, २००६ च्या पत्रान्वये श्री. पवार यांचेकरीता नाशिक विभागात लेखा परीक्षक, श्रेणी-१ या सरळसेवेच्या कोटयातील रिक्त पदी बदलीने नियुक्ती देण्यास संमती दिली आहे. सोबत संदर्भित शासन पत्राांच्या प्रती जोडल्या आहेत. श्री पवार यांना शासन परिपत्रक सामान्य प्रशासन विभाग क्रमांक एएससी-१०८२/चौदा-अ, दिनांक २१ एप्रिल, १९८२ मधील अटींच्या अधीन राहून लेखा परीक्षक, श्रेणी-१ या पदावर रुजू होण्यासाठी दिनांक

३० जून,२००६ (मध्यान्होत्तर) पासून कार्यमुक्त करण्यात आले आहे"

The above communication was addressed to Commissioner of Co-operative Societies and Registrar of Co-operative Societies.

3. Although MPSC acted with some promptitude which unfortunately one does not associate with the functioning of Government offices and offices of the Institutions which fall within the definition of the word "State" under Article 12 of the Constitution of India. Normally, the Applicant should have actually joined his new assignment post transfer on 1st July, 2006. However, ultimately, he joined actually on 10th April, 2007 after posting order came to be issued, appointing him as Co-operative Officer, Grade-I in SC category. Therefore, the period from 1.7.2006 to 9.4.2007 has been described as a compulsory waiting on administrative ground and it is for this particular period, that whatever dispute now remains relates to.

4. The record shows that the Applicant entered into correspondence with the Respondents trying to ventilate his grievance with them. A detailed reading of the various letters would be out of place. The all

important order is dated 1st December, 2007 to be found at pages 48 and 49 of the paper book. By then, the Applicant had already joined the post of Co-operative Officer, Grade-I under the Respondent No.3 at Indapur in District Pune. The said order refers to the fact as to how the Applicant then working as an Assistant in MPSC came to be transferred as Auditor, Grade-I and was to be posted at Nashik and as to how, he was relieved by MPSC on 30th June, 2006.

5. At this stage itself, it will be pertinent to refer to the fact that as per the Rules, nobody can simultaneously hold two substantive posts. It is quite natural and equally naturally, there was no dispute thereabout. It is also clearly borne out *inter-alia* from the averments in the Affidavits filed on behalf of the Respondents that they did not issue any order of posting of the applicant by the time the MPSC relieved the Applicant. Now, it seems that the Applicant was found ineligible for being appointed as Auditor, Grade-I. The cause is immaterial, but the effect was the same. The document at Annexure 'R-2' at page 37 tends to suggest that on academic side, the Applicant might not have been

found to be so meritorious as to be eligible for being appointed as Auditor, Grade-I.

6. Returning to the order dated 1st December, 2007 in the above background, it then refers to the fact that by an order of 29th March, 2007, the Applicant came to be appointed as Co-operative Officer, Grade-I under the Respondent No.3. The order that ultimately was made *inter-alia* mentioned that the actual absence that has resulted due to the delay above referred to was regularized by treating the said period as compulsory waiting period and what can be described as on duty. The salary and emoluments of this period and the retiral benefits would be given to the Applicant. The seniority will be counted w.e.f. 10.4.2007. This is the gist of the easy translation of the order, but we think it appropriate to quote the entire order in Marathi for facility.

" **-आदेश-**

श्री. श्री.ल. पवार, सहकारी अधिकारी (श्रेणी-१) अधीन सहाय्यक निबंधक, सह. संस्था, इंदापूर, ता. इंदापूर, जि. पुणे यांचे विभागबदलीदरम्यान पदस्थापनेस झालेला विलंब हा प्रशासकीय कारणास्तव झालेला असल्याने, उक्त संदर्भ क्र.२ वरील दि. २ जून २००३ चे शासन निर्णयान्वये प्राप्त झालेल्या अधिकारानुसार, मी, श्री. किशोर तोष्णीवाल, विभागीय सहनिबंधक, सहकारी संस्था, पुणे विभाग, पुणे याद्वारे श्री. पवार यांनी दि. ८/६/२००७ चे अर्जान्वये, त्यांचा दि. १/७/२००६ ते दि. ९/४/२००७ हा सक्तीच्या प्रतीक्षेचा

कालावधी ''कर्तव्य'' म्हणून नियमित करण्याची केलेली विनंती मान्य करीत आहे.

सदरचा दि. १/७/२००७ हा कालावधी श्री. पवार यांचे सदर कालावधीचे वेतन अदा करणे आणि सेवानिवृत्तीवेतनाचे प्रयोजनार्थ ग्राहय धरण्यात येत आहे. त्यांची सहकार खात्यातील पुणे प्रशासन विभागातील रुजू तारीख १०/४/२००७ ही विचारात घेऊन त्यांना सेवाज्येष्ठता यादीमध्ये योग्य तो स्थानांक देण्यात येईल.

श्री. पवार यांना दि. १/७/२००६ ते ९/४/२००७ या कर्तव्य कालावधीचे वेतन व भत्ते सहाय्यक निबंधक, सह. संस्था, इंदापूर, ता. इंदापूर, जि. पुणे यांनी अदा करावेत.''

7. It is the above referred order which has given rise hereto only in so far as the seniority aspect of the matter is concerned. The Applicant, as already indicated above, is aggrieved thereby and he has mentioned the name of one Shri Kamble, who was in fact shown below him in the list of seniority as on 1.1.2010 at Serial No.3 while Shri Kamble was shown at Serial No.4. The Applicant was shown as direct appointee w.e.f. 10.4.2007 while Shri Kamble was shown as "by promotion" w.e.f. 17.10.2007. This was in so far as the Co-operative Deprtment, Pune (Administration) was concerned. However, it seems that in the State-wise seniority list published on 16th July, 2012, Shri Kamble has been shown at Serial No.36 and Applicant at Serial No.54.

8. It was strongly urged by Shri Bandiwadekar, the learned Advocate for the Applicant that for no fault of the Applicant, he was languishing then awaiting appointment, and therefore, he should not be made to suffer in the matter of seniority. The learned Presenting Officer, however, countered by telling us that the seniority aspect of the matter is on an entirely different pedestal. He adopted the submissions in line with the averments in the Affidavit-in-reply that the Respondents have treated the Applicant fairly.

9. In the background of the above discussion, we are quite clearly of the view that although an argument based on convenience could be that once in all other respects including monetary dues, both pre and post retirement, the relevant date has been appointed as 1.7.2006, there is no reason why the Applicant should be put to disadvantage in the matter of seniority. This argument appears to be attractive, but in the ultimate analysis, it will not be possible for us to accept it. It is very clear that in the matter of emoluments and all other aspects that are strictly between the parties hereto, one can acclaim the generosity of all concerned including the Respondents and the MPSC vis-à-vis the Applicant, but when comes to the seniority, it ceases to be a matter

inter-partes and it has the potential to affect other unsuspecting third parties requiring the Tribunal to be that much more careful. It is a fact that if the MPSC had the required patience to wait till such time as the suitability, eligibility, etc. of the Applicant for the post of Auditor, Grade-I was determined. But then that was not to be. In our opinion, whatever be the state of affairs, the acceptance of Applicant's request to be given seniority from 1.7.2006 in so far as a holistic and overall view of the matter is concerned, would tantamount to holding as if, he practically assumed charge and started functioning from 1.7.2006 requiring the counting of a seniority from that date. This is in fact not the state of affairs. He was positively found to be ineligible for the post that was meant for him to begin with and it was only thereafter that with a little generous approach, the post of Co-operative Officer, Grade-I was offered to him, and therefore, unless and until he started to actually function as such, we are not prepared to accept that his seniority should be counted from any earlier date. If that be so, then as per the relevant Rules, indisputably, he would be placed below all those who came to be appointed either directly or by the promotion in that particular year, and therefore, we cannot countenance the assail made by the

Applicant to the list of seniority, generally and with regard to Shri Kamble in particular. In the context of the above observations, it is not possible for us to accept the submissions made on behalf of the Applicant that though Auditor's post was available, but it was not offered to the Applicant. The fact apparently is that he was not found fit for the said post.

10. We would, therefore, conclude by holding that the Applicant's challenge to the seniority aspect of the matter, cannot be accepted. We make it clear that we totally uphold the order dated 1.12.2007. In that we do not interfere with whatever has been held in favour of the Applicant, but we also do not interfere with the seniority aspect of the matter. The Application is, accordingly, disposed of with no order as to costs.

Sd/-

(R.B. Malik)
Member-J
01.09.2014

Sd/-

(Rajiv Agarwal)
Vice-Chairman
01.09.2014

Mumbai
Date : 01.09.2014
Dictation taken by :
S.K. Wamanse.
E:\SANJAY WAMANSE\JUDGMENTS\2014\9 September, 2014\O.A.366.12.9.2014.doc

THE MAHARASHTRA ADMINISTRATIVE TRIBUNAL, MUMBAI

ORIGINAL APPLICATION NO. 950/2009

DISTRICT: PUNE

Mr.Shashikant Raghunath Chavan,)
D2/4, Ratan Park Housing Society,)
Flat No.4, Sus Road, Pashan,)
Pune .. APPLICANT

VERSUS

1. State of Maharashtra,)
through the Secretary,)
Home Department, Mantralaya,)
Mumbai-400 32.)

2. Dr.Jai Jadhav,)
Assistant Commissioner of Police,)
Nashik City. RESPONDENT

Smt.Punam Mahajan, the learned Advocate for the applicant
Shri D.B.Khaire, the learned Chief Presenting Officer for the Respondent No.1

Shri A.V.Bandiwadekar with Shri B.A.Bandiwadekar, the learned Advocate for the Respondent No.2.

Coram: Dr.Justice S.Radhakrishnan, Chairman
Date: 17.08.2010

ORDER

Heard Smt.Punam Mahajan, the learned Advocate for the applicant, Shri D.B.Khaire, the learned Chief Presenting Officer for the Respondent No.1 and Shri A.V.Bandiwadekar with Shri B.A.Bandiwadekar, the learned Advocate for the Respondent No.2.

2. By the above Original Application, the applicant is challenging the transfer order dated 27th July 2009. Mr.Mahajan, the learned Counsel for the applicant pointed out that the Applicant was working as the Superintendent of Police and he was posted as Superintendent of Police, Highway Safety Patrol, District Pune by an order dated 29th July 2006. Thereafter the present transfer order has been issued on 27.07.2009, whereby the applicant has been transferred to the post of Superintendent of Police, Highway Safety Patrol, District Pune to State C.I.D, Pune and the applicant has also taken charge of the said post in October 2009. Mrs.Mahajan, the learned Counsel contended that the above transfer order has been issued without following the due procedure as per Section 4(4) (ii) and Section 4 (5) of the Maharashtra Government Servants Regulation of Transfers and Prevention of Delay in Discharge of Official Duties Act, 2005. Mrs.Mahajan also contended that the above transfer order was not a general transfer order, hence special reasons were

required to be specified hence the above transfer order suffers from the said lacuna. She also strongly contended that the applicant has been wrongly transferred under the guise of election guidelines issued by the Election Commission of India. She also sought to contend that the above transfer order was against the public interest and the same was not for administrative convenience and it was only to accommodate Respondent No.2.

3. Mrs.Mahajan, the learned Counsel for the applicant further pointed out that the applicant was actually retiring on 31st July 2010 and having regard to the provisions of Section 5 (1) (a) of the Maharashtra Government Servants Regulation of Transfers and Prevention of Delay in Discharge of Official Duties Act, 2005, the applicant ought not to have been transferred and ought to have been continued in the earlier posting itself.

4. Mrs.Mahajan, the learned Counsel for the applicant relied on judgments of this Tribunal in O.A. 343/2008, O.A.694/2009, O.A.955/2009 and O.A.746/2008. In addition, she has also relied on the judgment of the Hon'ble Supreme Court in K.Ajit Babu and Others Versus Union of India and Others 1997 SCC (L.&S) 1520 and Shriprakash Maruti Waghmare Versus State of Maharashtra and Others Writ Petition No.5652/2009, Aurangabad Bench of the Bombay High Court, in support of her contention that the impugned transfer order is illegal.

5. Shri D.B.Khaire, the learned Chief Presenting Officer contended that the applicant had almost completed three years in the sense there is a shortage of only two days. However, Shri Khaire, the learned Chief

Presenting Officer pointed out that the above transfer order has been issued in accordance with Section 4 (4) (i) of the Maharashtra Government Servants Regulation of Transfers and Prevention of Delay in Discharge of Official Duties Act, 2005 to fill in a vacant post and in such cases there is no necessity of any reasons to be recorded. Mr.Khaire also pointed out that in the case of the applicant, the Hon'ble Chief Minister being the next higher authority also has granted approval and it is not an isolated case of transfer and the above transfer order was issued along with 55 other officers. The Hon'ble Chief Minister has duly approved all the aforesaid transfers. Accordingly, he submitted that there is no question of any malafide or any question of accommodating Respondent No.2. Mr.Khaire, the learned C.P.O categorically stated that there is absolutely illegality in the above transfer order.

6. Shri Khaire, the learned Chief Presenting Officer pointed out that as per provisions of Section 5 (1) (a) there is no mandatory right to continue and it is the discretion of the Government to continue the applicant and he contended that the applicant has misrepresented in his application that his date of retirement as 30th June 2010 instead of 31st July 2010. The transfer order is dated 27th July 2009, which is more than a year prior to retirement. In any event Shri Khaire, the learned Presenting Officer submitted that Section 5 (1) (a) of the Maharashtra Government Servants Regulation of Transfers and Prevention of Delay in Discharge of Official Duties Act, 2005 is only an enabling provision and the same is not mandatory provision. Mr.Khaire submitted that the respondents having taken into account that the applicant is retiring on 31st July 2010 have posted him in a vacant post in the very same District Pune so as not to cause any inconvenience to the applicant and his family.

Mr.Khaire submitted that the above Original Application is devoid of any merit and the same should be dismissed.

7. Shri Bandiwadekar, the learned Counsel appearing on behalf of Respondent No.2 contended that Respondent No.2 had taken charge in the transferred post on 30th July 2009. Mr.Bandiwadekar has also pointed out that the applicant has been suffering from health problem and that his transfer was in public interest. Shri Bandiwadekar pointed out that Highway Safety Patrol from Pune involves touring extensively in 12 districts. Hence younger and energetic person was required. He pointed out that the said Highway Safety Patrol covers 12 districts viz. Pune, Satara, Sangli, Solapur, Kolhapur, Ahmadnagar, Aurangabad, Jalna, Parbhani, Beed, Latur and Osmanabad. He also pointed out that these districts cover the length of Expressway 47 kms, National Highway 1805 Kms and State Highway 6340 Kms. and there are 18 Traffic Aid Posts and the concerned officer is expected to complete 72 visits during the last four months. Whereas Applicant visited only one Traffic Aid Post out of 18, during the last four months. Having regard to the aforesaid facts and circumstances in larger public interest, the above transfer order has been issued and also the applicant has been accommodated in Pune itself so that he does not suffer. Hence Mr.Bandiwadekar prayed that the above Original Application be dismissed.

8. After hearing the learned Counsel for the applicant and the learned Chief Presenting Officer for Respondents, it is clear from the record that in the above case the transfer order has been issued as per Section 4 (4) (i) of the Maharashtra Government Servants Regulation of Transfers and Prevention of Delay in Discharge of Official Duties Act, 2005. Even from the transfer order it is clear that the applicant has been transferred to

a vacant post. Section 4 (4) (i) of the Maharashtra Government Servants Regulation of Transfers and Prevention of Delay in Discharge of Official Duties Act, 2005 makes it abundantly clear that even in case of cutting short the tenure there is no need to record the reasons as he is being posted in a vacant post. All the above judgments cited by Mrs.Mahajan pertain to 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 which have no application in the instant case. Even otherwise, there is only a shortfall of two days for completion of normal tenure.

9. Under the aforesaid facts and circumstances, the applicant in fact has been accommodated in Pune itself especially, as he is about to retire in a year. Another vital aspect is to be noted is that the applicant was working in Highway Safety Patrol which involves extensively touring as pointed out hereinabove. Obviously, a younger person would be more suitable. There is no substance in the allegation of malafdie. The above order has been issued with regard to 55 officers in addition to the applicant and the Hon'ble Chief Minister also has given his prior approval. I do not find anything arbitrary and illegal in the above transfer order. Original Application stands dismissed, however with no order as to costs.

Sd/-

(Dr.S.Radhakrishnan.J.)
Chairman

Date:17.08.2010
Place: Mumbai
Dictation taken by
P.S.Zadkar

IN THE MAHARASHTRA ADMINISTRATIVE TRIBUNAL
MUMBAI BENCH

DISTRICT : THANE

ORIGINAL APPLICATION NO. 869 OF 2009

Shri Narayan D. Bhat)
Sub-Divisional Forest Officer, Kasa, Dahanu Forest)
District : Thane and having R/o. Kopri Forest Colony)
Kopri, Thane (East))... Applicant

Versus

1. Government of Maharashtra, through Additional)
Chief Secretary, Revenue & Forest Department)
Mantralaya, Mumbai 400032.)

2. Shri B.N. Patil, Assistant Director)
Forest Guard Training School, Shahapur.)... Respondents

Shri M.D. Lonkar Advocate for the applicant.

Shri D.B. Khaire Chief Presenting Officer for the Respondent No.1.

Shri A.V. Bandiwadekar Advocate for the Respondent No.2.

Coram : Dr. Justice S. Radhakrishnan (Chairman)

Date : 26.11.2009.

J U D G M E N T

Heard Shri M.D. Lonkar, learned Advocate for the applicant, Shri D.B. Khaire, learned Chief Presenting Officer for the Respondent No.1 and Shri A.V. Bandiwadekar, learned Advocate for the Respondent No.2.

2. By this application, the applicant who is working as Sub Divisional Forest Officer, Kasa, Dahanu Forest Division, District : Thane is challenging the transfer order dated 9.7.2009 whereby the applicant has been transferred for the post of Assistant Director Forest Guard Training School at Shahapur.

3. Shri Lonkar pointed out that the applicant was earlier posted at Kasa by a transfer order dated 7.7.2006 and that he had taken charge on 27.7.2006 Therefore, Shri Lonkar pointed out that the impugned transfer

order dated 9.7.2009 was premature as he has not still completed 3 years tenure.

4. Shri D.B. Khaire, learned Chief Presenting Officer for Respondent No.1 pointed out that all the requisite formalities for the said transfer, approval by the Forest Minister as well as Hon'ble Chief Minister were duly obtained. Hence, there is absolutely no illegality in the said transfer order. Shri Khaire stated that the said transfer order was issued strictly in consonance with the Transfer Act, 2005.

5. Shri A.V. Bandiwadekar, learned Advocate for the Respondent No.2 also emphasized that the impugned transfer order was issued strictly in consonance with the Transfer Act, 2005 and that there is no illegality in the said order.

6. Under these circumstances, Shri Lonkar on instructions from the applicant states that as the applicant has now completed 3 years, and he will report for duty as Assistant Director, Forest Guard Training School, Shahapur on 3.12.2009. Shri Lonkar also pointed out that certain pending

work still remaining. However, Shri Bandiwadekar, learned Advocate for Respondent No.2 states that the Respondent No.2 will take charge and clear the said pending work.

7. Having regard to the facts and circumstances of the case, the applicant is directed to take charge as Assistant Director of Forest Guard Training School, Shahapur on 3.12.2009 and Respondent No.2 to take charge at Kasa, Dahanu Forest Division, District Thane on 3.12.2009 and complete all the pending work. The applicant is at liberty to make a representation for change of posting during the General Transfer in the April/May 2010 in view of certain personal difficulties. Accordingly, the same may be sympathetically considered by the Respondents.

8. Original Application stands disposed of accordingly with no order as to costs.

Sd/-

(Dr. S. Radhakrishnan J)
Chairman

Place : Mumbai
Date : 26th November, 2009.
Typed by C.S. Bhosle

IN THE MAHARASHTRA ADMINISTRATIVE TRIBUNAL

MUMBAI

ORIGINAL APPLICATION NO.694 OF 2009

DISTRICT : PUNE

Vijay Khanderao Pawar.)
Deputy Director, Industrial Safety &)
Health, Pune, Dist Pune and residing at)
C-102, Vrudavanan Model Colony,)
Shivaji Nagar, Pune 411 016.)..**Applicant**

Versus

1. The State of Maharashtra.)
Through the Principal Secretary,)
Industry, Energy & Labour Dept.)
Mantralaya, Mumbai 400 032.)

2. V.M. Yadav.)
Deputy Director, Industrial)
Safety & Health, Mumbai.)..**Respondents**

Shri M.D. Lonkar, Advocate for Applicant.

Shri D.B. Khaire, Chief Presenting Officer for Resp.1

Shri A.V. Bandiwadekar, Advocate for Resp.No.2

CORAM : SHRI S.R. SATHE (MEMBER-J)

DATE : 23.06.2009

JUDGMENT

1. The applicant has filed this application under Section 19 of the Administrative Tribunal Act, 1985, to challenge the order dated 30.5.2009 issued by Respondent No.1 whereby the applicant was transferred from Pune to Mumbai.

2. Brief facts giving rise to this application are as under.

3. By order dated 29.6.2006, the applicant came to be transferred from Jalgaon to Pune. Thus, by 30.5.2009, he had not completed normal tenure of three years at Pune. However, the Respondent No.1 transferred him and posted Respondent No.2 in applicant's place. According to applicant, the Respondent No.2 had not even completed two years at Mumbai. He, however, managed to bring political pressure on Respondent No.1 and as a result of the same, the applicant was transferred from Pune and Respondent No.2 was transferred in his place. It is the applicant's case that his transfer is against the provisions

of Section 4 of the Maharashtra Government Servants Regulation of Transfers and Prevention of Delay in Discharge of Official Duties Act, 2005 (hereinafter referred to as "Transfer Act"). Besides this, the transfer in question is mala fide and arbitrary. Hence, the applicant has filed the present application to set aside his transfer order.

4. The Respondent No.1 filed Affidavit-in-reply through A.N. Sakharkar, Desk Officer working in the office of Industries, Energy and Labour Department and opposed the application. The Respondent contended that out of last 10 years, the applicant has worked for 9 years in Pune. He worked as Assistant Director from 2.6.1999 to 28.3.2004. Then, he was promoted as Deputy Director, Pune and worked from 29.3.2004 to 4.6.2005. Then, he was transferred to Jalgaon. Again, he was transferred to Pune and worked from 7.7.2006. Lastly, he was brought to Pune, as a result of the recommendations of some political personalities. The Respondent further contended that the transfer order is issued only one month before applicant completing his full tenure of three years. The said order has been issued taking into consideration School/College admission and shifting problems of the officers. Besides this, according to Respondent, the transfer of the applicant was necessary in view of the various oral and written

complaints against the applicant. The Respondent has also contended that as the applicant had almost completed three years and so, it cannot be said that the provisions of Section 3 & 4 of the Transfer Act are not complied with.

5. It is contended by the Respondent No.1 that the Respondent No.2 had requested for his transfer to Pune, as his father was under treatment of a Cardiologist from Pune. So, the application of Respondent No.2 was considered during regular transfer and the competent authority consented for the same. The Hon'ble Minister for Labour has given approval for the transfer in question and as such, the same is not in violation of the Transfer Act. The Respondent, therefore, contended that there is no merit in the application and the same be dismissed.

6. The Respondent No.2 filed Affidavit-in-reply and opposed the application. It is his contention that in pursuance of transfer order, he has taken charge at Pune on 6.6.2009 and as such, there is no necessity to grant the application. According to Respondent No.2, as per the provisions of the Transfer Act, normal tenure is three years. However, the said period cannot be counted literally. It has to be considered that the periodical transfers are effected only in the month of April/May of

each year. So, according to Respondent, a Government servant who is due for transfer after the month of May, that year such Government servant cannot claim protection under Section 4(4)(2) and 4(5) of the Transfer Act. So, according to Respondent, in the instant case, the provisions of the Transfer Act have been substantially complied with. In the alternative, the Respondent No.2 contended that the Respondent No.1 may allow the applicant to complete one month at Pune and thus to complete tenure of three years. According to him, it was not necessary to make out any special case or record special reasons and bring the case within "exceptional circumstances".

7. The Respondent No.2 denied the allegation that he managed to bring political pressure on Respondent No.1 for getting transfer at Pune. According to him, the applicant had in fact brought political pressure and managed to secure posting at Pune. The Respondent No.2 therefore, contended that there is no substance in the application and the same be dismissed.

8. In this application before me, Shri Lonkar, learned Advocate for the applicant submitted that the applicant's transfer is in violation of the provisions of

Section 4(4)(2), 4(5) of the Transfer Act. The applicant had not completed normal tenure of three years. So, it was necessary for Respondent No.1 to make out a special case, as contemplated under Section 4(5) of the Transfer Act and obtain prior approval from the concerned authority and as that has not been done, the transfer of the applicant is illegal. As against this, Shri Khaire, learned Chief Presenting Officer submitted that the applicant was at Pune for 9 years. There were complaints against him and he had completed 2 years and 11 months at Pune and as such, he had almost completed normal tenure. He, therefore, submitted that the transfer in question is legal and valid. Shri Bandiwadekar, learned Advocate for Respondent No.2 strenuously argued before me that the provisions of Section 3, 4(4)(2) & 4(5) of the Transfer Act need not be construed strictly. If a Government servant has completed 2 years and 11 months, when the transfer order was issued, then it must be said that there is compliance of the provisions of Section 3 & 4 of the Transfer Act. He also submitted that if the said provisions are construed strictly and technically, then it may happen that in some cases, the officer would be required to keep at that place for 4 years, because the period of exact 3 years may not match with the time schedule i.e. April/May of each year for general transfer. Besides this, it may also

create difficulty in administration. He, therefore, submitted that liberal view has to be taken while construing the provisions of Section 3 & 4 of the Transfer Act. He, therefore, urged that in the instant case, it be held that there was proper compliance of the provisions of the Transfer Act. The learned Advocate also canvassed that there is nothing to show that political pressure was brought to post Respondent No.2 in place of applicant. So, there is no substance in the allegation made in this behalf. He, therefore, submitted that the application be dismissed.

9. It is not in dispute that the applicant was transferred to Pune by order dated 29.6.2006. Admittedly, the present transfer order is issued on 30.5.2009. So, one thing is certain that when the present transfer order was issued, the applicant had not completed normal tenure of three years. But he had completed 2 years and 11 months. The question arises whether in such circumstances, it can be said, having regard to Section 3 & 4 of the Transfer Act that the applicant had completed normal tenure of three years. In order to answer this question properly, it would be worthwhile to see the relevant provisions.

> "3. (1) For All India Service Officers and all Groups A, B and C State

Government Servants or employees, the normal tenure in a post shall be three years.

4. (1) No Government servant shall ordinarily be transferred unless he has completed his tenure of posting as provided in section 3.

(2) .....
(3) .....
(4) The transfers of Government servants shall ordinarily be made only one in a year in the month of April or May.

Provided that, transfer may be made any time in the year in the circumstances as specified below, namely :-

(i) .....
(ii) 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.

(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 the immediately superior Transferring Authority mentioned in the table of Section 6, transfer a

Government servant before completion of his tenure of post."

10. From the perusal of the above provisions, it is clear that as per Section 3, normal tenure in a post is of three years. Section 4 specifically says that no Government servant shall ordinarily be transferred unless he has completed his tenure of posting means three years. We cannot ignore the fact that in this section, it is not mentioned that unless he has completed about three years or almost three years. We cannot insert new words in the Section. The word 'completed' has to be given due weightage. It obviously shows that before completion of tenure of three years, there cannot be a usual or normal or ordinary transfer. That does not mean that a Government servant cannot be transferred in any event prior to completion of three years. The Act has made a special provision that such Government servant who has not completed normal tenure of three years can also be transferred. However, for that particular procedure as laid down in Section 4(4)(2), 4(5) read with Section 6 of the Transfer Act has to be followed. So, there is no question of arising any administrative difficulty. Naturally, in the instant case, when it is an admitted position that the applicant had not completed normal tenure of three years

at Pune, when the transfer order in question was issued, it was absolutely essential for the Respondent No.1 to follow the procedure laid down in Section 4(4)(2) and Section 4(5) of the Transfer Act.

11. It is tried to be argued on behalf of Respondents that out of 10 years the applicant is at Pune for 9 years. This may be true, but who is to be blamed for that. Admittedly, this is not a case where the applicant was at Pune on the post of Deputy Director (Industrial Safety) continuously for a period of 9 years, immediately preceding the transfer order in question. On the contrary, it appears that when he was transferred to Pune on 29.6.2006, he was working at Jalgaon. From the perusal of the record, it appears that the applicant was posted earlier at Pune on the recommendations of some political personalities. However, that cannot be considered as a ground for transferring him at this stage, when he had not completed normal tenure. In fact on many occasions, it has been noticed by this Tribunal that the transfer of Government employee has been effected due to pressure of political personalities. I really fail to understand as to how a Government servant dears to approach political personalities to have a posting of his choice. In fact, if law permits, action has to be taken against such Government

servant, who adopt such method for obtaining place of choice.

12. Once it is said that the applicant had not completed normal tenure of three years at Pune in the post of Deputy Director, when his transfer order dated 30.5.2009 was issued, it was necessary for the concerned authority to make out a special case and obtain prior approval from the next superior authority which in the instant case, can be said to be Hon'ble Chief Minister. From the perusal of the file, it is very clear that no such special case has been made out. No special circumstances for transferring the applicant prior to completion of normal tenure have been brought on record nor the Respondent No.1 has recorded in writing the reasons for issuing transfer order in question. On the contrary, it appears that the Respondent No.1 may have proceeded under assumption that the applicant's case can be considered to be a normal case of transfer, because in the transfer order in question, it is mentioned **"उपसंचालक, औद्योगिक, सुरक्षा व आरोग्य, गट-अ, या संवर्गातील अधिका-यांच्या खालील प्रमाणे नियतकालीक बदल्या करण्यात येत आहेत."**

13. From the facts of the case, I have absolutely no hesitation to hold that the applicant could not have been transferred by holding that he has completed normal tenure. So, the Respondent No.1 ought to have followed

the procedure under Section 4(4)(2), 4(5) read with Section 6 of the Transfer Act. As per that procedure, it was necessary to obtain prior approval for the transfer in question from the Hon'ble Chief Minister. Admittedly, that has not been done. So, the transfer of the applicant is certainly violating the provisions of Section 3, 4(1), 4(4)(ii) and 4(5) of the Transfer Act.

14. It is the case of the applicant that his transfer order has been issued only with a view to accommodate Respondent No.2 who had brought political pressure. It is an admitted fact that the Respondent had not even completed two years at Mumbai. He was not due for transfer. If we see the transfer order dated 30.5.2009, then it is not mentioned therein that Respondent No.2 has been transferred on request. It does appear that the Respondent No.2 had made some application for his transfer. However, at the same time, it is equally clear from the record that one M.L.C. and Hon'ble Minister for Water Resources had twice written a letter to the concerned Minister requesting to transfer Respondent No.2 from Mumbai to Pune, because he (Respondent No.2) was having some family difficulties. Thus, when we find that the applicant had not completed normal tenure of three years and as such, was not due for routine transfer, he

was transferred and that too, without recording any special reasons and making out a case for the same and without obtaining prior approval from the competent authority viz. the Hon'ble Chief Minister and Respondent No.2 is transferred though he had not completed normal tenure and was posted at a place of his choice i.e. Pune, it creates the impression that the transfer in question may have been made to accommodate the Respondent No.2. Apart from the fact, as to whether the transfer of the applicant has been made to accommodate Respondent No.2 or not and whether the same is mala fide or not, one thing is certain that the transfer of the applicant has not been made after following the statutory procedure laid down in the Transfer Act. It is true that in the instant case, the applicant had completed 2 years and 11 months, when the transfer order was issued. But because of that, he cannot be transferred by treating him as due for transfer and treating his transfer as regular or normal transfer.

15. Thus, having regard to all the facts and circumstances of the case and considering the position of law, it is very clear that the transfer of the applicant in question is illegal and against the provisions of the Transfer Act. Hence, the application is allowed. The

transfer order of the applicant dated 30.5.2009 is set aside.

No order as to costs.

Sd/-

(S.R. Sathe)
Member-J
23.06.09

Mumbai
Date : 23.06.09
Dictation taken by :
S.K. Wamanse.
C:\Sanjay Wamanse\Judgments\2009\June, 09\O.A.694.09.W.6.09.doc

THE MAHARASHTRA ADMINISTRATIVE TRIBUNAL
MUMBAI BENCH
ORIGINAL APPLICATION NO.376 OF 2007
WITH
ORIGINAL APPLICATION NO.377 OF 2007

****

ORIGINAL APPLICATION NO.376 OF 2007

DISTRICT : NASHIK

Shri Murlidhar Changdeo Patil,)
Agriculture Supervisor,)
Office of Taluka Agriculture Officer,)
Sinnar, District Nashik and)
Residing at 3, Swapna Vaibhav Apartment,)
Adwait Colony, Canada Corner, Nashik 422005)..Applicant

Versus

1. Government of Maharashtra,)
Through Secretary,)
Agriculture Department, Mantralaya,)
Mumbai 400 032)

2. Commissioner of Agriculture,)
Maharashtra State, Pune-1)

3. Divisional Joint Director of Agriculture,)
Nashik Division, Nashik)

4. Shri Gopinath Dashrath Kakad,)
Agriculture Supervisor,)
Office of T.A.O., Triambakeshwar,)
Saja Harsul – 1/3)..Respondents

WITH

ORIGINAL APPLICATION NO.377 OF 2007

DISTRICT : NASHIK

Shri Ravindranath Kashinath Patil,)
Agriculture Supervisor,)
Office of Taluka Agriculture Officer,)
Sinnar, Saja-Nandurshingote 1, and)
Residing at 2, Adarsh Housing Society,)
Behind Mahila Bank, Indira Nagar, Nashik)
District Nashik)..Applicant

Versus

1. Government of Maharashtra,)
Through Secretary,)
Agriculture Department, Mantralaya,)
Mumbai 400 032)

2. Commissioner of Agriculture,)
Maharashtra State, Pune-1)

3. Divisional Joint Director of Agriculture,)
Nashik Division, Nashik)

4. Shri Prakash Bhaurao Nawale,)
Agriculture Supervisor,)
Office of T.A.O., Kalwan,)
Saja Kanashi – 2)..Respondents

Correction carried out as per order dt. 19.10.2007 on Note of C.P.O. dt.17.10.2007.

Sadhikar 19/X/07
(Registrar)

Common appearances in both the matters:

Shri M.D. Lonkar – Advocate for the Applicants
Shri D.B. Khaire - Chief Presenting Officer with
Shri M.B. Kadam – Presenting Officer for the Respondent Nos.1 to 3

Shri M.R. Patil – Advocate for Respondent No.4

CORAM : Shri Justice A.B. Naik, Chairman
Shri R.B. Budhiraja, Vice-Chairman
DATE : 4th October 2007
PER : Shri Justice A.B. Naik, Chairman

JUDGMENT

1. Heard Shri M.D. Lonkar, learned Advocate for the Applicants, Shri M.B. Kadam, learned Presenting Officer for the Respondent Nos.1 to 3 and Shri M.R. Patil, learned Advocate for Respondent No.4 in both the original applications.

2. Both these original applications are filed by the Agriculture Supervisors working in the office of Taluka Agriculture Officer, Sinnar (Saja-Nandurshingote-1) challenging the order of transfer dated 31.5.2007 issued by Divisional Joint Director of Agriculture, Nashik Division, Nashik. The Applicants are transferred by the impugned order from their existing post to Taluka Agriculture Officer, Triambakeshwar, Saja Harsul – 1/3 and Taluka Agriculture Officer, Peth, (Saja Peth-1) and in their place respondent no.4 in both applications are posted. The main grievance of the applicants is that they are not due for transfer and only to accommodate respondent no.4 (in both O.As.) in their places, the impugned orders are issued.

3. The applicant in O.A. No.376 of 2007 was posted as Agriculture Supervisor at Akkalkuwa, District Nandurbar. From Akkalkuwa he was transferred to the office of Taluka Agriculture Officer, Taluka Sinnar, District Nashik on 23.6.2004. The applicant was performing his duties as Taluka Agriculture Officer until he was transferred vide order dated 31.5.2007. By the impugned order, the applicant was transferred and in his place, respondent no.4 came to be posted. On receipt of the order passed by the authorities the applicant has approached this Tribunal by filing the present O.A. This O.A. was lodged in this Tribunal on 25.6.2007 and it was circulated for urgent motion hearing and was adjourned from time to time at the request of the respondents for filing reply and contesting the application.

4. The O.A. No.376 of 2007 was heard on 16.7.2007 and this Tribunal passed a detailed order directing the Principal Secretary, or Secretary Agriculture Department, Mantralaya, Mumbai to file comprehensive affidavit. In response to the notice issued by this Tribunal Shri Nanasaheb Balkrishna Patil, Principal Secretary, has filed his affidavit dated 2.8.2007 and to oppose the applicant's claim on merit the respondent nos.2 and 3 have filed their reply. Shri M.R. Patil, learned advocate appearing for respondent no.4, though not filed specific reply, but supported the order.

5. The applicant in O.A. No.377 of 2007 was posted as Agriculture Officer Class III in the office of Taluka Agriculture Officer,

Sinnar, District Nashik by order dated June 2003. Prior to the order of June 2003 he was posted at Peint, District Nashik and in that office he worked from 2000 to June 2003 and from June 2003 because of transfer, he worked in the office of Taluka Agriculture Officer, Sinnar. By the impugned order dated 31.5.2007 he came to be transferred from Sinnar to Peth and that order is subject matter of challenge in the O.A.

6. O.A. Nos.376 and 277 of 2007 are filed by two different applicants challenging the common order dated 31.5.2007. Thus, this Tribunal thought it fit to club these O.As. and accordingly these O.As. were heard together. It will not be out of place to make reference to one aspect of the matter as to how these O.As. came to be listed for hearing before the Division Bench. Initially, O.A. No.446 of 2007 in which the order of transfer was challenged, was heard at the motion hearing and having regard to the points involved regarding the interpretation of several provisions of the Maharashtra Government Servants Regulation of Transfers and Prevention of Delay in Discharge of Official Duties Act, 2005 (hereinafter referred to as the Act), was directed to be heard by the Division Bench, by one of us (A.B. Naik, J. Chairman) in exercise of the power conferred on him by Section 5 r/w Section 25 of the Administrative Tribunals Act, 1985 on 30.7.2007 directing that O.A. No.446 of 2007 be placed before the Division Bench for hearing. By same order it was directed to the Secretary, G.A.D. Government of Maharashtra to file an affidavit in the matter as service of all Government servants primarily comes under the purview of General

Administration Department. Accordingly, Shri Satish Tripathy, Additional Chief Secretary (Services), General Administration Department, Mantralaya, Mumbai has filed affidavit on 21st August 2007 to which we will refer at appropriate place.

7. But, the applicant in O.A. No.446 of 2007 withdrew the O.A. with permission of this Tribunal. As that O.A. stood withdrawn, a joint request was made by S/Shri M.D. Lonkar, D.B. Khaire and M.R. Patil that these O.As. be heard by the Division Bench as the O.A. No.446 of 2007 was already referred to the Division Bench by the order of the Tribunal. Thus, having accepted the request the two O.As. came to be listed for hearing and accordingly they are heard together.

8. We will now note down the submission of the counsel. The learned counsels, appearing in the matter, as well as the other learned counsels, who were requested by us to address, on the point at issue, made following submissions:

9. First, we will note the submission, qua, interpretation of the provisions of the Act.

10. It is contention of all the counsels that, the Act is in the nature of a regulating enactment, empowering the competent authority to issue or affect the transfer of the government servants in terms of the statute (Act). Thus, in effect, it is a procedural law, and the provisions

cannot be termed as mandatory. To support this contention Shri Patil placed reliance on a judgment of Apex Court in case of **SMT. RANI KUSUM VS. SMT. KANCHAN DEVI & ORS. AIR 2005 SC 3304.**

11. They submitted that though at many places in Section 3, 4, 5 and 6 word "shall" is used, which prima facie denotes that the provisions are mandatory or imperative, but the word "shall" by itself does not make the provisions mandatory, as no consequences are stated or indicate its non-observance. Thus, they submitted having regard to the subject matter of the statute, all the provisions are only directive, or at the most are statutory guidelines, for the administration or for that matter competent authority in the matter dealing with transfer of a government servant, according to needs of administration, coupled with administrative as well as public interest. Thus each and every section of the Act has to be interpreted keeping in view, the subject matter of statute which deals with transfer of a government servant, appointed to a transferable post and having no vested right, to claim that he/she be retained at a particular place, as long as he likes.

12. It is submitted that in absence of specific provisions contained in the Act, the practice or procedure that was in vogue prior to enactment is to be followed or adopted. This submission of the counsels is in respect of the point, posed by us whether, there is any provision contained in the Act, enabling the Competent Authority to entertain a

request of a government servant, for his/her transfer to a particular post, or place.

13. Shri M.R. Patil, learned Advocate who led the submission stated that prior to the present enactment, the subject matter of transfer was not subject matter of any Act, passed by the Legislature. The transfer used to be effected, in terms of the two resolutions i.e. executive instructions mentioned in the statement of objects and reasons. Shri Patil contends that under those resolutions several guidelines or modalities were provided, to enable the administration to order transfer. However, he said that in the present Act, all those contingencies or guidelines stated in the resolution do not in fact find place, but that does not mean, that the administration while effecting transfers, has to ignore the facts and situation and get themselves tied by the law and say that, as the Act does not provide for transfer on genuine request of the government servant, same cannot be entertained. He, therefore, contends that all the aspect which were present in the resolution are in fact not referred specifically in the Act, then those aspects, which were in existence, in the two G.Rs. can be taken help of by the authorities, empowered to effect transfers. Shri Patil to buttress his submission, relied on Section 16 of the Act dealing with repeal and saving, and said that the provisions of the two resolutions still hold good, to the extent, not covered by the Act. In other words, he submitted that the two resolutions were not repealed in toto, and what is not covered by the provisions of the Act, has to be accepted, or considered as saved. The counsel submitted that

the Legislature by enacting particular enactment, decides a policy, and that policy is to be implemented, by the executives, who are on the spot, and they know the administrative needs. Thus, if the executive while executing the policy takes help of the previous enactment i.e. the resolutions, no fault can be found in it. It is asserted that unless, particular provisions of previous Act, rules, resolutions, circulars etc. are specifically repealed or declared ultra vires, they remain in the field and can be used to bridge the gap or vacuum, that was left by the Legislation. He submitted that the legislation may not cover entire field, whatever is left out, by the statute, i.e. present enactment, the executive still can exercise power conferred on it by the two resolutions to affect the transfer of a government servant, on request. In other words, he said that those provisions contained in the resolutions are not in consistent with the present enactment. As such in given circumstances the Competent Authority can entertain a request made by a government servant, for his or her transfer.

14. Shri Patil, Learned Counsel then contended that looking at the various provisions contained in Part II of the Act, there is still scope for the Competent Authority, to entertain a genuine request made by a government servant, for a transfer from one place to another or to transfer to a particular place or post, provided, such request must be supported by some valid, real reason and then it will be within the discretion of the Competent Authority, to consider it and then, by exercising the discretionary power, having regard to the provisions

contained in Section 4(4) of the Act. Thus, he submitted that receiving a request from the government servant, about the transfer is not totally barred or ousted.

15. Shri Patil, taking clue from the statement made in the affidavits filed by Additional Chief Secretary, General Administration Department and Principal Secretary contended that though there is no specific provision in the Act, permitting the competent authorities to entertain request for transfer, still having regard to circumstance, as referred to in affidavit of the Secretary, it is permissible to consider the request. He contended that the Additional Chief Secretary in his affidavit has stated that such provision and request transfer are to be included under the rules that are, being made under Section 14 of the Act. Thus, he submitted that till the rules so framed the residuary of the two resolutions can be taken help of.

16. Shri Khaire, Ld. CPO joined the issue by adopting the submission of Shri Patil, regarding the survival of some part of the two resolutions. He contends that as there was no legislation occupying the field, the question of transfer of a government servant, relates to the service in connection with the affairs of the State. As such the State Government has the competence to regulate the services of the servant, either by i) enactment of an Act, by State Legislature ii) making rules by the Governor of the State in view of the proviso to Article 309, of the Constitution or in absence of both iii) issue executive guidelines,

resolution, by invoking power conferred on the State Executive by Article 162 of the Constitution of India, as those resolutions undisputedly were issued in exercise of power conferred by Article 162. As such, in absence of specific repeal of resolutions in toto by the Act, the provisions, which are not inconsistent, with the Act, can be followed. He contends that, while interpreting the provisions of the Act, the Court, or Tribunal in this connection the practice that was followed i.e. to invite and consider application from the government servant, by the head of office or Competent Authority cannot be called to be illegal or unauthorized act. Shri Khaire, thus submitted that an application from the government servant regarding his or her transfer, can be entertained, which is not derogatory to the provisions of the Act. Shri Khaire, submitted that the practice followed in past also is a relevant consideration for interpreting the provisions of the Act. In support of his submission, Shri Khaire invited our attention to a judgment of the Apex Court, in case of **SHAILENDRA DANIA & OTHERS VS. S.P. DUBEY AND OTHERS (2007) 2 SCC (L&S) 202.**

17. Shri Khaire, Ld. CPO submitted that, no doubt Section 4(2) demands preparation of list every year, of the government servants, due for transfer by the Competent Authority in the month of January, but having regard to the definition of Competent Authority under Section 2(b) it cannot be insisted that 'the Competent Authority', which consists of i) appointing authority and includes transferring authority, which is the Hon'ble Minister of the Department and the Secretary of the

department, should itself prepare the list, but such list can be prepared by the concerned department which had in possession, required data, and if such list is prepared by those officers it can be utilized for effecting transfer. However, the Ld. C.P.O. is not in a position to demonstrate or explain the logic behind the requirement of finalization of such list by Hon'ble Minister in charge of the department, in consultation with the Secretary to the department. The Ld. C.P.O. tried to explain to us the true meaning and impact of the term "shall be finalized by concerned Minister in consultation with concerned Secretary of the department", but he has no answer. The two affidavits filed by the Secretaries, also do not throw much light on this aspect.

18. It is submitted by Shri Khaire, Ld. CPO in respect of delegation of power of the Competent Authority, as envisaged by 2nd proviso to Section 6 of the Act. He submitted that 2nd proviso permits the Competent Transferring Authority to delegate its power to its subordinate; once such power or authority is delegated by the Competent Transferring Authority, then the delegatee, will exercise all such powers or authority, under the Act. He submitted that then there cannot be any restriction of power to the delegatee. He submitted that no doubt the proviso has used sentence "under this section", however, that power, cannot be restricted to operation of Section 6 only, as the Competent Authority, under the Act has some other powers, to be exercised. He submitted that this aspect is to be construed, with reference to the word "powers" meaning thereby that the delegation of all powers of the

competent authority. Therefore, he submitted that the powers of delegatee cannot be restricted to the powers under Section 6 only.

19. To substantiate above submission, Shri Khaire brought to our notice, the powers of Competent Authority in other parts of the Act i) Section 4(2), (3) (5) and contended that if the list as required is prepared by the delegatee, it has to be held valid, and deemed to have been prepared by Competent Authority.

20. Shri Lonkar, Ld. Adv. joined the issue having adopted the submission of Shri Khaire. He added that it may be accidental slip or omission, by the Legislature in referring as "under this Section". He contends that if this sentence reads as "under this Act" coupled with the following word 'powers', will mean that all powers conferred on the competent authority from Section 4 to 6 of the Act. He contended if all provisions are read harmoniously, then only the object that is to be achieved by the statute, will be achieved. Thus, the delegatee of competent authority can perform all the powers of competent authority.

21. Apart from his above submission, S/Shri Lonkar and Bandiwadekar, Ld. Advocates, contended that the word 'tenure' used as Section 3, 4 and 5, assumes importance in interpreting the provisions. They submitted that by referring to words 'tenure of posting' and then specifying it by definite number of 'years' from it, the intention of the law makers is apparent, that a government servant, tenure of post is

secured, to minimum period of 3 years, though word 'normal' is used in Section 3 that to be considered in real sense i.e. normally no transfer be effected, unless a government servant completes his/her minimum tenure of 3 years.

22. To buttress above submission they further submitted that Section 4(1) used, term 'no' and then 'shall', which goes without saying that provisions of Section 3 r/w 4(1), are mandatory. They submitted that no doubt, consequences are not specifically referred or indicated in the Act itself but by using the particular words in Section 4(1) leaves no doubt that, a government servant is not to be transferred from a post until he completes the tenure.

23. It is further contended that Section 3(1) of the Act refers to normal tenure of posting at a post or place for 3 years, Section 3 (1) refers to all the groups of government servants, but 2nd proviso of Section 3(1) makes abundantly clear that group 'C' government servant cannot be transferred from a post held by him, till he completes too full tenures. In other words, they stated that so far as a group 'C' government servant is concerned, his/her tenure is fixed for 6 years in a post.

24. As far as group 'D' government servant is concerned they submitted that such government servant, is not normally subjected to a fixed tenure, but cannot be transferred out of Station, except on request, or on some complaints of serious nature. They therefore contend that

group 'C' and 'D' government servants tenure of posting is fixed with simple purpose i.e. probably looking at their service condition, pay etc. Thus, they submitted that unless the tenure of posting of such government servant is completed, they cannot be transferred, as the Act has conferred such limited right in a government servant. The counsels relied on two judgments of the Apex Court to bring home the point i.e. **Dr. P.L. AGARWAL VERSUS UNION OF INDIA & OTHERS (1992) 3 SCC 526** and **KUMAR SHRILEKHA VIDYARTHI VERSUS STATE OF U.P. (1991) 1 SCC 212.**

25. Shri Chandratre, Ld. Adv. contended that having regard to the definition of 'Competent Authority', given under the Act means i) appointing authority, and includes transferring authority as referred to in Section 6 of the Act, It also specifies Competent Transferring Authority, for all groups. For group 'A' and All India Services government servants the Competent Authority being the Chief Minister, for those who are in the pay scale of Rs.10,650-15,850 and above, other than those, group 'A' government servants who having pay scale less than Rs.10,650-15,850/-, the Competent Authority being Minister in Charge in consultation with Secretary of the concerned department and Non-gazetted group 'B' and group, it is the Head of Department and for group 'D' employees, it is Regional Head of the Department. Thus, he submitted that even appointing authority can order transfer of the government servant under his control (in what way this submission is pressed in service, is not understood). Be it as may, if in a given case,

the appointing authority, being a competent transferring authority, can effect the transfers, but the same must be within the four corners of the Act.

SUBMISSION REGARDING CHALLENGE TO THE IMPUGNED TRANSFER ORDERS

26. Shri M.D. Lonkar, Learned Advocate for both the applicants submitted that the impugned orders of transfer are issued in total disregard to the statutory provisions, and orders of transfer are issued transferring the applicants even though they were not due for transfer, as both of them had not completed their tenure of posting. He submitted that the respondent authorities issued the orders of transfer not in any of the administrative exigencies or need of the administration, but those are affected only to honour or dictate of the Hon'ble Minister who has recommended their transfer. It is submitted that, in fact, no application is submitted by the private respondents making out the case for their transfer. It is submitted that the so-called applications, which were placed on record of this Original Application along with reply by the Respondents, if considered, in right perspective, it is apparent that the cause made by the private respondents to seek transfer is not a special cause or any exceptional case.

27. Shri Lonkar then submitted that the Respondent No.2 who has filed affidavit, which is verified by the Administrative Officer, has

annexed the copies of the Medical Certificate purported to be submitted by the private respondents to seek their transfer. He contended if the date of issue of the medical certificate is considered then it is apparent that those certificates were secured subsequently to justify the action and produced before this Tribunal along with the reply.

28. It is contended that the orders are affected arbitrarily without adhering the statutory mandate. It is submitted that even for the sake of argument if it is presumed that the private respondents did make a request for their transfer, the Competent Authority is required to consider their applications, in tune with the exceptions carved out by the 2nd proviso to sub-section 4 of Section 4 or by sub-section 5 of Section 4 of the Act. It is submitted that no reasons whatsoever are recorded by the authorities nor is there any approval from the next higher authority. Thus, the transfers are ordered in total disregard to the provisions of the Act. The learned counsel contended that the transfer orders under challenge are issued not on any administrative ground but are issued on extraneous consideration with a view to favour and accommodate private respondents at the place of their choice.

29. Shri Lonkar then submitted that the Joint Director, Agriculture, Nasik, in his communication dated 30.5.2007 has opined that the applicants are not due for transfer, and if the request of the private respondents is to be considered then their request is to be considered as special case as envisaged by Sub-section 5 of Section 4,

and then to issue order, but the Counsels submitted that transfers are effected not under sub-section 5 of Section 4 of the Act but at the behest of the Hon'ble Minister as it is stated in the file as, "मंत्री महोदयाची शिफारस". According to Shri Lonkar, such ground/reason is not requirement of the statute. Thus, respondents cannot take shelter of usual terminology of "administrative reasons" and support the transfer orders, which are void and illegal.

30. In reply to the submissions of Shri Lonkar, Shri M.R. Patil, Learned Counsel appearing for the Private Respondents submitted before us that on receipt of the applications submitted by the private respondents, the Competent Authority having considered the fact that the request made by the private respondents regarding their transfers being genuine and real, exercised its discretion and effected the transfer. The said transfer cannot be called as bad in law. Shri Patil contended that the reasons as required to be stated which the statute commands but the fact as disclosed, that the authority having regard to the facts, situation and having satisfied that request of the private respondents being just, thus the orders being that of transfer may not be interfered by this Tribunal as the transfers are effected for the administrative reasons, which is referred to in the order itself.

31. Shri Patil finally concluded that this Tribunal in its jurisdiction of judicial review cannot re-appreciate the whole material, placed before the Tribunal as a Court of Appeal. This Tribunal will

concern itself with the decision making process only. Thus, he submitted, that if the Competent Authority having taken a reasonable view of the fact and situation ordered the transfer and that too for administrative reasons, the applications deserve to be dismissed, by confirming the order of transfer. Shri Patil however stated that he cannot give any explanation whether the medical certificates were submitted along with applications, and if so why they are not available in the file. Be it as may. This has to be considered later on.

32. Shri Kadam, Learned Presenting Officer supported the orders by contending that on receipt of the application from the Private Respondents about their transfer, the Joint Director was of the view that as they were not due for transfer, their applications were referred or forwarded to the Commissioner and then to the State Government. Thereafter, in view of the letters dated 16.5.2007 and 23.5.2007 from S.D.O., transfers are ordered and the reasons for such transfer are also recorded in the file. Thus, he submitted that the transfer orders are issued by the Competent Authority, in accordance with the provisions of the Act.

We will now consider the submissions:-

33. No doubt the controversy in the present application relates to a transfer of a Government servant and is to be solved on the basis of the pleading, the files and on the back drop of statutory provisions.

34. The point at issue being somewhat important accordingly, we requested the learned members of the bar to address us on the point of interpretation of the provisions of the Act besides their contention on merit to challenge and support to individual transfer subjected in this application. We must appreciate the gesture shown by the learned members of the bar, who readily accepted our request and made submission (supra) with their learning and professional experience addressed us on all the points about niceties of the law, principles of interpretation, role of executives etc., which helped us to a great extent to solve the controversy raised. We are really grateful to the learned members of the bar.

Retrospective:-

35. Prior to the passing of the Act i.e. Maharashtra Government Servants Regulation of Transfers and Prevention of Delay in Discharge of Official Duties Act, 2005 (hereinafter referred to as the Act), the subject was primarily occupied by guidelines and the circulars issued by the executives from time to time under their power conferred by Article 162 of the Constitution of India.

36. There was a feeling in the majority of the Government servants that power to transfer a Government servant was being misused and that power was being utilized, in an indiscriminate manner without

adhering to settled norms and for extraneous consideration. At times, there were allegations of corruption, favouritism, political interference etc. The transfer orders were affected keeping a particular government servant at a particular post or place for indefinite period. With this feeling and the situation prevailing and to overcome such situation, the Governor of Maharashtra thought it fit to take immediate steps and accordingly the Government of Maharashtra intervened and promulgated an Ordinance by invoking the power conferred on him by Article 213 of the Constitution of India by promulgating an Ordinance on 25th August 2003, called as Maharashtra Government Servants Regulation of Transfers and Prevention of Delay in Discharge of Official Duties Ordinance, 2003. From this time, the subject of transfer of a Government came under this legislation.

37. While promulgating this Ordinance the purpose was spelt out by statement of objects and reasons, which reads thus:

> "The Government had issued guidelines for general transfers of Government Employees from time to time. All such comprehensive guidelines have recently been issued in a consolidated form under Government Circular, General Administration Department, No.SRV-1097/C.R.20/97/XII, dated the 27th November 1997, and by Government Circular, dated the 7th February 1998. However, it has come to the notice of Government that these directions are not being followed

scrupulously at various levels in the administration and is not having the desired effect.

2. Under the circumstances to ensure strict compliance with Government transfer policy, Government considers it expedient to make a suitable law for regulating transfers of all government servants.

3. Government is also deeply concerned about the delays and dereliction in the discharge of duties by government servants. To effectively curb this undesirable tendency, Government considers it expedient to lay down the time schedule for disposal of Government work and to provide for taking disciplinary action against the defaulting government servants for any dereliction of duties.

4. As both Houses of State Legislature are not in session and the Governor of Maharashtra is satisfied that circumstances exist which render it necessary for him to take immediate action to promulgate this Ordinance, for the aforesaid purposes, this Ordinance is promulgated."

38. On promulgating the Ordinance in view of provisions of sub Article 2 of Article 213 of the Constitution of India, a bill (L.C. Bill No.XV of 2003) came to be tabled and introduced before the house of

legislature on 6th December 2003 appending statement of objects and reasons. The object and reasons read thus:

"The Government had issued guidelines for general transfers of Government Employees from time to time. All such comprehensive guidelines were recently issued in a consolidated form under Government Circular, General Administration Department, No.SRV-1097/C.R.20/97/XII, dated the 27th November 1997, and by Government Circular, dated the 7th February 1998. However, it was noticed by the Government that these directions were not being followed scrupulously at various levels in the administration and were not having the desired effect.

2. Under the circumstances, to ensure strict compliance with the Government transfer policy, Government considered it expedient to make a suitable law for regulating transfers of all Government servants.

3. Government was also deeply concerned about the delays and dereliction in the discharge of official duties by Government servants. To effectively curb this undesirable tendency, Government considered it expedient to lay down the time schedule for disposal of Government work and to provide for taking disciplinary action against the defaulting Government servants for any dereliction of official duties.

4. As both Houses of State Legislature were not in session and the Governor of Maharashtra was satisfied that circumstances existed which rendered it necessary for him to take immediate action for the aforesaid purposes, the Maharashtra Government Servants Regulation of Transfers and Prevention of Delay in Discharge of Official Duties Ordinance, 2003 (Mah. Ord. IX of 2003), was promulgated by the Governor of Maharashtra, on the 25th August 2003.

5. The Bill is intended to replace the said Ordinance by an Act of the State Legislature with certain amendments."

39. On introduction of the bill before House of State legislature, it was referred to the Joint Committee of the State Assembly. On referring the bill to Committee, the Bill could not be converted into an Act passed by the Assembly. In such a situation, it was considered expedient to continue with the Maharashtra Ordinance No.1 of 2004 promulgated by the Governor of Maharashtra on 16th January 2004. Upon reassembly of the State Legislature, the bill was pending for consideration with the Joint Committee. Hence, as provided by Article 213(2)(a) of the Constitution of India, Ordinance No.1 of 2004 shall cease to operate at the expiration of six weeks from the reassembly of the State Legislature, the Governor of Maharashtra having considered the situation was pleased to promulgate the orders under powers

conferred by Article 213(1) of the Constitution of India. Accordingly, it was published as the Maharashtra Government Servants Regulation of Transfers and Prevention of Delay in Discharge of Official Duties Ordinance, 2004. The committee after due deliberation submitted its report on 15th December 2005 by suggesting some modification and amendments in the bill. The remarks of the committee pertaining to the amendments made in various clauses (only the relevant ones for our purpose are taken):

> "In clause 2(a) of the original Bill, the definition of the word "transfer" has been explained. The Committee has made an amendment in the said definition with an object to make it very clear that the transfer of employee caused from one post to another post in the same department or transfers, which are possible in any other manner.
>
> Clause (3).- Clause (3) provides the tenure of appointment of Government employees. Under this sub-clause (1) of this clause a proviso which prescribes as to where the employees shall be transferred after their tenure is over. This clause states that an employee shall be transferred from one post to another after their tenure is over. The Committee felt that it is necessary to make a clear provision in place of the word "at place" so that it becomes more clear. From that point of view, in first proviso to clause 3(1) for the words "at that place to another place" the word "at that

office or department to another office or department" has been substituted.

Clause (4).- In Clause (4) it is provided in context of tenure of transfer to be made after completion of prescribed tenure of appointment of employees. In accordance with sub-clause (5) therein, it is provided for the transfer of any Government servant before completion of his prescribed tenure of post with the prior permission of the Government or the Chief Minister, as the case may be, in special cases. While considering in this context, the Committee has noticed that, action is taken as per the said provisions in the relevant transfer policy of the Government. That means prior permission is required to be taken from the Government or Chief Minister, as the case may be, for every transfer coming under the special cases. Accordingly, employees on lower-level (employees at Village/Taluka/District level, similarly group "C" and "D") are also required to take prior permission of the Government or Chief Minister for transfer in special cases. In such cases, time is consumed unnecessarily. Similarly, due to such type of transfers the extent of work is also increased on higher level. Hence, it has come to the notice of the Committee that people throng to the Mantralaya only for the purpose of transfers. The Committee feels that it is necessary to decentralize the power from higher level to curb these instances. Consequently the Committee is of the opinion that, the transfer to

be made in specific cases should be made with the prior approval of the next competent authority that makes the transfer. Accordingly an amendment has been made in clause 4(5)."

40. In due course, the Bill No.XV of 2003 was converted into an enactment. Accordingly, the State Legislature enacted the Act i.e. Maharashtra Act No.XXI of 2006 and the same is published after having received assent of the Governor of Maharashtra and it was first published in Maharashtra Government Gazette on 12th May 2006. However, Act No.XXI of 2006 did not come into immediate effect in view of the mandate of Section 1 sub section 2. The State Government by publishing a notification in the official gazette appointed the date of commencement 1st July 2006. Thus, the Act became operative and effective from 1st July 2006. Thereafter, the transfer of Government servants has to be effected in terms of the provisions of the Act, to which we will refer.

Principles of interpretation of statute:

41. Before referring to the various provisions of the Act, we will recapitulate broad principles of interpretation of statute enumerated in several pronouncements of the Apex Court. We will not burden our order by referring all those pronouncements, but we will refer to one of the judgments on the subject. In this context we will refer to Constitution Bench judgment of Apex Court in **PUNJAB LAND DEVELOPMENT**

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AND RECLAMATION CORPORATION LIMITED VS. PRESIDING OFFICER, LABOUR COURT, CHANDIGARH & ORS. (1990) 3 SCC 682, wherein it is observed:

"62. This is literal interpretation as distinguished from contextual interpretation said Tindal, C.J. in Sussex Peerage case.

> "The only rule of construction of Acts of Parliament is that they should be construed according to the intent of the Parliament which passed the Act. If the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense. The words themselves alone do, in such case, best declare the intention of the law giver."

In B.N. Mutto v. T.K. Nandi it was similarly said: (SCC p.368, para 14)

> "The court has to determine the intention as expressed by the words used. If the words of a statute are themselves precise and unambiguous then no more can be necessary than to expound those words in their ordinary and natural sense. The words themselves alone do in such a case best declare the intention of the lawgiver."

As was stated in Thompson v. Goold & Co. "it is a wrong thing to read into an Act of Parliament words which are not there, and in the absence of clear necessity it is a wrong thing to do so". "The cardinal rule of construction of statute is to read statutes literally, that is, by giving to the words their ordinary, natural and grammatical meaning". (Jugalkishore Saraf v. Raw Cotton Co. Ltd.)

63. To interpret an Act of Parliament is to give its intention. Lord Simon in Ealing L.B.C. v. Race Relations Board said: (AC pp.360-61)

> "The court sometimes asks itself what the draftsman must have intended. This is reasonable enough: the draftsman knows what is the intention of the legislative initiator (nowadays almost always an organ of the executive); he knows that canons of construction the courts will apply; and he will express himself in such a way as accordingly to give effect to the legislative intention. Parliament, of course, in enacting legislation assumes responsibility for the language of the draftsman. But the reality is that only a minority of legislators will attend the debates on the legislation. Failing special interest in the subject matter of the legislation, what will demand their attention will be something on the face of proposed legislation which alerts them to a questionable

matter. Accordingly, such canons of construction as that words in a non-technical statute will primarily be interpreted according to their ordinary meaning....."

64. According to Lord Simon looking into the legislative history or the preparatory works may sometimes be useful but may often lead to abuse and waste, as "an individual legislator may indicate his assent on an assumption that the legislation means so-and-so and the courts may have no way of knowing how far his assumption is shared by his colleagues, even those present". In the absence of such material it is said, the courts have five principal avenues of approach to the ascertainment of the legislative intention: (1) examination of the social background, as specifically proved if not within common knowledge, in order to identify the social or juristic defect which is likely subject of remedy; (2) a conspectus of the entire relevant body of the law for the same purpose; (3) particular regard to the long title of the statute to be interpreted (and where available, the preamble), in which the general legislative objectives will be stated; (4) scrutiny of the actual words to be interpreted, in the light of the established canons of interpretation; and (5) examination of the other provisions of the statute in question (or of other statutes in pari material) for the illumination which they throw on the particular words which are the subject of interpretation.

65. The Heydon's Rule requires that the court will look at the Act to see what was its purpose and what mischief in the earlier law it was designed to prevent. Four things are to be considered: (i) What was the law before the making of the Act? (ii) What was the mischief and defect for which the earlier law did not provide? (iii) What remedy the Parliament had resolved to cure? (iv) What is the true reason for the remedy? The court shall make such construction as shall suppress the mischief and advance the remedy.

66. Where the statute has been passed to remedy a weakness in the law, it is to be interpreted in such a way as well to bring about that remedy.

67. The literal rules of construction require the wording of the Act to be construed according to its literal and grammatical meaning whatever the result may be. Unless otherwise provided, the same word must normally be construed throughout the Act in the same sense, and in the case of old statues regard must be had to its contemporary meaning if there has been no change with the passage of time. However, the Law Commission 21 of England has truck a note of caution that "to place undue emphasis on the literal meaning of the words or a provision is to assume an unattainable perfection in draftsmanship". In Whiteley v. Chappell, a statute concerned with electoral malpractices made it

an offence to personate 'any person entitled to vote' at an election. The defendant was accused of personating a deceased voter and the court, using the literal rule, found that there was no offence as the personation was not of person entitled to vote. A dead person was not entitled to vote. A deceased person did not exist and had no right to vote and as a result the decision arrived at was contrary to the intention of Parliament. As it was pointed out in Prince Ernest of Hanover v. Attorney General, the Golden Rule in the form of modified literal rule, according to which the words of statute will as far as possible be construed according to their ordinary and plain and natural meaning, unless this leads to an absurd result. Where the conclusion reached by applying the literal rule is contrary to the intention of Parliament, the Golden Rule is helpful. A tested rule is that of noscitur a sociis. The meaning of a word can be gathered from its context. Under this rule words of doubtful meaning may be better understood from the nature of the words and phrases with which they are associated [Muir v. Keay]. But this will not apply when the word itself has been defined.

70. However, a judge facing such a problem of interpretation cannot simply fold his hands and blame the draftsman. Lord Denning in his Discipline of Law says at p. 12:

"Whenever a statute comes up for consideration it must be remembered that it is not within human powers to foresee the manifold sets of facts which may arise, and, even if it were, it is not possible to provide for them in terms free from all ambiguity. The English language is not an instrument of mathematical precision. Our literature would be much the poorer if it were. This is where the draftsman of Acts of Parliament have often been unfairly criticized. A judge, believing himself to be fettered by the supposed rule that he must look to the language and nothing else, laments that the draftsman have not provided for this or that, or have been guilty of some or other ambiguity. It would certainly save the judges trouble if Acts of Parliament were drafted with divine prescience and perfect clarity. In the absence of it, when a defect appears a judge cannot simply fold his hands and blame the draftsman. He must set to work on the constructive task of finding the intention of Parliament, and he must do this not only from the language of the statute, but also from a consideration of the social conditions which gave rise to it, and of the mischief which it was passed to remedy, and then he must supplement the written words so as to give 'force and life' to the intention of the legislature."."

42. Determination of legislative interest. Ascertainment of legislative interest is basic rule of construction. A rule of constitution should be preferred, which advances the purpose and object of legislation.

43. Court can neither rewrite to suit its convenience nor record it in such a manner as to render some absurd onus ?

44. Plain meaning cannot be relied upon where it results in absurdity, injustice and unconstitutionally. In such a situation, Court must construe having regard to the object and purpose which the legislature had in view in enacting the provisions and in the context of the setting in which it occurs and with a view to suppress the mischief sought to be remedied by legislature.

45. For an application of the mischief rule, firstly it must be possible to determine from a consideration of the provisions of the Act read as a whole what the mischief was and what was the purpose of the Act to remedy, secondly, it must be apparent that the draftsman and Parliament had by inadvertence overlooked, and so omitted to deal with, an eventuality that required to be dealt with if the purpose of the Act was to be achieved; and thirdly, it must be possible to state with certainty what were the additional words that would have been inserted by the draftsman and approved by Parliament had their attention been drawn to the omission before the Bill passed into law. Unless these three

conditions are fulfilled any attempt by a court of justice to repair the omission in the Act cannot be justified as an exercise of its jurisdiction to determine what is the meaning of a written law, which Parliament has passed. Such an attempt crosses the boundary between interpretation and legislation. It becomes a usurpation of the function, which under the Constitution of this country is vested in the legislature to the exclusion of the courts.

46. The only rule for the construction of Acts of Parliament is that they should be construed according to the intent of the Parliament which passed the Act. If the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense. The words themselves alone do, in such case, best declare the intention of the lawgiver.

47. Keeping in view these principles, we now proceed to the text of the Act, which we are required to interpret.

48. As we have noted from the statement of object and reasons, supra, where there is reference to a resolution and a circular as such, we will refer to them as it is stated in statement and object that the directions contained in those circulars were not being followed scrupulously at various levels of the administration and not having desired effect. The two circulars were Government Circular, General Administration

Department No.SRV-1097/CR 20/97/XII dated 27th November 1997, and Government Circular dated 17th February 1998. We will note down those circulars for ready reference:

"शासकीय सेवकांच्या नियतकालीक
बदल्यासंदर्भात धोरण

महाराष्ट्र शासन
सामान्य प्रशासन विभाग,
शासन परिपत्रक क्रमांक :- एसआरव्ही-१०९७/प्र.क्र.२०/९७/बारा-मंत्रालय, मुंबई ४०० ०३२
दिनांक २७ नोव्हेंबर १९९७

वाचा:- १) शासन परिपत्रक,सामान्य प्रशासन विभाग, क्रमांक :-टीआरएफ-१०७७/बारा, दिनांक २७ सप्टेंबर, १९९७.
२) शासन परिपत्रक,सामान्य प्रशासन विभाग, क्रमांक :-टीआरएफ-१०८९/प्र.क्र.८/बारा, दिनांक २१ एप्रिल, १९८९.

परिपत्रक

शासकीय कर्मचा-यांच्या/अधिका-यांच्या नियतकालीक बदलीसंबंधी तत्वे शासन परिपत्रक, सामान्य प्रशासन विभाग, क्रमांक - टीआरएफ १०७७/१२, दिनांक २७ सप्टेंबर, १९७७ अन्वये विहीत करण्यात आली आहेत, त्यात गरजेनुसार वेळोवेळी सुधारणा करण्यांत आल्या आहेत.

२. शासनांच्या बदली संदर्भात अस्तित्वात असलेल्या त्याच्या धोरणाचा फेरविचार करून हे धोरण जास्तीत जास्त पारदर्शी व प्रशासकियदृष्टया उपयुक्त ठरावे या उद्देशाने त्यात काही बदल करण्यासंबंधीचा प्रस्ताव शासनाच्या विचाराधीन होता. याबाबतीत सर्वंकष विचार करून बदल्यासंबंधीच्या सध्याच्या आदेशाचे अधिक्रमण करण्यांत येत असुन बदल्यांबाबत सुधारीत धोरण

अवलंबिण्याचा निर्णय घेण्यांत आला आहे. शासनाचे बदलीसंबंधीचे सर्वसाधारण सुधारीत धोरण हे खालीलप्रमाणे राहील :-

* १) राज्य शासनाच्या राज्य शासनांतर्गत असलेल्या निमशासकीय सेवकांच्या बदल्या व सर्वसाधारण वर्षातून एकदाच करण्यात याव्यात. अधिकारी/कर्मचा-यांच्या पाल्यांच्या शैक्षणिक गरजा लक्षात घेता, या बदल्या मे महिन्यांत करण्यात याव्यात. मात्र खालील प्रकरणी या सर्वसाधारण धोरणात अपवाद करण्यात यावा.

* अ) सेवा निवृत्ती/पदोन्नती/राजिनामा इत्यांदीमुळे रिक्त होणा-या पदांवरील नियुक्त्या.

* ब) पती/पत्नी यांना एकत्रित ठेवण्याच्या धोरणानुसार असलेल्या बदल्या.

क) जिथे अपवादात्मक परिस्थितीमुळे बदली करणे आवश्यक आहे. अशी सक्षम अधिकाऱ्यांची खात्री झाल्यास, मात्र तसे करतांना तत्संबधींची कारणे नमुद करण्यांत यावीत.

* २) प्रशासकीय कारणास्तव आवश्यक असलेल्या सर्वसाधारण बदल्या, संबंधीत शासकीय सेवकाच्या त्या पदावरील सेवा किमान एक वर्ष इतकी झाल्याशिवाय करू नयेत. सर्वसाधारणपणे एका पदावर ३ वर्षे व एकाच जिल्हयात ५ वर्षे होईपर्यंत बदली करण्यांत येऊ नये.

३) शासन स्तरावरील बदल्यांचे अधिकार, संबंधित मंत्री व विभागाचे सचिव यांनी संयुक्तपणे वापरावेत.

* ४) वरील कार्यपध्दती राबवितांना बदल्या संबंधीच्या ज्या प्रकरणात एकवाक्यता होणार नाही, अशा प्रकरणी मुंख्यमंत्री, मुख्य सचिवाच्या सल्ल्याने अंतिम निर्णय घेतील.

५) बदल्यांचे प्राधिकार -

अ) मा.मुख्यमंत्री रू.३,२००/- व त्यावरील वेतनश्रेणीत असलेल्या सर्व अधिका-यांचे तसेच अखिल भारतीय सेवेतील सर्व स्तरावरील अधिका-यांचे प्रस्ताव मा.मुख्यमंत्री यांच्या मान्यतेसाठी सादर करणे आवश्यक राहील.

ब) मा.मंत्री, रू.३,०००/- ते ४,१००/- या वेतनश्रेणीतील अधिकारी (मा. मुख्यमंत्री जया विभागाचे प्रभारीमंत्री म्हणून काम पहात अशा विभागातील

Annexure

अधिका-यांच्या बाबतीत या वेतनश्रेणीतील प्रस्ताव मा.मुख्यमंत्री यांना सादर करण्यांत यावेत.)

क) प्रशासकीय विभाग-रू.२,२००/- ते ३,७००/- या वेतनश्रेणीतील अधिकारी.

ड) विभाग प्रमुख-रू.२,००० ते ३,५००/- या गट - अ मधील कनिष्ठ वेतनश्रेणीतील पदे व गट-ब मधील सर्व पदे (रू.२०००-३५०० रू.२३७५ - ३५००) आणि गट - क व गट - ड मधील मुख्यालयातील पदे

ई) प्रादेशिक विभाग प्रमुख - गट -क मधील विपक्षीत निर्देशीत केली जातील अशी पदे तसेच गट-ड मधील पदे.

राजपत्रित गट-अ पदावरील बदली संदर्भातील शासन नियमावलीतील तरतूदीत इतर आवश्यक ते बदल स्वतंत्रपणे करण्यांत येतील.

बदल्या करण्यास सक्षम असलेल्या प्राधिका-यांनी त्यांना प्रदान करण्यांत आलेल्या अधिकाऱ्यांचा पूर्ण वापर नि:पक्षपातीपणे करावा. बदलीसंबंधात शासनाने विहीत केलेल्या मुलभूत तत्त्वांशी विसंगत अशी कार्यवाही करणे, एखाद्या प्रकरणात अपरिहार्य असल्यास त्यासाठी योग्य त्या वरिष्ठांची संमती घ्यावी.

* कर्मचाऱ्यांच्या/अधिका-यांच्या वारंवार बदल्या करण्यांत येऊ नयेत. शासकीय सेवकांची बदली करण्यास सक्षम असलेल्या प्राधिका-यांनी दरवर्षी आक्टोंबर महिन्यात ज्या शासकीय सेवकांची पुढील मे महिन्यात बदली करणे आवश्यक असेल अशा शासकीय सेवकांची यादी करावी व अशा शासकिय सेवकांना त्यांच्या आवश्यक पसंतीची ३-४ ठिकाणे कळविण्याची सूचना द्यावी. आपली पसंती नमुद करण्यासाठी त्यांना डिसेंबर अखेरपर्यंत अवधी द्यावा. प्राप्त झालेल्या पसंतीचा खालील प्रमाणे विचार करण्यांत यावा.

* अ) नियतकालीक बदल्यासंबंधी निर्णय घेताना सेवकांची कळविलेली पसंती विचारात घेतली जावी.

* ब) सक्षम प्राधिका-यांनी प्रशासकीय सोय व कर्मचा-यांची वैयक्तिक पसंती या दोन्ही बाबी विचारात घेऊन बदलीसंबंधी निर्णय घ्यावेत

* क) महसूल विभागातील व पोलिस विभागातील अधिका-यांना स्वत:ची किंवा कुटंबियाची स्थावर मिळकत असलेल्या ठिकाणी नेमणुका देऊ नयेत, असे स्वतंत्र आदेश आहेत.

अशा अधिका-यांनी सदर आदेशांशी सुसंगत अशी पसंती व्यक्त करू नये आणि त्यांनी ती व्यक्त केल्यास सक्षम प्राधिका-यांनी ती विचारात घेऊ नये.

* ड) नियतकालीक बदल्या व्यतिरिक्त पदोन्नतीच्या वेळी किंवा अन्य अनपेक्षित प्रसंगीही बदली करण्याची आवश्यकता निर्माण होऊ शकते. अशा बदल्या करण्यापूर्वी सुध्दा संबंधीत शासकिय सेवकाने नियतकालीक बदल्यांच्या संदर्भात तत्पूर्वी नमुद केलेली पसंती शक्यतो विचारात घेण्यांत यावी.

५(अ) कोणत्याही बदलीपात्र राजपत्रित अधिका-यास ३ वर्षापुढे त्याच ठिकाणी त्याच पदावर ठेवणे हे क्वचित (Sparingly)आणि अपवादात्मक प्रकरणी (Exceptional cases) असावे व ते संबंधीत प्रशासकीय विभागांच्या पूर्वसहमतीने मान्य करण्यात यावे. हा कालावधी एक वर्षापर्यंत असावा. तशी परवानगी देत असतांना, ४ वर्षाचा अवधी शैक्षणिक वर्षाच्या मध्येच संपल्यामुळे किंवा इतर कारणासाठी पुन्हा त्याच पदावर मुदतवाढ द्यावयाची पाळी येऊ नये, याची काळजी घेऊनच ३ वर्षाच्या पलीकडचा योग्य मुदतवाढीचा कालावधी ठरविण्यांत यावा. केवळ खालील प्रकारच्या बदल्यासंदर्भात ३ वर्षाच्या कालावधीबाबत अपवाद करण्यात यावा.

* १) एकाच जिल्हयात ३ वर्षे सेवा करून बदली योग्य झालेल्या अधिकारी जर पुढील ६-८ महिन्यात सेवानिवृत्त होणार असेल व त्याला त्याच जिल्हयात ठेवणे आवश्यक असेल तर,

२) एखाद्या पदाचे कार्य हे विशेष स्वरूपाचे आहे आणि त्या पदावर असलेल्या व्यक्तीकडे त्या कामासंबंधीचे विशेष ज्ञान असेल तर,

३) ज्या प्रकल्प कामामध्ये अधिकारी काम करीत आहे, त्या प्रकल्पाचे काम अंतिम (Final Stage) टप्प्यापर्यंत पोहोचले असेल तर,

अशा प्रस्तावास बदलीस सक्षम असलेल्या अधिका-यांच्या एक टप्पा वरच्या अधिका-यांची पूर्वसहमती प्राप्त करून घेण्यात यावी.

ब) कुठल्याही अधिका-यांस ४ वर्षांच्या पुढे एकाच पदावर ठेवण्यात येऊ नये. तसे करावयाचे झाल्यास, त्यात मा.मुख्यमंत्र्यांची पूर्व अनुमती अनिवार्य आहे. विभागानी असे प्रस्ताव किमान ४ महिने आधी प्रशासकीय विभागाकडे संपूर्ण समर्थनासह पाठवावेत.

काही विशिष्ट प्रकरणांत विशेष कारणासाठी अधिकाऱ्यांची ३ वर्षापेक्षा कमी कालावधीनंतर बदली करणे आवश्यक असल्यास शक्यतो त्याला पूर्वीच्या (म्हणजे ज्या ठिकाणाहून विहीत कालावधी पूर्ण झाल्यामुळे बदली केली होती) त्या ठिकाणी पुन्हा नेमणूक देण्यांत येऊ नये. अशा अधिकाऱ्यांस काही अपरिहार्य कारणासाठी पूर्वीच्याच ठिकाणी नेमणूक देणे आवश्यक असल्यास अशी नेमणुक निदान एक वर्षापर्यंत तरी दिली जाणार नाही, ही दक्षता सक्षम प्राधिका-यांनी घ्यावी.

६ गट-क मधील कर्मचाऱ्यांच्या बदलीकरीता किमान सेवा कालावधी

* गट-क (वर्ग-३) च्या अराजपत्रित कर्मचाऱ्यांना एकाच ठिकाणी एकाच पदावर ५ वर्षापेक्षा जास्त काल ठेवण्यांत येऊ नये व ५ वर्षानंतर त्यांचा कार्यभार बदलण्यात यावा. मात्र कोणत्याही गट-क च्या कर्मचाऱ्यास एकाच ठिकाणी १० वर्षापेक्षा जास्त काळ ठेवण्यात येऊ नये. १० वर्षानंतर अशा कर्मचाऱ्यांची शक्यतो त्याच जिल्हयात परंतू अन्यत्र बदली करावी.

* गट-क मधील कर्मचा-यांच्या बाबतीत बदलीकरिता ५ वर्षांची कालमर्यादा संवेदनशील पदाकरिता जास्त वाटत असल्यास संबंधीत मंत्रालयीन विभागांनी यादी करावी व सदरहू कालावधीपेक्षा कमी कालावधी बदलीकरीता विहीत करावा. तसे करतांना सामान्य प्रशासन विभागाच्या सहमतीने हा कालावधी निश्चित करावा.

७. एकाच विभागातील अधिकारी/कर्मचारी यांच्या मोठया प्रमाणात बदल्या केल्यास, त्याचा शासनाच्या दैनंदिन कामकाजावर विपरीत परिणाम होतो. त्यामुळे सर्वसाधारणपणे एका वर्षात राजपत्रित संदर्भातील बदलीपात्र अधिका-यांपैकी ३० ते ३५ टक्के पर्यन्त असावे. याबाबत दक्षता घेण्यात यावी.

८. सर्वसाधारणपणे गट -ड मधील कर्मचा-यांचे काम समाधानकारक असेल, अशा कर्मचा-यांस शक्यतो त्याच ठिकाणी ठेवण्यात यावे. तथापी, विशेष कारणास्तव अशा कर्मचा-याची एका ठिकाणाहून दुस-या ठिकाणी बदली करणे सक्षम प्राधिका-यास आवश्यक वाटत असेल, तरच संबंधीत कर्मचा-यांची बदली करण्यांत यावी.

* ९. प्रत्येक विभागात काही विशेष पदे अथवा संवर्ग आहेत. खात्यातील किंवा विभागातील प्रत्येक व्यक्तीस प्रत्येक विशेष गटास काम करण्याची शक्यता मिळावी त्यासाठी संबंधिताची आळीपाळीने विशेष गटात बदलीने नेमणुक करावी.

* **१०. पती-पत्नी यांची बदली :**

जेव्हा पती व पत्नी या दोघांची बदली करावयाची असेल तेव्हा ती एकाच ठिकाणी करण्यांत यावी मात्र, खालील प्रकरणी सहानुभूती व गुणात्मक विचार करून वरिष्ठ अधिका-यांच्या सहमतीने विचार करण्यांत यावा.

अ) पती व पत्नी यांना पदाअभावी एकाच ठिकाणी ठेवता येणे शक्य नसेल.

ब) जेव्हा दोघांपैकी एक कर्मचारी बदलीपात्र नसेल

क) अन्य काही कारणांमुळे पती अथवा पत्नी यांची बदली सर्वथा टाळता येणे शक्य नसेल.

* **११. मतीमंद मुलांच्या पालकांची बदली :**

* मतीमंद व्यक्तीच्या/मुलांच्या पालकांना मतीमंद पाल्यांच्या औषधोपचारासाठी, शिक्षणासाठी विशिष्ट स्थानी बदली मिळण्याची विनंती केल्यास, त्याचा सहानुभूतीपूर्वक विचार करण्यांत यावा व रिक्त पदे उपलब्ध असल्यास बदली करण्यात यावी अशी बदली करतांना खालील बाबी विचारात घेण्यांत याव्यात :-

* १) ज्या अधिकारी/कर्मचा-यांनी बदलीची विनंती केली आहे त्यांचा पाल्य मतीमंद असल्याचे व्यावसायिक वैद्यकिय अधिका-याचे प्रमाणपत्र सादर केलेले असावे.

* २) एकाच विभागांतर्गत बदली होत असल्यास, ज्येष्ठता अबाधित ठेवण्यांत यावी.

सदरहू सवलत देण्याचे अधिकार संबंधीत प्रशासकीय विभागांना असतील व त्यांनी अशी प्रकरणे प्रशासकीय गरजा लक्षात घेऊन तपासावीत.

* १२. जिल्हा परिषद आस्थापनेवरील अधिकारी/कर्मचारी यांची बदली-

* अ) जिल्हा परिषदेमध्ये नेमणूक करीत असतांना त्या त्या विभागाच्या संवर्गातील गट-अ व गट-ब संवर्गात सरळ सेवेने नेमणुका करण्यात आलेल्या व परिविक्षाधीन कालावधी

समाधानकारकरित्या पूर्ण केलेल्या अधिका-यांच्या नेमणुका करण्यात याव्यात व त्यांनी पदोन्नतीपूर्वी ३ वर्षे जिल्हा परिषदेत काम करावे.

* ब) प्रशासकीय विभागांनी त्यांच्या अखत्यारितील अधिकाऱ्यांच्या जिल्हा परिषदेमध्ये नेमणूका केल्यानंतर अशा अधिकाऱ्यांच्या बदल्या शक्यतो ३ वर्षापर्यंत करू नयेत. मात्र बदली करण्याची आवश्यकता असेल तर ती बदली संबंधीत जिल्हा परिषदेच्या मुख्य कार्यकारी अधिका-यांशी विचार विनिमय करून करावी.

* क) मुख्य कार्यकारी अधिकाऱ्यांना त्यांच्या जिल्हा परिषदेमध्ये कार्यरत असलेल्या विविध प्रशासकिय विभागाच्या संवर्गातील अधिकाऱ्यांच्या बदल्या विहीत कालावधीपूर्वी काही प्रशासकिय कारणास्तव करावयाच्या असल्यास, अशा बदल्या संबंधीत प्रशासकीय विभागाचे मत घेऊन कराव्यात.

* १३. वर नमूद केलेल्या सूचनाखेरीज विभागीय गरजा लक्षात घेऊन अन्य विभागांना पुरक सूचना निर्गमित केल्या असल्यास व त्या वरील तरतूदींशी विसंगत नसल्यास कार्यान्वीत राहतील.

* १४. शासनाच्या सुधारीत बदली धोरणाची अमंलबजावणी करण्याची संपूर्ण जबाबदारी ही विभागाच्या प्रशासकीय सचिवांची असेल, ज्या प्रकरणी शासनाच्या प्रचलीत धोरणांशी सुसंगत नसेल, अशी बदली करण्याचे प्रस्तावित केले असल्यास त्यांस मुख्यमंत्री स्तरावर मान्यता घेतल्यानंतरच ती बदली करण्यात यावी. मुख्यमंत्र्यांनी अशा प्रस्तावास मान्यता असल्याखेरीज केलेल्या बदल्यांचे उत्तरदायित्व संबंधीत सचिवांकडे असेल.

* १५. बदली धोरणासंबंधीचे हे आदेश राज्य सेवेतील, अधिकारी/कर्मचारी तसेच जिल्हा परिषद/महानगरपालिका/नगरपालिका/नगरपरिषदा/निम-शासकीय कार्यालये, मंडळे/ महामंडळे व शासकीय अंगिकृत व्यक्ती या सर्वांना लागू राहतील.

महाराष्ट्राचे राज्यपाल यांच्या आदेशानुसार व नावाने.

रवि भू. बुध्दिराजा,

प्रधान सचिव (सेवा)"

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धोरण

महाराष्ट्र शासन

सामान्य प्रशासन विभाग,

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दिनांक ७ फेब्रुवारी, १९९८

वाचा:- १) शासन परिपत्रक,सामान्य प्रशासन विभाग, क्रमांक :-टीआरएफ-१०७७/बारा, दिनांक २७ सप्टेंबर, १९७७.

२) शासन परिपत्रक,सामान्य प्रशासन विभाग, क्रमांक :-टीआरएफ-१०८९/प्र.क्र.८/बारा, दिनांक २१ एप्रिल, १९८९.

३) शासन परिपत्रक,सामान्य प्रशासन विभाग, क्रमांक :-टीआरएफ-१०८९/प्र.क्र.२०/बारा, दिनांक २७ नोव्हेंबर, १९९७.

परिपत्रक

दिनांक ५ जानेवारी, १९९८ रोजी बदल्यासंबंधीच्या दिनांक २७ नोव्हेंबर, १९९७ रोजी निर्गमित केलेल्या आदेशाचा शासन स्तरावर आढावा घेण्यात आला त्या अनुषंगाने खालीलप्रमाणे निर्णय घेण्यात आले :-

* अ) दिनांक २७ नोव्हेंबर, १९९७ च्या आदेशाची काटेकोर अंमलबजावणी होण्याच्या दृष्टीने मे महिन्यामध्ये बदल्या करण्यात याव्यात, तोपर्यंन्त बदल्या करू नयेत. यामुळे शैक्षणिक वर्षाच्या मध्ये व परिक्षेच्या काळात होणा-या बदल्यांनी निर्माण होणा-या अडचणी येणार नाहीत.

* ब) अपवादात्मक प्रकरणीसुध्दा शक्यतो बदल्या करण्याचे टाळावे. मात्र तशी बदली करणे अपरिहार्य ठरल्यास व अत्यावश्यक असल्यास बदल्या करण्यास सक्षम असलेल्या अधिका-याने त्याच्या नजीकच्या वरिष्ठ अधिका-याच्या पुर्वानुमतीनेच ती करावी.

Ahmad

* क) एखाद्या कर्मचा-या/अधिका-या विरूध्द तक्रारी आल्यास त्याची बदली करण्यात येते. हा उपाय नव्हे. आलेल्या तक्रारीची तात्काळ शहानिशा संबधिताचे सदर पदावर राहणे अयोग्य वाटत असल्यास त्याची बदली करावी तसेच आवश्यकता असेल अशा प्रकरणांत शिस्त भंगविषयक कार्यवाही करावी.

महाराष्ट्राचे राज्यपाल यांच्या आदेशानुसार व नावाने.

नवीन कुमार

प्रधान सचिव (सेवा)"

[* made by us to indicate that they are not included in the Act.]

We have noted (supra) that these resolutions did not yield required result and in spite of it, transfers were made indiscriminately and for extraneous circumstances and this mischief are, remediate by the legislature by enacting the Act.

49. The purpose to refer these circulars in detail necessitated, as the learned counsel made submission (supra) on that basis to interpret and explain some of the provisions of the Act and which refers to the practice that was in vague.

Provisions of the Act:

50. We now refer to the relevant provisions of the Act. To begin with we will refer to the preamble of the Act, which reads thus:

"An act to provide for regulation of transfer of Government servants and prevention of delay in discharge of official duties."

51. Chapter I, Section 2 deals with various definitions. The relevant clauses for our purpose are:

"(b) 'Competent Authority' means the appointing authority of the Government servant and shall include the transferring authority specified in section 6;

(c) 'Department' or 'Administrative Department' means the Department of the Government of Maharashtra as specified in the First Schedule to the Maharashtra Government Rules of Business;

(g) 'post' means the job or seat of duty to which a Government servant is assigned or posted;

(i) ['Transfer' means posting of a Government servant from one post or place of work to another post or place of work and includes posting from one office to another office within the same town;] 'Transfer' means posting of a Government servant from one post, office or Department to another post, office or Department.

(j) 'Transferring authority' means the authorities mentioned in section 6."

52. Chapter II of the Act deals with tenure of posting and transfer and transferring authority, which reads thus:

"3. (1) For All India Service Officers and all Groups A, B and C State Government Servants or employees, the normal tenure in a post shall be three years:

Provided that, when such employee is from the non-secretariat services, in Group C, such employee shall be transferred from the post held, on his completion of two full tenures at that office or department to another office or Department:

Provided further that, when such employee belongs to secretariat services, such employee shall not be continued in the same post for more than three years and shall not be continued in the same Department for more than two consecutive tenures.

(2) Employees in Group D shall normally not be subjected to fixed tenure. They shall not be transferred out from the station where they are serving except on request when a clear vacancy exists at the station where posting is sought, or

on mutual transfer, or when a substantiated complaint of serious nature is received against them.

4. (1) No Government servant shall ordinarily be transferred unless he has completed his tenure of posting as provided in section 3.

(2) The competent authority shall 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.

(3) 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:

Provided that, any dispute in the matter of such transfers shall be decided by the Chief Minister in consultation with the Chief Secretary.

(4) The transfers of Government servants shall ordinarily be made only once in a year in the month of April or May;

Provided that, transfer may be made any time in the year in the circumstances as specified below, namely:-

(i) to the newly created post 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;

(ii) 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.

(5) Notwithstanding anything contained in section 3 of this section, the competent authority may, in special cases, after recording reasons in writing and with the prior approval of the next higher Competent Transferring Authority mentioned in the table of section 6, transfer of a Government servant before completion of his tenure of post.

5. (1) The tenure of posting of a Government servant or employee laid down in section 3 may be extended in exceptional cases as specified below, namely:-

(a) the employee due for transfer after completion of tenure at a station of posting or post has less than one year for retirement;

(b) the employee possess special technical qualifications or experience for the particular job and a suitable replacement is not immediately available; and

(c) the employee is working on a project that is in the last stage of completion, and his withdrawal will seriously jeopardize its timely completion.

(2) Notwithstanding anything contained in section 3 or any other provisions of this Act, to ensure that the Government work is not adversely affected on account of large scale transfers of Government servants from one single Department or office, not more than thirty per cent, of the employee shall be transferred from any office or Department at a time, in a year.

6. The Government servants specified in column (1) of the table hereunder may be transferred by the Transferring Authority specified against such Government servants in column (2) of the table.

TABLE

	Groups of Government servants (1)	Competent Transferring Authority (2)
(a)	Officers of All India Services, all Officers of State Services in Group "A" having pay-scale of Rs.10,650-15,850 and above	Chief Minister
(b)	All Officers of State Service in Group "A" having pay-scales less than Rs.10,650-15,850 and all Gazetted Officers in Group "B"	Minister-in-charge in consultation with Secretaries of the concerned Departments.
(c)	All non Gazetted employees in Group "B" and "C"	Heads of Departments.
(d)	All employees in Group "D"	Regional Heads of Departments:

Provided that, in respect of officers in entry (b) in the table working at the Divisional or District level, the Divisional Head shall be competent to transfer such officers within the Division; and the District Head shall be competent to transfer such officers within the District:

Provided further that, the Competent Transferring Authority specified in the table may, by general or special order, delegate its powers under this section to any of its subordinate authority.

7. Every Administrative Department of Mantralaya shall for the purposes of this Act prepare and publish a list of the Heads of Departments and Regional Heads of Departments within their jurisdiction and notify the authorities competent to make transfers within their jurisdiction for the purposes of this Act.

53. Having noted down the relevant provisions of the Act, we will now analyze them:

To begin with the topic of interpretation of the provisions of the Act, we will note the preamble of the Act-

"An act to provide regulation of transfer of Government servant....."

54. The preamble is expected to express the scope, object and purpose of the Act comprehensively. Thus, comparing title of the Act, and the preamble with statement of object and reasons, the Act is meant to regulate the transfer of Government servants, who are appointed to a transferable post. Thus, we first look at the word 'Regulate'.

55. The word "regulation" is adjective of 'regulate' which means direct, manage, control, according to certain principles Regulation means the act of regulating or state of being regulated. Thus, the Act is meant for effecting transfer of a Government servant in the manner provided by the Act.

56. Chapter I of the Act consist of two sections, Section 2 deals with various definitions of the terms used in the Act.

57. We must remember statutory setting and placement of provisions. Chapter I of the Act headed "Preliminary" and chapter II headed "Tenure of posting and transfer and transferring authority".

(i) Section 3 speaks of Tenure of posting
(ii) Section 4 speaks of Tenure of transfer
(iii) Section 5 speaks of Extension of tenure
(iv) Section 6 speaks about transferring authority
(v) Section 7 speaks of publication of list of competent authorities.

"Regulation of transfer": This is indication of the fact that the Act is a regulatory legislation.

Section 3: The normal tenure in a post shall be 3 years.

Section 4(1): No government servant shall ordinarily be transferred unless he has completed the tenure of posting of normal tenure of 3 years.

58. No Government servant shall be transferred unless he completes his tenure referred to in Section 3. Thus, it being a negative character, the requirement of the Section is imperative.

59. The legislation commands that the competent authority shall prepare in the month of January a list of 'Government servants due for transfer'

60. The list so prepared under the above provision shall be finalized by the concerned Minister in consultation with Secretary of the Department. As such it is imperative on the part of the authority to prepare the list of such government servants, who are due for transfer. The use of words "due for transfer" has significance and indicative of the fact, how the authorities are to effect the order of transfers,

"at any time in the year" in the circumstances.... enumerated in the provisions of Section 4(1) of the Act.

61. Further, the Act has mentioned two different authorities i.e. Competent Authority and Competent Transferring authority:

62. Preparation of list is a mandate of the statute, which has to be prepared and will provide a data for effecting transfers of the Government servants who are 'due for transfer'.

63. It is to be noted, that the purpose of preparation of such list as indicated in Section being indicative of fact that only those government servants who have completed the tenure are 'due for transfer'. A Government servant becomes due for transfer when he completes his/her normal term of 3 years, in a post.

64. The question as to whether a statute is mandatory or directory depends upon the intent of the legislature and not upon the language in which the intent is clothed. The meaning and the intention of the legislation must govern and these are to be ascertained not only from the phraseology of the provision, but also by considering its nature, its design and the consequences, which would follow from construing in one way or another.

65. When a rule or section is a part of an integral scheme, it should not be considered or construed in isolation. One must have regard to the scheme of the relevant rules, or sections in order to determine the true meaning of any one or more of them. An isolated consideration of the provisions lead to the risk of some other interrelated provisions becoming devoid of meaning. Keeping in mind this aspect we look at Section 3 and 4 of the Act.

A) Intent of Section 3 and 4 - by plain reading of Section 3 and 4 of the Act, the legislature intended to create separate category of Government servants for purpose of transfer i.e. (a) those who are due for transfer on completion of their normal tenure as referred to under section 3; (b) prepare list of such government servants and (c) order of transfer to be effected in April and May which is clear that this is generally to be referred as general transfer.

66. The second category of transfer, those can be made which are called as special transfer, such categories are enumerated under provisions of sub section 4 of Section 4 and sub section 5 of Section 4.

67. To effect such (special transfer) what modalities to be adopted and what are the circumstances to exercise that power are also indicated in these provisions i.e. Section 4 and 5 of the Act. The scheme of the Act indicates following aspect:

1) List of government servants due for transfer is to be prepared in January of every year.

2) List so prepared shall be made final by the Minister and Secretary of the Department i.e. (head of department)

3) These two stages in the section are to be performed by competent authority as defined in the Act. The use of words 'shall' in sub section 2 of this section being a statutory obligation, is to be performed by the designated authority only. The obligation to prepare a list being a condition precedent, for effecting the general transfers, as it relates to those government servants who are 'due for transfer'.

68. Having noted the provisions of the Act and the intention of the legislature to enact it, following salient features emerge:

i) to have a secured tenure at one place at least for 3 years;

ii) to have transparency and uniformity in the matter of transfer;

iii) to apprise the higher echelon of administration, about the Government servants who are due for transfer and details thereof, which ensures that no government servant will be kept in one place or post for more than the statutory tenure, depending on the group of government servants.

iv) creation of transferring authority by investing the power to effect transfer;

v) The Act also takes care by empowering the competent authority to delegate its power to make transfer to its subordinate (as indicated in

both proviso to Section 6) for the obvious reasons, that authority to whom the powers are delegated is generally on the spot and knows the fact and situation, vacancy etc. being the judge of the situation and needs of day to day administration, depending upon various aspects, factors which probably the competent transferring authority may not be aware. Thus, the head of those departments are entrusted to post the government servant whose normal tenure is completed and whose name is included in the list, which is made final in terms of the provisions of Section 4(2) of the Act.

vi) To make the list final under Section 4(2) is a job of the competent authority which consist of i) appointing authority including the transferring authority, ii) Hon'ble Minister and iii) the secretary of that department.

vii) The legislature was aware of the job that is to be undertaken and performed by the competent authority, i) preparation and finalization of list, ii) to make transfers. The legislature by adding 1st proviso to Section 6 permitted the Head of Department to effect the transfers as indicated therein.

And by second proviso of Section 6, it has authorized the competent transferring authority to delegate its power to make transfer to its subordinates. The precise words used by the legislature "under this section" is indicative of the fact that the legislature did not want the

competent authority to surrender or delegate its authority to finalise the list of the government servants who are due for transfer.

69. Clear directives contained in the proviso, when it refers, "for the purpose of this section" what is the need of this section is to effect 'transfers' and beyond that 'no'. The legislation has authorized competent transferring authority to delegate its authority to transfer a government servant, for the purpose of the sentence under this section is used and with intention the legislature have not used "under the Act".

70. Thus, there is clearly fixation of policy of the legislature in the matter of transfer of a government servant. Second proviso of Section 6 speaks of delegation of the power, for the purpose of this section is indicative that, the legislature were not intending to give the competent transferring authority any other power or powers, enumerated else where in the Act.

71. If we accept the contentions of Shri Lonkar, learned counsel, then we have to rewrite the second proviso, by substituting "For the purpose of this section" as "for the purpose of this Act". If we do so, then we will be overstepping our jurisdiction, in not interpreting the Act or its Section but we will be enter into an arena of 'legislation', which certainly is out of bonds for this Tribunal.

72. The words of limitation for the purpose of this section and that limiting factors govern the provisions of Section 6 i.e. to be competent Transferring Authority.

73. We immediately look at Section 7. This section commands that every Administrative Department of Mantralaya, shall "for the purpose of the Act" prepare and publish the "heads of department" and Regional Heads of Department" within their jurisdiction and notify the authorities competent to make transfer within their jurisdiction for the "purpose of this Act".

74. Thus, in comparison to second proviso to Section 6 and Section 7, it is apparent that ordering or effecting transfer, the legislature has empowered the competent authority to delegate its power to transfer to its subordinate under this section. If the legislature wanted that all the powers of the competent transferring authority are to be delegated to its subordinate the legislature definitely used "for the purpose of this Act", as is used in Section 7.

76. In accordance with the maximum "delegations, non-protest delegate" a statutory power must be exercised only by the body or officer in whom it has been conferred, unless sub delegation of the power is authorized by express words or necessary implication. The legislature by adding second proviso authorized the competent transferring authority who itself is a delegate of the State Government, to

delegate its power. The legislature has intentionally used term "under this section" is indicative that the powers of Competent Transferring Authority are delegated and no other power else where under the Act.

77. If the requirements of a statute which prescribes the manner in which some thing is to be done are expressed in negative language, that is to say if the statute enacts that it shall be done in such manner and in no other manner, it has been laid down that those requirements are in all cases observed and that neglect to attend to them will invalidate the whole proceedings.

78. Where a power is given to do a certain thing in a certain way, the thing must be done in that way or not at all. Other modes of performance are necessarily forbidden.

79. If really the legislature wanted that all the powers and authority of the competent transferring authority to be delegated to the subordinates certainly the legislature could have used term "Under this Act" but not doing so or using the term "Under this Section" goes to show that the power that is given to the competent authority under sub section 2 of Section 4 is to be specifically delegated. Thus, the delegatee himself cannot on its own usurp that power and authority which is vested in the competent authority by virtue of sub section 2 of Section 4.

80. The Act, defines the term "competent authority", and "transferring authority". The definition has to be understood in the context that is used in the body of the Act. We have reproduced the definition in earlier part of the order. If the definitions as referred to in clause (b) and (j) of Section 2 are inclusive of the appointing authority and the competent transferring authority, the Act independently has defined the competent transferring authority and further Section 6 elaborates who are the competent transferring authority. Thus, the competent authority as defined is entrusted with special job i.e. to prepare and finalise the list and on that basis, the competent transferring authority who is on the spot is effect or order the transfer.

81. The competent transferring authority has to be entrusted with the groups of Government servants i.e. A, B, C, D. For all the group the appointing authority may not be the same. Similarly, the competent transferring authority also is different. As per the two provisions to Section 6, the transferring authorities are different than the competent authority.

82. Entry (b) in the table consists of Group A & B. Group 'A' officers are placed in entry (b) in terms of their salary and gazetted group 'B' officers. The transferring authority qua the officers in entry (b) working at Division and District level is the head of that level and his jurisdiction or authority is only to transfer a Government servant in division or District within District.

83. As far as designated authority as per IInd proviso is concerned there is no such restriction. There the key words used "under this Section" being decisive have to be interpreted as such.

84. A delegate to whom the power is delegated by the competent authority cannot travel beyond that authority and if it does, then that action undoubtedly is without jurisdiction or any authority. In other words, the competent authority, which includes the transferring authority, can prepare list of the Government servants due for transfer as envisaged by Section 4(2) of the Act. This is what our reading and interpretation of the provisions of the Act.

85. This takes up to the scope of judicial review of the order of transfer order effected by the competent transferring authority. The learned counsel for that have placed reliance on the pronouncement of law by the Apex Court. Now let us go to the pronouncement of the Apex Court, where the Apex Court has determined the limit and extent of power of judicial review of the Court/Tribunal dealing with challenge to the orders of transfer of a Government servant or employee of public or private undertaking ordered by the competent authority and by referring the law declared by the Apex Court and by finding out the arena or extent of exercise the jurisdiction of judicial review qua the transfers. The general principle about extent of judicial review is well settled, i.e.

A) Judicial review is concerned with reviewing not the merit of the decision in support of which the application for judicial review is made but the decision making process.

B) It is different from an appeal:

i) when hearing an appeal the Court/Tribunal is concerned with merit of the decision under appeal;
ii) The appellate Court/authority can substitute its own decision in the place of original decision.
iii) The appellate Court/authority can re-appreciate the entire evidence.

C. The power of judicial review is not an appeal from the decision. The Court/Tribunal can not substitute its own decision.

D. The duty of the Court/Tribunal is thus confined to:

a) whether decision making authority exceeded its power?
b) committed an error of law;
c) committed a breach of rules of natural justice;
d) reached a decision which no reasonable Tribunal would have reached.
e) abused its power, i.e.-

i) malafide, ii) colourable exercise of power, iii) for extraneous consideration or circumstances.

f) whether there is patent illegality in issuing order.

g) in given case/situation it is open for the Court/Tribunal to review the decision maker's evaluation of facts. Then the Court/Tribunal will intervene where the facts taken as a whole could not logically warrant the conclusion of decision maker.

86. As we are dealing with a case of transfer of a Government servant, appointed to a transferable post, we will now refer to the judicial pronouncement and the ratio.

OBSERVATION/RATIO IN VARIOUS PRONOUNCEMENTS OF THE APEX COURT IN RE-TRANSFER OF i) GOVERNMENT SERVANT, ii) PUBLIC UNDERTAKING, iii) DEFENCE / POLICE PERSONNEL i.e. DISCIPLINED FORCE.

A) Transfers effected by administrators in exercise of statutory power;

B) Under administrative instructions, circulars, etc.

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1) **Gujarat Electricity Board V/s. Atmaram.**
(1989) 2 SCC 602 = AIR 1989 SC 1433.

Atmaram

"Transfer of a Government servant appointed to a particular cadre of transferable posts from one place to another, is an incident and condition of service. It is necessary in public interest and efficiency in public administration. No Government servant or employee of Public Undertaking has legal right for being posted at any particular place. Whenever a public servant is transferred, he must comply with the order."

2) Union of India V/s. H.N. Kirtania
(1989) III SCC 445 = AIR 1989 SC 1174.

Transfer of public servant made on administrative ground or in public interest, should not be interfered with unless there are strong and pressing grounds rendering the transfer order illegal on the ground of violation of statutory rules or on ground of mala fides.

The Respondent, being a Central Government employee, held a transferable post and he was liable to be transferred from one place to another in the country, he has no legal right to insist his posting at Calcutta or at any other place of his choice.

3) B. Varadha Rao V/s. State of Karnataka
(1986) IV SCC 131 = AIR 1986 SC 1955.

Transfer of a Government servant, who is appointed to a particular cadre of transferable post from one place to another is an ordinary incident of service. No Government servant can claim to remain in particular place or in a particular post unless, his appointment itself is to a specified non-transferable post. Therefore, a transfer order per se made in the exigencies of service does not result in alteration of any of the condition of service express or implied to the disadvantage of a Government servant.

However, a transfer order which is mala fide and not made in public interest, but made for collateral purposes with oblique motive and in colourable exercise of power is vitiated by abuse of power and open to challenge before Court being wholly illegal and void.

So far as superior or more responsible posts are concerned, continued posting at one station or in one department, is not conclusive of good administration.

4) E.P. Royappa V/s. State of Tamil Nadu
(1974) IV SCC 3 = AIR 1974 SC 555.

"It is acceptable principle that in public service, transfer is an incident of service. It also an implied condition of service, and the appointing authority has a wide discretion in the matter. The Government is best judge to decide how to distribute and utilize the services of its

employees. However, the power must be exercised honestly, bonafide and reasonably. It should be exercised in public interest. If the exercise is based on extraneous considerations or for achieving an alien purpose, or an oblique motive, it would amount to mala fide and colourable exercise of power. Frequent transfers without sufficient reasons to justify such transfers cannot, but be held as mala fide. A transfer is mala fide such as in normal course or in public or administrative interest or in the exigencies of service, but for other purpose that is to accommodate another person for undisclosed reasons. It is the basic principle of rule of law, a good administration that even administrative action should be just and fair."

5) Dr. Shilpi Bose (Mrs.) V/s. State of Bihar
(1991) Suppl. (2) SCC 659 = AIR 1991 SC 532.

"The Respondents have continued to be posted at their respective places for last several years. They have no vested right to remain posted at one place since they hold transferable post. They are liable to be transferred from place to other."

6) Bank of India V/s. Jagjit Singh Mehta
(1992) 1 SCC 306 = AIR 1992 SC 519.

"Ordinarily and as far as practicable the husband and wife who are both employed should be posted at the same station, even if their employer is

different. The Government guide-lines are also to the same effect. The guide-lines do not enable any spouse to claim such posting as of right, if the departmental authorities do not consider it feasible. The only thing required is that the departmental authorities should consider this aspect along with the exigencies of administration and enable the two spouses to live together at one station, if it is possible without any detriment to the administrative needs and claim of other employees. In case of All India Services, the hardship resulting from the two being posted at different stations may be unavoidable at time particularly when they belong to different services and one of them cannot be transferred to the place of other posting. While choosing the career and a particular service, the couple has to bear in mind this factor and be prepared to face such a hardship, if the administrative needs and transfer policy do not permit the posting of both at one place without sacrifice of requirements of administration and needs of other employees. In such a case, the couple has to make their choice at the threshold between career prospects and family life. After giving preference to the career prospects by accepting such a promotion or any appointment in an All India Service with the incident of transfer to any place in India, subordinating the need of the couple living together at one station, they cannot as of right claim to be relieved of the ordinary incidents of All India Services and avoid transfer to a different place on a ground that the spouses thereby would be posted at different places.

7) **Union of India V/s. S.L. Abbas**
(1993) 4 SCC 357 = AIR 1993 SC 2444.

"An order of transfer is an incident of Government service, who should be transferred where, is a matter for the appropriate authority to decide."

8) **N.K. Singh V/s. Union of India.**
(1994) VI SCC 98.

"The element of prejudice to public interest can be involved only in transfers from sensitive and important public offices and not in all transfers."

9) **Chief General Manager (Telcom) N.E. Telcom Circle V/s. Rajendra Bhattacharjee.**
(1995) 2 SCC 532 = AIR 1995 SC 813.

"It is needless to emphasize that a Government employee or any servant of a Public Undertaking has no legal right to insist for being posted at any particular place. It cannot be disputed that the Respondent holds a transferable post and unless specifically provided in his service condition, he has no choice in the matter of posting since Respondent has no legal or statutory right to claim his posting at Agartala."

10) National Hydroelectric Power Corpn. Ltd. V/s. Shree Bhagwan & Anr.
(2001) 8 SCC 574.

"Transfer of employee is not only an incident, but a condition of service. Unless shown to be an out come of mala fide exercise of power or of any statutory provisions, not subject to judicial interference as a matter of routine."

11) V. Jaganath Rao V/s. State of A.P.
(2001) X SCC 401 = AIR 2002 SC 77.

"Transfer in relation to service reduced to simple terms means a change of place of employment, within an organization. It is an incident of public service and generally do not require the consent of the employer. In most service rules, there are express provisions to transfer. Though definitions may differ and in many cases, transfer is conceived in wider terms, a Government servant is liable to be transferred to a similar post in some cadre which is a normal feature and incidence of Government service and no Government servant can claim to retain in a particular place or particular post unless of course his appointment itself is to a specific non-transferable post."

12) State of Rajasthan V/s. Anand Prakash Soni.
(2003) VII SCC 403.

"Transfer is an incidence of service, can be exercised by the employer unless expressly barred."

13) Public Service Tribunal Bar Assn. V/s. State of U.P. (2003) IV SCC 104

"Transfer is an incident of service and is made in administrative exigencies. Normally, it is not to be interfered with by the Courts. The Supreme Court consistently has been taking a view that the order of transfer should not be interfered with, except in rare cases, where the transfer is made in vindictive manner."

14) Union of India V/s. Janardhan Debanath. (2004) IV SCC 245 : 2004 SCC (L&S) 631

A) Transfer of employee to different division, propriety has to be determined by the employer upon the administrative necessities and extent of solution thereof.

B) Question whether transfer in a particular case was in the interest of public service requires factual adjudication.

15) State of U.P V/s. Siyaram. (2004) VII SCC 405.

"No Government servant or employee of a public undertaking has any right to be posted forever at any one particular place or place of his choice."

16) State of U.P. V/s. Gobardhan Lal.
(2004) XI SCC 402 = AIR 2004 SC 2165.

A) Transfer is prerogative of the authorities concerned, and Court should not normally interfere therewith, except when – i) transfer order shown to be vitiated by mala fide or ii) in violation of any statutory provision or iii) having been passed by an authority not competent to pass such an order.

B) No Government servant can contend that once appointed or posted in a particular place or position, he should continue in such place or position as long as he desires. Transfer of an employee is not only an incident 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 conditions of service. Unless the order of transfer is shown to be an outcome of a mala fide exercise of power or violative of any statutory provision (an Act or rule) or passed by an authority not competent to do so, an order of transfer cannot lightly be interfered with as a matter of course or routine for any or every type of grievance sought to be made.

C) A challenge to an order of transfer should normally be eschewed and should not be countenanced by the courts or tribunals as though they are Appellate Authorities over such orders, which could assess the niceties of the administrative needs and requirements of the situation concerned. This is for the reason that courts or tribunals cannot substitute their own decisions in the matter of transfer for that of competent authorities of the State.

D) Condition of service or rights, which are personal to the parties concerned, are to be governed by rules as also the inbuilt powers of supervision and control in the hierarchy of the administration of State or any authority as well as the basic concepts and well-recognized powers and jurisdiction inherent in the various authorities in the hierarchy.

17) Sureshkumar Awasti V/s. U.P. Jalnigam.
(2003) XI SCC 740.

"Transfer of an officer at the behest of politicians without following any guidelines provided thereof, an arbitrary or mala fide transfer of an efficient and independent officer is not in favour of good administration. Transfer of officers is required to be effected on the basis of set norms or guidelines without allowing any political interference in regard thereto."

18) Maj.General J.K. Bansal V/s. Union of India.
(2005) VII SCC 227 = AIR 2005 SC 334.

"The transfer of members of the armed force, interference by the Court is far more limited and narrow than in case of civilian employees or those working in public sector undertaking. Courts should be extremely slow in interfering with an order of transfer of such category of persons."

19) S.C. Saxena V/s. Union of India & Ors.
(2006) IX SCC 583.

Duty of Government servant to comply with transfer order. Tendency of not reporting at the new place and instead indulging in litigation to ventilate grievances needs to be curbed.

A Government servant cannot disobey a transfer order by not reporting at the place of posting and then go to a court to ventilate his grievances. It is his duty to first report for work where he is transferred and make a representation as to what may be his personal problems. Such tendency of not reporting at the place of posting and indulging in litigation needs to be curbed. Assuming there was some sickness, that did not prevent him from joining at the transferred post, more so when there was no physical disability to join duty at transferred post.

87. Having noted the ratio of various pronouncements, following principles emerge:

A) If the transfer of a Government servant is ordered de hors of the statutory mandate, the Court/Tribunal gets the jurisdiction to interfere in the order.

B) The transfer of a government servant/employee appointed to a transferable post, is an incident and condition of service.

C) No Government servant has legal right for being posted at a particular post/place.

D) The Government or the Administrator is best judge to decide how to distribute and utilize the services of its employees.

E) No government servant has a vested right to be placed at particular place or post for several years.

F) A husband and wife employed and appointed to a transferable post have no right to claim that both be placed at one and the same place.

G) If the transfer is shown to be out come of malafide or colourable exercise of power to wit, i) to accommodate a particular government servant at particular place or post ii) at the behest of political personality iii) violation of statutory provisions iv) by an authority not competent to pass such order.

H) If the transfer order is de hors the statutory provisions and the procedure provided there under then in those circumstances the Court/Tribunal gets a jurisdiction to interfere in such decision.

88. If the order of transfer is affected in accordance with the procedure prescribed by law, having regard to the administrative exigencies/need, public interest, then Court/Tribunal will be very slow to interfere in such cases.

89. We propose to deal with all contentions raised by the counsel together relating to the interpretation of the provisions of Act. So far contention regarding challenge to the order of transfer as such will be dealt with separately. The main contention revolved on the provisions of Section 3, 4 and 6 of the Act. So far as the contention in respect of Section 3 are concerned such contentions fell for consideration before this Tribunal (one of us Shri A.B. Naik, Chairman) when various provisions of Section 3 were interpreted and having considered those contentions and provisions this Tribunal observed.

> "19. The Act was enacted for regulating the transfer of the government servant as such the transfers are to be regulated by and under this Act. The Act empowers the Competent Authority to transfer its subordinate under the provisions of this Act. The Act refers to the tenure which means :- " The normal tenure in the post shall be 3 years" Thus the Act specifies the tenure of a Government servant at a particular post or at a particular place at least for 3 years. Going by the provision of Section 3, it is clear that a government servant is to be retain at one place for a tenure of 3 years, thus

retention of a government servant at a place for 3 years there is some sort of assurance in the statute itself to a government servant, but, however, one has to find out, whether that tenure is mandatory or just, a enabling assurance. This will have to be ascertained from the Section itself, in foregoing para. I had reproduced Section 3, the important words used in that Section, being the word 'normally' is used in this Section followed by word 'shall'. Thus what is the importance of these two words in the Section is to be ascertained, thus I will first ascertain the literary meaning of word 'normally'. Word 'normal' is adjective and term "normally" being adverb the plain or dictionary meaning of word 'normal' mean – in accordance with an established law, or conforming to a type a standard, regular, natural, constituting a standard made, designating a condition, the word 'normally' as used in the Section being adverb, which denote a usual or accepted rule or process, normally is synonymous; as usually or normal. Thus it is in general, as a rule, on the whole, or by and large, or more often, than not, 'as normal' 'as usual' naturally 'conventional'. Thus going by the dictionary or popular meaning, followed by word 'shall' thus the tenure of 3 years has to be treated being as mandatory, or by and large which again depending not upon the meaning but the intention of the legislature to use these two words. That intention can be not merely from the words

used by the legislature but from variety of other circumstances and consideration prevailing at that time. The circumstances to ascertain the intention of legislature to interpret the 'tenure' of 3 years has to be gathered. As I had notice from the object and reason appended to while promulgating the Ordinance indicates that the resolution, circulars etc. (probably those having no force of law and cannot be enforced by the Courts or Tribunals) could not get designed result, thus the legislation is intended to define a tenure of 3 years, for fixing this tenure of 3 years at a place is with a designed intention, being, that a government servant to be retained in a post at least for a period of 3 years, so as to have some sort of stability, certainty, to gain experience, bear responsibilities of the post etc., which this vivid object the tenure of 3 years is introduced, which has to be construed being mandatory or compulsory, and a government servant in normal course is not liable to be transferred unless a government servant completes 3 years tenure at a particular post, that is why the legislature have used word 'normally' followed by 'shall'. This conclusion of mine also gets support from the next section i.e. Section 4, which says that "no government servant shall ordinarily transfer unless he completes his tenure of 3 years". Thus both Section 3 and 4(1) refers to the tenure of 3 years, as such that much tenure is assured to the Government servant,

by the statute and in this way a right is created in favour of a government servant. Thus by considering section 3 r/w S. 4(1) together it leads to inevitable conclusion that a government servant in normal course shall not be transferred from one post till he/she completes 3 years tenure/posting at a particular post and any transfer before completion of that tenure, gives a right to say that, such transfer is contrary to law, and he has a claim to be retained at a particular place at least for 3 years.

20. But that is not end of it, the Legislature are aware that a situation may arise when a government servant is required to be transferred before he/she completes his or her tenure of 3 years at a post/place, thus the Legislature in Section 4 itself has made such provisions and laid down a procedure to effect the transfers before completion of the tenure of 3 years. This aspect now is required to be considered, as this aspect is center of controversy..

21. As stated above, Section 3, of the Act deals with tenure of posting. Section 4 of the Act deals with tenure of transfer, meaning thereby retaining a government servant at a particular place till he or she completes 3 years in a post. Section 4(1) opens with word 'no' and followed by the

sentence "shall ordinarily be transferred unless he completes his tenure as referred to in Section 3 of the Act". Bare looking at this part of the sentence it indicates that the 3 years tenure being imperative, meaning thereby to have fixed tenure for a government servant at a particular post. Thus conjoined reading of Sections 3 and Section 4(1) of the Act leads to an inevitable conclusion that the normal tenure of posting and transfer had to be 3 years at a place, to buttress my views, following well known rule of construction can be pressed in service, and, the inference can be drawn from the negative language used in the statute, (as said by Craise : Statute Law 6th edn. P.263). "If the requirement of the statute which present the manner in which same thing is to be done, are expressed in negative language that is to say if the statute enacts it shall be done in such a manner, and in no other manner it has been laid down that those requirements are in all cases absolute and that neglect to attain them will invalidate whole proceeding". To this known canon there is an exception i.e. a contrary indication is in the statute itself, that can be gathered by referring to further provision of Section 4(4) proviso, clauses (i) (ii) in Section 4 of the Act. The Legislature by using words 'No' 'Shall' and 'Ordinarily' made its intention clear that a government servant, shall not be transferred, unless he/she has completed his/her tenure, here again the use of

word 'Completed' assumes significance, the use of word 'completed' used in past tense, which means a state of being 'completed', fulfillment, also synonyms – completion. As per dictionary meaning of completion i.e. the Act of completing or the state of being completed. Thus only on completion of 3 years tenure at a particular post a government servant can be transferred, otherwise not. This is the net result of the combined reading of Sections 3 and 4 (1) of the Act."

90. Having considered the observations made by this Tribunal, (supra), we approve the same and hold that Section 3 Sub-section 1 guarantees the tenure of posting for 3 years.

91. Having held that tenure of 3 years posting is guaranteed, we now proceed to consider the 1st proviso to Section 3 of the Act as this proviso, if read, gives an impression that for group 'C' government servants 6 years posting is provided. If we apply the analogy of Section 3(1) then we have to hold that for 'C' group government servant tenure is of 6 years but if we look at the proviso, itself properly, then 6 years posting is not a fixed one. The legislature in its wisdom has used term "full tenure" at that 'office' after the term, "from the post held". Thus, the reference to the post held is in relation to an office where he is working. The word 'post' is defined in Clause (9) of Section 2 but the Act nowhere defines term "tenure' and 'office'. To understand the

Proceed

definition of these two terms, we will refer 1st to dictionary definition and then to pronouncement of the Apex Court.

A) **WEBSTER'S COMPREHENSIVE DICTIONARY (ENCYCLOPAEDIC EDITION) 1196 :**

OFFICE : i) A particular duty, charge or trust on employment undertaken by Commission or Authority, a post or position held by an official or functionary specifically a position of trust or authority under government, ii) A place building or series of rooms in which some particular branch of the public service is conducted iii) A room or building in which a person transacts business or carries on his sealed occupation, distinguished from shop, store or studio.

B) **BLACK'S LAW DICTIONARY MEANS**

OFFICE : A right, and correspondent duty, to exercise a public trust. A public charge or employment. An employment on behalf of the government in any station or public trust, not merely transient, occasional, or incidental. The most frequent occasions to use the word arise with reference to a duty and power conferred on an individual by the government; and, when this is the connection, "public office" is a usual and more discriminating expression. But a power and duty may exist without immediate grant from

government, and may be properly called an "office" as the office of executor. Here the individual acts towards legatees in performance of a duty, and in exercise of a power not derived from their consent, but devolved on him by an authority which quo ad hoc is superior.

An "assigned duty" or "function" Synonyms are "post', "appointment", "situation", "place", "position", and "office" commonly suggests a position of (especially public) trust or authority. Also right to exercise a public function or employment, and to take the fees and emoluments belonging to it. A public charge or employment, and he who performs the duties of the office is an officer. Although an office is an employment, it does not follow that every employment is an office. A man may be employed under a contract, express or implied to do an act, or to perform a service, without becoming an officer. But, if the duty be a continuing one, which is defined by rule prescribed by the government, which an individual is appointed by the government to perform, who enters upon the duties appertain to his status, without any contract defining them, it seems very difficult to distinguish such a charge or employment from an office, or the person who performs the duty from an officer. In the constitutional sense, the term implies an authority to exercise

some portion of the sovereign power, either in making, executing, or administering the laws".

C) **THE LAW LEXICON MEANS** :-

OFFICE : The word 'office' refers to the place where business is transacted. Champalal v. State of M.P., AIR 1971 MP 88, 91. (Interpretation of Statutes, M.P. Panchayats Act (7 of 1962), Ss. 20, 21, 22).

92. Having noted the meaning of term 'office', (supra), we take up for consideration the effect of 1st proviso to Section 3. In our considered view that a group 'C' government employee can be posted in a particular office for 6 years, and in 'post' for 3 years. We illustrate it. In a Collectorate, there are different branches, such as Revenue, Land Reforms, Land Acquisition etc. A government servant of group 'C', if working in the Land Acquisition branch, on his completion of 3 years, can be posted to another branch under the control of the Collector, and in such eventuality the total tenure will be 6 years and on completion of 6 years in the office of Collector, such government servant, has to be transferred from that 'post' in the office. Thus, it cannot be said that group 'C' government servant gets a right to be posted in a post for a period of six years. The legislature in its wisdom has used word "office" and not "post" in this proviso, which is a pointer to our conclusion. It cannot be forgotten that the Act has defined word "post". In spite of this he legislature with definite purpose have used "office".

93. Though, the judgment of the Apex Court in Shrilekha Vidharthi (supra) was pressed in service to consider the meaning of word 'office' but with utmost respect in our view this judgment is of no help to us, in the present context. In that case, before the Apex Court, the question was totally different than we are dealing presently. In Shrilekha's case the Government pf Uttar Pradesh, by stroke of pen removed number of government pleader/public prosecutor, engaged throughout the State of U.P. That action was subject matter of controversy, and in that context, the Apex Court considered whether the government offices are holder of a 'post' or 'office'. No doubt, while considering that aspect, the Apex Court observed "By 'office' is meant a right and duty, to exercise an employment, or position of authority and trust to which certain duties are attached".

94. Now we take the next aspect i.e. **"Tenure".**

"T E N U R E"

A) MEANING OF WORD 'TENURE' GIVEN IN WEBSTER'S COMPREHENSIVE DICTIONARY (ENCYCLOPAEDIC EDITION) 1196 :-

"The act of holding, in general, or the State of being hold'. The term during which thing is held as an office

B) **BLACK'S LAW DICTIONARY MEANS**

TENURE : Generally, tenure is a right, term, or mode of holding or occupying, and "tenure of an office" means the manner in which it is held, especially with regard to time. Winterberg vs. University of Nevada System, 89 Nev. 358, 513 P. 2d 1248, 1250.

C) **THE LAW LEXICON MEANS** :-

TENURE : The word "tenure" in its technical sense, is the manner whereby lands or tenements are holden, or the service that the tenant owes to his lord, and there can be no tenure without some service, because the service makes the tenure. Again tenure signifies the estate in land. The most common tenure by which lands are held in this country is "fee simple", which is an absolute tenure of land, to a man and his heirs, forever, without rendering service of any kind.

Tenure, meaning of, 12 BLR 484=21 WR 94.
The word "tenure" when used in connection with the expression "tenure of office" means the term of office.

The word "tenure" is one of very extensive signification. It may import a mere possession, and may include mere holding of an inheritance.

The definition of a "Tenure" in S.2(q) expressly includes a Ghatwali tenure. There is no reason why the expression should not be construed to include Ghatwali tenures of every description, namely both the Zamindari and the Government Ghatwalis, Rani Sonabati Kumari v. State of Bihar, AIR 1957 Pat 270, 273. (Bihar Land Reforms Act 30 of 1950, S. 2(q)).

The word "tenure" means only the period of service and it has no reference to the post held by the employee. Vaidyanatha v. L.I.C. of India, AIR 1964 Mad 24, 30. (Life Insurance Corporation Act (19560, S.11)"

95. Having noted dictionary meanings, we will now refer to a pronouncement of Apex Court in Dr. P.L. Agrawal's case (supra). The apex Court in this case was dealing with a tenure post, and whether tenure of service can be curtailed in this context. The Apex Court observes, "The appointment of the appellant was on a five years tenure, but it could be curtailed, in the event of his attaining the age of 62 years before completing the said 'Tenure'. The High Court failed to appreciate, the simple alphabet of service jurisprudence, the High Court reasoning is against the clear and unambiguous language of Recruitment Rules. The said rules provide "Tenure of five years, including of one

year probation", and the post is to be filled in by direct recruitment. The tenure means a term during which an office is held. It is a condition of holding the office". Thus from these observations, it is evident that where a tenure is fixed, the person appointed to that post shall enjoy that post till the end of tenure. Thus applying this principle in case at hand, the 'tenure' of 3 years of posting is assured, and such government servant is not liable to be transferred, unless, he/she completes 3 years at a 'posting', unless, such transfer within 3 years falls under the exceptions carved out by the Act itself.

96. Now it remains to refer to other judgments relied on by S/Shri Patil and Khaire to support their proposition. We first take up case of Rani Kusum (supra), and find out how for the ratio is attracted in case at hand. The case arose out of a say filed in a Civil Court, on lodging the suit in Civil Court. The Court issued summon to the defendant, to file their written statement, as per the amended Civil Procedure Code (Amendment) Act, 2002, amending Order VIII Rule 1, making it incumbent on the defendant/s to file written statement in the time frame, as envisaged by the amendment. As the defendant did not file written statement within time, however, the written statement was accepted by the Trial Court, acceptance of written statement, was subject matter of challenge in 1st instance in the High Court, at Patna, who rejected the revision, then the matter, reached the Apex Court. The Apex Court having regard to subject matter, a point at issue was in respect of a procedure to be followed in a of Civil nature, and in that

context, the Apex Court was considering whether the provisions of Order VIII, Rule 1, are mandatory or directory, on these premises the Apex Court observed :-

"12. The mortality of justice at the hands of law troubles a Judge's conscience and points an angry interrogation at the law reformer.

13. The processual law so dominates in certain systems as to overpower substantive rights and substantial justice. The humanist rule that procedure should be the handmaid, not the mistress, of legal justice compels consideration of vesting a residuary power in Judges to act ex debito justiciae where the tragic sequel otherwise would be wholly inequitable – Justice is the goal of jurisprudence – processual, as much as substantive. (See Sushil (AIR 1975 SC 1185) Kumar Sen v. State of Bihar, (1975 (1) SCC 774).

14. No person has a vested right in any course of procedure. He has only the right of prosecution or defence in the manner for the time being by or for the Court in which the case is pending, and if, by an Act or Parliament the mode of procedure is altered, he has no other right than to proceed according to the altered mode. (See Blyth v. Blyth (1966 (1) All ER 524 (HL)). A procedural law should not ordinarily be construed as mandatory, the procedural law is always

subservient to and is in aid to justice. Any interpretation which eludes or frustrates the recipient of justice is not to be followed. (See Shreenath and Anr. v. Rajesh and Ors. (AIR 1998 SC 1827) (1998 AIR SCW 1619).

15. Processual law is not to be a tyrant but a servant, not an obstruction but an aid to justice. Procedural prescriptions are the handmaid and not the mistress, a lubricant, not a resistant in the administration of justice.

16. It is also to be noted that though the power of the Court under the proviso appended to Rule 1 of Order VIII is circumscribed by the words – "shall not be later than ninety days" but the consequences flowing from non-extension of time are not specifically provided though they may be read by necessary implication. Merely, because a provision of law is couched in a negative language implying mandatory character, the same is not without exceptions. The courts, when called upon to interpret the nature of the provision, may, keeping in view the entire context in which the provision came to be enacted, hold the same to be directory though worded in the negative form.

17. Challenge to the Constitutional validity of the Amendment Act and 1999 Amendment Act was rejected by this Court in

Salem Advocate Bar Association. Tamil Nadu v. Union of India (JT 2002 (9) SC 175). (2002 AIR SCW 4627 : AIR 2003 SC 189) However to work out modalities in respect of certain provisions a Committee was constituted. After receipt of Committee's report the matter was considered by a three-Judge Bench in Salem Advocate Bar Association, Tamil Nadu v. Union of India (JT 2005 (6) SC 486) (2005 AIR SCW 3627). As regards Order VIII, Rule 1, Committee's report is as follows :

The question is whether the Court has any power or jurisdiction to extend the period beyond 90 days. The maximum period of 90 days to file written statement has been provided but the consequences on failure to file written statement within the said period have not been provided for in Order VIII, Rule 1. The point for consideration is whether the provision providing for maximum period of ninety days is mandatory and, therefore, the Court is altogether powerless to extend the time even in an exceptionally hard case.

It has been common practice for the parties to take long adjournments for filing written statements. The Legislature with a view to curb this practice and to avoid unnecessary delay and adjournments has provided for the maximum

period within which the written statement is required to be filed. The mandatory or directory nature of Order VIII, Rule 1 shall have to be determined having regard to the object sought to be achieved by the amendment. It is, thus, necessary to find out the intention of the Legislature. The consequences which may follow and whether the same were intended by the Legislature have also to be kept in view. In Raza Buland Sugar Co. Ltd., Rampur v. The Municipal Board, Rampur (AIR 1965 SC 895), a Constitution Bench of this Court held that the question whether a particular provision is mandatory or directory cannot be resolved by laying down any general rule and it would depend upon the facts of each case and for that purpose the object of the statute in making out the provision is the determining factor. The purpose for which the provision has been made and its nature, the intention of Legislature in making the provision, the serious general inconvenience or injustice to persons resulting from whether the provision is read one way or the other, the relation of the particular provision to other provisions dealing with the same subject and other considerations which may arise on the facts of a particular case including the language of the provision, have all to be taken into account in arriving at the conclusion whether a particular provision is mandatory or directory.

In Sangram Singh v. Election Tribunal Kotah & Anr. (AIR 1955 SC 425), considering the provisions of the Code dealing with the trial of the suits, it was opined that :

"Now a code of procedure must be regarded as such. It is procedure, something designed to facilitate justice and further its ends : not a Penal enactment for punishment and penalties; not a thing designed to trip people up. Too technical construction of sections that leaves no room for reasonable elasticity of interpretation should, therefore, be guarded against (provided always that justice is done to both sides) lest the very means designed for the furtherance of justice be used to frustrate it.

Next, there must be ever present to the mind the fact that our laws of procedure are grounded on a principle of natural justice which requires that men should not be condemned unheard, that decisions should not be reached behind their backs, that proceedings that affect their lives and property should not continue in their absence and that they should not be precluded from participating in them. Of course, there must be exceptions and where they are clearly defined they must be given effect to. But taken by and large, and subject to that proviso, our laws of procedure should be construed,

wherever that is reasonably possible, in the light of that principle."

In Topline Shoes Ltd. V. Corporation Bank ((2002) 6 SCC 33) (2002 AIR SCW 2794 : AIR 2002 SC 2487) the question for consideration was whether the State Consumer Disputes Redressal Commission could grant time to the respondent to file reply beyond total period of 45 days in view of Section 13(2) of the Consumer Protection Act, 1986. It was held that the intention to provide time frame to file reply is really made to expedite the hearing of such matters and avoid unnecessary adjournments. It was noticed that no penal consequences had been prescribed if the reply is not filed in the prescribed time. The provision was held to be directory. It was observed that the provision is more by way of procedure to achieve the object of speedy disposal of the case.

The use of the word 'shall' in Order VIII, Rule 1 by itself is not conclusive to determine whether the provision is mandatory or directory. We have to ascertain the object which is required to be served by this provision and its design and context in which it is enacted. The use of the word 'shall' is ordinarily indicative of mandatory nature of the provision but having regard to the context in which it is

used or having regard to the intention of the legislation, the same can be construed as directory. The rule in question has to advance the cause of justice and not to defeat it. The rules of procedure are made to advance the cause of justice and not to defeat it. Construction of the rule or procedure, which promotes justice and prevents miscarriage has to be preferred. The rules or procedure are handmaid of justice and not its mistress. In the present context, the strict interpretation would defeat justice."

97. We have given our anxious consideration to the ratio (supra) but we find that the principle as stated cannot be doubted but nonetheless, we are conscious of the fact that we are dealing with a question of transfer of government servant, appointed to a transferable post. A government servant has no vested right in a particular post. However now the Legislature have enacted a law, on subject, which up till now was not a subject of Legislative enactment. Thus, we have viewed the provisions of the Act from the angle of the right created in favour of a government servant, the power of authority to effect transfer by the authorities etc. Thus, in our opinion, the judgment, which is relied on by Shri Patil, is only of assistance to us to apply the principles of interpretation of a particular statute. The statute at hand cannot be called a statute providing a procedure, but it is for the protection of a government servant, against frequent unwanted transfers.

98. We then go to a judgment relied on by Shri Khaire, Learned Chief Presenting Officer. He referred on the case of Shailendra Dania (supra) to substantiate his stand, about the practice followed by the authorities in past, to receive application from the government servants, about transfer. In foregoing part, we have discussed the object of the Legislation, the mischief that was remediate etc.. Shri Khaire, said that while interpreting the provisions of the Act, this Tribunal also to take into account, the past practice, and for that matter the judgment of Apex Court is pressed in service. Let us consider that judgment. The subject matter of that case was in respect of promotion of a government servant, and in past practice was being followed by reckoning the experience of a particular government servant before he/she became eligible, but on promulgation of Recruitment Rules, the question that arose, as to whether the experience gained by Diploma Holders as Junior Engineer has to be counted for promotion, to the post of Assistant Engineer in the event, they are duly qualified as degree-holder. On that issue the question arose whether the past practice, can be used for interpreting the statutory provisions. The Apex Court in course has observed :-

> "26. In N. Suresh Nathan v. Union of India, a three-Judge Bench was called upon to decide a similar question as involved in the present case, namely, whether the three years' service experience for promotion for graduate Engineers would mean three years' service prior to obtaining the degree or three years' service after obtaining the degree. The relevant

Rule 11 provided for recruitment by promotion from the grade of Junior Engineers. Two categories were provided therein viz. one of degree-holder Junior Engineers with three years; service in the grade and the other of diploma-holder Junior Engineers, with six years" service in the grade, the provision being for 50% from each category. While interpreting the rule, this Court said that the entire scheme did indicate that the period of three years' service in the grade as a degree-holder and, therefore, that period of three years can commence only from the date of obtaining the degree and not earlier. The service in the grade as a diploma-holder prior to obtaining the degree cannot be counted as service in the grade with a degree for the purpose of three years' service as a degree-holder. The Court observed as follows : (SCC p. 586, para 4)

"4. In our opinion, this appeal has to be allowed. There is sufficient material including the admission of respondent diploma-holders that the practice followed in the department for a long time was that in the case of diploma-holder Junior Engineers who obtained the degree during service, the period of three years' service in the grade of eligibility for promotion as degree-holders commenced from the date of obtaining the degree and the earlier period of service as diploma-

holders was not counted for this purpose. This earlier practice was clearly admitted by the respondents diploma-holders in para 5 of their application made to the Tribunal at p. 115 of the paper-book. This also appears to be the view of the Union Public Service Commission contained in their letter dated December 6, 1968 extracted at pp. 99-100 of the paper-book in the counter-affidavit of Respondents 1 to 3. The real question, therefore, is whether the construction made of this provision in the rules on which the past practice extending over a long period is based is untenable to require upsetting it. If the past practice is based on one of the possible constructions which can be made of the rules then upsetting the same now would not be appropriate. It is in this perspective that the question raised has to be determined."

(Underlined by us)

From a reading of the aforesaid judgment, it appears to us that after construing the relevant Rule the Apex Court has found that the past practice followed in the Department is consistent with the relevant Rule and such practice if is not inconsistent with the statutory provisions can be taken help of to interpret the provisions of the Act.

We proceed to reproduce the relevant part of judgment:

29. In para 11 of the judgment, the Apex Court held : (M.B. Joshi case, SCC p. 426)

"11. A perusal of the above observations made by this Court clearly show that the respondent diploma-holders in that case has admitted the practice followed in that department for a long time and the case was mainly decided on the basis of past practice followed in that department for a long time. It was clearly laid down in the above case that if the past practice is based on one of the possible constructions which can be made of the rules then upsetting the same now would not be appropriate. It was clearly said 'it is in this perspective that the question raised has to be determined'. It was also observed as already quoted above that the Tribunal was not justified in taking the contrary view and unsettling the settled practice in the department. That apart the scheme of the rules in N. Suresh Nathan case was entirely different from the scheme of the rules before us. The rule in that case prescribed for appointment by promotion of Section Officers/Junior Engineers provided that 50 per cent

quota shall be from Section Officers possessing a recognized degree in Civil Engineering or equivalent with three years' service in the grade failing which Section Officers holding diploma in Civil Engineering with six years' service in the grade. The aforesaid rule itself provided in explicit terms that Section Officers possessing a recognized degree in Civil Engineering was made equivalent with three years' service was rightly counted from the date of obtaining such degree. In the cases in hand before us, the scheme of the rules is entirely different."

30. In the above decision (i.e. M.B. Joshi case), N. Suresh Nathan was distinguished mainly on the basis of past practice and the Court further held that the rules under consideration in N. Suresh Nathan was entirely different from the scheme of the rule which the Court was considering in M.B. Joshi. We have carefully considered N. Suresh Nathan and it is not correct to say that the decision rendered in that matter was based on past practice. The Court, in fact, has considered and interpreted the relevant service rules and then found that such an interpretation is fortified by the practice followed in that Department.

(underlined by us)

99. We will now, consider, the contention of Shri Khaire, Learned Chief Presenting Officer on the basis of the two affidavits filed by Shri Satish Tripathi, Additional Chief Secretary (Services), G.A.D. on 21st August, 2007 filed in O.A. No.446/2007 as per our directions and the affidavit filed by Shri N.P. Patil, Principal Secretary, Respondent No.1. These affidavits though filed in another Original Application, the parties agreed to read and consider them in these Original Applications.

100. Shri Tripathi in his affidavit, regarding entertaining request by a government servant, has made following averments :-

> **"5. I submit that there is no provision in the Act, regarding request transfer. However, the Government is engaged in preparation of rules as per the provisions of Section 14(1) of the Act, in which a provision regarding request transfer is proposed to be included."**

101. Shri N.B. Patil in his affidavit, in that behalf has submitted:-

> **"Though the word "transfer on request" is nowhere defined in the said Act, it is respectfully submitted that due to transfers sometimes concerned Government servants may have to face certain domestic problems, e.g., his/her own/near blood relatives ailment, education of children etc.. Such domestic problems come on record only by way of representation made**

by concerned Government servant. Hence, on this background, it cannot be justifiable if Competent Authority does not entertain such representation."

102. Let us now consider those resolutions in existence prior to the Act. We have reproduced those resolutions in detail in earlier part of this order. Clauses 2, 5(a), 10, and 11 of circular dated 27.11.1997 permitted the Competent Authority for transfer. This was being followed as a "practice", and on that background Shri Khaire wanted us to interpret relevant provisions of the Act, on the back ground of practice. It is accepted by Shri Tripathi in his affidavit that the provisions for request transfer is being included in the rules, which are at the stage of preparation. Thus, we have no hesitation to hold that till the relevant provisions are incorporated in the rules, the practice in vogue, on the basis of the resolution can be continued to operate, but however such request of a government servant has to be treated as a special or exceptional case, and then by strictly following the mandate of 2nd proviso of sub Section 4 and 5 of the Section 4, but of course this practice to be continued till the rules as envisaged by Section 14 of the Act are framed. As Shri Tripathi in his reply has referred to this aspect, we hope and trust that the State Government without any further delay will make the rules, so that there after that subject i.e. request transfer will also be covered by the Statutory Rules.

103. Though no specific submissions are made by the counsel based on the principle of repeal and saving as such but S/Shri Patil and Khaire faintly suggested that whatever is covered by the Act in relation with the two resolutions, stand impliedly repealed and what ever is left out from the two resolutions from the enactment, still survives. In foregoing part of this judgment by asterisk marks we have noted that those * * are not covered by the Act. We do not propose to ponder on this aspect as the State Government is actively processing of making of the rules under its power conferred by Section 14 of the Act, as such the question of request transfer on commencement of the rules will then be governed by the rules so made. The copy of draft rule was made available for our perusal and we noted that subject of "request transfer" is one of the item in the rules. Thus, we will not make any observation or record any finding on that issue (as on today) on that aspect.

Now to the challenge to order of transfer on merit:-

104. Having noted the contentions of S/Shri Lonkar, Patil and Khaire, Learned Chief Presenting Officer we now proceed to consider the files placed before us to find out whether the requirement of Act is complied and whether on merits they are sustainable.

105. Three set of files i) Deputy Director, Agriculture, Nashik Division, Nashik. ii) Director of Agriculture, Pune and iii) Mantralaya Department of Agriculture, are placed before us for our perusal, which

contain the applications of the government servants in Agriculture Department and Deputy Director, Nashik.

1) Letter dated 30.05.2007 from Deputy Director, Agriculture, Nashik to Directorate, Agriculture, Pune. This letter in response with the letter dated 23rd May 2007 from O.S.D. Agriculture Water Resources and Khar Land Department, Government of Maharashtra, Mantralaya, Mumbai.

2) The letter of O.S.D is in the file which reads:

"कृषी विभागातील वर्ग ३ च्या सर्वत्रीक बदल्याबाबत --------

"कृषि विभागातील वर्ग ३ च्या (कृषि पर्यवेक्षक, कृषि सहाय्यकए कृषि सेवक इ.) बदल्या संदर्भात माननीय लोकप्रतिनिधी व मान्यवर व्यक्तींकडून प्राप्त झालेल्या पत्रांच्या शिफारशींची यादी सोबत पाठवित आहे. कृपया सदर प्रकरणी नियमानुसार योग्य ती कार्यवाही व्हावी. अशी माननीय मंत्री महोदयांचे निदेशानुसार आपणास विनंती आहे."

. The letter dated 30.05.2007 is in the file, which reads thus. By reading that letter following aspects emerge:

"विषय:- बदलीचा पदावधी पुर्ण होत नसल्याने बदलीस मान्यता मिळणेसाठी प्रस्ताव सादर करणे बाबत..... (कृषि पर्यवेक्षक संवर्ग)

संदर्भ:- माननीय विशेष कार्य अधिकारी, कृषिए जलसंधारण व खार जमीन, मंत्रालय, मुंबई-३२ दिनांक २३-०५-२००७ चं पत्र

उपरोक्त विषयाचे अनुषंगाने या संभागाचे अधिनस्त काम करीत असलेले खालील कृषि पर्यवेक्षकांचे बदलीचा पदवधी पुर्ण होत नसल्याने प्रस्ताव सादर करण्यात येत आहे.

१. श्री काकड गोपीनाथ दशरथ, कृषि पर्यवेक्षक, हरसुल, तालुका कृषि अधिकारी, त्रयबकेश्वर
२. श्री नवले प्रकाश भाउराव, कृषि पर्यवेंक्षक, कनाशी.२० तालुका कृषि अधिकारी, कळवण.

वरील कृषि पर्यवेक्षकांनी अनुक्रमे तालुका कृषि अधिकारी, सिन्नर कृप सजा सिन्नर.१ व कृषि पर्यवेक्षक नांदुरशिंगोटे१ येथे विनंतीने बदली मागितलेली आहे. सदर कर्मचारी माहे जुन २००५ मध्ये पदोन्नतीने वरील मुख्यालयी हजर झालेले आहेत. त्यांना हजर होवून फक्त २ वर्षाचा कालावधी झालेला आहे. अधिनियम क २१ दिनांक १२ मे २००६ मधिल तरतुदीनुसार दोन पूर्ण पदावी म्हणजेच एकुण ६ वर्ष पुर्ण झाल्याशिवाय बदली करण्यात येणार नाही असे नमुद केलेले आहे. त्यामुळे त्यांचे विनंतीनुसार बदलीचा विचार करण्यात आलेला नाही.

तसेच त्यांनी मागितलेल्या ठिकाणी श्री पाटील मुदलीधर चांगदेव कृप सजा सिन्नर.१ व श्री पाटील रविंद्र काशिनाथ, कृप सजा नांदुरशिंगोटे.१ येथे चार वर्षांची सेवा झालेली आहे. अधिनियमातील तरतुदीनुसार ते बदलीसाठी पात्र होत नाहीत. त्यामुळे त्यांचीही बदली करता येत नाही.

मा. विशेष कार्य अधिकारी, यांनी निर्देश दिल्यानुसार अधिनियमातील ४ ;५ मध्ये नमूद केल्यानुसार वरील कर्मचा-यांचा बदलीस मान्यता मिळणेबाबतचा प्रस्ताव सादर करण्यांत येत आहे.

सोबत --- उपरोक्त संदर्भिय पत्र व त्यांच्या विनंती अर्जाची छायांकिंत प्रत जोडणेत आली आहे.

विभागीय कृषि सहसंचालक
नाशिक विभाग, नाशिक

The information submitted along with the proposal is as under:

1) S.A. Narkhede, Agriculture Supervisor Nagpur dated 29.05.2007. (followed by opinion of Deputy Director, Agriculture)

Sr.No.	Name of Agriculture Supervisor	Date of Application	Opinion/remark of Deputy Director
1.	S.A. Narkhede	29.05.2007	30.05.2007
2.	Aaher V.M.	Not filed to Director but to Shri D.S. Ahire, MLA, Sakri and Shri Kolhe, ex.MLA	30.05.2007
3.	R.S.Wankede	Complaint dt.27.05.2007 from Shri Shivajirao Daulatrao Patil, Member Z.P.	01.06.2007
4.	P.N. Devse	Recommendation from Shri Rohidas Patil vide letter dated 26.05.2007	04.06.2007

Thus the transfer of private respondents are effected for some extraneous consideration.

File : Directorate of Agriculture, Pune:

A) Letter dated 31st May 2007 by the Joint Director (Agriculture) Administration addressed to Divisional Joint Director, Agriculture, Nashik Division, Nashik in reply to letter dated 30.05.2007 (File No. 7/5)

विषय नाशिक संभागातील गट क संवर्गातील पदावधी पूर्ण न केलेल्या कर्मचा-यांच्या बदली प्रस्तावा बाबत

संदर्भ:- आपले पत्र क, बिना/आस्था-२/बदलीप्रस्ताव/३८७५/२००७ दिनांक ३० मे, २००७

१. (अ) शासकीय कर्मचा-यांच्या बदलयाचे विनियमन करण्यासाठी सन २००६ चा महाराष्ट्र अधिनियम क्रमांक.२१ मधील प्रकरण दोन कलम ३ (१) नुसार गट-क मधील कर्मचा-यांने धारण केलेल्या पदावर २ पूर्ण पदावधीची सेवा पुर्ण केल्यानंतर त्यांची त्या कार्यालयातून किंवा विभागातून दूस-या कार्यालयात किंवा विभागात बदली करण्यात येईल अशी तरतूद आहे.

(ब) अधिनियम क्रमांक २१ मधील प्रकरण दोन कलम ७ नुसार या अधिनियमाच्या प्रवेजनासाठी कलम-६ मध्ये नमुद केल्या प्राधिका-यांस आपल्या अधिकारितेतील बदल्या

करण्यासाठी सक्षम असणारे प्राधिकारी अधिसुचित करण्यास प्राधिकृत केलेले आहे. त्यानुसार कृषि विभागातील गट क मधील सर्व कर्मचारी यांचे बदल्याचे अधिकार प्रादेशिक विभाग प्रमुख म्हणून संबंधित विभागीय कृषि सह संचालक यांना एप्रील/मे मध्ये करण्यात येणा-या बदल्यासाठी आयुक्तालयाचये परिपत्रक दिनांक २१ फेब्रुवारी, २००७ अन्वये अधिनियमाच्या कलम-६ व ७ नुसार व दिनांक ५/२/२००७ च्या शासन निर्णयान्वये प्राप्त अधिकारात प्रदान करण्यात आलेले आहेत.

(क) तसेच अधिनियमातील कलम-४ (४) (२) आणि ४ (५) च्या तरतूदी अन्वये करण्यात येणा-या बदल्यासाठी बदली करण्यास सक्षम असणा-या प्राधिका-यांच्या लगतच्या वरिष्ठ प्राधिका-यांची मान्यता आवश्यक राहील असे परिपत्रकामध्ये नमूद करून कळविण्यात आलेले आहे.

(ड) उपरोक्त क मध्ये नमूद केलेल्या तरतूदीच्या विचार करता अधिनियमातील कलम ४(५) मध्ये असे नमूद करण्यात आलेले आहे की, कलम-३ मध्ये किंवा या कलमामध्ये काहीही अंतर्भूत असले तरीही, विशेष प्रकरणात, सक्षम प्राधिका-यांला, कारणे लेखी नमूद करून कलम-६ च्या टप्प्यामध्ये उल्लेखिलेल्या लगतपूर्व, बदली करणा-या सक्षम प्राधिका-याची पूर्व परवानगी घेवून शासकीय कर्मचा-यांची त्याचा पदावधी पूर्ण होण्यापूर्वी बदली करता येईल.

२(अ) नाशिक संभागाकडून खालील तपशिला प्रमाणे वर्ग - ३ चा संवर्गनिहाय प्रस्ताव प्राप्त झालेला आहे.

अ.क्र.	प्रस्तावाचे स्वरूप	प्रस्तावातील एकुण संख्या	संवर्ग कृ.प
१	म.मंत्री महोदय शिफारस	२	२
	एकुण	२	२

याबाबत कृषि आयुक्तालयाचे अभिप्राय संवर्गनिहाय पुढील प्रमाणे सादर करण्यात येत आहे.

(ब) नाशिक संभागाकडून प्राप्त कृषि पर्यवेक्षकांच्या बदली बाबतचा प्रस्ताव विचारात घेता अधिनियम - २१ मधील प्रकरण - दोन मधील कलम ४(५) नुसार संबंधिताच्या बदल्या करण्यास मान्यता देण्यात येत आहे.

मा.आयुक्त कृषि यांचे मान्यतेने

कृषि सह संचालक (आस्था)
कृषि आयुक्तालय, महाराष्ट्र राज्य, पुणे-५

This file also does not refer or contain any application with medical certificate from the private respondents.

Even in entire file no reference to the name of private respondents. In this file only two names figure i) Shri Shinde ii) Shri Damdhere

File from Mantralaya Department:

Documents : available are i) Original of letter of OSD dated 23.05.2007 with list of 47 Agricultural Supervisor to be transferred as directed by the Hon'ble Minister. ii) Original letter of OSD dated 16.05.2007 with list of 11 Agricultural Supervisors whose transfers are recommended by political personalities.

1) Letter dated 16th May 2007 and 23.05.2007 by S.D.O along with lists

A) 16th May 2007 -11, Agriculture Supervisor with the recommendation

in Respect of Shri Kakad, private respondent's recommendation is by Shree Suresh Jagganath Thorat, Member, P.S., Sangamner.

105. On going thorough the three files coupled with the contentions raised by Shri Lonkar, Learned Advocate for both the applicant, we come to the conclusion that :

i) Both private respondents are not due for transfer

ii) The place or post on which the private respondents desired to be transferred and posted is occupied by the Supervisors, who are not due for transfer, as such they can not be transferred.

iii) Cases of private respondents for transfer can be considered U/s 4 (5) and approval for it was solicited.

iv) Along with this letter copies of the applications are forwarded to Directorate, but surprisingly the copies of the so called request applications from the private respondents are not available in it.

106. Consequently, we hold that the transfer of the private respondents are in total defiance of the Act. These are orders not passed in any public interest, administrative exigencies as tried to be impressed upon us, but are issued as private respondents who had approached or taken help of politicians/persons in power to seek the transfer or posting of their choice. Thus they are effected in arbitrary, colourable exercise of power opposed to rule of law and policy spelt out by the Act. In

effect the order dated 31st May 2007 transferring the applicants and posting private respondents is in total defiance of statutory mandate as such bad in law and issued on extraneous consideration. Thus the order dated 31.05.2007 is bad in all sense.

107. Having considered the historical background the relevant provisions of the Act, the law declared by the Apex Court, the pleadings of the parties, record and the learned and useful submissions of the learned counsel, the stage has come to record our conclusion. Accordingly, we record our conclusions in two part; first part will be about the true intent of the Act, second on factual aspect, re-challenge to orders of transfer.

Part-I

i) Fixed tenure of a government servant at a particular post is 3 years for all groups.

ii) The tenure of 6 years, as referred to in 1st proviso dealing with the government servant, implies that in non secretariat service he shall be transferred from that office-department on his completing two full tenures there. In other words, he may be transferred to a post within particular office or department on completion of 3 years in that office and out of that office or department on completion of two tenures i.e. 6 years.

Arjman

iii) Preparation of list of government servants every year due for transfer in month of January is condition precedent to effect transfers in April/May which in common parlance, are called as general transfers.

iv) General transfers will be in respect of the list of those government servants figuring in the list and none else.

v) The list so prepared being final one in terms of section 4(3), no modifications or alterations are permitted thereafter.

vi) The list so prepared, will be valid till the orders of transfers are issued in pursuant to that list.

vii) There are no provisions contained in the Act to receive or entertain any representation or request for transfer once the list is finalized. However, before preparation of the list of the government servants in January, due for transfer, the competent authority may direct the head of office to apprise such government servant, due for transfer in April/May. In such eventuality a particular government servant whose name is to be included in the list as he/she has completed tenure of 3 years at a post makes an application or representation for or against proposed transfer the same may be considered, according to exigency or need of administration but in no case such request will be binding on the administration. Such representation may enable the competent authority

to appropriately post the person or extend the tenure having regard to the provisions of Section 5 of the Act.

viii) Any representation or request to the competent authority with any recommendations from an outsider, political, big wigs, Hon'ble Minister not in charge of such department, shall be summarily rejected and the Government servant indulging in such activities shall be firmly dealt with in accordance with conduct rules.

ix) In case any application or representation is received from a government servant, due for transfer, such shall be only addressed to the competent authority and shall be made through proper channel only.

x) Any application sent directly to any of the Mantralaya Department or Hon'ble Minister not concerned with the department shall not be entertained at any level.

xi) On receipt of such application by the competent authority, the competent authority having regard to provisions of Section 4(4), 1st and 2nd proviso r/w Section 4(5) of the Act shall consider that application and find out prima facie whether the reason or cause for transfer or non transfer from one post to another or retain at that place is genuine and just, then having regard to administrative exigencies, needs, availability of post etc. on the back drop of statutory provision, contained in Section 4 of the Act, that too after scrupulously adhering to

it, may entertain such request, representation, then order of transfer be issued.

xii) In case such request of the government servant for transfer is received and it does not fit in to the statute, it shall be rejected and it shall not be necessary to intimate it to the concerned.

xiii) The power or authority of delegation as envisaged in Section 6(1), 2nd proviso only in respect of Section 6 of the Act and that delegation shall not apply to Section 4 or Section 5 of the Act, unless specifically delegated.

xiv) In case the delegatee after the delegation by the competent authority as provided in second proviso to sub section (1) of Section 6 encroaches upon the areas covered by section 4 that will be illegal and void ab initio, without specific delegation.

xv) Preparation of list under Section 7 of the Act and notification of it shall be for the purpose of effecting actual transfer and posting and for no other purpose.

xvi) Consultation as envisaged and referred to in Section 4 and Section 6 of the Act shall be meaningful, real and effective. Superficial action in that behalf shall be avoided.

xvii) Reasons to be recorded as required by clause (ii) of proviso to sub section (4) of Section 4 and sub section (5) of Section 4 of the Act being mandatory, non recording of reasons shall vitiate the ultimate order.

xviii) Reasons to be recorded as required by 4(4) proviso, clause (ii) and Section 4(5) of the Act may generally not be referred to in the order of transfer. However, the same shall be invariably recorded in concerned file. Reasons so recorded should indicate due application of mind by the competent authority to the fact and situation and law.

Part II

i) The impugned orders of transfer are vitiated by non application of mind. The three files produced before us, do not contain the application submitted by the respondents, no material (documents) are in the file to justify the order nor they show that there was consultation as envisaged.

ii) No reasons as required by Section 4(4), 2nd proviso or Section 4(5) are recorded.

iii) Transfer orders of private respondents are issued at the behest and/or intervention of the political leaders having no connection with administration.

iv) The documents annexed with the reply by the respondent nos.1 to 3 (i.e. medical certificates etc.) are not in the file placed before this Tribunal.

v) From the dates of issue of medical certificates annexed to reply by the State authority they appear to have been obtained to justify the action of transfer.

vi) The transfer orders are vitiated by arbitrariness and issued not on administrative exigencies but on the basis of recommendation of Hon'ble Minister.

vii) Orders of transfer do not come under any of the contingency or circumstances as indicated in Section 4 and 5 of the Act. Thus, those orders are issued contrary to law and are as such illegal.

108. For the reasons and conclusions supra, in the result, both Original Applications are allowed. Impugned orders of transfers are set aside with no order as to cost.

109. Before parting, we direct the Principal Secretary of Respondent no.1 to hold an enquiry against the officer, who has filed and verified the reply on behalf of respondent nos.2 and 3 by producing the medical certificates on the record of original application, when the

same are not in any of the file. Producing those documents indicate that the deponent is intending to help the private respondents.

110. Three files produced before this Tribunal are returned to Shri D.B. Khaire, learned Chief Presenting Officer.

111. Registrar of this Tribunal is directed to forward copy of this judgment to:

i) Additional Chief Secretary (Services), General Administration Department, Mantralaya, Mumbai

ii) Principal Secretary, Agriculture, Animal Husbandry, Dairy Development and Fisheries Department, Mantralaya, Mumbai.

iii) Benches of this Tribunal at Nagpur and Aurangabad.

Sd/-

(R.B. Budhiraja)
Vice-Chairman
4.10.2007

Sd/-

(A.B. Naik, J.)
Chairman
4.10.2007

Date : 4th October 2007

Dictation taken by: S.G. Jawalkar.

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IN THE MAHARASHTRA ADMINISTRATIVE TRIBUNAL

MUMBAI BENCH

ORIGINAL APPLICATION NO.376 OF 2007

DISTRICT : NASHIK

Shri Murlidhar Changdeo Patil, ..Applicant

Versus

Government of Maharashtra & Ors. ..Respondents

WITH

ORIGINAL APPLICATION NO.377 OF 2007

DISTRICT : NASHIK

Shri Ravindranath Kashinath Patil, ..Applicant

Versus

Government of Maharashtra & Ors. ..Respondents

Common appearances in both the matters:

Shri M.D. Lonkar – Advocate for the Applicants

Shri M.B. Kadam – Presenting Officer for the Respondent Nos.1 to 3

Shri M.R. Patil – Advocate for Respondent No.4

CORAM : Shri Justice A.B. Naik, Chairman

Shri R.B. Budhiraja, Vice-Chairman

DATE : 4th October 2007

PER : Shri Justice A.B. Naik, Chairman

ORDER

1. After we pronounced the order, in these O.As. the learned counsel for the applicants Shri M.D. Lonkar submitted that as the impugned orders are set aside by this Tribunal, consequent the order of posting of the applicants to their original post is required to be passed by the authorities and for that matter Shri M.D. Lonkar submitted that specific time be given to the respondents to pass orders posting applicants to their original post. There is no difficulty in accepting this contention.

2. Having accepted it, we direct the respondents to pass an order within two weeks from today posting the applicants at their original posts.

Sd/-

(R.B. Budhiraja)
Vice-Chairman
4.10.2007

Sd/-

(A.B. Naik, J.)
Chairman
4.10.2007

Date : 4th October 2007

Dictation taken by: S.G. Jawalkar.

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IN THE MAHARASHTRA ADMINISTRATIVE TRIBUNAL
MUMBAI BENCH

DISTRICT : KOLHAPUR

ORIGINAL APPLICATION NO. 459 OF 2006.

Dr. Tulsidas Abarao More)
Aged Adult, Occ. Govt. service as District Health)
Officer, Zilla Parishad, Kolhapur, R/o. T2, Shivtirth)
Apt., Ambai Tank Area, Kolhapur.)... Applicant

Versus

1. The Principal Secretary, Public)
Health Department, Mantralaya, Mumbai 400 032)

2. Dr. D.A. Patil, Aged about, Occ. Govt. service)
as Principal, Health & Family Welfare, Training)
Centre, Kolhapur.)... Respondents

Shri A.V. Bandiwadekar Advocate for the applicant.

Shri D.B. Khaire Learned Chief Presenting Officer for the Respondent No.1.

Shri M.D. Lonkar Advocate for the Respondent No.2.

Coram : Justice Shri A.B. Naik (Chairman)

Date : 22.9.2006.

O R D E R

By this application filed under Section 19 of the Administrative Tribunals Act, 1985. The applicant has challenged the order dated 4.8.2006. (Exh. 'A') on factual, and legal malafides, and also on the ground of violation of the provisions of the Act 2005 (to which a reference will be made at relevant place). The applicant in order to challenge that order on the

ground of factual/legal malafides has made for following averments, which reads thus :-

"6. The petitioner has reliably learnt that when the Respondent No.2 moved the Respondent No. 1 for choice posting in place of petitioner and that too within a period of two months of his present post at Kolhapur, that the Respondent No.1 declined to show any favour and accordingly made his intention clear on the concerned file, stating therein that the petitioner is not due for transfer in terms of recently promulgated rules of 2005 and therefore consequently, the Respondent No. 2 cannot be transferred in place of the applicant. The petition however states that for the reasons best known to the Respondent No. 2 he could succeed in getting himself transferred in place of petitioner vide impugned order. Thus the said order is out rightly mala fide, arbitrary and illegal, more particularly when the petitioner has reason to believe that such order was an outcome of tremendous political pressure exerted by Respondent No. 2 upon the concerned Hon'ble Minister for Health so also upon the Hon'ble Chief Minister, without which the political pressure the impugned order of transfer could not have seen the light of the day.

7. That in fact, even otherwise, the impugned order of transfer does not fall within the exceptions carved out under 4(4)(i) or 4(4)(ii) or 4(5) of the said rules. The petitioner states that in the facts of the present case as stated above, it is crystal clear that the by no stretch of imagination the impugned transfer order could be said to fall under any of the aforesaid three exceptions. This is because, admittedly, hardly

two months before the Respondent No.2 came to be transferred on administrative ground by Respondent No.1 from Satara to Kolhapur and he having joined at Kolhapur as Principal, Health & Family Welfare Training Centre, Kolhapur, there was no reason for hi to make any request to the respondent No.1 for being transferred that too in Kolhapur itself (at the distance of 2 Ks. away) and that too by dislodging the petitioner and posting him in the place of Respondent NO.2 when the petitioner was not due for transfer. That according to the petitioner, the Respondent No.2 has not at all made any request application to the Respondent no. 1 (whether through proper channel or directly) making out his strong case for transfer within the four corners of aforesaid three exceptions. That apart, even the Respondent No.1 cannot justify to treat such impugned transfer order so as to bring the same within any of the three exceptions by treating the same as being an order of transfer being based on special reasons or in exceptional circumstances or as a special case, that too by recording reasons in writing on the file or otherwise ".

2. Thus the applicant by making the allegations quoted (supra) has attributed that the order dated 4.8.2006 has been issued not on the administrator needs or exigencies, but it is issued only on the wish of political personality, thus, the order being mala fide, arbitrary and illegal. Second ground of attack is that after the enforcement of Maharashtra Government Servants Regulation of Transfers and Prevention of Delay in Discharge of Official Duties Act, 2005, (herein after referred to as 'the Act',

the transfer of the government servant has to be made in strict compliance with the provisions of the Act, that too only after following the procedure envisage in the act. It is the contention that the transfer order under challenge in this application is issued without following the mandatory provisions of the act. Thus it is in violation of statutory provisions.

3. Respondent No. 1 having filed affidavit-in-reply by Shri S.V. Kolekar, Under Secretary in Public Health Department, Mantralaya, Mumbai, supported the order by contending that the transfer of the applicant has been effected strictly in accordance with the provisions of the Act and in particular by following the procedure as laid down by Section 4(5) of the Act. It is contended that Section 4 Sub-section (5) empowers or authorizes the competent authority to order the transfer of a government servant even before the complication of his tenure of 3 years at a post and as such in exercise of that power the transfer is ordered. In other words the Respondent No. 1 supported the order by contenting that it is effected strictly according to the provisions of the Act.

4. Respondent No. 2 has filed his reply, opposing the claim of the applicant by taking specific contention and explained why he was transferred by the impugned order. He contented that the application requires to be

dismissed as the applicant has suppressed number of material facts from this Tribunal, as a matter of fact it is the applicant who brought pressure on the authorities by approaching political bigwigs only with an object or intention to stick up to the post of District Health Officer, Z.P., Kolhapur as such he cannot make any grievance on that ground. It is contended that alleged breach of the statutory provisions are not enforceable in court of law. It is contended that the applicant is transferred from one post to another which is situated in Kolhapur itself, both post or offices are within radius of one km. only as such even if the applicant or for that matter, the Respondent No. 2 join those post no prejudice will be caused to any one or even it will not disturb or create any problem on family front nor they are required to shift or change their residence. It is averred that the applicant's performance as District Health Officer, Zilla Parishad, Kolhapur was not satisfactory, inasmuch as, the applicant was unable to handle the pressure work or complete the targets set out by the department. Thus it is averred by the Respondent No.2, that on this count the applicant came to be transferred from that post, I will test this contention/submission at this stage itself whether the Competent Authority or for that matter the Respondent No.1 who is unknown of these aspect has supported the order on this premises or ground. Respondent No.1, who is a Competent Authority to order a transfer of

officers like applicant and the Respondent No.2, has not raised such contention, even not remotely there is any suggestion in the reply in that context. If the contention/submission as advanced by Respondent No.2, was in fact existed then the Competent Authority, could have referred to this aspect in the reply or by producing contemporaneous record, to support or justify the order on that ground, but Respondent No.1 has not said anything of this sort, as such in my opinion, the contention/submission that is made by Respondent No.2 only with oblique intention. Thus I reject the contention, and need not probe into it any further.

5. To resume further averment/submission of Respondent No.2, who contended that the present application is bad for non-joinder of necessary party. It is contended that Director of Health Services is a necessary party, in view of the provision, made in Section 4 Sub-section (5) of the Act. The Director being preceding authority of the Competent Authority, whose approval or permission is necessary for transferring the applicant as well as the Respondent No.2. In this way it is submitted that this application be dismissed at the threshold, it is a submission that the presence of Director is necessary, to find out whether there exists any special case and his prior permission is obtained as required by the act. In other words, a special

Approach

circumstances may be there which may be in the know of the Director, that probably have been placed before the competent authority, and on being satisfied about the special case the order might have been issued. Thus to bring these aspect before this Tribunal, the Director is necessary party. This contention is also not available to Respondent No.2 as the Respondent No.1 i.e. Competent Authority has not justified the order on these grounds. If that is a fact in existence then the Respondent No.1 definitely would have referred to in the reply or by producing relevant record justified the order thus in my opinion that Respondent No. 2 has raised this allegation without any foundation or any material to substantiate this contention. Thus the same is rejected.

6. It is contended by Respondent No.2 that the applicnt is mixing different issues in this application which has hardly any relevance to judge the validity of the order dated 4.8.2006. The Respondent No.2 has come with categorical statement about the fact of his meeting with Hon'ble Speaker of the Assembly at Satara, who expressed his desire that Respondent No.2 is to be posted as District Health Officer, Zilla Parishad, Kolhapur. The Respondent No.2 has disclosed this aspect by contending :-.

Abmai

"9. I further submit that even during May 2006, I was not due for transfer, inasmuch as, I had not completed normal tenure of three years in the post at Satara. Incorrect statement is made by the petitioner in paragraph 6.5 that I was due for transfer and therefore, was transferred form Satara to Kolhapur. Fact, however, remains that I came to be transferred from Satara to Kolhapur and as an obedient Government servant I immediately accepted the said posting by resuming my duties. At this place it would be worthwhile to mention that Hon'ble Speaker of the Legislative Assembly, Shri Babasaheb Kupekar personally met me while I was posted at Satara in the month of April 2006 and apprised me of his desire to post me as District Health Officer, Zilla Parishad, Kolhapur, considering my past service record. In my submission, that is how the issue of my transfer to the present post of DHO was set in motion before the authorities. It seems that the recommendation of the Hon'ble Speaker were not considered for some or the other reason which rather compelled the Hon'ble Speaker to convene a meeting, in which the Hon'ble Minister holding the portfolio of Health, Respondent No.1, so also the Director of Health Services were directed to remain present. The said meeting was held on or about 29.6.2005. In the said meeting the issue of my transfer and posting as DHO, Zilla Parishad, Kolhapur was discussed and after considering the pros and cons, a decision was arrived at to transfer me in the post held by the petitioner. It is therefore evident that decision to transfer me to the post of DHO, Zilla Parishad and petitioner to the post of Principal was crystallized on 30th June, 2006. Formal order however came to be issued on 4th August, 2006. Without prejudice to the

aforesaid contention, I submit that before deciding to post me in the post held by the petitioner, special circumstances were set out, approval/recommendation of the preceding authority to transferring authority i.e. in the present case Director of Health Services was considered and approved. No only this, prior approval of the Hon'ble Chief Minister also came to be obtained and it is only thereafter the order of transfer came to be issued. It is therefore evident that the order of transfer has been issued within the four corners of the statutory provisions and no case is made out by the petition seeking judicial intervention. It is also important to note that the provisions of Sec. 4(5) starts with a non-obstentate clause, giving overriding power to the concerned authority to transfer a Government servant from one place to another, irrespective of whatever stated in the other provisions of the said Act". (underlined by me)

The Respondent no.2 though denied the fact that he has indulged in bringing any political pressure on the authority but on the other hand he has explained that Hon'ble Speaker of Assembly on his own expressed desire that the applicant should be posted as District Health Officer, Kolhapur. He contended that neither the Hon'ble Minister for Health Services nor the Hon'ble Chief Minister, have been impleaded as parties in this application, in view of the allegations made by the applicant, as they are not before this Tribunal, thus it is contended that, that the averments or allegations made by the applicant to that effect may not be gone into by this Tribunal, as Hon'ble

Ministers can only refute or rebut that allegation. The Respondent No.2 has contended that the applicant in fact has approached Shri Jaywant Patil, The Hon'ble Minister in the State Cabinet and at his instance he secured the posting of his choice, but however no authentic material, or specific instances are brought on record by him thus no importance can be attached to this contention, he has also taken usual contention about the scope and ambit of jurisdiction of the Court/Tribunal in considering the challenge to the transfer orders issued by the Competent Authority, and prayed for dismissal of this application.

7. The applicant filed a rejoinder to the replies filed by Respondent Nos. 1 and 2 and contraverted all the adverse averments made by them. Respondent No. 2 by filing sur-rejoinder he has produced some documents to demonstrate before this Tribunal that his performance as District Health Officer or Medical Officer wherever he worked being good and appreciated. In my judgment all these documents being irrelevant to consider the points raised in this application.

8. The contentions raised or averment made by the applicant and by the Respondent No.2 being words again words, they both are claiming that other has brought political pressure on the authorities to seek the posting of choice,

thus I had to find out from the file produced by Shri Khaire, Learned Chief Presenting Officer, at the time of hearing of this application about the factual aspect i.e. who has brought political pressure on the authority, in seeking favourable posting, however, it depends on, how the Respondent No. 1 while passing the order has reacted or whether Respondent No.1 exercise the authority or power uninfluenced by any such consideration, or acted independently and passed the order in the interest of the administration or as situation demands and that too adhering to the provisions of the Act. I will advert to this aspect, little later.

9. Now a days this Tribunal is coming across number of cases involving transfers of Government servant, that the transfers are issued or effected at the behest of political personalities and at times the authority-in-charge, yield or succumb to that pressure, unwillingly. This tendency is still in vogue in spite of the introduction of the legislation governing the regulation of transfer of Government servants.

10. First I have to consider the validity, legality and propriety of the impugned transfer order also on the backdrop of the statutory provisions. Till the present legislation the transfer orders were effected or regulated by or under the executive directions issued by the State Government or other

Competent Authorities in charge of administration but in view of the introduction of the legislation covering the transfer of Government servant it is necessary to me to consider the various statutory provisions, as all the learned counsels for the parties have made elaborate submission, by referring the various provisions of the Act.

11. Prior to the introduction of the present legislation, i.e. the Ordinances and the Act, the field was occupied by the circulars or regulations issued by the Executives under Article 162 or Rules of Business framed under Article 166 of the Constitution of India. For the first time in the year 2003 a need was felt by the State Government to have a comprehensive legislation on the question of transfer of the government servant, thus, the Governor of Maharashtra having satisfied that the need was felt to take immediate action to meet the situation thus in exercise of power conferred upon him by Sub-clause (1) of Article 213 of Constitution of India. The Governor of Maharashtra promulgated, the Maharashtra Government Servants Regulation of Transfers and Prevention of Delay in Discharge of Official Duties Ordinance, 2003. The said ordinance was promulgated on 23.8.2003 and it came into operation with immediate effect.. In view of the mandate of Article 213 (2) (a), the ordinance was required to be converted into the Act of

legislature by requiring bill to be tabled before the Assembly. Accordingly the LC Bill No.XV of 2003 called as Maharashtra Government Servants Regulation of Transfers and Prevention of Delay in Discharge of Official Duties Bill, 2003 was introduced in the Legislative Council on 17.12.2003. When the bill was tabled the council has adopted the motion for referring it to the joint committee of both the houses, and accordingly the bill was refereed to the Joint Committee of the Legislature. As the bill was referred to the joint committee, the Ordinance which was issued on 23.8.2003 could not be converted into the Act, visualizing this situation that the bill which was introduced could not be passed in that Session, as such a situation arose to repromulgated that Ordinance as such again, the Governor of Maharashtra by invoking the power conferred on him by Article 213 of the Constitution of India again promulgated the Ordinance being Ordinance No.1 of 2004 thereby continuing the provisions contained in Ordinance of 2003 and the provisions of Ordinance No. 1 of 2004 were deemed to have come into force from 25.8.2003.

12. Prior to these Legislations, the transfers of the Government servants admittedly were regulated or effected on the basis of the guidelines or executive instructions issued from time to time by superceding all those

earlier guidelines, a comprehensive guidelines was issued by Circular, i.e. General Administration Department No. SLV-1097/CR.20/97/XII a dated 27.11.1997 and by another circular dated 7.2.1998. In spite of these circulars, it was noticed by the Government that those circulars were not followed scrupulously at the various levels, in the administrative department and did not have desired effort. Thus need was felt by the Government to ensure strict compliance with the transfer policy. The State Government to have a legislation for regulating transfers of all government servants thus the Bill, referred to above was introduced and after the report of the Joint Committee the Bill which was introduced in the State Assembly was adopted and the Act being Act No. XXI of 2006 called as Maharashtra Government Servants Regulation of Transfers and Prevention of Delay in Discharge of Official Duties Act, 2005 came to be passed accordingly. After the passing the Act and it was sent for the assent of the Governor of Maharashtra. Having received assent to it, the Act was published in the Government Gazette on 12.5.2006 though the act was published in Government Gazette on 12.5.2006 the date of implementation, was not published. Therefore, in terms of sub section (2) of Section of the Act by a notification published in Government gazette the date of commencement was published as such the Act came into force with effect from 1.7.2006 and from that date all the

transfers of the government servants has to be effected or required to be made or regulated by or under the provisions of the Act.

13. Before adverting to the merits of the contentions of the learned counsels on the point of various provisions of the act it will be expedient to take note of various provisions contained in the act and to know true intendment of the Act, i.e. i) what was the situation prior to the passing of the act ii) what mischief or default were noticed before introduction of the Act iii) whether it is remedical. Presently I am dealing with an application transfer order issued by the State Government transferring the applicant is challenged, thus, I will refer to the relevant provisions dealing with transfers. The act consist of four chapters, the relevant chapters for my consideration being Chapter 1 to 3.

The Preamble of the Act reads:-

"An Act to provide for regulation of transfers of Government servants and prevention of delay in discharge of official duties".

Application of the Act :-

"This Act applies to all Government servants in the State services as referred to in Sub-section 3 of the Section 1 of the Act. Section 2 of the Act

contains the definition clauses. The material and relevant clauses of definition being :-

2(b) "Competent authority" means the appointing authority of the Government servant and shall include the transferring authority specified in Section 6;

Clause (i) 'Transfer' means posting of a government servant from one post, office or department to another post, office or department.

(j) "Transferring Authority" means the authorities mentioned in Sec. 6.

So far the present case is concerned though the applicant and Respondent No.2 are posted in Kolhapur City only, but in fact is transfer, as defined in clause (j) of Section 2 of the Act. Both the counsels accepted that the order is passed by the Competent Authority as defined under Clause (b) of Section 2.

Chapter II of the Act deals with the tenure of posting, transfer and transferring authority. Section 3 deals with tenure of posting which read thus :-

3(1) For All India Service Officers and all Groups A, B and C State Government Servants or employees the normal tenure in a post

shall be three years." (Rest part of the Section not taken as it is not relevant)

Then Section 4 which deals with tenure of transfer as all the learned counsels made submissions on the basis of this section, it will be appropriate to reproduce Section 4 of the Act.

"4 (1) No Government servant shall ordinarily be transferred unless he has completed his tenure of posting as provided in Section 3.

(2) The Competent Authority shall 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.

(3) 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 finalised 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:

Provided that, any dispute in the matter of such transfers shall be decided by the Chief Minister in consultation with the Chief Secretary.

(4) The transfers of government servants shall ordinarily be made only once in a year in the month of April or May.

Provided that, transfer may be made any time in the year in the circumstances as specified below, namely :-

(i) to the newly created post 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 ;

(ii) 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.

Section 5 which deals with extension of tenure as that question as it is not involved in this application. Thus it is not taken. Then come to Section 6 which deals with transferring authority. Section 6 reads thus :-

"6. The Government servants specified in column (1) of the table hereunder may be transferred by the Transferring Authority specified against such Government servants in column (2) of the table".

TABLE

Group of Government Servants (1)	Competent Transferring Authority (2)
(a) Officers of All India Services, all Officers of State Services in Group "A'" having pay-scale of Rs.10,650-15,850 and above	Chief Minister
(b) All Officers of State Services in Group "A" having pay-scales less than Rs.10,650-15,850 and all Officers in Group "B"	Minister-in-charge in consultation with Secretaries of the concerned Departments.
(c) All employees in Group "C"	Heads of Departments.
(d) All employees in Group "D"	Regional Heads of Departments

Provided that, in respect of officers in entry (b) in the table working at the Divisional or District level, the Divisional Head shall be competent to transfer such officers within the Division ; and the District Heal shall be competent to transfer such officers within the District :

Provided further that, the Competent Transferring Authority specified in the table may, by general or special order, delegate its powers under this section to any of its subordinate authority.

Section 7 requires that a lost if Competent Authority is to be published; Section 7 reads :-

"7. Every Administrative Department of Mantralaya shall for the purposes of this Act prepare and publish a list of the Heads of Departments and Regional Heads of Departments within their jurisdiction and notify the authorities competent to make transfers within their jurisdiction for the purposes of this Act".

14. Shri Bandiwadekar, Learned Advocate for the applicant contended that unless and until the list as required by this Section i.e. Section 7 is published and the authority is notifies the Competent Authorities, no transfer can be ordered. I see no substance in this contention as it is irrelevant for the point at issue raised. If one look at Section 6, the Competent Authority is designated. It is not disputed that for the transfer of applicant and the Respondent No.2, authority referred to in Clause (b) of Group of Government Servants in the table is the Competent Authority thus the contention about notifying the authority as per Section 7, raised by Shri Bandiwadekar being irrelevant need not be gone into the facts of this case.

15. Section 14 of Chapter IV under title Miscellaneous makes a provision for making rules to carry out the purpose of this act. However, Shri D.B. Khaire, Learned Chief Presenting Officer states that the rules as envisaged under Rule 14 are not ye made, be it as may no submission on that count are advanced before me. In the present proceedings and noting will turn or

depend on framing or non-framing of the Rules having gone through the various provisions of the Act. From the provision referred to above, after the act came into force, the transfer of a government servant is to be effected in accordance with the provisions of the act. Before proceeding to consider the merit of the contention, all the counsels are in agreement, about competency of the legislature to enact the present Act.

16. As the subject matter of the present controversy being a "transfer of a government servant" thus I have to trace out whether the act creates any right in favour of a government servant so as to give a government servant to challenge the same and seek enforcement of that right by approaching this Tribunal. There are number of judicial pronouncements dealing with the questions regarding transfer of the government servants and their rights most of those judgments are based on the challenges to transfer order which were effected in contravention of the executive guidelines, issued under Article 162 of the Constitution of India or circulars issued by the incharge of the administration to transfer a government servant, that power to effect the transfer by the competent authorities is recognized and accepted by numbers of judicial pronouncements, where it is held that any breach of such guidelines or circular, are not enforceable by the Courts or the Tribunal.

From the judicial pronouncement dealing with the challenges to a transfer order issued by the Competent Authority, transferring a servant or employee, following aspects are to be kept in mind, while exercise, the jurisdiction of judicial review of such order. Those are viewed as :-

(a) A Government servant holding or appointed to a transferred post has no vested right i.e.

i) To claim that he may be posted at the particular place or other

ii) During his service tenure he is liable to be transferred from one place to another.

(b) An order of transfer is an incident of service.

(c) The Government servant has no choice to select the post or place.

(d) He has no right to say that some other government servants be transferred to other or a particular post or place and place or post him in that post..

(e) Under service rules, governing the condition of their services they are full time government servant and liable to be transferred anywhere in State of Maharashtra

(f) If the transfer made in the administrative exigencies or reasons, normally the Court or Tribunal will not interfere with it.

(h) No government servants has any legal right to be posted forever at any one particular place, since transfer of a government servant to a transferable post from one place to another not only incident of service but condition of service placing of a particular government servant, is within the domain of the administrative authority who are in known of i) situation ii) efficiency of a particular government servant etc.

(i) Transfer always necessitated with i) Public interest ii) Efficiency in the public administration, iii) Need to post a particular government servant having regard to his/her expertise or eligibility etc..

(j) Transfer of a public servant made on administrative ground or public interest should not be interfered with unless there is strong and reasons that the transfer order is illegal on the ground of i) violation of statute or rule ii) or is tented with mala fides or colourable exercise of power.

Though the parameters, (supra) mainly based on consideration of challenge to a transfer order, effected or issued on the basis of executive instructions, guidelines etc. but still those aspect can be considered as a guiding features to judge the challenges to the transfer order issued under the terms of the Act. After noticing the parameters or arena the Court or Tribunal can or cannot travel.

17. I will now consider the factual aspect about which there is no controversy. In the impugned order, there is a reference, that the order is being issued on the request of the applicant, if it is established and proved that the impugned transfer order is issued on his request, then I need not go into the questions raised before me, if it is not established that the applicant has not requested for his transfer, then the questions will have to be gone into. The order dated 4.8.2006, is made part of paper book which reads thus :-

अ. क्र.	अधिका-याचे नांव व सद्याची पदस्थापना	सुधारित पदस्थापना
१.	डॉ. डी. ए. पाटील (Respondent No.2) प्राचार्य. आरोग्य व कुटुंब कल्याण प्रशिक्षण केंद्र कोल्हापूर	जिल्हा आरोग्य अधिकारी जिल्हा परिषद, कोल्हापूर (डॉ. मोरे यांचे जागी) (विनंतीनुसार)
२.	डॉ. टी. ए. मोरे (Applicant) जिल्हा आरोग्य अधिकारी जिल्हा परिषद, कोल्हापूर	प्राचार्य. आरोग्य व कुटुंब कल्याण प्रशिक्षण केंद्र कोल्हापूर (डॉ. पाटील यांचे जागी) (प्रशासकिय कारणास्तव)

(From the order reproduced above one gets an impression because of the word "विनंतीवरून " i.e. on request, that transfer is issued on request made by the applicant). Shri Bandiwadekar, Learned Advocate however disputed this aspect and challenged correctness of it, he contended that there is factual incorrect statement or reference is made in the order, in fact the applicant has

not asked either presently or in past for being posted or transferring him from the post of District Health Officer, Z.P., Kolhapur to Principal, Health & Family Welfare Training Centre, Kolhapur. He contended that assuming without accepting that the fact be correct then he submitted that Respondent No.1 should have said so in the reply and should have demonstrated in what manner or method the applicant requested the Competent Authority i.e. by making an oral request or by written representation, surprisingly nothing is brought on record by Respondent No.1 to establish the fact of request by the application to test this contention I have to examine the file produced before me. Having examining entire file minutely there is no application submitted by the applicant nor there is any other material to accept this fact that apart even there is no positive averment in the affidavit, filed by Respondent No.1 about the request of the applicant. Thus in absence of any material on record and on the background that the applicant has disputed the fact of his request, which is not contraverted by both the Respondents, thus I had to hold that the applicant has not made any request for his transfer from the post of District Health Officer, Z.P., Kolhapur and agreed to be posted as Principal on the other hand the record disclosed that in the letter written by the Hon'ble Speaker to the Hon'ble Minister for Health, there is a reference about the request made by the applicant, to which I will advert later on.

18. The Respondent No.2 has accepted that Hon'ble Speaker his meeting with Hon'ble Speaker expressed his desire, that Respondent No.2 should be transferred as District Health Officer, Kolhapur, and as such at his intervention the transfer order is issued and this being the factual position, emerging from record. As such the moot question being whether the Competent Authority after commencement of the Act, can order transfer of applicant, be it may be in Kolhapur City.

19. The Act was enacted for regulating the transfer of the government servant as such the transfers are to be regulated by and under this act. The act empowers the Competent Authority to transfer its subordinate under the provisions of this Act. The Act refers to the tenure which means :- " The normal tenure in the post shall be 3 years" Thus the Act specifies the tenure of a Government servant at a particular post or at a particular place at least for 3 years. Going by the provision of Section 3, it is clear that a government servant is to be retain at one place for a tenure of 3 years, thus retention of a government servant at a place for 3 years there is some sort of assurance in the statute itself to a government servant, but, however, one has to find out, whether that tenure is mandatory or just, a enabling assurance. This will have to be ascertain from the Section itself, in foregoing para. I had

reproduced Section 3 , the important words used in that Section, being the word 'normally' is used in this Section followed by word 'shall'. Thus what is the importance of these two words in the Section is to be ascertain, thus I will first ascertain the literary meaning of word 'normally'. Word 'normal' is adjective and term "normally" being adverb the plain or dictionary meaning of word 'normal' mean – in accordance with an established law, or conforming to a type a standard, regular, natural, constituting a standard made, designating a condition, the word 'normally' as used in the Section being adverb, which denote a usual or accepted rule or process, normally is synonymous; as usually or normal. Thus it is in general, as a rule, on the whole, or by and large, or more often, than not, 'as normal' 'as usual' naturally 'conventional'. Thus going by the dictionary or popular meaning, followed by word 'shall' thus the tenure of 3 years has to be treated being as mandatory, or by and large which again depending not upon the meaning but the intention of the legislature to use these two words. That intention can be not merely from the words used by the legislature but from variety of other circumstances and consideration prevailing at that time. The circumstances to ascertain the intention of legislature to interpret the 'tenure' of 3 years has to be gathered. As I had notice from the object and reason appended to while promulgating the Ordinance indicates that the resolution,

circulars etc. (probably those having no force of law and cannot be enforced by the Courts or Tribunals) could not get designed result, thus the legislation is intended to define a tenure of 3 years, for fixing this tenure of 3 years at a place is with a designed intention, being, that a government servant to be retained in a post at least for a period of 3 years, so as to have some sort of stability, certainty, to gain experience, bear responsibilities of the post etc., which this vivid object the tenure of 3 years is introduced, which has to be construed being mandatory or compulsory, and a government servant in normal course is not liable to be transferred unless a government servants completes 3 years tenure at a particular post, that is why the legislature have used word 'normally' followed by 'shall'. This conclusion of mine also gets support from the next section i.e. Section 4, which says that "no government servant shall ordinarily transferred unless he completes his tenure of 3 years". Thus both Section 3 and 4(1) refers to the tenure of 3 years, as such that much tenure is assured to the Government servant, by the statute and in this way a right is created in favour of a government servant. Thus by considering section 3 r/w S. 4(1) together it leads to inevitable conclusion that a government is normal course shall not be transferred from one post till he/she completes 3 years tenure/posting at a particular post and any transfer before completion of that tenure, gives a right to say that, such transfer is

contrary to law, and he has a claim to be retained at a particular place at least for 3 years.

20. But that is not end of it, the Legislature are aware that a situation may arise when a government servant is required to the transferred before he/she completes his or her tenure of 3 years at a post/place, thus the Legislature in Section 4 itself has made such provisions and laid down a procedure to effect the transfers before completion of the tenure of 3 years. This aspect now to require to be considered as this aspect is center of controversy..

21. As stated above, Section 3, of the Act deals with tenure of posting. Section 4 of the Act deals with tenure of transfer, meaning thereby retaining a government servant at a particular place till he or she completes 3 years in a post. Section 4(1) opens with word 'no' and followed by the sentence "shall ordinarily be transferred unless he completes his tenure as referred to in Section 3 of the Act" bare looking at this part of the sentence it indicate that the 3 years tenure being imperative, meaning thereby to have fixed tenure for a government servant at a particular post. Thus conjoined reading of Sections 3 and Section 4(1) of the Act leads to an inevitable conclusion that the normal tenure of posting and transfer had to be 3 years at a place, to buttress my views, following well known rule of construction can be pressed

in service, and, the inference can be drawn from the negative language used in the statute, (as said by Craise : Statute Law 6th edn. P.263). "If the requirement of the statute which present the manner in which same thing is to be done, are expressed in negative language that is to say if the statute enacts it shall be done in such a manner, and in no other manner it has been laid down that those requirements are in all cases absolute and that neglect to attain them will invalidate whole proceeding". To this known cannon there is an exception i.e. a contrary is indication is in the statute itself, that can be gathered by referring to further provision of the Section 4(4) proviso, clauses (i) (ii) in Section 4 of the Act. The Legislature by using words 'No' 'Shall' and 'Ordinarily' made its intention clear that a government servant, shall not be transferred, unless he/she has completed his/her tenure, here again the use of word 'Completed' assumes significance, the use of word 'completed' used in past tense, which means a state of being 'completed', fulfillment, also synonyms – completion. As per dictionary meaning of completion i.e. the Act of completing or the state of being completed. Thus only on completion of 3 years tenure at a particular post a government servant can be transferred, otherwise not. This is the net result of the combined reading of Sections 3 and 4 (1) of the Act. But this being general rule it has also exception, what are those exceptions will be discussed herein after.

22. The Section 4, Sub-section (4) proviso (i)(ii) and Sub-section 5 of the Act provides an exception to the general rule contained in Section 3 r/w S. 4(1) of the Act as discussed above. Shri Khaire, Learned Chief Presenting Officer appearing for the Respondent No.1, while supporting the order, has contended that the impugned order is issued, by the Competent Authority, by resorting to the power conferred on the Competent Authority, by virtue of Sub. 5 Section 4 of the Act.

23. Shri Lonkar, Learned Advocate for the Respondent No.2 supported the contention of Shri Khaire, in addition to, he by taking support of Sect 4, (Sub-section 4) proviso clause (i), contended that the applicant is being transferred from the post of District Health Officer to the post of Principal which fell vacant on account of transfer of Respondent No.2 from the post of Principle, as such the present case is covered and protected by the exception carved out by Clause (i) of proviso of Sub-section 4, of the Act, this contention has to be considered on the backdrop of the facts on record. The fact as disclosed will not detain me to reject this contention of Shri Lonkar, by some order dated 4.8.2006, both have been transferred, thus when the order was issued, the post of Principal was not vacant, as such by no stretch of imagination one can contain that so far as the Respondent

No.2's transfer is concerned it is protected or covered by the exception of Clause (1) of proviso of Sub-section 4 of Section 4 of the Act.

"Now about Competent Authority and its Authority to order a transfer"

24. In case at hand the applicant and the Respondent No. 2 are the officers indicated in Part (b) of table of Section 6 of the Act, as such the competent authority being the Minister-in-charge as such the transfer has to be ordered by the Hon'ble Minister in consultation with Secretaries of the concerned department, by (ii) clause of proviso to Sub-section 4 of Section 4 of the Act read with Sub Section (5) of Section 4 of the Act , a power is given to the competent authority to transfer a government servant at any time in a year, even prior to completion of the tenure of 3 years, provided the circumstance referred to in Clause (ii) of proviso to Sub-section 4 and Sub-Section (5) of Section 4 are present and complied with. The Respondent No. 1 in reply it has stated that there is no breach of these provisions and the order is effected only after the procedure envisage in the section is followed. The Respondent No.1 placed strong reliance on Sub-section 5 of Section 4 of the Act. Let me consider this aspect. Sub-section (5) of Section 4 of the Act begins with a non-obstante clause, meaning thereby giving some kind of overriding effect to Sections 3 & 4 of the Act. Thus if the transfer is to be made by taking

recourses to either Sub-Section 5 and 4, proviso Clause (ii) r/w Sub-section (5) of Section 4 of the Act, then the procedure that is provided has to be followed. Whether the procedure is followed or not, is to be ascertain from the facts brought on record. This aspect ~~has~~ is necessarily a question of fact, thus, if the Competent Authority having regard to the circumstances, desires to transfer a government servant, before completion of tenure of 3 years then the required conditions to be complied with the conditions are (i) there is a special case (ii) prior recording reason for effecting transfer and (iii) obtaining prior permission of the immediately preceding Competent Authority. Thus on facts I have to find out, whether these conditions are fulfilled. Shri Khaire, Learned Chief Presenting Officer, contend that condition no. (iii) in the Sub-section is only directory and not mandatory and even if it is not complied, it will have no adverse effect on the order passed by the Competent Authority.

25. In Section 4 of Sub-section 5 an unusual phrase is used which reads **"with prior permission of immediately preceding Competent Authority"** in this case there is no dispute that the Minister-in-charge in consultation with Secretary of the concerned department being a competent authority, to order the transfer, then before effecting transfer by invoking Sub-section 5 of Section 4 of the Act, prior permission of subordinate has to be obtained in

the hierarchy of the department i.e. Hon'ble Minister-in-charge being Head followed by the Secretary of the department, then followed by Divisional Head etc.. The Competent Authority authority is the Hon'ble Minister and the Secretary of the department, than obviously the Director of Health Services, who is immediately preceding Competent Transferring Authority whose prior permission has to be obtained, thus, it sounds strange, as a higher authority has to rest its discretion or authority, and, to exercise it only after permission of its subordinate is obtained. Reading this provision in the Section it appears unusual, the Learned Chief Presenting Officer is not in a position to explain or demonstrate the purpose of this peculiar condition. That is why he contended that this requirement is only directory. Shri D.B. Khaire, Learned Chief Presenting Officer to substantiate this aspect has referred to the report of the Joint Committee. The committee has deliberated on this aspect i.e. permission it has noted several clauses in the Ordinance and in particular Sub Clause 5 of Clause 4 of the Ordinance as referred which reads thus :-

> "(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 permission of the (Government or the Chief Minister as the case may be) immediately preceding Competent

Transferring Authority mentioned I the table of Section 6 , transfer a Government servant before completion of his tenure of post".

26. In Clause 5 of the Ordinance the authority of whose prior permission is to obtain, being the Government or the Chief Minister with is perfectly correct position. When the bill was referred to the Joint Committee, the Joint Committee in its report about clause 4 sub clause (5) has suggested suitable amendment by making reference to the existing situation. Clause 4 of the report being relevant to understand the contention of Shri Khaire. The same is being reproduced :-

Clause 4 of the report as suggested by the committee reads thus :-

"(4) The transfers of Government servants shall ordinarily be made only once in a year in the month of April or May ;

Provided that, transfer may be made any time in the year in the circumstances as specified below, namely –

(i) to the newly created post 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;

(ii) 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". (Underlined by me)

27. Accordingly, the committee suggested that the transfer of a government servant prior to completion of normal tenure, prior permission of next higher authority is to be obtained, this sounds reasonable and logical also, if one looks at the table provided in Section 6, then the Hon'ble Chief Minister being 'next higher authority to the Competent Authority', and in such cases his approval is required but however in sub section 5 of section 4, no such change is found, leaving the things as it is, still the fact remain that on record there is no permission by the Director of Health Services, to the transfer order in question.

28. Shri D.B. Khaire, Learned Chief Presenting Officer contended that if one reads Sub-section (5) of Section 4, in proper perspective the procedure that effecting transfers some sort of transparency is indicated in the matter of transfer and to avoid allegations arbitrary exercise of power by the authorities or allegations of mala fide etc.. He submitted that the order dated 4.8.2006 no doubt issued after commencement of the Act, however, the competent authority having authority or jurisdiction, to order the transfer by taking recourse to Sub Section 5 of Section 4 of the Act by following required

procedure, impugned transfer order came to be passed. He submitted the procedure prescribed by Sub Section 5 of Section 4 of the Act is in fact followed in true spirit. He submitted that so far as the special case and recording of reasons being imperative, however, he stated that prior permission of immediately preceding Competent Authority being a discretionary, that part is not complied with. He submitted that to have the transparency and to avoid the arbitrariness at the level of competent authority the procedure was incorporated. In the present case, he stated that the special reasons are in fact recorded in the concerned file, thus he submitted that so far the permission of Director is concerned, it was not complied with as it was not imperative or mandatory by that the order will not become illegal or bad for that matter in order to substantiate this contention. Shri Khaire relied on a judgment of the Apex Court reported in AIR 1961 SC 200. In the case of L. Hazri Mal Kuthiala Vs. Income-tax Officer, Special Circle, Ambala, he placed reliance in para 5 and 6 of the report, in that case a question arose about the consultation with some authority of the Income-tax Department before passing an order by the Commissioner of Income Tax. On factual back ground of that case, the Apex Court was called upon to consider whether the provisions of consultation is directory or mandatory. On the facts the Apex Court made the following observations:

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(5) The Patiala Income-tax Act contained provisions almost similar to Ss. 5(5) and 5(7A) of the Indian Income-tax Act. Sub-section (5) differed in this that the Commissioner of Income-tax was required to consult the Minister-in-charge before taking action under that sub-section. The only substantial difference in the latter sub-section was that the Explanation which was added to S. 5(7A) of the Indian Income-tax Act as a result of the decision of this Court in Bidi Supply Co. v. Union of India 1956 SCR 267 ; ((S) AIR 1956 SC 479) did not find place in the Patiala Act. The Commissioner, when he transferred this case, referred not to the Patiala Income-tax Act, but to the Indian Income-tax Act, and it is contended that if the Patiala Income-tax Act was in force for purposes of reassessment, action should have been taken under that Act and not the Indian Income-tax. This argument, however, loses point, because the exercise of a power will be referable to a jurisdiction which confers validity upon it and not to a jurisdiction under which it will be nugatory. This principle is well-settled. See Pitamber Vajirshet v. Dhondu Navlapa ILR 12 Bom 486 at p. 489.

(6) The difficulty, however, does not end there. The Commissioner, in acting under S. 5(5) of the Patiala Income-tax Act, was required to consult the Minister-in-charge. It is contended that the Central Board of Revenue which, under the Indian Finance Act, 1950, takes the place of the Minister-in-Charge was not consulted, and proof against the presumption or regularity of official acts is said to be furnished by the fact that under the Indian law no such consultation was necessary, and the Commissioner , having purported to act under the Indian law,

could not have felt the need of consultation with any higher authority. This, perhaps, is correct. If the Commissioner did not act under the Patiala law at all, which enjoined consultation with the Minister-in-charge and purported to act only under the Indian law, his mind would not be drawn to the need for consultation with the Central Board of Revenue. Even so, we do not think that the failure to consult the Central Board of Revenue renders the order of the Commissioner ineffective. The provision about consultation must be treated as directory, on the principles accepted by this Court in State of U.P. vs. Manbodhan Lal Srivastava, 1958 SCR 533 : ((S) AIR 1957 SC 912) and K.S. Srinivasan v. Union of India 1958 SCR 1295 at p. 1321 :(AIR 1958 SC 419 at p. 430). In the former case, this Court dealt with the provisions of Art. 320 (3)(c) of the Constitution, under which consultation with the Union Public Service Commission was necessary. This Court relied upon the decision of the Privy Council in Montreal Street Railway co. v. Normandin 1917 AC 170 where it was observed as follows :

"..... The question whether provisions in a statute are directory or imperative has very frequently arisen in this country, but it has been said that no general rule can be laid down, and that in every case the object of the statute must be looked at. The cases on the subject will be found collected in Maxwell on Statutes, 5th edn., p. 596 and the following pages. When the provisions of a statute relate to the performance of a public duty and the case is such that to hold null and void acts done in neglect of this duty would work serious general

inconvenience, or injustice to persons who have no control over those entrusted with the duty, and at the same time would not promote the main object of the Legislature, it has been the practice to hold such provisions to be directory only, the neglect of them, though punishable, not affecting the validity of the acts done."

The principle of the Privy Council case was also applied by the Federal Court in Biswanath Khemka v. Emperor 1945 FCR 99 : (AIR 1945 FC 67) and there, as pointed out by this Court the words of the provision were even more emphatic and of a prohibitory character. The essence of the rule is that where consultation has to be made during the performance of a public duty and an omission to do so occurs, the action cannot be regarded as altogether void, and the direction for consultation may be treated as directory and its neglect, as of no consequence to the result. In view of what has been said in these cases, the failure to consult the Central Board of Revenue does not destroy the effectiveness of the order passed by the Commissioner, however, wrong it might be from the administrative point of view. The power which the Commissioner had, was entrusted to him, and there was only a duty to consult the Central Board of Revenue. The failure to conform to the duty did not rob the commissioner of the power which he exercised, and the exercise of the power cannot, therefore, be questioned by the assessee on the ground of failure to consult the Central Board of Revenue, provision regarding which must be regarded as laying down administrative control and as being directory.

How far above observations are applicable in the present controversy or come to help of Shri Khaire in support of his contention will be considered at a later stage of this order.

29. Resuming the discussion on the point of permission, the Director, Health Service being a subordinate or immediate preceding authority to the Competent Authority, I take a situation by way of illustration, the Competent Transferring Authority i.e. concerned Minister, in consultation with the Secretary of the department, having treated a case of transfer of a government servant, in fact as a special case and decided to transfer the concerned government servant, but (the subordinate) i.e. immediately preceding the Competent Transferring Authority refers to grant permission then the Competent Transferring Authority cannot exercise its authority and power to transfer that government servant even if that being a special case. In my judgment that condition act as clog of the power of superior or higher authority. Thus on these premises obtaining prior permission as required by this section will not be considered mandatory or a condition precedence, thus I accept the contention of Shri Khaire that this request is not mandatory one, if it is treated as mandatory then it will be a clog on the power of the higher authorities, and it will give undue importance to the subordinate officers and

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such situation or condition is to be avoided, for the above reasons and on face of it the said requirement appears to some extent unreasonable and it will give unnecessary importance to the subordinate authority of the competent transferring authority, on whose permission only the transfer has to be effected, is to be treated as not necessary.

30. The judgment of the Apex Court in case of L. Hazari Mal on which the reliance is placed by Shri Khaire had contended that 'Term prior permission' used in Sub-section 5 of Section 4 be read as prior consultation. Let me test this aspect by considering the litrary and the dictionary meaning of 'permission' and 'consultation' as Sub-section 5 of Section 4 used "prior permission".. Shri Khaire wants me to read it as 'prior consultation'. The meaning of word 'permission' and 'consultation' has to be understood in proper perspective, if the meaning of both the words are synonymous, then there may not be any difficulty in accepting the proposition, Webster's Comprehensive Dictionary + (Encyclopedia Edition Page 941). Defines word permission – The act of permitting or allowing, formal authorization consent. Synonyms : allowance authority, authorization, to justify another in acting without interference, or censure

The Black Law Dictionary VIII th Edition defines permission as -

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Permission : A license to do a thing; an authority to do an act which, without such authority, would have been unlawful. Act of permitting, formal consent, authorization, leave license or liberty granted, and it has a flexible meaning depending upon the sense in which it is used.

31. If one look to the term permission in local parlance that means to seek a permission from the Competent Authority or Higher Authority whose permission necessary by law say for example to conduct a stage performance, to hold a fair, or to deal with some commodity, so on and so forth, then the permission from a Competent Authority has to be obtained if any act done without such permission then that will lead to either a penalty or punishment as the case may be, as such always a permission has to be obtained from superiors or a Competent Authority, seeking prior permission from a subordinate by the superior authority cannot be insisted, and for that matter impugned order cannot be faulted with.

32. Now the word consultation dictionary meaning of the word given by a Webster Comprehensive Dictionary (Encyclopedia Edition Page 281). "Consultation" the act of consulting to meeting for conferred, giving a professional advice. Term consultation came for consideration before the Apex Court in several cases and the Apex Court succinctly explained the

term consultation, word 'consult' implies conference of two or more persons or more minds in respect of a topic in order to enable them to evolve a correct or at least a satisfactory solution. 'Consultation" connotes meeting of mind, to achieve a solution. It is to be noted here that the term consultation is used in several Central and State enactments but still the Legislature in the present enactment has not used word 'consultation' but used word 'permission' and this make a difference. Thus it is not possible to read word consultation in place of 'permission', if I do it, then I will be rewriting the section, which is not permissible with the jurisdiction of this Tribunal.

33. Thus having seen extensively the dictionary and legal meanings of these words and with the help of several judicial pronouncements, in my judgment, it is not possible for me to subscribe the view propounded by Shri Khaire. Thus the meaning and purport of consultation being altogether different and distinct that cannot be equated with the permission. But consultation not necessary for the purpose of a complete action, consultation has to be prior for taking future action. Thus both these terms have altogether different meaning and facet and dimensions. Thus the argument of Shri Khaire on the basis of judgment of Apex Court in Hazarimal's case cannot be accepted and the facts and situation brought on record in the present case. The term prior permission cannot be read as prior consultation.

34. I had already arrived at the conclusion that the act of prior permission of subordinate to the competent authority being a clog on the power of the Competent Transferring Authority. Thus to that extent I have to accept the contention of Shri Khaire that the prior permission is not necessary, and that aspect is to be treated as directory.

35. The things does not rest here, further requirement of exercise of the power to transfer under this Sub-section if to be exercised then it has to be done in the manner referred to, in the section i.e. the using of power it is hacked by two conditions i.e. i) a special case ii) reasons to be recorded, this aspect requires more deliberation, as I referred to sections in earlier part of this order, Sub-section 5 of Section 4 begins is with non – ab stante clause, the Sub-section 5 is sort of exception to the earlier part of Section 4 or for that matter Section 3. Thus Sub-Section 5 authorized the Competent Transferring Authority to transfer a Government servant irrespective of the conditions in Section 3 and Section 4 (1) of the Act and two clauses of the proviso to Sub-section 4 of the Act. Thus to some extent the Competent Transferring Authority has given an upper hand to effect the transfers of the Government servant even before he or she completes normal tenure of 3 years as the Competent Transferring Authority being in-charge of the

department and it knows the requirement of that department. However to exercise this power the conditions that are required to be fulfilled being i) in special case ii) after recording reasons in writing for ordering transfer. As the Respondent No.1 in his affidavit have placed reliance on Sub-section 5 of Section 4 to demonstrate or disclose the source of a power. So far the power of the Competent Transferring Authority to transfer, a government servant is accepted phenomena to contend otherwise is impermissible. The power in the transferring authority is thus has to be accepted but in the cases covered by Sub-section (5) of Section 4, is not an absolute power, that has to be exercise only after two conditions stated in it are fulfilled.

36. In the present case the transfer being effected in terms of Sub-section 5 of Section 4, thus I have to find out what is the special case pleaded or spelt out by Respondent No.1 and whether any reasons are in fact recorded. At this stage I note the submission of Shri M.D. Lonkar, he contended that sufficiency and insufficiency of reasons so recorded cannot be gone into by the Court or Tribunal in its jurisdiction of judicial review. If the reasons are present either in the order or in the file i.e. then their sufficiencies or insufficiencies etc. need not be gone into and if I found that reasons are present in the file then I have to accept, that the necessary condition is

complied with, and I need not ponder on the issue whether for those reasons the order can or cannot be issued.

37. The importance of recording the reasons by the quasi judicial or administrative authorities concerned being highlighted by the Apex Court in series of its judgment, the landmark being Union of India Vs. Tulshiram Patel Reported in AIR (1985) III SCC 398 the majority view is reflected in paragraph 134 of the judgment. In a later case of M.I. Sivani Vs. State of Karnataka (1995) 6 SCC 289, the Apex Court reiterated the importance of recording reasons by the administrative authorities; in para 32 of this judgment the Apex Court made following observations :-

> "32. It is also settled law that the order need not contain detailed reasons like court order. Administrative order itself may contain reasons or the file may disclose reasons to arrive at the decision showing application of mind to the fact in issue. It would be discernible from the reasons stated in the order or the contemporaries record. Reasons are the link between the orders and the mind of its maker when the rules direct to record reasons, it is a sine qua non and condition precedent for valid order". (underlined by me)

Thus from the observation of the Apex Court supra, it is apparent that reasons must be recorded before taking an action, and those reasons must disclose of application of mind by the concerned. the presence of reason

either in the order or on the concerned file, and after perusing the file if the Court/Tribunal is satisfied that reasons are recorded, which indicates conscious application of the mind, than the Tribunal need not probe the question any more.

38. Thus, recording of reasons is necessitated for two oblique purposes i) to have a transparency and to avoid arbitrariness ii) the arbitrary action or arbitrariness is the scorn enemy of Article 14 and thus when a statute authorizes the particular authority to act in the particular manner and to perform the duty or obligation in the manner prescribed by the statute then the action has to be taken or done in the manner provided in the statute and any other no manner, thus, the Competent Transferring Authority having taken resources of Sub-section 5 of Section 4. I have to consider whether requirements envisages in the Section are complied with.

I make it clear I am not going to consider that if there exist a reason or reason in the file then sufficiency of or insufficiency of it cannot be gone into.

39. The three requirements being condition to be observed before transferring a government servant i) there being a special case ii) to record the reason in writing iii) with prior permission. So far as third condition is

concerned, I had dealt with that aspects earlier and held that prior permission is not necessary when the Competent Transferring Authority executed or exercised that power.

40. The Respondent No. 1 who filed reply has made a specific statement that the reasons are recorded separately in the file. The file is made available for the perusal of this Tribunal and Shri Khaire, Learned Chief Presenting Officer stated that the reasons for transfer are recorded in the note put up for approval by the concerned to the Competent Transferring Authority which reads thus :

अध्यक्ष - महाराष्ट्र विधानसभा यांचे दिनांक १० एप्रिल, २००६ चे पत्र कृपया पृष्ठ /प.वि. वर पहावे.

२. त्या अन्वये, डॉ. दिलिप पाटील यांना जिल्हा आरोग्य अधिकारी, कोल्हापूर या पदावर बदली देण्याची शिफारस शासनाकडे करण्यात आली आहे, त्यावरिल मा. मंत्री (आ) यांच्या निर्देशांस अनुसरुन सादर.

३. जिल्हा आरोग्य अधिकारी संवर्गातील अधिका-यांच्या सन २००६ च्या बदल्यांमध्ये डॉ. दिलिप पाटील, जिल्हा आरोग्य अधिकारी सातारा यांची बदली प्राचार्य आरोग्य व कुटुंब कल्याण प्रशिक्षण केंद्र, कोल्हापूर येथे झाली आहे. डॉ. पाटील हे जिआअ, सातारा या पदावर दि. १/७/०४ पासून कार्यरत होते. सद्यस्थितीत त्यांना बदली दयावयाच्या जिल्हा आरोग्य अधिकारी, कोल्हापूर या पदावर डॉ. टी. ए. मोरे हे दि. १६/५/०५ पासून कार्यरत आहेत.

४. दि. १.७.०६ पासून बदलीविषयक अधिनियम राज्यात लागू झाला आहे. त्यामधील परि. ४ मध्ये बदलीच्या पदावधी संबंधिच्या तरतुदी स्पष्ट करण्यात आल्या आहेत. **त्यानुसार डॉ. मोरे यांचा जिआअ, कोल्हापूर या पदावरिल ३ वर्षाचा बदलीपात्र कालावधी पुर्ण झालेला नसल्यामुळे, त्यांची बदली करता येणे शक्य होणार नाही. तरिसुध्दा डॉ. मोरे यांची बदली करावयाची झाल्यास अधिनियमातील पोटनियम ४(५) मधील तरतुदींनुसार त्यास मा. मुख्यमंत्री महोदयांच्या मान्यतेची आवश्यकता आहे,** त्या अनुषंगाने प्रस्ताव ओशार्थ सादर करण्यात येत आहे. (Emphasized by me)

41. The note so prepared, for approval, which according to Shri Khaire refers to the reason. The file further shows that the said note was first approved by Under Secretary who opined that permission or approval from the Hon'ble Chief Minister to be obtained. Thereafter, the note was placed before Deputy Secretary then to Secretary then before the Hon'ble Minister for Health and then to the Hon'ble Chief Minister. All these authorities have approved paragraph no. 4 of the note (supra). No doubt, the note so prepared was placed for approval of the Hon'ble Chief Minister and accordingly it was approved, thus, that note for approval whether can be treated as reasons recorded by the Competent Transferring Authority. Section 4 Sub-section 5 mandates that the Competent Authority to record the reasons thus it is for the Competent Transferring Authority to record the reasons and not to approve the note put up by its subordinates. Even though this Tribunal cannot go into the question of sufficiency or insufficiency reasons still the question whether the Competent Transferring Authority has followed the mandate of statute in true sense can be gone into, the reasons so recorded must co-relate with special case, as the government servant is being transferred before completion of tenure of 3 years.

42. Now about the 2nd requirement of the special case. The special case has to be ascertain on a factual aspects, and for that matter, I will have to find out from the reply filed by Respondent No. 1 whether there is any reference to a special case as admittedly Respondent No. 1 has invoked or gone by sub-section 5 of Section 4 of the Act. The word 'special' used in this sub-section means distinguished by "some unusual quality" or "out of the ordinary". Thus special case therefore in context of exercising power, as a specific contention is raised by Respondent No.1, to transfer the applicant and the Respondent No.2, thus Respondent No.1 treated as 'special case' thus he has to spell out that special case, may not be in the order itself but this aspect can be demonstrated from the record or file, in the file produced before me there are no reason or any circumstance indicates any 'special case'. (Meaning of word 'special', stated above is taken from words and phrase, Permanent Edition and Webster Comprehensive Dictionary Encyclopeadia Edn. Page 1024). Respondent No. 1 is silent on the point of the special case. While recording the submissions, I have recorded the submissions of Shri Khaire when he contended that existing of special case and recording of reasons being mandatory that is to be followed. So far the requirement of recording the reasons are concerned I have already referred to that aspect above but so far the special case is concerned the reply by

Respondent No. 1 is silent. Thus in absence of any explanation on the part of Respondent No.1 about the existence of special no material is brought on record to establish this aspect as a matter of fact; then in such situation I have to go back to the note prepared for approval or / sanction and to find out whether there is any reference, to a special case, however, there is reference to the letter from the Hon'ble Speaker of Legislative Assembly dated 10.4.2006 to the Hon'ble Minister for Public Health and Family Welfare. That is indicative of fact that the initiation of process of effecting transfer of the applicant and Respondent No. 2 is on the basis of the letter dated 10.4.2006, though the Respondent No. 1 in the affidavit has not referred to this aspect but Respondent No. 2 frankly disclosed this fact in his reply and referred to the fact of his meeting with the Hon'ble Speaker and the Hon'ble Speaker in that meeting expressed his desire that the Respondent No. 2 should be brought to Kolhapur as District Health Officer. With this backdrop and the frank disclosure by Respondent No. 2 it compels me to refer to the letter of the Hon'ble Speaker addressed to the Hon'ble Minister for Public Health and Family Welfare which is available in the file which reads thus :-

पत्र दि. १०.४.२००६

डॉ. दिलिप पाटील, जिल्हा आरोग्य अधिकारी म्हणून सातारा येथे गेली २ वर्षे कार्यरत आहेत. डॉ. पाटील यांनी यापूर्वी कोल्हापूर येथे आरोग्य विभागाच्या वेगवेगळया पदावर कार्यरत असताना अतिशय चांगल्या प्रकारे काम केले आहे. सध्या कोल्हापूर येथे कार्यरत असलेले श्री. मोरे, जिल्हा आरोग्य अधिकारी

हे इतरत्र बदली स्विकारण्यास तयार असल्याने त्यांच्या बदलीमुळे रिक्त होणा-या जागी डॉ. दिलीप पाटील यांची बदली करण्यात यावी, ही विनंती. (Underlined by me)

43. In the letter (supra) the Hon'ble Speaker has made reference that the applicant is ready to accept his transfer from District Health Officer at any other post and for that reason Respondent No.2 be brought in his place. The applicant has denied this very fact of making any request or showed his willingness to opt for any other posting or transfer. Thus the reference or the letter of the Hon'ble Speaker is not a fact situation, be it as may. The fact remains that the wheel of administration started moving only after this letter. Thus in view of this undisputed facts and in particular in absence of special reasons assigned by Respondent No.1 can one say that the transfer of the applicant vis-à-vis Respondent No.2 is a special case. The answer will be in negative. One can understand that if the authorities dealing with the department including the Minister-in-Charge may initiate the move to transfer of a particular officer under his department according to the needs of the departments or requirement for placing a particular officer at a particular place. But if the initiation or move of a transfer is made at the behest of any other authorities or any person unconnected with the affairs of the department, holding any high post indulges in requesting for a transfer of a government servant. Can it be a special case, it is imperative on the part of

the person in charge of the administration to abide by law than to succumb to such method. They must show their loyality to the kingdom than the king. Thus initiation of the present transfer, process is corrupted or influenced by extraneous consideration i.e. the letter dated 10.4.2006 from the Hon'ble Speaker. The Legislation is brought only to avoid and prohibit such type of interference in the matter of government servant, but it has to be said with regret that the real object of the Legislation is not still achieved as desired. When the Legislature have protected the interest of the Government servants by introducing Legislation by giving some sort of assurance that he or she may not be transferred for a period of three years from the particular place i.e. with intention that at least a Government servant is assured about his posting for three years on a particular post which is a reasonable period for a Government servants to work with his full dedication and devotion to the work but if the transfer are effected frequently then a government servant is frustrated, he looses his efficiency and devotion to the duty and run after the political bigwigs to seek transfer which always involves quid-pro-quo. Thus the impugned order is not passed on any valid administrative reason or exigencies.

44. The Respondent No.1 has not pleaded about special case. This aspect i.e. letter of Hon'ble Speaker is considered independently thus, in my

judgment, the exercise of power to transfer of the applicant and the Respondent No. 2 is in violation of mandate of Sub-section 5 of Section 4. The language of the section makes it abundantly clear that the Competent Transferring Authority is under an obligation for prior recording of reason, relating to the special case thus reason to be recorded must make or spell out about special case, as in my judgment the Legislature stepped in and circumscribed and allowed the Competent Transferring Authority to transfer a government servant, even before he or she completes 3 years tenure, and left it open to the Competent Transferring Authority to do it only in special case that too by recording reasons thus to exercise this power there must exists a special case and reasons are to be recorded which must be in consonance with each other. Both these aspects are wanting or silent in this case. Now to the reasons recorded (in the file) i.e. the noting in my opinion are not the reason disclosing a special case but what is noted being a facts situation brought on record which relates to the facts of posting of both the officers. Paragraph 4 of note (supra) is about the implementation of the act and the requirement of the Act. It is stated in the note that the Dr. Mane i.e. applicant is not due for transfer, but transfer can be effected by invoking provisions of Sub-section 5 of Section 4 of **the Act and for that matter the sanction or approval of the Hon'ble Chief Minister is needed**. Let me

consider this aspect also as to whether this is in consonance with the statutory requirement or whether this can be equated with the recording of reason. Section 6 deals with transferring authority and the Competent Transferring Authority are specified and defined in the table forming part of the Section. It is not disputed before me that the applicant and Respondent No.2 falls in the categories or group of Government servants, falling in Group B and for those officers the Competent Authority described as the Minister-in-charge in consultation with the Secretaries of the Department of the concerned department. It is not disputed that the portfolio of the Public Health Department is not with the Hon'ble Chief Minister but it is with Hon'ble Dr. Smt. Mundada, Minister for Health and Family Affairs, the note (supra) was then placed before Hon'ble Minister Dr. Smt. Mundada as she was in charge of that department. It is also not in dispute that Hon'ble Minister for Health and Family Welfare in consultation with the Secretary of the department, constitute the Competent Transferring Authority, thus, in terms of the statute, the reasons are to be recorded by that designated authority and by non-else admittedly no reasons are recorded by Designated Competent Authority. But what is done by Competent Transferring Authority, it has put initial below the note prepared by the department. Thus, there is non-compliance of the mandatory requirements envisages by Sub-section 5 of Section 4 of the

Act. Having reached to this conclusion now naturally I have to refer to the judgment of the Apex Court to find out whether in such situation the Tribunal can interfere in the matter of transfers.

45. Shri Lonkar appearing for the respondent no. 2 has placed reliance on the judgment of the Apex Court in case of Major J.K. Bansal Vs. Union of India Reported in AIR 2005 VII SCC 3341 wherein the Apex Court taking note in its earlier judgments dealing with the case of transfer has culled out a special class to members of the armed forces, by culling out all these earlier judgment and approving the all earlier judgments i.e. Dr. Shilpi Bose Vs. State of Bihar Reported in 1991 SCC 532, Union of India Vs. S.L. Abbas Reported Reported in AIR 1993 SC 2444 and National Hydraulic Power Corporation Vs. Shri Bagwan Reported in 2001VOL.8 SCC Page 574. The Apex Court reads thus

> "12. It will be noticed that these decision have been rendered in the case of civilian employees or those who are working in Public Section Undertakings. The scope of interference by courts in regard to members of armed forces is far more limited and narrow. It is for the higher authorities to decided when and where a member of the armed forces should be posted. The Court should be extremely slow in interfering with an order of transfer of such category of persons and unless an exceptionally strong case is made out, no interference should be made".

46. On the basis of observations made by the Apex Court in para 12 quoted supra Shri Lonkar submitted that in case armed forces as held by the Apex Court that interference by the Courts in respect of transfers of members of armed forces is far more limited and narrow we think by slight modification it can be read and made applicable to the members of Health Department too. This submission is plausible submission because the medical services being utmost essential and necessary and the members of that department are required everywhere and their services are necessary for all citizens alike. While accepting the submission made by Shri Lonkar one cannot forget the requirement of law as the Apex Court itself has carved out the exemption for interference by the Court/Tribunal in the transfer of the government servant for that matter a useful reference can be made to the judgment of the Apex Court in case of State of U.P. and Others Vs. Gobardhan Lal Reported in 2004 AIR SCW 2082. In that case also the Apex Court was dealing with the case of transfer of a Government servant and the Apex Court has laid down the parameters and the scope of interference by the Court or Tribunal when the orders of challenge in question. In para 8 and 9 of the said judgment the Apex Court made the following observations.

> "8. It is too late in the day for any Government servant to contend that once appointed or posted in a particular place or position, he

should continue in such place or position as long as he desires. Transfer of an employee is not only an incident 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. Unless the order of transfer is shown to be an outcome of a mal fide exercise of power or violative of any statutory provision (an Act or Rule) or passed by an authority not competent to do so, an order of transfer cannot lightly be interfered with a matter of course or routine for any or every type of grievance sought to be made. Even administrative guidelines for regulating transfer or containing transfer policies at best may afford an opportunity to the officer or servant concerned to approach their higher authorities for redress but cannot have the consequence of depriving or denying the competent authority to transfer a particular officer/servant to any place in public interest and as is found necessitated by exigencies of service as 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. This Court has often reiterated that the order of transfer made even in transgression of administrative guidelines cannot also be interfered with, as they do not confer any legally enforceable rights, unless, as noticed supra, shown to be vitiated by mala fides or is made in violation of any statutory provision. (underlined by me)

9. A challenge to an order of transfer should normally be eschewed and should not be countenanced by the Courts or Tribunals as though they are Appellate Authorities over such orders, which could assess the niceties of the administrative needs and requirements of the situation

concerned. This is for the reason that Courts or Tribunals cannot substitute their own decisions in the matter of transfer for that of Competent Authorities of the State and even allegations of mala fides when made must be such as to inspire confidence in the Court or are based on concrete materials and ought not to be entertained on the mere making of it or on consideration borne out of conjectures or surmises and except for strong and convincing reasons, no interference could ordinarily be made with an order of transfer."

47. Having noted the observations of Apex Court in the matter of transfer the only scope whether the Tribunal or for that matter the Court can interfere in the transfer of government servants when the transfers are effected in contravention of the statutory provisions. At the beginning of this order I had made a reference that the earlier judgments and the law declared by the Apex Court either were dealing with the administrative instructions or the resolutions issued by the Government from time to time in his authority under Article 162 of the Constitution of India but in the present case this Tribunal is considering the validity of transfer on the backdrop of the statutory provisions and I already held that the two requirements of Sub-section 5 of Section 4 being mandatory if those are not followed or complied with then certainly the Tribunal or the Court gets jurisdiction to interfere in the order of transfer. For that matter at the cost of repetition I will refer to

the judgment of the Apex Court in S.L. Abbas Vs. Union of India Reported in AIR 1993 3 SCC 2444 which reads thus -

> "7. Who should be transferred where, is a matter for the appropriate authority to decide. Unless the order of transfer is vitiated by mala fides or is made in violation of any statutory provisions, the Court cannot interfere with it. While ordering the transfer, there is no doubt, the authority must keep in mind the guidelines issued by the Government on the subject. Similarly if a person makes any representation with respect to his transfer, the appropriate authority must consider the same having regard to the exigencies of administration. The guidelines say that as far as possible, husband and wife must be posted at he same place. The said guideline however does not confer upon the Government employee a legally enforceable right". (underlined by me)

From the foregoing discussion and reasons, I hold that i) The impugned order is issued in violation of mandatory provision of Sub-section (5) of Section 4. ii) The order is issued, not on any administrative reasons or exigencies. iii) It is effected on the basis of the letter of the Hon'ble Speaker of Legislative Assembly. iv) The applicant has not requested for his transfer form the post of District Health Officer, Z.P., Kolhapur.

48. Thus from the discussion above on the basis of the record i.e. produced by Shri Khaire, submissions advanced by respective counsels in my judgment the order of transfer dated 4.8.2006 is not in consonance with the provisions of Sub-section 5 of Section 4 and the mandatory requirement of recording reasons and the special case is being absent in the present case. Thus the transfer has been effected in contravention and dehors to the statutory provisions as such a case is made out before this Tribunal for interfere in the order of transfer.

49. Before parting I must make a note of my strong disapproval of the attitude of the applicant. The applicant has not joined at transferred post on his transfer, where he was posted as Principal of Training Centre. By non-joining that post the candidate taking education or training must have suffered as the incumbent i.e. respondent No. 2 was relieved and joined at his transferred post as District Health Officer, and the post of Principal remained vacant and that definitely resulted into great inconvenience to those who are taking training in the said institution and incidentally they have suffered on account of adamancy of the applicant. For non-joining to the post of Principal the applicant has not given any valid reasons, nor a statement to that effect is made in the application, when asked about it Shri

Bandiwadekar, Learned Advocate stated that the transfer order is not received by him as such there was no occasion for him to join the post. This is lame excuse, if the dates are noted then falsify of the applicant's claim is apparent. The impugned order is dated 4.8.2006 i.e. Friday the application is lodged in this Tribunal on 8.8.2006 intervening days being Saturday & Sunday i.e. 5th and 6th August. The applicant must be in Mumbai at least i.e. on 7th August, 2006 which is Monday to give instructions to his Advocate to draft this application and to lodge it in this Bench. Thus mere dates indicate that the applicant deliberately avoided to receive the order and did not join the post of Principal. Thus Tribunal could have dismissed this application on this ground alone but for the lapse committed by the Competent Transferring Authority, he could succeed in the matter, but this aspect may not preclude the authority to take appropriate departmental action against him for his absence from duty, if advised under the Service Rules. Thus, it is for the Government to look into the matter and to take action against the applicant.

50. `With these reasons and observations made supra, the impugned order is set aside, application allowed in terms of prayer clause "A" and it is for the Respondent No.1 to pass appropriate order of giving posting to the Respondent No.2.

I must appreciate the efforts and co-operation extend by Shri A.V. Bandiwadekar, Shri M.D. Lonkar and Shri D.B. Khaire, they took me through and apprising with relevant provisions of the Act and they made their submissions which helped me at least to solve a little problem raised in this application. Parties are directed to bare their own costs.

Sd/-
(A.B. NAIK)
Chairman
22.9.2006

Place : Bombay
Date : 22nd September, 2006.
Typed by C.S. Bhosle