

(2019) 02 BOM CK 0005
In the Bombay High Court
Case No : Writ Petition No. 9844 Of 2018

Santosh Machhindra Thite

APPELLANT

Vs

State Of Maharashtra And Ors

RESPONDENT

Date of Decision : 04-02-2019

Acts Referred:

Maharashtra Government Servants Regulation Of Transfer And Prevention Of Delay in Discharge Of Official Duties Act, 2005, — Section 2, 3, 3(1), 4, 4(5), 6
Constitution Of India, 1950 — Article 226

Citation : (2019) 3 BCR 241

Hon'ble Judges : A.S. Oka, J;Sandeep K. Shinde, J

Bench : Division Bench

Advocate : Uday P. Warunjikar, Bhushan Arvind Bandiwadekar, Gaurav Arvind Bandiwadekar, A.B. Vagyani, P.G. Sawant, R.S. Apte, Leena Patil, S.G. Deshmukh, Nazia S.A. Shaikh

Judgement

A.S. Oka, J.

1. The petitioner by filing this petition under Article 226 of the Constitution of India has taken an exception to the judgment and order dated 7th August 2018 passed by the learned Administrative Member of the Maharashtra Administrative Tribunal on original application filed by the petitioner. With a view to appreciate the legal and factual submissions, a brief reference to the factual aspects will be necessary.

2. The petitioner is in the service of the Government of Maharashtra. On 17th November 2015, the State Government transferred the petitioner from the post of the Deputy Collector of Rationing, G- Zone, Mumbai to the post of the Sub-Divisional Officer, Bhiwandi, District Thane. Before completion of normal tenure of three years, the State Government passed an order dated 7th June 2018 by which he was transferred to the post of Deputy Collector (Land Acquisition No.4), Mumbai Suburban District. In fact, by the Government order dated 7th June 2018, transfer of three officers including the present petitioner was made

admittedly in purported exercise of powers under sub-section (5) of section 4 of the Maharashtra Government Servants Regulation of Transfer and Prevention of Delay in Discharge of Official Duties Act, 2005 (for short "the said Act of 2005"). Under the said order dated 7th June 2018, as stated earlier, the petitioner was transferred from the post of Sub-Divisional Officer, Bhiwandi in District Thane to the post of Deputy Collector (Land Acquisition No.4), Mumbai Suburban District which was the post occupied by one Smt. Archana Kadam (the third respondent herein). The second respondent - Mohan Naladkar who was holding the post of Sub-Divisional Officer, Wada, District Palghar was transferred to the post of Sub-Divisional Officer, Bhiwandi, District Thane held earlier by the petitioner. The third respondent was posted as Sub-Divisional Officer, Wada District, Palghar which was the post earlier held by the second respondent. The challenge in the Original Application No.515 of 2018 filed by the petitioner before the Maharashtra Administrative Tribunal (for short "the said Tribunal") was to the said order of transfer dated 7th June 2018.

3. The first respondent - State Government filed a reply of Shri Santosh Vitthal Gawade. The stand taken by the State Government is set out in paragraphs 3 to 6. The said paragraphs 3 to 6 read thus :-

"3.. I further submit that this Hon'ble Tribunal vide the aforesaid order dated 13.6.2018 in paragraph 4 has been pleased to observe that the Applicant following the impugned transfer order has handed over the charge to Respondent No.2 and Respondent No.2 has joined at his place. In other words, the order of transfer has been duly effected and implemented. Record further reveals that the Applicant having been relieved from the post of Sub-Divisional Officer, Bhiwandi, District Thane has not yet complied with the order of transfer dated 7.6.2018 as, the Applicant has not joined his duties at the place of transfer viz. Dy. Collector (Land Acquisition), No.4, Mumbai Suburban.

4.. I respectfully say and submit that the order of transfer dated 7.6.2018 has been issued in consonance with the provisions of ROTA-2005 and the order impugned adheres to the various orders issued by the Hon'ble Apex Court as well as by this Hon'ble Tribunal in the context of judgement rendered by the Hon'ble Apex Court in TSR Subramaniam & Ors. Vs. Union of India & Ors. Decided on 31.10.2003 and followed by the circular issued by the Highest Competent Authority, as quoted on page no.46 of the Original Application. Procedure so followed in compliance with the aforesaid judgment rendered by the Hon'ble Apex Court is mentioned hereinbelow.

5.. I say and submit that the proposal of transfer and posting of 4 officers was prepared and approved by the Civil Services Board. The names of the present Applicant as well as names of Respondent Nos.2 and 3 did not figure therein. Pursuant to the statutory provisions incorporated under ROTA-2005 read with the aforesaid judgment rendered by the Hon'ble Apex Court, the proposal approved by CSB was placed before the Hon'ble Minister holding the portfolio of Revenue Department for approval. The Hon'ble Minister in pursuance of power and

authority conferred upon him, effected certain modifications in the proposal prepared by Civil Services Board. Accordingly, in public interest the Hon'ble Revenue Minister recorded specific observations as regards in so far as the transfer and posting of the present Applicant and that of Respondent No.2. It is recorded that the post of Dy. Collector (Land Acquisition) No.4, Mumbai Suburban has become vacant and the same is required to be filled. At the same, in so far as the posting of Respondent No.2 is concerned, the Hon'ble Revenue Minister specifically observed that the Applicant is due for transfer in November 2018 and it is essential to give priority to ongoing project viz. Nagpur-Mumbai Samrudhi Highway. Accordingly, in public interest and on administrative grounds, the Hon'ble Revenue Minister decided to post Respondent No.2 in the post occupied by the Applicant. In so far as Respondent No.3 is concerned, the Hon'ble Minister specifically observed that the post of Sub-Divisional Officer, Wada, District Palghar, which has become vacant consequent upon transfer of Respondent No.2 is required to be filled in. Hereto annexed and marked as EXHIBIT 'AR-1' is the copy of proposal of Civil Services Board and the decision taken by the Hon'ble Revenue Minister.

6.. I say and submit that in consonance with the statutory provisions, the aforesaid proposal was placed before the Highest Competent Authority i.e. the Hon'ble Chief Minister. The Highest Competent Authority approved the aforesaid proposal. Hereto annexed and marked as EXHIBIT 'AR-2' is the copy of approval rendered by the Hon'ble Chief Minister."

(emphasis added)

4. Copies of the notings signed by various government authorities were annexed to the affidavit. The second respondent filed a reply in which a contention was raised that the provisions incorporated in the said Act of 2005 are regulatory and not prohibitory. It was submitted that a discretion is vested in the authorities of the first respondent to make exception whenever special circumstances exist. The third respondent relied upon a decision of the Division Bench of this Court in the case of V.B. Gadekar Vs. Maharashtra Housing and Area Development Authority and Anr. (2008) 2 Mh.L.J. 640. The petitioner filed rejoinder to the affidavit in reply. There is an additional reply of Shri Santosh V. Gawade filed on behalf of the State Government essentially for relying upon a letter received from the Election Commission of India.

5. By the impugned order dated 7th August 2018, the original application preferred by the petitioner was dismissed. The reasons given by the learned Member of the Tribunal for rejecting the contentions of the petitioner can be summarised as under :-

A]. As the impugned order provided for mid-term transfer, obviously Civil Services Board (for short "CSB") did not have the names who were short of completing three years as per the provisions of the said Act of 2005;

B]. After noticing the omission and realizing the importance of completing

'Samrudhi Project' without any difficulties, the name of the petitioner was mentioned in the proposal and approved by the Hon'ble Minister;

C]. The Hon'ble the Chief Minister approved the said proposal of the Hon'ble Minister and

D]. The Competent Authority has mentioned special reasons for the mid-term transfer of the petitioner.

6. We may note here that this petition was heard for some time by the earlier Bench. By order dated 11th September 2018, a prima facie finding was recorded by the said Bench that the impugned order of transfer was illegal. Paragraphs 2 to 6 of the said order reads thus :-

2.. It is an admitted position that the impugned transfer of the petitioner was a mid term transfer and he had not completed his tenure at the post held by him at Bhivandi. Before the Tribunal, it was contended that considering the fact that the work of acquisition of the lands for Samruddhi Project was required to be given priority, the second respondent was required to be appointed in place of the petitioner. Perusal of the impugned order prima-facie indicates that the Tribunal proceeded on assumption that the Hon'ble Chief Minister has approved the transfer of the petitioner in accordance with the Sub Section 5 of the Maharashtra Government Servants Regulations of Transfers and Prevention of Delay in Discharge of Official Duties Act, 2005. This is borne out from the observations made by the Tribunal in paragraph 15, which reads thus:

"15. Considering that the impugned order was midterm and mid tenure, obviously the CSB did not have names of officers who were short of completing three years as per the provisions. After noticing the omission and realizing the importance of completing the 'Samrudhi project' without entertaining administrative difficulties, the name of the Applicant has been mentioned in the proposal and approved by the Minister. The Minister has further submitted the same to Hon'ble C.M. who is the supervisory authority. The C.M. has considered the same and approved it as per the provisions of the Transfer Act. The competent authority has mentioned the special reasons for transfer of the Applicant."

3.. We, therefore, called upon learned AGP to produce the original file. Page 3 of the file is a proposal submitted by Civil Services Board, which does not contain name of the petitioner. Page 5 is a note signed by the Hon'ble Minister of Revenue Department. The note contains the names of the petitioner, second and third respondents and two other officers. The note records that for the purpose of efficiency in the work, the proposal submitted by the Civil Services Board is required to be amended for administrative reasons by incorporating the proposals of the aforesaid objects. It is therefore recorded below the said note that the transfer of the petitioner, second and third respondents and two other officers was proposed in the said note, along with the proposal of the Civil Services Board. The signature of the Hon'ble Minister of the Revenue Department

appears below the said note. Moreover, it is not clear what prompted the Hon'ble Minister to propose the transfer of 5 officers whose cases were not considered by the Board. Below the signature of the Hon'ble Minister, there is a place for the signature of the Hon'ble Chief Minister. Admittedly, the Hon'ble Chief Minister has not signed the said note. The Hon'ble Chief Minister has signed a separate note on page 7. On the top, it is mentioned that the note is prepared by the Secretariat of the Hon'ble Chief Minister. Below that, it is mentioned that subject to three changes suggested, the proposal of the transfer of the officers in the category of Deputy Collector stands approved. Below the name of the three officers, there appears the signature of the Hon'ble Chief Minister. There is nothing to indicate whether the Hon'ble Chief Minister approved the transfer as proposed by the Board or the transfer as suggested by the Hon'ble Minister. Sub-section (5) of Section 4 of the said Act, 2005 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 [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."

4.. It is the case of the first respondent that the order of the transfer of the petitioner is under Sub-section (5) of Section 4 of the said Act, 2005. Firstly, it is not the case of the first respondent that Hon'ble Minister of Revenue is the competent authority. The specific stand taken before the Tribunal is that the proposal for transfer of petitioner and second and third respondent was inserted in the proposal prepared by the Civil Services Board by the Hon'ble Minister. The transfer under Sub-Section (5) of Section 4 has been initiated by the competent authority by recording reasons in writing. The actual transfer is to be effected with the prior approval of the immediately superior transferring authority mentioned in the table of Section 6. The competent authority defined in Sub-Section (b) of Section 2 of the said Act is reads thus :

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

5.. It is not the case of the first respondent that the Hon'ble Minister of Revenue Department is the competent authority for the transfer of the petitioner. Going by the table which is a part of Section 6, the transferring authority for the category of officers in which the petitioner falls is the Hon'ble Chief Minister. Thus, the Hon'ble Minister was neither a competent authority nor transferring authority. The condition precedent for exercise of the power under Sub-Section (5) of Section 4 is recording of reasons by the competent authority. In this case, the competent authority has not recorded reasons. Moreover, there is a specific place provided in the note signed by the Hon'ble Minister for signature of the Chief Minister. The signature of the Chief Minister does not appear there. The condition precedent for exercise of power under Sub-Section (5) of Section 4 is recording reasons in writing by the competent authority. In this case, no such reasons have

been recorded by the competent authority. Moreover, there is no specific prior approval of the transferring authority.

6.. Thus, it appears to us that, prima-facie, the order of transfer of petitioner is illegal. Perhaps, the Tribunal did not notice that there were no reasons recorded in writing by the competent authority and there was no signature of the transferring authority. Therefore, this petition deserves to be disposed of finally at the admission stage."

(emphasis added)

7. For dealing with the prima facie observations made above, additional affidavit was filed by the State Government of Shri Manik A. Gutte, Joint Secretary of Revenue and Forest Department which is affirmed on 29th November 2018. He relied upon a note prepared on 27th November 2018 seeking confirmation of the fact that the changes proposed by the Hon'ble Minister were placed before the Hon'ble the Chief Minister. Accordingly, the Secretary in the office of the Hon'ble the Chief Minister has recorded in the said note that even recommendations of the Hon'ble Minister proposing transfer of the petitioner as well as the second and third respondents were placed before the Hon'ble the Chief Minister.

8. The learned counsel appearing for the petitioner invited our attention to the provisions of the said Act of 2005 and in particular section 4. He submitted that if a mid-term transfer is to be effected of a Government servant before completing the tenure of his post, the Competent Authority can only in special cases, after recording reasons in writing and with the prior permission of the immediately superior Competent Transferring Authority, can transfer a Government servant before completion of the tenure of his post. He submitted that firstly, there is nothing on record to show that the Hon'ble the Chief Minister approved the suggestion of transfer of the petitioner which was incorporated in the proposal by the Hon'ble Minister. The page on which the signature of the Hon'ble Chief Minister appears does not contain any reference to the proposal to make a mid-term transfer of the petitioner. Secondly, he urged that even assuming that the recommendations of the Hon'ble Minister were placed before the Hon'ble Chief Minister, no reasons are recorded for coming to the conclusion that the case of the petitioner was a special case. He submitted that unless a satisfaction is recorded regarding the existence of a special case, mid-term transfer could not have been effected. The learned counsel appearing for the petitioner relied upon a decision of the Division Bench of this Court in the case of Ramakant Baburao Kendre Vs. State of Maharashtra and Anr. 2012(1) Mh.L.J. 951. He also pointed out two unreported decisions of this Court dated 21st November 2011 in Writ Petition No.7960 of 2011 in the case of Harish Maganlal Baijal Vs. The State of Maharashtra and Ors. as well as the judgment and order dated 27th February 2014 in Writ Petition No.722 of 2014 (Shri A.P. Kamble Vs. State of Maharashtra and Anr.). He submitted that in absence of any special reasons, the exercise of power becomes completely illegal. He submitted that in any case, prima facie finding recorded by this Court in paragraph 6 of the order dated 11th September

2018 deserves to be confirmed.

9. The learned Government Pleader invited our attention to the provisions of the said Act of 2005 and the Government Resolution dated 28th July 2016. The said Government Resolution is regarding constitution of CSB. He also invited our attention to the proposal of CSB together with note signed by the Hon'ble Minister of Revenue Department and the note on page 114 which is signed by the Hon'ble Chief Minister. He submitted that what is approved by the Hon'ble Chief Minister is the proposal of Hon'ble Minister which is on page 113 and in addition, he made certain modifications to the original proposal. He pointed out that under the said Act of 2005 and in particular, under section 6, the Competent Transferring Authority for the petitioner as well as for the second and third respondents was the Hon'ble Minister in-charge. He pointed out that under sub-section (5) of section 4 of the said Act of 2005, it is provided that 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 in section 6, transfer a Government Servant before completion of the tenure of his post. He submitted that in the present case, the immediately superior Transferring Authority of the petitioner was the Hon'ble Chief Minister. He submitted that reasons in writing have been recorded by the Hon'ble Minister by mentioning that the transfer of the second respondent to the post of Sub-Divisional Officer, Bhiwandi, District Thane was required to be made on the ground that the work of Samrudhi Highway was required to be done on priority basis. He urged that the Hon'ble Chief Minister has granted prior approval and only thereafter, the transfer has been effected. He urged that as the reasons were recorded by the Hon'ble Minister, it was not necessary for the Hon'ble Chief Minister to record reasons. He would, therefore, submit that no interference was called for. He also invited our attention to two separate affidavits filed by Shri Manik Abaji Gutte.

10. The learned counsel appearing for the second respondent pointed out that both the petitioner and the second respondent were due for transfer in November 2018. He also relied upon the provisions of the said Act 2005 and submitted that power has been exercised of transfer by the Transferring Authority with the prior approval of immediately superior Transferring Authority and the reasons for transfer have been recorded. He relied upon a decision of the Division Bench of this Court in the case of V.B. Gadekar Vs. Maharashtra Housing and Area Development Authority (supra) and submitted that the words "special circumstances" must be understood in the context of service jurisprudence. He submitted that the provisions of sections 3 and 4 are regulatory in nature and not prohibitory in nature. The learned counsel appearing for the third respondent also supported the impugned order of transfer and the impugned order of Administrative Tribunal by relying upon the decision in the case of V.B. Gadekar. It was pointed out that in any event, the petitioner was due for transfer in November 2018.

11. We have considered the submissions. Section 4 of the said Act of 2005 reads thus :-

"4.. Tenure of transfer. - (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 Office as 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. (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.

5.. Extension of tenure. - (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 possesses 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 jeopardise 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 employees shall be transferred from any office or Department at a time, in a year."

(emphasis added)

12. In view of sub-section (1) of section 3 of the said Act of 2005, the normal tenure of the posts held by the petitioner as well as the second and third respondents is of three years. In this case, even going by the stand taken by the State Government, the power of transfer has been exercised under sub-section (5) of section 4. In paragraph 4 of the first affidavit of Shri Manik A. Gutte filed by the State Government, it is contended that in view of clause (b) of section 6 of the said Act of 2005, the Transferring Authority of the petitioner as well as the second and the third respondents is the Hon'ble Minister in-charge and the immediately superior Transferring Authority is the Hon'ble the Chief Minister. The said contention deserves to be accepted with a modification. As per the table in section 6 the Competent Transferring Authority in this case is "Minister-in-charge in consultation with the Secretaries of the concerned Departments". The Hon'ble Minister alone is not the Competent Transferring Authority. He has to exercise powers "in consultation with" the Secretaries of the concerned Departments.

13. The first issue to be decided is in the light of what is observed in the order dated 11th September 2018 quoted above.

What is observed in the said order is on the basis of perusal of the concerned file. The question is whether prior approval was granted by the Hon'ble Chief Minister to the modifications suggested by the Hon'ble Minister as the signature of Hon'ble Chief Minister does not appear below the modifications proposed by the Hon'ble Minister and the signature appears on a separate sheet. This aspect has been clarified by the affidavit-in-reply dated 29th November 2018 filed by Shri Manik A. Gutte on behalf of the State Government and especially on the basis of a copy of the note appended thereto. It shows that the approval of the Hon'ble Chief Minister recorded on a separate sheet (page 114) is to the proposal of the Hon'ble Minister (page 113). Hence, we go into other aspects of the challenge.

14. As stated earlier, the specific stand of the State Government is that the power of transfer is exercised by the State Government under sub-section (5) of section 4. The said power is to be exercised by the Competent Authority. Clause (b) of section 2 of the said Act of 2005 defines "Competent Authority" to mean appointing authority which includes the Transferring Authority specified in section 6. The power of transfer under sub-section (5) of section 4 is to be exercised by the Competent Authority only in special cases, after recording reasons in writing and that also with the prior approval of the immediately superior Transferring Authority (in the present case, the Hon'ble Chief Minister). According to the stand of the State Government, the power was exercised by the Hon'ble Minister as a Competent Transferring Authority within the meaning of section 6.

15. As per clause (b) of the table in section 6, the Competent Transferring Authority in case of the petitioner and second and third respondents is "the Minister in-charge in consultation with the Secretaries of the concerned

Departments". We have perused the relevant pages in the file (pages 109 to 114). We find that there is nothing in the file which indicates that the Hon'ble Minister consulted the Secretaries of the concerned Departments. No such consultation has been reflected from the record and even the proposal of the Hon'ble Minister (page 113) does not refer to any such consultation with the Secretaries. In both the affidavits filed by the State Government, there is no reference to any such consultation. We have also perused the reply filed to the original application. Even in the said reply, no stand has been taken that the Hon'ble Minister had consulted the concerned Secretaries. On the contrary, in paragraph 5 of the reply of Shri Santosh Vitthal Gawade, the specific contention is that the Hon'ble Minister of Revenue exercised the power under the said Act of 2005. Therefore, the power purportedly exercised is not in consonance with sub-section (5) of section 4 as the concerned Secretaries were not consulted. The Hon'ble Minister can exercise the powers as a Competent Transferring Authority under section 6 only after consultation with the Secretaries of the concerned Departments. Hence, the Hon'ble Minister had no power to pass orders under sub-section (5) of section 4 of the said Act without consultation with the Secretaries.

16. Even according to the case of the State Government, the reasons recorded are in the note signed by the Hon'ble Minister. The reasons recorded are only against the name of the second respondent. The alleged reasons read thus :

"उपविभागीय अधिकारी, भिवंडी, जि, ठाणे कार्यरत अधिकारी नोव्हेंबर 2018 मध्ये बदलीपात्र असून समृद्धी महामार्गाच्या कामकाज प्राथम्याने होणे आवश्यक असल्याने प्रशासकीय कारणास्तव."

17. It is recorded that the second respondent is due for transfer in November 2018. It is further stated that the work of Samrudhi Highway has to be done on priority basis. Hence, the second respondent is proposed to be transferred as Sub-Divisional Officer, Bhiwandi for administrative reasons. It is not stated that the second respondent has either an expertise or experience in the work of Highways. The question is whether the said reasons show that the case is a "special case" within the meaning of sub-section (5) of section 4 of the said Act of 2005. Reliance was placed by the respondents on the observations made in paragraph 7 of the decision in the case of V.B. Gadekar (supra). Relevant portion relied upon reads thus :-

"7.. If the authorities have taken a view that they need to transfer the Officers upon whom show cause notices were served and disciplinary action is contemplated that decision cannot be termed as arbitrary or mala fide. It is a decision obviously taken for administrative reasons and there is no occasion for the Court to go behind the order and examine, like an Appellate Authority, whether or not such order needs to be passed. The expressions "exceptional circumstances" or "special circumstances" have to be read ejusdem generis provided that transfer may be made any time in the year in question under the circumstances stated in those provisions. The expression "exceptional

circumstances" has been explained in Black's Law Dictionary, Sixth Edition, as conditions which are out of the ordinary course of events, unusual or extraordinary circumstances. The Shorter Oxford English Dictionary on historical principles, Vol. 1 A- Markworthy explains the word "exceptional" - of the nature of or forming an exception, unusual. The discretion is vested in the authorities to make an exception of tenure of two and three years wherever special circumstances exist. Special circumstances should be understood in the concept of service jurisprudence and not in its literal sense. Conditions of service make transfer as a necessary incidence of service. The Rules give protection to an employee to stay at the place of posting for three years but this is subject to the exception that, where in the wisdom of the authority concerned, he should, for administrative and exceptional circumstances, even be transferred during that period."

18. In the case of Ramakant B. Kendre (supra), the same issue arose for consideration. Paragraph 22 of the said decision reads thus :-

"22.. Insofar as the second judgement of the Apex Court, relied on by the learned counsel for Respondent No. 2 herein is concerned, no doubt that the learned counsel for Respondent No. 2 is right in relying on the observations of the Apex Court that merely because the transfer is being made at the instance of the public representative, the same shall not be vitiated. However, in the present case, we are not interfering with the transfer order on the ground that it is being done at the behest of public representative, but we are interfering on the ground that the same is being done without following the relevant provisions of the Maharashtra Transfer Act. For the sake of repetition, we reiterate that such a transfer, either of Respondent No. 2 or the petitioner, which is a subject matter of the present petition, could be done only in an exceptional circumstances and for special reasons and that too by recording the reasons in writing. We find that no such reasons or circumstances of whatsoever nature are recorded in the impugned order of transfer and also in the impugned order passed by the learned Maharashtra Administrative Tribunal. Therefore, the only course that is available to us is to find out the reason from the impugned transfer order dated 8th July, 2011. The only reasoning given is "in the public interest" and "administrative convenience". When the Maharashtra Transfer Act stipulates recording of reasons, first it has to be recorded in the original file. If any transfer which takes away the right guaranteed to an employee of not being transferred prior to completion of his tenure is allowed, only by stating that it is "in the public interest" or on the ground of "administrative exigency", then it would frustrate the very purpose of the Act and makes the provisions of such Act redundant. In our considered view, it is necessary to record atleast some reason as to how "a special case" is made out. No doubt that we do not expect an authority to write an elaborate judgment to make out "a special case". However, at the same time, in order to enable the Court to exercise the powers of judicial review, atleast it is necessary for an authority to write in brief as to how "a special case" is made out, so that the powers of judicial review, which has been

held to be a basic structure of the Constitution, can be properly exercised by the High Court/Supreme Court. In that view of the matter, we find that the petition deserves to be allowed."

(emphasis added)

19. In this case, we agree with the submissions of the learned Government Pleader that if the Competent Authority records reasons, immediately superior Transferring Authority need not again record reasons while granting prior approval. However, the question is whether reasons as contemplated by sub-section (5) of section 4 have been recorded by the Competent Authority. At highest, in the present case, the reason given is "administrative reason". There is nothing mentioned as to how the requirement of expediting the work "Samrudhi Highway/ Mahamarg" is connected with the transfer of the second respondent. The general rule is that the transfer of a Government Servant can be made only at the expiry of the tenure prescribed by section 3 of the said Act of 2005. Under sub-section (5) of section 4, an exception can be made to the general rule only in special cases and that also after recording reasons in writing. Thus, the reasons in brief must indicate why a case of a transfer of a particular employee is a special case. It is not recorded in this case that the second respondent has an expertise or experience in the matter of construction of highways or in the matter of acquisition of lands relating to construction of highways. Therefore, taking the so called reasons recorded by the Hon'ble Minister as correct, the same are not sufficient to treat the case as a special case. The power under sub-section (5) of section 4 is an exception to the general rule that no Government servant shall ordinarily be transferred unless he has completed his tenure. Therefore, in our view, the exercise of powers under sub-section (5) of section 4 in the present case was not at all justified and accordingly, the petition must succeed and we pass the following order :-

ORDER

(i). The impugned order dated 7th August 2018 passed by the Maharashtra Administrative Tribunal in Original Application No.515 of 2018 is hereby set aside and the said Original Application is allowed in terms of prayer clause (a);

(ii). Effect shall be given to this order only after expiry of period of six weeks from the date on which this judgment and order is uploaded;

(iii). Rule is accordingly made absolute on above terms with no order as to costs.