

**IN THE MAHARASHTRA ADMINISTRATIVE TRIBUNAL
MUMBAI**

ORIGINAL APPLICATION NO.523 OF 2019

DISTRICT : PUNE

Shri Milind Vasudeo Tambe.)
Age : 51 Yrs., Working as Assistant Sub)
Inspector, Motor Transport Section,)
Residing at Lane No.1, Home No.77,)
Survey No.8/12, Karvenagar,)
Pune - 411 052.)...**Applicant**

Versus

1. The State of Maharashtra.)
Through Additional Chief Secretary,)
Home Department, Mantralaya,)
Mumbai - 400 032.)
2. Special Inspector General of Police.)
Motor Transport Maharashtra State,)
Pune.)...**Respondents**

Mrs. Punam Mahajan, Advocate for Applicant.

Mrs. K.S. Gaikwad, Presenting Officer for Respondents.

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

DATE : 06.01.2020

JUDGMENT

1. The Applicant serving as Assistant Sub Inspector, State Reserve Police Force (SRPF), Motor Transport Section has challenged the impugned transfer order dated 31.05.2019 whereby he is transferred

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from Pune to Hingoli invoking jurisdiction of this Tribunal under Section 19 of the Administrative Tribunals Act, 1985.

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

The Applicant is serving as Assistant Sub Inspector, SRPF Motor Transport Department. In the month of May, 2016, he was transferred from Raigad to Pune on request. His normal tenure at one posting is five years. However, by transfer order dated 31.05.2019, he was abruptly transferred from Pune to Hingoli citing administrative reason. The Applicant contends that he had not completed normal tenure of five years, and therefore, the impugned transfer is mid-tenure and in defiance of provisions of Maharashtra Police Act, 1951 (hereinafter referred to as 'Act of 1951' for brevity). He contends that the Police Establishment Board (PEB) (competent authority) in question is not properly constituted PEB in the eye of law particularly, in absence of its Notification in the Official Gazette as mandated under the provisions of 'Act of 1951'. He further contends that the transfer is punitive and there was no such administrative exigency to transfer him mid-tenure. He, therefore, contends that the impugned transfer order is in contravention of Section 22N(1) and 22N(2) of 'Act of 1951' and prayed to quash the impugned order.

3. The Respondents resisted the application by filing Affidavit-in-reply on behalf of Respondent No.2 i.e. Special Inspector General of Police, Motor Transport, State of Maharashtra *inter-alia* denying that the impugned transfer order suffers from any illegality. It is not in dispute that the Applicant had not completed normal tenure of five years at Pune and he is transferred mid-tenure. However, the Respondents sought to justify the transfer order contending that in view of report of misconduct of the Applicant by Commandant, SRPF (Grade-I), the Applicant's transfer was necessitated. Accordingly, the matter was placed before the PEB constituted by order dated 29.05.2019. The PEB accordingly in its meeting dated 31.05.2019 resolved to transfer the Applicant from Pune

to Hingoli in view of default report submitted by Commandant. The Respondents thus denied that the impugned transfer order is punitive. As regard constitution and Notification of PEB in the Official Gazette, the Respondent No.2 in reply fairly admits that there is no publication of said PEB in Official Gazette. However, the Respondents sought to justify the impugned transfer order contending that it being passed by PEB under the Chairmanship of Special Inspector General of Police, Motor Transport on the ground of default report against the Applicant, it cannot be faulted with. With these pleadings, the Respondents prayed to dismiss the O.A.

4. Smt. Punam Mahajan, learned Advocate for the Applicant assailed the legality of the impugned transfer order on the following grounds :-

(a) The PEB purportedly constituted by Respondent No.2 by order dated 29.05.2019 being not notified in the Official Gazette of the State of Maharashtra as mandated in law, the transfer order passed by such PEB is unsustainable in law.

(b) The impugned transfer order being based upon the default report, the same is punitive, as the Applicant has not completed normal tenure of five years prescribed in law.

5. Per contra, Smt. K.S. Gaikwad, learned Presenting Officer sought to justify the impugned transfer order on the ground that it was necessitated in view of default report submitted by Commandant, SRPF, Pune, and therefore, no *malafides* can be attributed therein. As regard the constitution and its Notification in Official Gazette, she submits that the Motor Transport Department is distinct Department headed by Special Inspector General of Police, Motor Transport, State of Maharashtra, and therefore, Special I.G.P. by order dated 29.05.2019 constituted its own PEB at State level for the transfers of employees serving in SRPF, Motor Transport on the line of Section 22J(1) of 'Act of 1951' and the said PEB in its meeting dated 31.05.2019 unanimously

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resolved to transfer the Applicant in view of default report. However, she fairly concedes that the PEB constituted by order dated 29.05.2019 under the Chairmanship of Special I.G.P. was not notified in the Official Gazette. She submits that the transfer order need not be set aside on technical ground for absence of Notification in the Official Gazette.

6. At the very outset, it needs to be mentioned that as per settled legal position, the order of transfer is an administrative order and incident of service. As such, transfer being incident of service, it should not be interfered with unless the same is found in defiance of express provisions of law, *malafide* or colourable exercise of power.

7. Indisputably, the Applicant being in the cadre of A.S.I, his normal tenure is five years at one posting, as provided under Section 22N(1)(b) of 'Act of 1951'. The Applicant was posted at Pune in 2016 and as such, admittedly, he was not due for transfer at the time of impugned transfer order. Suffice to say, he was transferred mid-tenure. True, the PEB is empowered to transfer the Police Personnel mid-term or mid-tenure in exceptional cases, in public interest and on account of administrative exigency, as contemplated under Section 21N(2) of 'Act of 1951'. In the present case, the perusal of impugned order reveals that the PEB transferred the Applicant exercising the powers under Section 22N(2) of 'Act of 1951'.

8. In the present case, the crucial aspect is whether the PEB which transferred the Applicant can be said legally competent, PEB to make such mid-tenure transfer in exercise of power under Section 22N(2) of 'Act of 1951' for want of its Notification in Official Gazette.

9. Though the matter of transfer exclusively fall within the domain of executive, now in view of amendments in 'Act of 1951', in pursuance of directions given by Hon'ble Supreme Court in **(2006 (8) SCC 1 (Prakash Singh Vs. Union of India & Ors.)**, the transfers of Police Personnel are governed and strictly regulated by the provisions of Maharashtra Police Act and it is not left to the whims or discretion of the executive. In

Prakash Singh's case, the Hon'ble Supreme Court directed for the establishment of PEB in each State to deal with transfers, postings and other service related matter of Police Personnel. It is in pursuance of these directions, various amendmends were made in 'Act of 1951'. As per the amendment in 'Act of 1951', the amendments were incorporated in Section 22 of 'Act of 1951' and PEBs are established at various levels.

(i) Under Section 22C, the PEB Board No.1 is established at State level under the Chairperson of Additional Chief Secretary (Home) and its functions are defined in Section 22D.

(ii) Under Section 22E, the PEB Board No.2 is established at State level under the Chairperson of Director General and Inspector General of Police and its functions are defined in Section 22F.

(iii) Under Section 22G, the PEB Board No.1 is established at Range level under the Chairperson of Range Inspector General of Police and its functions are defined in Section 22H.

(iv) Under Section 22I, the PEB Board No.1 is established at Commissionerate level under the Chairperson of Commissioner of Police and its functions are defined in Section 22J.

(v) Under Section 22J-1, the PEB are established at District level and its functions are defined in Section 22J-2.

(vi) Lastly, the PEB for specialized agencies viz. Crime Investigation Department, State Intelligence Department, the State Reserve Police, Highway Traffic, etc. are constituted under Section 22J-3 and its functions are defined under Section 22J-4 of the 'Act of 1951'.

10. Suffice to say, the transfers being now regulated by 'Act of 1951', the executive is required to ensure that the PEBs are constituted strictly

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adhering to the statutory provisions, so that the legislative intent is fulfilled the origin of which is in the directions given by the Hon'ble Supreme Court in **Prakash Singh's** case. In other words, the necessity was felt to streamline and regularize the service related matter of the Police Personnel and to make it transparent so as to keep nepotism and favourism at bay, the PEB at various levels were established and the manner in which the same is required to be constituted and notified in the Official Gazette have been expressly provided by amendment in the 'Act of 1951'.

11. Now turning to the facts of the present case, the perusal of order dated 29.05.2019 (Page No.42 of Paper Book) issued by Inspector General of Police reveals that he had constituted the PEB at his level exercising powers under Section 22J-1 of 'Act of 1951'. It consists of Special I.G.P, Motor Transport as Chairman, Deputy Inspector General, Motor Transport as a Member from Backward community and Deputy Superintendent of Police, Motor Transport as Member Secretary. Thus, it consists of Chairman, one Member and one Member Secretary. The said Committee held its meeting on 31.05.2019. The minutes of the meeting is at Page Nos.44 & 45 of P.B. It shows that six employees (including Applicant) were transferred on administrative ground on the basis of default report by the concerned Head of Section. As such, it appears that on the basis of default report submitted by Commandant, SRPF, Pune, the Applicant was transferred from Pune to Hingoli. The minutes does not indicate what was the nature of default report, it's seriousness, etc. All that the PEB recorded that because of default report, the transfers are necessitated. Suffice to say, the minutes are silent about the nature and details of default report. Be that as it may, here crux of matter is whether the PEB in question was legally constituted PEB in the eye of law for want of its Notification in the Official Gazette.

12. As stated above, the Respondent No.2 at his level seems to have constituted the PEB on the line of Section 22J-1 of 'Act of 1951' which indeed pertain to the establishment of PEB at District level. As

Respondent No.1 had constituted the PEB at his level indeed, it should have been as per Section 22J-3 of 'Act of 1951' which provides for establishment of PEB for specialized agencies including SRPF.

13. Here, it would be apposite to reproduce Section 22J-1 as referred in Order dated 29.05.2019 as well as Section 22J-3 of 'Act of 1951', which provides for PEB for specialized agencies and Section 22N-2 of 'Act of 1951', and Section 22N(2) of Act 1951.

"22J-1. Police Establishment Board at District Level

(1) The State Government shall, by notification in the *Official Gazette*, constitute for the purposes of this Act, a Board to be called the Police Establishment Board at District Level.

(2) The Police Establishment Board at District Level shall consist of the following members, namely:-

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| (a) District Superintendent of Police | ... Chairperson; |
| (b) Senior-most Additional Superintendent
Of Police. | ... Member; |
| (c) Deputy Superintendent of Police (Head
Quarter) | ... Member-
Secretary; |

Provided that, if none of the aforesaid members is from the Backward Class, then the District Superintendent of Police shall appoint an additional member of the rank of the Deputy Superintendent of Police belonging to such class.

Explanation.- For the purpose of this sub-section, the expression "Backward Class" means the Scheduled Castes, Scheduled Tribes, Denotified Tribes (*Vimukta Jatis*), Nomadic Tribes, Special Backward Category and Other Backward Class.

22J-3. Police Establishment Board at Levels of Specialized Agencies

(1) The State Government shall, by notification in the *Official Gazette*, constitute for the purposes of this Act, a Board to be called the Police Establishment Board at the Levels of Specialized Agencies, namely Crime Investigation Department, State Intelligence Department, Protection of Civil Rights, Anti-Corruption Bureau, State Reserve Police Force, Anti-Terrorist Squad, Highway Traffic and Training Directorate.

(2) The Police Establishment Board at the Level of Specialized Agencies shall consist of a Chairperson, as the Head of the concerned Specialized Agency and three senior-most Police Officers of that Specialized Agency.

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Provided that, if none of the aforesaid members is from the Backward Class, then the concerned Head of the Specialized Agency shall appoint an additional member of any senior most Police Officer belonging to such class.

Explanation.- For the purpose of this sub-section, the expression "Backward Class" means the Scheduled Castes, Scheduled Tribes, De-notified Tribes (*Vimukta Jatis*), Nomadic Tribes, Special Backward Category and Other Backward Class.

22N(2). In addition to the grounds mentioned in sub-section (1), in exceptional cases, in public interest and on account of administrative exigencies, the Competent Authority shall make mid-term transfer of any Police Personnel of the Police Force."

14. As such, there is no denying that the PEB was required to be notified in the Official Gazette. The law mandates that the State Government shall by Notification in the Official Gazette constitute a Board to be called 'Police Establishment Board' for the purpose of functions to be discharged by 'Act of 1951'. In the present case, it appears that the Respondent No.2 was of the opinion that the transfers of Motor Transport Department does not fall within any of the PEB established under various Clauses of Section 22, and therefore, he had constituted distinct PEB headed by himself for the transfers of employees serving in Motor Transport Department. Indeed, the perusal of Section 22 of 'Act of 1951' makes it quite clear that the PEBs are established for all levels. Admittedly, the Applicant is serving as SRPF, Motor Transport Department. This being the position, the PEB meant for specialized agencies, as contemplated under Section 22J-3 would be competent PEB for such mid-tenure transfers, if the case falls under Section 22N-2 of 'Act of 1951'. As per Section 22J3(2), such PEB at the level of specialized agency shall consist of Chairperson as the Head of concerned specialized agency and three senior-most Police Officers of that specialized agency and one of the Member amongst them must be from Backward Class. In the present case, it appears from order dated 29.05.2019 that though one of the Member is from Backward Class, the Committee is consists of only three Members and not of four members as contemplated under Section 22J-3(2) of 'Act of 1951'. As such, the

Committee constituted by Respondent No.2 by order dated 29.05.2019 cannot be said in consonance with law.

15. Even assuming for a moment that, absence of 4th Member is not fatal, in that event also, admittedly, there being no Notification by the Government in the Official Gazette approving PEB constituted by Respondent No.2 in terms of order dated 29.05.2019, there is no legally constituted PEB in the eye of law.

16. As stated above, the publication of PEB by State Government by Notification in the Official Gazette is mandatory requirement, as explicit from the word used 'shall' in Section 22J-1 or 22J-3 of 'Act of 1951'. As such, it is not discretionary but mandatory requirement of law. Needless to mention that, when legislature provides for doing particular thing in a particular manner, then it has to be done in that manner only so as to comply the express provision of law. However, in the present case, admittedly, there is no publication of PEB in question in Official Gazette which in my opinion fatal and legal defect which goes to the very root of the matter. If the PEB itself is not legally constituted Board, the orders passed by such Board are not sustainable in law. The Notification of PEB by Government in its Official Gazette is *sine-qua-non* and in absence of it, the orders passed by such PEB are vulnerable.

17. In view of aforesaid discussion, there is no escape from the conclusion that the PEB in question being not as per the mandatory requirement of law namely its Notification in Official Gazette by the State Government, the impugned order is not sustainable in law.

18. The learned Advocate for the Applicant also sought to assail the impugned order on the ground that it is punitive, and therefore, liable to be set aside. In this behalf, she sought to place reliance on the decision of Hon'ble Supreme Court in **(2009) 2 SCC 592 (Someshwar Tiwari Vs. Union of India)** where the Hon'ble Supreme Court held as under :-

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“An order of transfer is an administrative order. Transfer, which is ordinarily an incident of service should not be interfered with, save in cases where inter alia malafides on the part of the authority is proved. Mala fides are of two kinds – first, malice in fact and second, malice in law. The order in question would attract the principle of malice in law as it was not based on any factor germane to passing of an order of transfer and based on an irrelevant ground i.e. on the allegations made against the appellant in an anonymous complaint. It is one thing to say that the employer is entitled to pass an order of transfer in administrative exigencies but it is another thing to say that the order of transfer is passed in lieu of punishment, the same is liable to be set aside being wholly illegal. No vigilance enquiry was initiated against appellant. Transfer order was passed on material which was non-existent. The order suffers not only from non-application of mind but also suffers from malice in law.”

19. Whereas, Smt. K.S. Gaikwad, learned Presenting Officer has pointed out that the transfer of the Applicant was necessitated on account of default report submitted by Commandant, and therefore, the transfer order cannot be termed as punitive.

20. In so far as the default report is concerned, the perusal of report (Page Nos.117, 119 and 121 of P.B.) reveals that the Applicant had already worked at Pune for 10 years, and therefore, he had become recalcitrant. As per default report, the Applicant is working as a Technician in Motor Transport Department, but do not possess adequate technical knowledge. The report alleges that the Applicant neglects to discharge duties, instigate other employees, not devoted to duty and unable to get the work done from his subordinates. It further shows that despite Memo, there was no improvement in his behavior. As such, there are allegations of insubordination and negligence in discharging duties. As such, it is on this background, the report of Commandant with other matters was placed before the PEB. In the report, it was recommended that the continuation of the Applicant in view of his irresponsible and recalcitrant behavior would not be conducive from the point of administration. It is on this background, the Applicant was transferred. As such, this is not a case of transfer on non-existent material as held by Hon'ble Supreme Court in **Somesh Tiwari's** case. In **Somesh Tiwari's**

case, no enquiry was conducted against the Appellant therein and he was found transferred on material, which was not existent. It was the case of transfer on anonymous complaint which was investigated but nothing adverse was found, yet he was transferred from Bhopal to Shilong. The Hon'ble Supreme Court, therefore, in fact situation held that such transfer is punitive and not sustainable in law.

21. Whereas, in the present case, in view of various default reports, it cannot be said that his transfer is on non-existent material. As such, if there are allegations of misconduct and the transfer was found necessitated from the point of administration and discipline in the Department, such transfer cannot be interfered with by the Tribunal as held by Hon'ble Supreme Court in **Civil Appeal No.1010-1011 of 2004 (Union of India Vs. Janardhan Debanath & Anr.) decided on 13.02.2004** wherein the Hon'ble Supreme Court held as follows :-

"12. The allegations made against the respondents are of serious nature, and the conduct attributed is certainly unbecoming. Whether there was any mis-behaviour is a question which can be gone into in a departmental proceeding. For the purposes of effecting a transfer, the question of holding an enquiry to find out whether there was mis-behaviour or conduct unbecoming of an employee is unnecessary and what is needed is the prima facie satisfaction of the authority concerned on the contemporary reports about the occurrence complained of and if the requirement, as submitted by learned counsel for the respondents, of holding an elaborate enquiry is to be insisted upon the very purpose of transferring an employee in public interest or exigencies of administration to enforce decorum and ensure probity would get frustrated. The question whether respondents could be transferred to a different division is a matter for the employer to consider depending upon the administrative necessities and the extent of solution for the problems faced by the administration. It is not for this Court to direct one way or the other. The judgment of the High Court is clearly indefensible and is set aside. The Writ Petitions filed before the High Court deserve to be dismissed which we direct. The appeals are allowed with no order as to costs."

Indeed, in view of the report of default report of misconduct, the Respondent No.2 ought to have initiated appropriate D.E. against the Applicant, but the Respondent No.2 instead of initiating the D.E. transferred the Applicant. Be that as it may, the transfer in view of

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decision of Hon'ble Supreme Court in **Janardhan Debanath's** case on the ground of default report can hardly be questioned.

22. However, there being fatal legal defect of non-publication of PEB in Official Gazette by the Government, the impugned order is not sustainable in law and on that ground, it deserves to be quashed.

23. The totality of aforesaid discussion leads me to sum-up that the impugned transfer order dated 31.05.2019 qua the Applicant is not sustainable in law for the reasons discussed above and O.A. deserves to be allowed. Hence, the following order.

ORDER

- (A) The Original Application is allowed.
- (B) The impugned order dated 31.05.2019 qua the Applicant is hereby quashed and set aside.
- (C) The Applicant be re-posted on the post he was transferred from within fifteen days from today.
- (D) No order as to costs.

Sd/-

(A.P. KURHEKAR)
Member-J

Mumbai
Date : 06.01.2020
Dictation taken by :
S.K. Wamanse.