

IN THE MAHARASHTRA ADMINISTRATIVE TRIBUNAL, MUMBAI**ORIGINAL APPLICATION NO.450 OF 2017**

DISTRICT: PUNE

Shri Pradeep Y. Shelar)
 Shri Gopinath Shankar Hajare ,)
 Saptashrunji Nagar, Mangalvedha,)
 Solapur - 413305.) **.. Applicant**

Versus

1) State of Maharashtra, through)
 Chief Secretary, Mantralaya, Mumbai 400032.)
 2) The Principal Secretary, Revenue and Forest Dept.)
 Madam Kama Marg, Hutatma Rajguru Chowk,)
 Mantralaya, Mumbai 400032.)
 3) The Divisional Commissioner, Pune Division,)
 Central Building, Pune – 411001.)
 4) Shri Appasaheb M. Saminder, Tahasildar,)
 Chandgad, Dist. Kolhapur – 416509.) **..Respondents**

Mrs. Punam Mahajan, the learned Advocate for the Applicant.

Smt. Kranti Gaikwad, the learned Presenting Officer for the Respondent Nos.1 to 3.

Shri A.V. Bandiwadkar, the learned Advocate for the Respondent No.4.

CORAM : JUSTICE SHRI A.H. JOSHI, CHAIRMAN

RESERVED ON : 23.10.2017.

PRONOUNCED ON : 02.11.2017

J U D G M E N T

1. Heard Mrs. Punam Mahajan, the learned Advocate for the Applicant, Smt. Kranti Gaikwad, the learned Presenting Officer for the Respondent Nos. 1 to 3 and Shri A. V. Bandiwadkar, the learned Advocate for the Respondent No.4.

2. The Applicant has approached this Tribunal by present Original Application by challenging the order of transfer.

3. Applicant has put in 14 ½ months tenure at Mangalwedha, and hence is a mid-tenure transfer.

4. The grounds on which the transfer is challenged and which are pressed are incorporated in para 6.9.1, 6.9.2, 6.9.3 & 6.9.4. For ready reference those grounds are quoted below :-

“6.9.1 The post of Tahasildar is a Group A post and the tenure as per the Transfer Act is of 3 years. The Petitioner is not due for transfer, as he has not completed the tenure of three years. Therefore the transfer of the Petitioner violates Section 3 of the Regulation of Transfer Act and it is a mid-tenure transfer order.

6.9.2 The impugned transfer order is issued for extraneous reasons and it is a clear case of colourable exercise of power by the Respondent No.3 as the transfer of the Petitioner is midtenure. The midtenure transfer of the Petitioner is in violation of the statutory provisions of Section 4(5) of the Transfer Act. The prior approval of the immediately superior Transferring Authority as mentioned in the Table of Section 6 of the Act has not been taken Hon’ble Chief Minister is the immediately Superior Transferring Authority as per Section (6) and therefore the prior approval of the Hon’ble Chief Minister is necessary. The impugned transfer is liable to be quashed and set aside on this ground alone.

6.9.3 The impugned transfer order suffer from malice in law as to the best of knowledge of the Petitioner, it has not issued in accordance with statutory provision of the Section 4(5) of the Transfer Act. Respondent No.3 is not the Competent Transferring Authority for midtenure transfer.

6.9.4 As per the Transfer Act, only the power of General Transfer can be delegated and not for the midterm and midtenure transfers. The power of the prior approval by the immediately superior authority cannot be delegated. The Circular cannot override the statutory provisions of the Transfer Act. Impugned transfer is therefore illegal and bad in law and is quashed and set aside on this ground alone.

(Quoted from pages 4 & 5 of OA)

6. Crucial aspects of ground of challenge are :-
- (a) Prior approval of immediate superior authority over Transferring authority is mandatory.
 - (b) Power to Transfer may be capable of delegation but power of approving authority is not delegated.

7. The grounds in para 6.9.1, 6.9.2, 6.9.3 & 6.9.4 are opposed by the State by filing Affidavit-in-Reply. Paras 8, 9 & 10 are quoted below for ready reference.

“8. With reference to para no.6.9.2, I say as follows:
That the order of Government dated 22.06.2016 the powers of Hon’ble Chief Minister in respect of midterm transfers have been delegated to the respective Divisional Commissioner. Hence the Respondent has passed order of transfer of the applicant.

9. With reference to para no.6.9.3., I say that this para has been dealt with while giving reply to para 6.7.

10. With reference to para no.6.9.4, I say as follows:
That as per the order of Government dated 22.06.2016 the powers of Hon’ble Chief Minister in respect of midterm transfers have been delegated to the respective Divisional Commissioners. Hence the Respondent has passed order of transfer of the applicant”.

(Quoted from pages 25 of OA)

8. Reply to para 6.9.3 refers to the text of para 6.7 of reply. However perusal of reply of the State to para 6.7 of O.A. reveals that it is totally mute as to reply to contents of para 6.9.3. Be it as it may. Now the merit of challenge and that of reply is to be examined on the basis of the pleadings as those are borne on record.

9. During the oral submissions, the learned P.O. has drawn attention of this Tribunal to the Government order dated 22.06.2016, शासन आदेश क्रमांक:-संकीर्ण-३०१६/प्र. क.६८/ई-३. By this order, the Government has delegated the power to transfer and power to approve to the Divisional Commissioner as regards the subordinate officers specified in said order. Copy thereof is tendered for perusal. Text of said order showing the delegation is quoted below for ready reference, as below :-

अ.क.	शासकीय कर्मचा-यांचा गट	बदलीचे स्वरूप	उक्त अधिनियमातील कलम ४(४), ४(५) सह कलम ६ अनुसार बदली करण्यासाठी सक्षम प्राधिकारी	अधिकाराच्या प्रत्यायोजनानंतर बदली करण्यास सक्षम असलेले प्राधिकारी
१	२	३	४	५
१	तहसीलदार राज्यसेवा (गट-अ)	एप्रिल-मे महिन्यात महसूली विभागांतर्गत नियतकालिक बदली	विभागाच्या सचिवांशी विचार विनिमय करून प्रभारी मंत्री	एप्रिल-मे महिन्यात महसूली विभागांतर्गत बदली असल्यास आणि एका पदावर ३ वर्ष पूर्ण झाली असल्यास-विभागीय आयुक्त
२	तहसीलदार राज्यसेवा (गट-अ)	एप्रिल/मे व्यतिरिक्त इतर वेळी करावयाची अनियतकालिक बदली किंवा ३ वर्षांचा पदावधी पूर्ण झालेला नसताना विशेष कारणास्तव करावयाची बदली	म.मुख्यमंत्री	विभागीय आयुक्त

(Quoted from pages 3 of G.R. dated 22.06.2016)

10. According to the learned Advocate for the Applicant :-

- (a) The circular dated 22.06.2016 is void ab initio on its face. This Tribunal has decided in the judgment in **Shri Ramchandra Appa Morwadkar's** O.A. No. 889 & 890 of 2015, with reference to similar order dated 14.11.2014, that the delegation of power for grant of approval is invalid.

11. The observations in **Morwadkar's** case is contained in para 10 thereof read as follows :-

“10. The impugned order dated 30.5.2015 is purportedly passed under the provisions of section 4(4)(ii) and 4(5) of the Transfer Act. As the order was passed in the month of May, (i.e. on 30.5.2015), there was no need to invoke section 4(4)(ii). However, invoking section 4(5) clearly shows that the Applicant had not completed their tenures. As per section 4(5) of the Transfer Act, such transfers can be made with the prior approval of the ‘immediately superior Transferring Authority’ mentioned in the table of Section 6, in special cases. Admittedly, the ‘Transferring Authority’ as per section 6 of the Transfer Act is ‘Minister-in-charge in consultation with Secretaries of the concerned Departments’. Second proviso to section 6 reads:-

“Provided further that the Competent Transferring Authority specified in the table may be general or special order, delegates its power under this section to any of the subordinate authority.”

Section 6 deals with Transferring Authority and powers to transfer employees of various categories to be exercised by such authorities. This section does not deal

with transfer envisaged in section 4 of the Transfer Act, which are so to say extraordinary powers. The terms used in section 4 and 'next higher authority' and 'immediately superior Transferring Authority'. Prior approval of these authorities in writing is required in exceptional circumstances or for special reasons. However, after prior approval is given, the order issued by the Transferring Authority will be valid. Second proviso to section 6 permits delegation of powers under that section only. It cannot be enlarged to include delegation of powers of authorities mentioned in section 4(4)(ii) and 4(5), who are not the Transferring Authorities. Learned Counsel for the Applicant contended that section 4 of the Transfer Act deals with cases, where extraordinary powers are being exercised and if such powers are delegated to lower level functionaries, the very purpose of enacting the Transfer Act would be defeated. I agree with his contention fully. The law does not provide for delegation of powers of the authorities under section 4(4)(ii) and 4(5) of the Act and transfer under these sections will have to be with the approval of original authorities mentioned in Table of Section 6, and not by the authorities to whom powers have been delegated, as was done by circular dated 5.12.2014. The impugned order has not been issued with the approval of Hon'ble Chief Minister as required under section 4(5) of the Transfer Act and is unsustainable.

(Quoted from page 10 & 11 of O.A.Nos.889 & 890/15)

12. The learned Advocate for the applicant has further argued that the findings recorded by this Tribunal in **Morwadkar's O.A. No. 889 & 890 of 2015** were followed by this Tribunal with approval while deciding **O. A. No.444 & 446 both of 2017** in **Harishchandra Jadhav's** case.

13. This Tribunal has also read the judgment of this Tribunal in **Harishchandra Jadhav's case (Supra)**, and it is seen that the conclusion reached by two different benches of this Tribunal has disapproved the delegation of power of grant of approval.

14. The learned P.O. has not shown as to whether the judgments relied on by the Advocate for applicant and discussed in foregoing paras are acquiesced or challenged.

15. This Tribunal is alive towards the fact that the G.R. dated 05.12.2014 has been referred to in **Morwadkar's** case and G.R. dated 23.06.2016 is referred to in **Harishchandra Jadhav's** case. The order of delegation in present case is different. It is

dated 22.06.2016, however, the spirit and discussion contained in the order passed by this Tribunal in above referred O.A.s on the principle of just; fairness and reasonableness of delegation, and this Tribunal agrees with the view expressed in both judgments.

16. The power of Hon'ble Minister in-charge who is competent transferring authority is now vested by delegation in the Divisional Commissioner, for which prima-facie no fault can be found. However, there exists independent reasons as to why the Government order of delegation dated 22.06.2016 could be considered to be bad. These reasons are as follows: -

- (a) The power of Hon'ble Chief Minister to grant prior approval whenever statutory tenure is not completed is also delegated to Divisional Commissioner.
- (b) Admittedly, the Divisional Commissioner is the officer under whose control the Civil Services Board has to decide the cases of transfer of Tahsildar etc.
- (c) Thus now it emerges that now the competent authority to transfer is now the Divisional Commissioner (instead of Minister incharge), and the Divisional Commissioner himself is now vested by delegation of power as approving authority.
- (d) Though the principles of doctrine of natural justice may in totality and in absoluteness not apply to executive business, yet power to take decision and the power to approve own decision cannot be vested in one and the same person.
- (e) The applications of principles of natural justice are not totally excluded in the matter of executive business particularly when somebody's right is violated. The doctrine that no one shall be a judge in his own cause gets attracted. The principle that no one shall be a judge in own cause applies. Observance of principles of natural justice constitutes a basic pillar of administration and administrative law.
- (f) Let the principles of natural justice apply or not, on plain reading, vesting power to transfer and power to approve, in same authority or officer conclusively proves total non application of mind as well as gravely arbitrary proves that such conduct is utterly and done through the order dated 22.06.2016. The delegation brutally insults the law i.e. Sub Section 5(4) of ROT Act.

- (g) Basic executive power to transfer, and the power of superintendence or power of approval being given to same officer create a paradox, not just an anomaly, and hence delegation of subject matter is arbitrary, unfair and divorced to principles of guarantee of fairness in administration and in executive business under the constitutional governance.

17. It could be gravely inappropriate to simply witness the situation of arbitrary trampling of the provisions of Act and brutal defeat of aims and objects for which the ROT Act, 2005 was enacted, however it shall suffice to say that, had legal luminaries been consulted before delegation, wiser counsel may have been available and brutal trampling of law and its objects could have been avoided.

18. In the result, the impugned Transfer which is proposed by a committee of which Divisional Commissioner is Chairperson, and is approved by himself which reminds of Wednesbury's principle and governance by Henry 8th deserves to be quashed and set aside.

19. Upon success in getting the transfer order quashed, the applicant wants restoration to the position at Mangalwedha.

20. This Tribunal having perused the circumstances which has necessitated the Transfer reveals grave circumstances and grounds. Moreover the fact that the order of Transfer is set aside does not mean that the proposal for transfer is set aside and quashed, and the proposal very much survives.

21. Therefore, now it shall be open for the respondents to process the proposal for applicant's transfer to competent authority by ignoring the delegation done through second entry in the table contained in the order dated 22.06.2016, and let the approving authority take decision in accordance with law and discretion, for which there shall be no fetter due to this judgment and order, if there be an occasion.

22. The Original Application is partly allowed in terms of foregoing Para No.18 to 21.
23. Parties are directed to bear own costs.

Sd/-
(A.H. Joshi, J.)
Chairman
02.11.2017