

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

CORAM : Shri Rajiv Agarwal (Vice-Chairman)

DATE : 10.10.2016

ORDER

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

2. This Original Application has been filed by the Applicant challenging his transfer by order dated 1.8.2016 from Pune to Aurangabad.

3. Learned Counsel for the Applicant argued that the Applicant was working as Chief Engineer, Water Resources Department, Pune after his transfer to that post by order dated 20.11.2015. He has not completed his tenure of 3 years when he was transferred by order dated 1.8.2016 to Aurangabad. Learned Counsel for the Applicant argued that the Applicant has been transferred in violation of Section 4(4)(ii) and 4(5) of the Maharashtra Government Servants Regulation of Transfer and Prevention of Delay in Discharge of Official Duties Act, 2005 (the Transfer Act). The Civil Services Board (C.S.B) in its meeting held in July, 2016 has recommended transfer of the Applicant to the post of Chief Engineer, Maharashtra Water Resources Development Centre,

Aurangabad, which was created by G.R dated 18.5.2016. The only reason for mid-tenure transfer of the Applicant is his 'past experience'. Learned Counsel for the Applicant argued that there is no mention as to how the past experience of the Applicant was relevant for the newly created post and whether the Applicant was the only officer having that experience. Learned Counsel for the Applicant argued that such vague expression as 'past experience' cannot be termed as exceptional circumstances or special reason to transfer the Applicant before completion of his tenure and in the month of August. Learned Counsel for the Applicant stated that in the affidavit in reply, it is stated that the Applicant is transferred under Section 4(5) and not under Section 4(4) of the Transfer Act. This is against the provision of the Transfer Act, as sub section (4) of Section 4 deals with mid-term transfers, which are ordered in a month other than April or May. As the impugned transfer order is issued in the month of August, provision of Section 4(4)(ii) are attracted in this case. She cited judgment of Hon. Bombay High Court, Aurangabad Bench in Writ Petition no 5835/2011 dated 15.9.2011. She also referred to the judgment of Hon'ble Bombay High Court in the case of **RAMAKANT BENDRE Vs. STATE OF MAHARASHTRA & ORS : 2012(1) Mh. L.J 951** and judgment of Hon. Supreme Court in **KALABHARATI ADVERTISING Vs. HEMANT VIMALMATH NAVICHANIA & ORS in SLP (C) Nos 25043-25045 of**

2008, regarding legal malice, which has happened in the present case against the Applicant. Learned Counsel for the Applicant contended that in the affidavit in sur-rejoinder, the Respondents have clearly claimed that it was not necessary to consider any other officer for the post on which the Applicant is transferred. This is highly arbitrary and shows extraneous consideration.

4. Learned Presenting Officer (P.O) argued on behalf of the Respondents that order mentions that the Applicant was transferred in compliance with the provisions of section 4(4) and 4(5) of the Transfer Act. The Government has created this post by G.R dated 18.5.2016 and considering the nature and importance of this post, it was decided to post the Applicant on that post. It is the subjective satisfaction of the Government, which cannot be the subject matter of judicial review. Learned Presenting Officer argued that this Tribunal by judgment dated 7.6.2010 in O.A no 19/2016 has held that the reasons for a transfer cannot be measured by a scale. If some reasons are given for such a transfer, there is no need to further scrutinize adequacy of such reasons. Learned Presenting Officer argued that the Applicant was the only Chief Engineer, who was considered suitable for this post, as other Chief Engineers, are likely to retire in a short time and a person having sufficient experience was required for this post.

5. Section 4(4) of the Transfer Act reads:-

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

Second proviso reads (referred to as 4(4)(ii)

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

(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.”

Sub-section (5) deals with transfer before completion of tenure, which can be done in ‘special cases’.

The transfer order, which is impugned is dated 1.8.2016, which definitely attracts section 4(4) of the Transfer Act. The order mentioned that the Applicant was transferred as per Section 4(4) and 4(5) in a ‘vacant post’.

6. In the affidavit in reply dated 16.8.2016, the Respondents have stated in para 10 as follows:-

“10. As regards para 6.6.(A), it is submitted that as per the proviso (one) to Section 4(4) of the Transfer Act, the post fallen vacant due to creation of new post or due to retirement, due to promotion, resignation, demotion, reinstatement or due to transfer or having return from leave can be filled up by transfer at any time in the year.”

This issue has been examined by Hon. Bombay High Court (Aurangabad Bench) in judgment dated 15.9.2011 in W.P no 5835 of 2011. Para 10 of the judgment reads:-

‘Applying these principles, we will have to consider the provisions of Section 4 of the Act. Sub-section (1) emphatically provides that no Government servant shall ordinarily be transferred unless he has completed his tenure of posting as provided in Section 3. Sub-section (2) requires a competent authority to prepare every year in the month of January, a list of Government servants due for transfer, in the month of April and May in the year. Sub-section (3) requires that the transfer list prepared by the respective competent authority under sub-section (2) for Group A Officers specified in entries (a) and (b) of the table under section 6 shall be finalized by the Chief Minister or the concerned Minister, as the case may be, in consultation with the Chief Secretary or concerned

Secretary of the Department, as the case may be. Proviso thereto requires that any dispute in the matter of such transfers shall be decided by the Chief Minister in consultation with the Chief Secretary. Sub-section (4) mandates that the transfers of Government servants shall ordinarily be made only once in a year in the month of April or May. Proviso to Sub-section (4) permits a transfer to be made any time in the year in the circumstances stated therein. Sub-clause (i) thereof permits such a transfer to be made at any time in a year to a newly created posts or to the posts which become vacant due to retirement, promotion, resignation, reversion, reinstatement, consequential vacancy on account of transfer or on return from leave. Sub-clause (ii) thereof permits such a transfer at any time where the competent authority is satisfied that the transfer is essential due to exceptional circumstances or special reasons, after recording the same in writing and with the prior approval of the next higher authority. Sub-section (5) of Section 4, which begins with a non obstante clause permits the competent authority, in special cases, after recording reasons in writing and with the prior approval of the immediately superior Transferring

Authority mentioned in the table of section 6, to transfer a Government servant before

completion of his tenure of post.

Thus the distinction between the two provisos to Sub-section (4) and Sub-section (5) is crystal clear. A transfer due to vacancy of the post is covered by Clause (i) to Proviso of Sub-section (4) while mid-tenure transfer is covered by Sub-section (5). It is thus clear that merely to fill a vacancy a Government servant cannot be transferred mid-tenure unless and until the conditions of Sub-section (5) are satisfied.

Further, this judgment in para 13 reads:-

“13] It can clearly be seen that the said enactment, particularly Sub-section (1) of Section 4 specifically protects a Government servant from being transferred prior to completion of his ordinary tenure. Sub-section (4) of Section 4 requires such transfers to be done once in a year i.e. in the month of April or May. The proviso thereto, though permits the transfers to be made any time in the year for the eventualities mentioned therein, however, we are of the considered view that the proviso to Sub-section (4) cannot be read in such a manner, which makes the provision of Sub-section (1) of Section 4 redundant or nugatory. Clause (i) of the proviso to

Sub-section (4), which permits transfer to be made at any time in a year on the ground of eventualities mentioned therein, will have to be read in a manner that the transfer on the grounds mentioned in clause (i) of proviso to Sub-section (4) would be permissible at any time of the year and not necessarily in April or May when a Government servant has completed his tenure of posting. If it is not read in that manner, the very purpose of the protection, which is granted in Sub-section (1) of Section 4 would become redundant and nugatory. A person, who has not completed even three months in a particular posting, could be transferred to some post which has become vacant on account of transfer of another Government servant, who was working on the post. As such, the clause (i) of proviso to Sub-section (4) will have to be read in harmony with Sub-section (1) of Section 4 of the said Act. It will have to be interpreted that a Government servant will not be ordinarily transferred prior to completion of his tenure, and the transfer will have to be made only in the month of April or May. However, if transfer is necessitated on account of any of eventualities stated in clause (i) to proviso of Sub-section (4), it can be made any time of the year and not necessarily in April or May, however, only on completion of tenure of the Government servant. No doubt, that clause (ii) of

proviso to Sub-section (4) would permit transfer to be made at any time of the year and not necessarily in April or May, where the competent authority is satisfied that the transfer is essential due to exceptional circumstances or special reasons. However, when this is being done, the reasons and the circumstances will have to be recorded in writing and the same cannot be done without prior approval of the next higher authority. Undisputedly, Sub-section (5) of Section 4 carves out an exception to the general protection granted in sub-section (1) of Section 4. Nodoubt, by taking recourse to Sub-section (5), Government servant can be transferred even prior to completion of his tenure and even at any time of the year and not necessarily in the month of April or May in special cases. However, while doing so, the competent authority will be required to record the reasons in writing and would also be required to obtain prior approval of the immediately superior Transferring Authority as mentioned in table of Section 6. As already discussed, the provision of Sub-section (5) of Section 4 carves out an exception to the protection granted in favour of an employee in Sub-section (1) of the said section. It is to be noted that for that reason, the legislature has made an inbuilt safeguard in Sub-section (5) by requiring the reasons to be recorded for making transfer as a

special case and obtaining approval of the immediately superior Transferring Authority. It is, thus, clear that the legislative intent is clear that ordinarily an employee should not be transferred prior to completion of his tenure. However, this would be permissible in special cases when the competent authority records the reasons for the same and obtains prior approval of the immediately superior Transferring Authority.”

It is quite clear that Hon. High Court has held that mere fact that a person is being posted to a vacant post will not suffice, unless that person has completed his normal tenure. In the present case, the provisions of both section 4(4) (ii) and 4(5) should have been complied with and ‘special reasons’ for transferring the Applicant should have been recorded. The claim of the Respondents that the Applicant was transferred to a vacant post and so section 4(4)(ii) is not required to be complied with cannot be accepted as the Applicant had not completed his tenure

7. In the minutes of the Civil Services Board, the reason for transferring the Applicant is given as “अनुभव विचारत घेता”. Thus the only special reason for the transfer is the past experience of the Applicant. What experience was required for the post to which the Applicant was transferred is not mentioned in the minutes of the Civil

Services Board or in the notings on the file. However, in the affidavit in reply dated 16.8.2016, it is stated in para 12 that:-

“Therefore, due consideration has been given to the experience of the applicant in various field of the water sector. He had also undergone various training abroad viz. SIDA Advanced International training on Integrated Trans boundary Water Resources Management in the year 2006. Further, he had also gone to Italy-Spain in the year 2008 for training / study of Dehan Lift (Drip) Scheme. He had also attended HCL Connect 2011 Conference held at Kochi, Kerala in November, 2011. He had also attended a training of Chief Information Officer at Hyderabad and South Korea in the year 2011 which is very useful to this particular project/office.”

It is seen that in the aforesaid para, various training programmes, national and international, attended by the Applicant have been mentioned. What is SIDA Advanced International Training is not explained. Nor is any explanation about HCL connect 2011. How the training of Chief Information Officer at Hyderabad and South Korea will be useful for the post has also not been explained. The Respondents want this Tribunal to believe that this experience of the Applicant was relevant

for the post he was transferred to. They are relying on the judgment of this Tribunal dated 76.2016 in O.A no 19/2016. In para 26 of the judgment, it is held that:-

“26. Record shows that reasons leading to mid-term and mid-tenure transfers are stated in the proposal sent by the Respondent No. 3. Reasons contained in the proposal are concurred by the CSB and by the Minister and Hon’ble Chief Minister. Text of reasons is copied in foregoing para No. 11 in the second column in item (b). The Government is to be accepted as best judge of the matter of decision as to what action shall achieve larger and administrative interest. The decision of the Government in administrative matters cannot be assessed by use of a calibrating device. Tests such as arithmetic or geometric tests or tests applicable for gauging, used in any material sciences do not apply to Government decisions.”

The reasons for transfer considered by Civil Services Board and other authorities are reproduced in para 11 of the aforesaid judgment. Detail reasoning for transfer has been given, which was considered by the Civil Services Board. All eligible officers were considered and reasons for picking up the Applicant therein were mentioned. In the present case, none except the Applicant was considered for transfer.

8. No reasons except experience of the Applicant are mentioned. How that experience was relevant for the post is not mentioned in C.S.B note or even in the affidavit in reply. It is quite clear that facts in O.A no 19/2016 were quite different and have no application in the present case.s The Applicant has stated in para 2 of his affidavit in rejoinder dated 23.8.2016 as follows:-

“2. I say that Shri I.S Chaudhary has been hastily posted in my place as Chief Engineer, Water Resources, Pune by the order dated 19.8.2016 to further complicate the matters and defeat my claim. It is further submitted that Shri I.S Chaudhary was promoted as Chief Engineer by the order dated 22.7.2016, but was deliberately not given posting with some ulterior motive. It will be pertinent to note that the post of Chief Engineer (Specified Projects), Pune is lying vacant since 1.4.2016 but despite that the Respondent no. 2 has hastily filled the vacancy created by my transfer and has chosen to keep that post vacant. I say that Shri I.S Chaudhary could have been posted on the vacant post of Chief Engineer (Specified Projects), Pune. This clearly depicts malice and patent arbitrary exercise of the power.”

The claim of the Applicant appears to be that at least one other officer, viz. Shri I.S Chaudhary promoted as Chief

Engineer by order dated 22.7.2016 was available to be considered to be posted to the post to which the Applicant was transferred. However, Shri Chaudhary was not given a posting, though another post of Chief Engineer in Pune was vacant. Keeping that post viz. Chief Engineering (Specified Projects), Pune as vacant, the said Shri Chaudhary was posted to the post vacated by the Applicant due to impugned transfer order. This has created malic in law against the Applicant. That issue is examined below.

In the affidavit in sur-rejoinder dated 26.8.2016, the Respondents have the following to say on this issue:-

“3. With reference to para 2 of the Rejoinder, it is denied that Shri I.S Chaudhary has been hastily posted as Chief Engineer, Water Resources, Pune vide order dated 19.8.2016. I say that Shri I.S Chaudhar6y has been posted on the post of Chief Engineer, Water Resources, Pune subject to final outcome of the present pending Original Application, as this post is become vacant due to transfer of the Applicant. As in this matter stay order is not passed by this Hon’ble Tribunal & observations of the Hon. Tribunal that Applicant is free to join at transfer post. But, still the Applicant has not joined at the transferred post, though he is

relieved from the earlier post. So this earlier post fall vacant, which adversely affects on administration. Hence Shri Chaudhary is posted on that post. Further, it is denied that Mr Chaudhary was though promoted vide order dated 22.7.2016, he was not given posting with some ulterior motive.”

It is not denied that Shri Choudhary was promoted on 22.7.2016. The allegation that he was given posting with some ulterior motive is denied. However, facts speak for themselves. The Respondents have taken great pain to emphasize that the Applicant was the only suitable officer to be posted to the post of Chief Engineer, Maharashtra Water Resources Development Centre, Aurangabad. The G.R dated 18.5.2016 does not mention that any special or specialized experience/knowledge is required for that post. It is presumed that the post could be filled by any Chief Engineer in Water Resources Department. If any special experience was required, that would have been mentioned in the aforesaid G.R. In absence of any such provision, it is difficult to accept the contention of the Respondents, that the Applicant was the only suitable Chief Engineer for that post. The reason given by the Civil Services Board is also quite vague. The claim of the Respondents in para 14 of the affidavit in sur-rejoinder dated 26.8.2016 that “the provision of Transfer Act, 2005 does not contemplate that

while considering an employee for transfer other employees are to be considered” may be correct. However, in the present case, it is mentioned in para 8 that “Hence applicant being young experienced and techo-savy has been rightly considered and transferred on the post of Chief Auditor, Water & Irrigation, Maharashtra State, Aurangabad.” Firstly these facts that the Applicant was young, experienced and techno-savy are not mentioned in the minutes of the Civil Services Board. Evidently, it is an attempt to improve their case by the Respondents. Even if, for the sake of argument, it is accepted as correct, it clearly shows that the Applicant was found suitable for the post from amongst a group of Chief Engineers. Only then it would have been possible to conclude that the Applicant was most suitable for the post. Either any Chief Engineer could be posted to that particular post, or if the Applicant was found to be the most suitable candidate, the Respondents are bound to disclose as to how they reached that conclusion. The contention of the Applicant that he was arbitrarily chosen for that post and there are no special reasons for his transfer has to be accepted. The impugned transfer order is clearly arbitrary. The Applicant has claimed that this is a case of legal malice. He has relied on the judgment of the Hon. Supreme Court in the case of **KALABHARTI ADVERSITING** (supra). Hon’ble Supreme Court has held that:-

“25. The State is under obligation to act fairly without ill will or malice-in fact or in law. “Legal malice” or “malice in law” means something done without lawful excuse. It is an act done wrongfully and willfully without reasonable or probable cause, and not necessarily an act done from ill feeling and spite. It is deliberate act in disregard to the rights of others. Where malice is attributed to the State, it can never be a case of personal ill-will or spite on the part of the State. It is an act which is taken with an oblique or indirect object. It means exercise of statutory power for “purposes foreign to those for which it is in law intended.” It means conscious violation of the law to the prejudice of another, a depraved inclination on the part of the authority to disregard the rights of others, which intent is manifested by its injurious acts. **(Vide Addl.Distt. Magistrate, Japalpur v. Shivakant Shukla, AIR 1976 SC 1207, Smt S.R Venkataraman v. Union of India, AIR 1979 SC 49, State of A.P vs. Goverdhanlal Pitti, AIR 2003 S.C 1941; Chairman and M.D., B.P.L Ltd v. S.P Gururaja & Ors (2003) 8 SCC 567; and West Bengal State Electricity Board v. Dilip Kumar Ray, AIR 2007 SC 976).**

26. Passing an order for an unauthorized purpose constitutes malice in law. (vide Punjab State

Electricity Board Ltd v. Zora Singh & Ors. (2005) 6 SCC 776; and Union of India through Government of Pondicherry & Anr. v. V Ramakrishnan & ors (2005) 8 SCC 394).

In the present case, the sole justification advanced for mid-term & mid-tenure transfer of the Applicant is his 'past experience'. This reasons has no nexus with the requirement of the post created by G.R dated 18.5.2016. The Respondents have repeatedly emphasized that the Applicant is chosen for a very important post. However, why the Applicant was found suitable for that post is not explained at all. There is no explanation as to why no other officer was not considered for that post. By somehow zeroing on the Applicant for that post, for which no explanation is forthcoming, there is some truth in the contention of the Applicant that it is a case of legal malice.

9. Learned Presenting Officer has relied on the following judgments, viz.

(i) O.A no 396/2015 dated 3.8.2015. It was held in para 42 that:

“Remaining within those confines, it is clear that subject to those provisions the powers of the employer to decide about the postings of the employees taking into consideration all aspects of

the matter to the different destinations is something which the judicial forum would by and large not interfere with.....”

In the present case, it has been held that all aspects of the matter have not been considered by the Respondents. Case is clearly distinguishable.

(ii) State of Maharashtra Vs. Ashok Ramchanda Kore & Another : 2009 (4) Mh. L.J 162.

It was held that except for strong and convincing reasons it is not possible to interfere with a transfer order by inferential reasoning based on conjectures and surmises.

In the matter before Hon. High Court, elaborate reason for mid-tenure transfer of the concerned employee (who had challenged his transfer before this Tribunal) were given. Hon’ble High Court held that those provide sufficient reasons and a special case was made out for mid-term transfer. The submission that the Chief Minister himself should have recorded special reasons and should have filed affidavit was rejected by Hon. High Court. In the present case, vague reason for mid-tenure transfer having no nexus with the G.R creating the post have been cited for transfer of the Applicant. Facts are clearly different.

10. Having regard to the aforesaid facts and circumstances of the case, the impugned order dated 1.8.2016 is quashed and set aside. The Respondents are directed to post the Applicant in the post he was working before the impugned order was passed within a period of two weeks from the date of this order. This Original Application is allowed accordingly with no order as to costs.

Sd/-
(Rajiv Agarwal)
Vice-Chairman

Place : Mumbai
Date : 10.10.2016
Dictation taken by : A.K. Nair.