

(2008) 12 BOM CK 0081

In the Bombay High Court

Case No : Writ Petition No. 4859 of 2008

The State of Maharashtra

APPELLANT

Vs

Omprakash Ghanshyamdas Mudiraj and Ramchandra
Keshavrao Nitturkar

RESPONDENT

Date of Decision : 18-12-2008

Acts Referred:

Constitution of India, 1950 — Article 226
Maharashtra Government Servants Regulation of Transfers and Prevention of Delay in
Discharge of Official Duties Act, 2005 — Section 3, 4, 4(4), 4(5), 6

Citation : (2008) 111 BOMLR 378

Hon'ble Judges : S.R. Dongaonkar, J;Naresh H. Patil, J

Bench : Division Bench

**Advocate : N.B. Khandare, Government Pleader, for the Appellant; J.N. Singh
and Sandeep S. Deshmukh, for the Respondent**

Final Decision : Allowed

Judgement

Naresh H. Patil, J.—In this writ petition filed under Article 226 of the Constitution the petitioners challenge the order dated 18-7-2008 passed by the Maharashtra Administrative Tribunal Mumbai, Bench at Aurangabad in Original Application No. 306 of 2008.

2. The factual matrix, in brief, is as under:

The respondent No. 1 - Omprakash Ghanshyamdas Mudiraj was working as Superintending Engineer Nanded Irrigation Circle Nanded at the relevant time. He assumed charge at Nanded on 23-2-2007 in pursuance to the order dated 17-3-2007. Respondent No. 1 - the applicant in the Original Application before the Maharashtra Administrative Tribunal (for short - "the Tribunal") is to retire on 31st December 2008 on attaining superannuation. It is the contention of respondent No. 1 before the Tribunal that he intended to settle at Nanded and his pension papers were forwarded by the Chief Engineer of Nanded Circle.

3. It is an admitted fact that after issuance of the transfer orders, the respondent No. 2 - R.K. Niturkar joined his new posting as Superintending Engineer at Nanded Irrigation Circle but the respondent No. 1 who was transferred to Nashik did not join.

4. In the contentions of the respondent No. 1 raised before the Tribunal, the transfer order, which was challenged before the Tribunal, deserved to be set aside due to mala fides and for non compliance of the provisions of the Maharashtra Government Servants Regulation of Transfers and Prevention of Delay in Discharge of Official Duties Act, 2005 (for short, "the Act of 2005"). The respondent No. 1 submitted before the Tribunal that there was no sufficient record and material before the State Government to transfer him from Nanded to Nashik. The transfer order was issued only to accommodate respondent No. 2 at Nanded.

5. The Tribunal called for the original record and verified the same which included names of some of the Engineers who were to be transferred in accordance with the Chart Nos. 1 and 2. The Tribunal observed that the name of respondent No. 1 herein was not appearing either in Chart No. 1 or Chart No. 2 of the Superintending Engineers proposed to be transferred under the Annual General Transfers of 2008. The name of respondent No. 1 in the list of impugned transfer order of 11 Superintending Engineers was appearing at Sr. No. 7.

6. Perusal of the impugned order passed by the Tribunal shows that the issue of mala fide was not considered by the Tribunal as a ground for setting aside the transfer order. In the view of the Tribunal it was non compliance of the provisions of Sub-section (5) of Section 4 of the Act of 2005. The Tribunal addressed the issue of sufficiency of reasons for issuance of transfer orders. The endorsements made against the name of respondent No. 2 as appearing in the transfer proposal were discussed and considered by the Tribunal and in view of the said discussion and appreciation of the material placed the Tribunal reached conclusion that the order of transfer which was questioned before the Tribunal was bad in law due to non compliance of the requirement of Sub-section (5) of Section 4 of the Act of 2005.

7. The learned Government Pleader submitted that it is settled position in law that transfer is an incidence of service and it shall not be interfered unless it is established that there are mala fides, it is against the provisions of law and for want of prior approval of the competent authorities. The learned Government Pleader submitted that one of the glaring aspects of the matter is that respondent No. 1 who was directed to join at Nashik did not obey the order and did not join the post at Nashik even till this date. In such circumstances the respondent No. 1 was not entitled to raise challenge to the transfer order. In the submission of the Government Pleader the Tribunal exceeded its jurisdiction in scrutinizing the sufficiency of the material placed before the State Government to take a decision to transfer the respondents No. 1 and 2 prior to their normal tenure of three years of service at the given place. Exigencies and exceptional

circumstances prevail upon the State Government, according to the Government Pleader, to transfer an employee even prior to completion of 3 years of normal tenure and even in accordance with the provisions of the Act of 2005 an employee is liable to be transferred, if in the opinion of the State, circumstances exist for such a transfer. In the facts of the case there were reasons and circumstances due to which the transfer orders had to be issued. In support of the contentions raised the learned Government Pleader has placed reliance on the following judgments:

Union of India and Others Vs. S.L. Abbas, .

State of Madhya Pradesh, and Another Vs. S.S. Kourav and Others, .

S.C. Saxena v. Union of India (2006) 9 SCC 583.

In the case of S.C. Saxena (cited supra) it was observed in para 6:

6. ...In the first place, a government servant cannot disobey a transfer order by not reporting at the place of posting and then go to a court to ventilate his grievances. It is his duty to first report for work where he is transferred and make a representation as to what may be his personal problems. This tendency of not reporting at the place of posting and indulging in litigation need to be curbed. Apart therefrom if the appellant really had some genuine difficulty in reporting for work at Tezpur, he could have reported for duty at Amritsar where he was so posted....

8. In the present case in the transfer proposal, copy of which is part of the order of the Tribunal as reflected in para 31, we find that, against the name of respondent No. 2 - Niturkar there is endorsement that he had requested for his transfer to Aurangabad or Pune due to certain difficulties. The State noticed that there was lack of proper liaison between the officers due to which over all functioning at Nashik got affected. Therefore it was proposed that respondent No. 2 be transferred. In the bottom of the said endorsement there is reference to the name of respondent No. 1 - Mudiraj in whose case the State had received a representation submitted by Mr. Bhimrao Gonarkar, District office bearer of Republican Party of India (Democratic), Nanded. Some sort of enquiry was going on, according to the endorsement made in that respect. In one of the columns of the said proposal two recommendations of Mr. Prakash Sundarrao Solanke, M.L.A. and Mr. Dilip Deshmukh, M.L.C. are mentioned. Considering these aspects of the matter, it was proposed to transfer respondent No. 2 at Nanded and respondent No. 1 at Nashik.

9. It would be necessary to consider the provisions of Chapter II of the Act of 2005. Section 3 relates to tenure of posting. The normal tenure in a post shall be three years. Section 4 relates to tenure of transfer. It mandates that no government servant shall ordinarily be transferred unless he has completed his tenure of posting as provided in Section 3. Sub-section (4) provides that the transfers of government servant shall ordinarily be made only once in a year in

the month of April or May. For our purpose it would be relevant to reproduce the provisions of Section 4(4) and (5) of the Act of 2005.

4.(4) The transfers of Government servant 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 permission of the immediately preceding Competent Transferring Authority mentioned in the table of Section 6, transfer a Government servant before completion of his tenure of post.

10. Proviso to Sub-section (4) of Section 4 says that transfer may be made at any time in the year in the circumstances as enumerated in Clauses (i) and (ii). We are concerned with Clause (ii) which provides that 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, it could be made in a year prior to completion of normal tenure in a post which is three years. Sub-section (5) of Section 4 further provides that the competent authority may, in special cases, after recording reasons in writing and with the prior permission of the competent transferring authority, transfer a Government servant before completion of his tenure.

11. In the submission of the learned Government Pleader there were special reasons which were recorded and after taking into consideration the same, transfer orders were effected.

12. Learned Counsel appearing for respondent No. 2 Mr. Sandeep Deshmukh has supported submissions of the Government Pleader and submitted that there is absolutely no evidence for alleging that the order of transfer was vitiated by mala fide or the same was passed to accommodate respondent No. 2 in place of respondent No. 1. In the submission of the Counsel, the Tribunal travelled beyond its powers in appreciating sufficiency of reasons which weighed with the State for passing transfer orders. The provisions of the Act of 2005 were fully complied with. In the submission of the Counsel the respondent No. 1 was disentitled to raise challenge to the order of transfer as he failed to obey the order of the State.

13. We find that by now the law is settled on the issue of interference in transfer orders. No government servant or employee has any legal right to be posted forever at any one particular place or place of his choice since transfer is not only an incidence but a condition of service, necessarily in public interest and in aid of efficiency in the public administration. Unless an order of transfer is shown to be outcome of mala fide exercise or stated to be in violation of statutory provisions, normally the Courts or Tribunals would not interfere as a matter of routine.

Once transfer orders are effected on account of administrative exigency it is for the competent authority to deal with the same as to who should be placed at what place and who should be transferred from one place to another and as to how long persons should be retained at a particular place. All these things will depend upon facts and circumstances of each case to be considered while dealing with the issue of transfer from one place to another.

14. The learned Counsel Mr. Singh appearing for respondent No. 1 submitted that the transfer order in question is issued just to accommodate respondent No. 2 on the recommendation of M.L.A. and M.L.C. who were not local representatives and were nowhere concerned with the functioning of respondent No. 1. As regards the issue of under recovery of water taxes by respondent No. 1, the Counsel submits that normally insistence of recovery is around 50% and in the tenure of respondent No. 1 the recovery was 14% and the said factor should not have been a ground for transferring a senior officer of the rank of Superintending Engineer. The State ought to have considered the functioning of respondent No. 1 on other matters in which he was very much successful. By picking up one facet of the functioning of the respondent No. 1 the State unreasonably took decision to transfer just after more than a year after respondent No. 1 had started working at Nanded. From the application and rejoinder filed the Counsel brought to our notice that issues of mala fide, unreasonableness, accommodation and violation of the provisions of law were raised by the respondent No. 1 before the Tribunal. In the submission of the Counsel prior approval was one of the essential conditions to transfer which was not complied with in this case. From the chart of proposal which is part of the order of the Tribunal it was pointed out by the Counsel that the Hon'ble the Chief Minister made endorsement to the effect that "Pl. consider" and there is no endorsement of prior approval. It was further submitted that respondent No. 1 is to retire by 31st December 2008. He had already submitted his pension papers. He had decided to permanently settle at Nanded and in that view of the matter the State ought to have desisted from transferring him. The Counsel has placed reliance on the judgment in Syed Yakoob Vs. K.S. Radhakrishnan and Others, in support of his contention that there are limits on the jurisdiction of the High Court while issuing writ of certiorari under Article 226 of the Constitution. A writ of certiorari can be issued for correcting errors of jurisdiction committed by inferior courts or tribunals. This Court would not enter into appreciation of facts while dealing with the orders of transfer. The Counsel further placed reliance on judgment in State of A.P. v. Prameela Modi (2006) 13 SCC 147 in support of his contention that High Court in

exercise of powers under Article 226 cannot convert itself into a court of appeal and indulge in reappreciation or re-evaluation of evidence. We have perused all the judgments cited by the learned Counsel.

15. Firstly, we do not find any justifiable reason with the respondent No. 1 not to obey the order of transfer issued by the State. In violation of the said order of transfer respondent No. 1 without joining the posting at Nashik approached the Tribunal. It is informed to this Court that, even till today he has not joined at Nashik though he is due to retire by 31st December 2008. This circumstance goes against respondent No. 1 in the facts of this case.

16. In the facts of this case we find that the Tribunal exceeded its jurisdiction in reappreciating and verifying sufficiency of reasons in evaluating the transfer order. This is not a case of no reasons with the State or the grounds based on imagination for effecting transfer order. M.L.A. and M.L.C. had recommended to the State Government in the case of respondent No. 2 and the State had received certain complaints against respondent No. 1 though submitted by an office bearer of a political party and some sort of enquiry was in the process. The State did find that the percentage of recovery of water taxes was not achieved to the desired extent by respondent No. 1. Though the Tribunal did not find names of respondents Nos. 1 and 2 in the charts 1 and 2 placed before the Tribunal by the Desk Officer of the Department that would not disentitle the State Government to consider cases of the respondents individually and pass appropriate orders before they could complete their normal period of 3 years. Proviso to Sub-section (4) of Section 4 of the Act of 2005 entitles and permits the State Government to pass an order of transfer prior to completion of normal period of 3 years in case where exceptional circumstances are noticed or special reasons are found. Certainly the provisions of the Act of 2005 are required to be strictly followed while effecting transfer order.

17. Whether the reasons propounded by the State Government for transferring the respondents are sufficient or otherwise could not have been gone into by the Tribunal. The Tribunal even assessed the sufficiency of reasons by referring to the case of one Mr. M.A. Mate, Superintending Engineer in Yawatmal Irrigation Circle having completed target 100% recovery. The said case was considered, as Mr. Mate, according to the Tribunal, was transferred prior to completion of his normal period. Such comparison in the facts of the case was not essential as each case will have to be considered on its own merits by the State. The employer would be the best judge to appreciate performance of its employees and their suitability in a particular place. At the same time, law mandates that the State shall comply with the necessary requirements as envisaged under the provisions of Section 4(4) for effecting transfers (order) prior to completion of normal tenure of posting. We find that in this case the State has considered individual cases of both the respondents and decided to transfer them. The Tribunal did not discuss the issue of mala fide. Therefore, we are of the opinion that the said issue need not be taken up by us for consideration in exercise of

extra ordinary writ jurisdiction under Article 226 of the Constitution of India. We find in the facts of the case that the State had complied with the provisions of Section 4 of the Act of 2005. There are special reasons with the State for effecting transfer orders and the contention of accommodation of respondent No. 2 in the facts of the case cannot be accepted.

18. We may caution the State that, cases of transfer of employees prior to normal period of three years on the complaints of political parties should be looked into very cautiously and with close scrutiny. It is necessary to discourage counter proposals for and against the employees by political parties to be the sole basis for transferring an employee. Of course, each case will have to be tested in the background of its peculiar facts and circumstances.

19. We are of the opinion that the Tribunal committed error of jurisdiction. The view of the Tribunal goes contrary to the established principles and the ratio of the judgments cited on the matter relating to interference of Courts/Tribunals in the matters of transfers. The writ petition is therefore required to be allowed.

20. The Writ Petition is allowed. The order dated 18-7-2008 passed by the Member (Judicial), Maharashtra Administrative Tribunal, Mumbai, Bench at Aurangabad in Original Application No. 306 of 2008 is quashed and set aside. Rule is made absolute accordingly with no order as to costs.