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DR. NAGORAO SHIVAJI CHAVAN

v.

DR. SUNIL PURUSHOTTAM BHAMRE & ORS.

(Civil Appeal No. 10991 of 2018)

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NOVEMBER 15, 2018

[ARUN MISHRA AND VINEET SARAN, JJ.]

Maharashtra Government Servants Regulation of Transfers and Prevention of Delay in Discharge of Official Duties Act, 2005 – ss.3, 4 – Respondent No.1 posted as Civil Surgeon, Jalgaon transferred as Asstt. Director, AIDS Control Society, Wadala, Mumbai – By the same order, the Appellant was transferred in his place to take over as Civil Surgeon, Jalgaon – Transfer Order questioned on the ground of violation of statutory provisions prescribing normal tenure of three years – Held: s.3, 2005 Act provides that for All India Service Officers and all Groups, A, B and C State Government Servants or employees, normal tenure in a post shall be three years – However, it is open in s.4, 2005 Act to make a departure from the said normal tenure and the expression used in the said section is that no Government servant shall ‘ordinarily’ be transferred unless he has completed his tenure of posting as provided in s.3 – Thus, on a conjoint reading of ss.3 and 4 it is apparent that though the normal tenure is 3 years but in administrative exigencies a transfer is still permissible – There is no total embargo – In view of the facts that inter alia allegations of financial irregularities were found to be substantiated against Respondent No.1, it was absolutely proper not to retain him as Civil Surgeon, Jalgaon – There was sufficient administrative ground to transfer him from Jalgaon to Mumbai – In the facts and circumstances of the case and also considering the past record of Respondent No.1 of not joining the place where he was transferred for five years, no interference with the order of transfer is called for – Service Law.

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B. Varadha Rao v. State of Karnataka & Ors. (1986) 4 SCC 131 – referred to.

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Case Law Reference

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(1986) 4 SCC 131 referred to **Para 10**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 10991 of 2018.

From the Judgment and Order dated 05.09.2018 of the High Court of Judicature at Bombay, Bench at Aurangabad in Writ Petition No. 1554 of 2018.

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Pravin Satale, Rajiv Shankar Dvivedi Advs. for the Appellant.

Sanjay Kharde, Samrat Shinde, Saju Jakob for Sunil Kumar Verma, Ms. Deepa M. Kulkarni, Nishant R. Katneshwarkar,, Advs. for the Respondents.

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The following Order of the Court was passed :

ORDER

1. Leave granted.

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2. It is a case where we find that Respondent No.1 was transferred from the post of Civil Surgeon, Jalgaon vide order dated 05.08.2017, as Assistant Director, AIDS Control Society, Wadala, Mumbai. By the same order, the Appellant had been transferred to the post of District Civil Surgeon, General Hospital, Jalgaon. 67 other doctors were also transferred on administrative grounds from one place to another.

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3. Respondent No.1 had been appointed as Medical Superintendent, Ghoti District, Nasik, in September, 1996 and remained there till July, 2002. In July, 2002, he was transferred from Ghoti to Nasik as a proper Medical Officer, where he worked till 13.06.2005. Vide order dated 13.06.2005, Respondent No.1 was transferred from Nasik to Jahwar tribal place in Thane District, but he did not join at the place where he was transferred for five years and 20 days. Again, he obtained his posting back to District Hospital, Nasik vide order dated 03.07.2010 and remained posted at Nasik till 03.03.2014. Thereafter, on 05.03.2014, Respondent No.1 was transferred from District Hospital, Nasik, to District Civil Hospital, Dhule, as Civil Surgeon.

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4. On 16.08.2016, Respondent No.1 was transferred from Dhule to Jalgaon, and as a Civil Surgeon he joined there.

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A 5. There are various allegations made as to his functioning. However, what is significant is that Chief Executive Officer, Jalgaon, wrote a letter to the Commissioner, Health Services and Director National Health Mission, Mumbai, pointing out the financial irregularities, acts of omission and commission committed by Respondent No.1 while he was discharging his duties as Civil Surgeon, Jalgaon. On 05.06.2017, a Committee was constituted to look into the conduct of Respondent No.1. The Enquiry Committee found a *prima facie* case against Respondent No.1 of financial and procedural irregularities and insubordination vide report dated 18.08.2017.

C 6. It transpires that the appellant and others had questioned the decision taken by the Government of non-practicing allowance vide G.R. dated 07.08.2012. There was yet another incident at Beed when appellant was posted at Beed. He had conducted a cesarean surgery on Mrs. Vaishali Bansode and it was claimed that she died due to medical negligence of the appellant; post-mortem was conducted; a Committee was formed and the Committee found him guilty of medical negligence, he was found practicing and drawing non-practicing allowance. This fact is disputed by the appellant. He had filed a representation which is stated to be pending consideration. There were certain charges levelled on appellant of improperly touching certain women during the course of Nurse selection. For inquiring into the said allegations, a Committee was also constituted. The Committee exonerated the appellant and the complaint was found to be baseless as per report dated 17.09.2018.

F 7. In the aforesaid backdrop of facts, Respondent No.1 was transferred from Jalgaon to Mumbai and the appellant was transferred in his place as to take over as Civil Surgeon, Jalgaon. The order was successfully assailed by the appellant before the Maharashtra Administrative Tribunal. The Tribunal allowed the application vide order dated 01.02.2018. The High Court declined to interfere, as such the appeal is before us. The Government has supported its order of transfer dated 05.08.2017. The order has been questioned on the ground of violation of statutory provisions prescribing normal tenure of three years.

H 8. After hearing learned counsel for the parties at length, we are of the opinion that the High Court as well as the Tribunal have erred in law in the facts and circumstances of the case in relying upon the provisions contained in Section 3 and Section 4 of the Maharashtra Government Servants Regulation of Transfers and Prevention of Delay

in Discharge of Official Duties Act, 2005 (hereinafter referred to as A
“the Act”). Sections 3 and 4 are extracted hereunder:

“3. Tenure of posting. -

(1) For All India Service Officers and all Groups A, B and C
State Government Servants or employees, the normal tenure in a
post shall be three years: B

Provided that, when such employee is from the non-secretariat
services, in Group C, such employee shall be transferred from the
post held, on his completion of two full tenures at that office or
department, to another office or Department: C

Provided further that, when such employee belongs to
secretariat services, such employee shall not be continued in the
same post for more than three years and shall not be continued in
the same Department for more than two consecutive tenures.

(2) Employees in Group D shall normally not be subjected to fixed
tenure. They shall not be transferred out from the station where
they are serving except on request when a clear vacancy exists
at the station where posting is sought, or on mutual transfer, or
when a substantiated complaint of serious nature is received against
them. D

4. Tenure of transfer. - E

(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. F

(3) Transfer list prepared by the respective competent authority
under sub-section (2) for Group A Officers specified in entries
(a) and (b) of the table under section 6 shall be finalized by the
Chief Minister or the concerned Minister, as the case may be, in
consultation with the Chief Secretary or concerned Secretary of
the Department, as the case may be: G

Provided that, any dispute in the matter of such transfers shall
be decided by the Chief Minister in consultation with the Chief
Secretary. H

A (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:—

B (i) to the newly created post or to the posts which become vacant due to retirement, promotion, resignation, reinstatement, consequential vacancy on account of transfer or on return from leave;

C (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.

D (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 1 [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.”

E 9. Section 3, no doubt, provides that for All India Service Officers and all Groups, A, B and C State Government Servants or employees, normal tenure in a post shall be three years. However, it is open in Section 4 to make a departure from the said normal tenure and the expression used in Section 4 is that no Government servant shall ‘ordinarily’ be transferred unless he has completed his tenure of posting as provided in Section 3. Thus, it is apparent from the conjoint reading of Sections 3 and 4 that though the normal tenure is 3 years but in the administrative exigencies a transfer is still permissible. There is no total embargo. No doubt the statutory provision of tenure is required to be observed unless special exigency arises. In the backdrop of the facts that complaint had been lodged by Chief Executive Officer, Zila Parishad, inquiry had been made into that and the allegations of financial irregularities and insubordination have been found to be substantiated. It was absolutely proper not to retain Respondent No.1 as Civil Surgeon, Jalgaon. It was not in the interest of the administration to retain him any further at the said place. Though, it was contended by learned counsel appearing on behalf of Respondent No.1 that no financial irregularity or insubordination was committed by Respondent No.1. We cannot

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adjudicate upon this issue at this stage, as it is for the Government to decide it. But there was sufficient administrative ground to transfer Respondent no.1 from the post of Civil Surgeon, Jalgaon to Assistant Director, AIDS Control Society, Wadala, Mumbai. A

10. In *B. Varadha Rao Vs. State of Karnataka & Ors.*, (1986) 4 SCC 131, this Court has observed with respect to transfer of Class I officers, thus - B

“4. That a Government servant is liable to be transferred to a similar post in the same cadre is a normal feature and incident of Government service and no Government servant can claim to remain in a particular place or in a particular post unless, of course, his appointment itself is to a specified, non-transferable post. As the learned Judges rightly observe : C

The norms enunciated by Government for the guidance of its officers in the matter of regulating transfers are more in the nature of guidelines to the officers who order transfers in the exigencies of administration than vesting of any immunity from transfer in the Government servants. D

5. It is no doubt true that if the power of transfer is abused, the exercise of the power is vitiated. But it is one thing to say that an order of transfer which is not made in public interest but for collateral purposes and with oblique motives is vitiated by abuse of powers, and an altogether different thing to say that such an order per se made in the exigencies of service varies any condition of service, express or implied to the disadvantage of the concerned Government servant. The petitioner who appeared in person placed reliance, as he did in the High Court, on the decision of the Bombay High Court in *Seshrao Nagorao Umap Vs. State of Maharashtra & Ors.* (1985) 2 LLJ 73 (Bom.). We do not see how the decision can be of any avail to the question at issue. The learned Judges were dealing with a petition under Article 226 of the Constitution by which a Medical Officer challenged his order of transfer on the ground that it was not only mala fide but was issued in colourable exercise of power and therefore wholly illegal and void. It was contended by the petitioner that he was being transferred contrary to the Government policy with a view to accommodate one Dr. R.P. Patil because of the political influence he wielded. In E
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A allowing the writ petition, the learned Judges observed that it was no doubt true that the Government has power to transfer its employees employed in a transferable post but this power has to be exercised bona fide to meet the exigencies of the administration. If the power is exercised mala fide, then obviously the order of transfer is liable to be struck down. They relied on the observations made by this Court in *E.P. Royappa V. State of Tamil Nadu and Anr.* for the positivistic view that 'equality is antithetic to arbitrariness' and held that the observations equally apply to the policy regarding the transfer of public servants. It was observed :

C It is an accepted principle that in public service transfer is an incident of service. It is also an implied condition of service and appointing authority has a wide discretion in the matter. The Government is the best judge to decide how to distribute and utilise the services of its employees. However, this power must be exercised honestly, bona fide and reasonably. It should be exercised in public interest. If the exercise of power is based on extraneous considerations or for achieving an alien purpose or an oblique motive it would amount to mala fide and colourable exercise of power. Frequent transfers, without sufficient reasons to justify such; transfers, cannot, but be held as mala fide. A transfer is mala fide when it is made not for professed purpose, such as in normal course or in public or administrative interest or in the exigencies of service but for other purpose, than is to accommodate another person for undisclosed reasons. It is the basic principle of rule of law and good administration, that even administrative actions should be just and fair.

G The observation that transfer is also an implied condition of service is just an observation in passing. It certainly cannot be relied upon in support of the contention that an order of transfer ipso facto varies to the disadvantage of a Government service, any of his conditions of service making the impugned order appealable under Rule 19(1)(a) of the Rules.

H 6. One cannot but deprecate that frequent, unscheduled and unreasonable transfers can uproot a family, cause irreparable harm to a Government servant and drive him to desperation. It disrupts

the education of his children and leads to numerous other complications and problems and results in hardship and demoralisation. It therefore follows that the policy of transfer should be reasonable and fair and should apply to everybody equally. But, at the same time, it cannot be forgotten that so far as superior or more responsible posts are concerned, continued posting at one station or in one department of the Government is not conducive to good administration. It creates vested interest and therefore we find that even from the British times the general policy has been to restrict the period of posting for a definite period. We wish to add that the position of Class III and Class IV employees stand on a different footing. We trust that the Government will keep these considerations in view while making an order of transfer.”

11. Notwithstanding the provisions contained in Section 3 which uses the expression that “ordinarily the tenure is three years”, in our opinion in exceptional circumstances in a given case, or in the case of administrative exigencies, transfer is permissible, and no absolute bar on transfer is created by virtue of the provisions contained in section 3 read with section 4. In the facts and circumstances of the case and also considering the past record of respondent No.1 of not joining the place where he was transferred for five years, no interference with the order of transfer is called for.

12. Resultantly, the appeal is allowed. We set aside the orders passed by the tribunal as well as by the High Court. We observe that Respondent No.1 has not joined at Mumbai in spite of the fact that no interim stay had been granted by the Tribunal till the final order was passed by the Tribunal on 01.02.2018. The aforesaid conduct of Respondent No.1 is not proper. Now in case he fails to join within 15 days at the post he has been transferred at Mumbai, the State Government shall initiate appropriate disciplinary proceedings against him. Let compliance of the order be reported to this Court by Respondent No.1.