

CENTRAL ADMINISTRATIVE TRIBUNAL  
MUMBAI BENCH

ORIGINAL APPLICATION NO.: 666/96.

Date of Decision : 9.1.1997

S. A. ENGINEER ... Petitioner.

Shri B. Marlapalle with  
Shri S. P. Saxena. ... Advocate for the  
Petitioner.

VERSUS

Union Of India & Others ... Respondents.

Shri V.S. Masurkar ... Advocate for  
Respondent No. 2 & 3.

CORAM :

Hon'ble Shri B. S. Hegde, Member (J).

Hon'ble Shri M. R. Kolhatkar, Member (A).

(i) To be referred to the Reporter or not ? ✓

(ii) Whether it needs to be circulated to other Benches of the Tribunal ?

  
(B. S. HEGDE)  
MEMBER (J).

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CENTRAL ADMINISTRATIVE TRIBUNAL

MUMBAI BENCH

ORIGINAL APPLICATION NO.: 666/96.

Dated this 9/2, the Third day of January, 1997.

CORAM :: HON'BLE SHRI B. S. HEGDE, MEMBER (J).

HON'BLE SHRI M. R. KOLHATKAR, MEMBER (A).

S. A. Engineer,  
Additional Divisional Commissioner,  
Aurangabad Division,  
O/o. the Divisional Commissioner,  
Aurangabad Division,  
AURANGABAD - 431 001.  
(By Advocate Shri B. Marlapalle with Shri S.P. Saxena).

... Applicant

VERSUS

1. Union Of India,  
Through the Secretary,  
Department of Personnel &  
Training & Public Grievances,  
Ministry of Home Affairs,  
North Block,  
NEW DELHI - 110 001.

2. The State of Maharashtra,  
Through the Chief Secretary,  
Government of Maharashtra,  
5th floor, Mantralaya,  
MUMBAI - 400 032.

3. Mr. Ramesh Kumar, I.A.S.,  
The Divisional Commissioner,  
Aurangabad Division,  
AURANGABAD - 431 001.

4. Shri I.S. Chahal, I.A.S.,  
Chief Executive Officer,  
Zilla Parishad,  
NASIK.

... Respondents.

(By Advocate Shri V. S. Masurkar  
for Respondent Nos. 2 & 3).

ORDER

PER.: SHRI B. S. HEGDE, MEMBER (J)

In this O.A., the applicant, [redacted] an I.A.S. Officer [redacted] who was working as an Additional Divisional Commissioner, Aurangabad Division at Aurangabad, has challenged the order of transfer dated 27.06.1996 at exhibit A-1, transferring him to the post of Joint Director of Industries, Mumbai. The grounds for challenging the transfer are that the normal tenure of the post is three years and the applicant took charge of the post of Additional Divisional Commissioner at Aurangabad only on 23.11.1994 and as such, he had completed about one and half years of his tenure. The transfer is, therefore, premature especially when there is no investigation or enquiry pending against the applicant. According to the applicant, the transfer is at the instance of Respondent No. 3, Divisional Commissioner, Aurangabad, who bears a personal malice against him. The transfer is also to accomodate Respondent No. 4, who was working as Chief Executive Officer, Zilla Parishad, Nasik and who was to take charge from him. It is stated that the Respondent No. 4 is the son-in-law of the former Chief Secretary of Punjab, who was a batch-mate of the present Chief Secretary to the State Government and that the Respondent No. 4, even

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before taking over charge of the post of Additional Divisional Commissioner, Aurangabad, from 09.07.1996, brought his house-hold effects to Aurangabad and wanted to occupy in advance the residential accomodation in possession of the applicant. This implies that he had some inkling regarding his transfer because he had made prior preparation and was able to pack his luggage and bring it to Aurangabad even prior to his formal take-over. It is further contended that the impugned transfer order is a net result of the revengeful attitude of the Respondent Nos. 2 and 3, who have been unhappy with him as a result of his previous litigation. In this connection, reference has been made to the O.A. No. 567/87 which related to allocation of year to the applicant on his promotion to I.A.S. and O.A. No. 182/94 decided on 05.08.1994 which related to the transfer of the applicant from a position in C.I.D.C.O. at Aurangabad to a post in Mumbai. Infact, it was from the position in C.I.D.C.O. that the applicant was transferred to the post of Additional Divisional Commissioner, Aurangabad. It is also alleged that the applicant is one of the very few nominated I.A.S. Officer belonging to a Tribal Community and this is also a consideration which ought to have weighed with Respondent No. 2 for not transferring him because there are guidelines relating to not transferring the SC/ST Officers frequently and also because the applicant is due to retire in the

normal course in one and half years' time at the time of filing of the application i.e. around January 1998. It was contended that the applicant had fixed the marriage of his daughter and son at Aurangabad in the month of November/December 1996 at Aurangabad and the wife of the applicant has donated one kidney to his son and the Mumbai climate is uncongenial to her health. The applicant has already submitted a representation on 28.06.1990 to the

Respondent No. 2, requesting him for retention at Aurangabad but without any effect.

The applicant has therefore, sought a declaration that the impugned transfer order dated 27.06.1996 has been issued with malice on the part of Respondent no. 3 and by way of punishment on his reporting and to quash the same as illegal and to direct the respondent no. 2 to consider the case of the applicant and to retain him on his present post or any other post at Aurangabad till his superannuation or atleast for six months and to direct the respondent no. 2 to consider the case of the applicant sympathetically to give him any suitable posting at Pune.

2. Respondent Nos. 2 and 3 have filed the written statement, Respondent Nos. 1 & 4 have neither appeared nor filed any written statement though notice was issued. The main thrust of the O.A. is that the Respondent No. 3, the Divisional Commissioner, bore malice against the applicant, who has induced the Respondent No. 2 to transfer the applicant prematurely. Although the applicant has

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stated that he has been frequently transferred in the past, namely; 8 times in a span of four years and three months, but the respondents have denied the same. We consider that we need not go into the averments in this regard, especially, when at the argument stage the main contention was as regards the malice borne by the Respondent no. 3 towards the applicant. Here the main contention of the applicant is that the applicant, as an Additional Divisional Commissioner, worked as an Appellate/Revisional Authority over the orders passed by the Collectors/Chief Executive Officers of Zilla Parishads, Chief Officers of Municipal Councils/Sub-Divisional Officers, etc. The orders passed by the applicant can be challenged only before the State Government or the Hon'ble High Court in its writ jurisdiction and that the Respondent No. 3 has no legal authority to interfere with the work of the applicant as an Appellate/Revisional Authority but he frequently interfered with due performance of the judicial duties of the applicant. On 31.01.1996, the respondent no. 3 called the applicant in his chamber and sought his explanation as to why he had granted ad-interim stay in some cases from Nilanga Taluka, District Latur and when the applicant tried to explain that as an Appellate/Revisional Authority, he had exercised his powers under the Act, he snubbed the applicant by saying that he should not teach him the law and asked him

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to get out of his chamber and warned him that he should not grant any ad-interim stay orders in future, especially on the orders passed by the Collectors and Chief Executive Officers of Zilla Parishad. In this connection, the applicant has referred to the formal order dated 16.05.1996 issued by the Respondent No. 3 addressed to the applicant and a copy of which appears to have been endorsed to all the Collectors and Chief Executive Officers of the Zilla Parishad. English translation of the same is as below :-

" Sub : Stay orders in appeal cases.

You have the powers to conduct appeals against the orders passed by the Collectors/CEO, Zilla Parishad as an Additional Commission. However, in a substantial number of such appeals it has been noticed that ex-parte stay orders have been issued without hearing the side of Collectors/CEO Zilla Parishad.

Therefore, hereafter in the following types of appeal cases ex-parte stay orders should not be issued before calling for the parawise remarks and without hearing the say of the Collectors/CEOs., Zilla Parishads.

- (a) Appeals against the orders passed by Collectors/CEO Zilla Parishad & A & B,
- (b) Appeals against the orders passed by the Junior Officers in pursuance to the orders passed by the Collectors/CEO, Zilla Parishad."

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3. The Counsel for the applicant invited our attention to the provisions of the Bombay Commissioners Schedule Of Divisions Act, 1957. Under entry 6B (2) of the ~~of the~~ Act, it is provided that - "An Additional Commissioner appointed under sub-section (1) shall not be subordinate to the Commissioner except in such matters as the State Government may, by general or special orders, specify in this behalf." The counsel for the applicant, pointed out that there are no such special or general orders ~~and consequently~~ the orders passed by the Commissioner directing the Additional Commissioner not to grant ad-interim ex-parte stay were entirely illegal.

4. The applicant also stated that under the APMC Act, the Commissioner has no power or jurisdiction but the Respondent No. 3 entertained one case and granted ex-parte ad-interim order and thereafter passed on the case to the applicant. The applicant then pointed out that neither the Commissioner nor the Additional Commissioner has any jurisdiction to entertain such an application. In the O.A., the applicant has stated that he craves leave to refer and to rely upon many more instances of gross interference by the Respondent No. 3 in the performance of duties of the applicant. In the rejoinder filed by the applicant on 22.08.1996, the applicant has given reference to the following cases, in which the Respondent No. 3 ~~has~~ alleged to have interfered with his lawful functioning as Additional Commissioner :

- (i) 95/Mun-Appeal Cell/20 .. Tapadia Construction Co. V/s. Municipal Council, Beed & Collector, Beed, etc.
- (ii) 95/Mun - Appeal Cell/40 .. Manik Bajirao Dharmadhikari & Others V/s. President, Municipal Council, Parlivaijinath & Others.
- (iii) 96-BVP-Appeal-Cell/32 .. Balabhai Budhaji Kolhe V/s. The Collector of Aurangabad & Others.
- (iv) 1996/KCH/R-13 .. Shaikh Ahmed Shaikh Imam V/s. Laxman Waman Fasage.
- (v) 95/Cooperative/Appeal/16 .. Sudhakar Wishwanath Gund V/s. Rajendra Dattatrya Bhosale & Others.

In all these cases, the contention of the applicant is that the Respondent No. 3 was under pressure from the higher functionaries including Ministers, to decide the matter in a particular way and even though the applicant explained to him the legal frame-work within which he was functioning, the Respondent No. 3 continued to bear a grudge against him.

5. The applicant has alleged that atleast in one case, the Respondent No. 3 had no such compulsion <sup>from his superiors</sup> to act in a particular manner but the pressure was put upon the applicant by the Respondent No. 3 purely for personal reasons. This was a case of Saint Francis De Sales Education Society V/s. Kersi Ardesri Dordi of Aurangabad (No. 1996/Rev/R-27) in which the Respondent No. 3 wanted

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the applicant to favour a particular party (Saint Francis De Sales Education Society) because the wife of the Respondent No. 3 works as a teacher in a local Nursery School run by a Christian Institution and hence was interested in the grant of stay to the petitioner as well as grant of still more time to the revision petitioner and he certainly did not like the rejection of the stay petition filed by the applicant in this case. It is contended that in this particular case, the respondent's interference was emphatically malafide.

6. The applicant has given certain other examples in which the Respondent No. 3 tried to harass him, namely; withdrawing the driver working on applicant's official vehicle for the past 7 to 8 years, his action in not processing the case of reimbursement for private accommodation in which the applicant had to stay till he was able to occupy the accommodation ear-marked for Additional Commissioner's Occupation. The Respondent No. 3 also initially refused to give him one day's casual leave for enabling the applicant to attend to an urgent civil matter involving the Civil Court Decree of the value of Rs. 80,000/- necessitating him to travel for about 500 Kms. to his home town. The casual leave was later on sanctioned.

7. The Counsel for the Respondent No. 2, at the outset brought to our notice one significant communication from the applicant dated 20.07.1996 addressed to the

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Respondent No. 3 on the subject of - "Permission to retain Government owned-residence viz., Gulshan Mahal Annex at Aurangabad", which according to him necessitates dismissal of O.A. in limine. The para reads as below :-

"My daughter's engagement ceremony is fixed on 21st of this month and her marriage ceremony fixed at Aurangabad on 23rd November 1996. My Son's marriage ceremony is also to take place in December 1996. Even when I shall be joining at Mumbai after about two months' leave as per the present indications, I may be not allotted any Government accomodation at Mumbai before 8 months after my joining at Mumbai."

The Counsel for the respondents urges that this shows that the applicant infact, was reconciled to accept the order of transfer and only wanted some time. We are unable to accept this contention. If we read the communication as a whole, it was written only one day prior to the date of engagement ceremony of his daughter and it was addressed to the Divisional Commissioner, specifically with the request to permit him to retain the accomodation in his possession for six months. The reference ~~to~~ joining at Mumbai is contained in the conditional clause and is qualified by the words "as per present indications." We are therefore, unable to accept the contention of the Respondent No. 2 that this communication puts the applicant out of court.

8. The Counsel for Respondent No. 2 then submits that the transfer of the applicant was part of a chain of transfers effected by the Government.

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Regarding the allegation that the respondent no. 3 acted without jurisdiction in giving him certain directions in his lawful function as a Judicial Officer, the Respondent No. 2 has stated that the Additional Commissioner is not an independent officer, but he is subordinate to Divisional Commissioner. The Additional Commissioner works under overall superintendence and control of Divisional Commissioner. The Disposal of cases by the Additional Commissioner and performance of the Additional Commissioner is reviewed and evaluated by the Divisional Commissioner. The Divisional Commissioner is empowered to write the confidential report of Additional Commissioner and can therefore guide and direct the Additional Commissioner in performance of his duties.

9. In response to the additional rejoinder filed by the applicant giving additional examples in which the allegedly Respondent No. 3 interferred with the functioning of the Additional Commissioner, the respondent no. 2 has taken the stand that the bulky supplementary affidavit filed by the applicant is nothing but an after thought and the respondent no. 3 will reply in this matter. The respondent no. 2 has further stated that this is a matter of difference of opinion between the Divisional Commissioner and the Additional Divisional Commissioner and in such a situation, the Tribunal is not the appellate authority or forum for redressal of their grievance and the only authority is the Government of Maharashtra.

*Am*

10. The Respondent No. 3 who filed the Written Statement long after the written statement filed by the Respondent No. 2 and the rejoinder filed by the applicant, has simply denied the allegations made by the applicant as being false, misleading and irrelevant. He has further stated that the Additional Divisional Commissioner is not an independent officer but he is subordinate to the Divisional Commissioner. The Additional Commissioner works under overall supervision and control of Divisional Commissioner. The disposal of cases by the Additional Commissioner is reviewed and evaluated by the Divisional Commissioner and the Divisional Commissioner is empowered to write the confidential report of the Additional Commissioner. It is submitted that the transfer of the applicant was/part of general transfer orders and not at the instance of respondent no. 3 and that the applicant should not have linked the issue of transfer with the alleged difference of opinion between the two functionaries to agitate before the Tribunal, as the Tribunal is not the appellate authority or forum for redressal of his grievance.

11. While considering the contention of the Respondent No. 2 and 3 that this Tribunal is not competent to go into the so called difference of opinion between the Additional Commissioner and the Divisional Commissioner, especially in the context of order passed by the Divisional

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Commissioner on 16.05.1996 directing the Additional Commissioner not to grant ad-interim ex-parte stay against the orders passed by the Collectors and Chief Executive Officers, Zilla Parishad, it may be that the Tribunal has no power under the Bombay Commissioners of Divisions Act, 1957, however, the contention of the applicant is that the Respondent No. 2 was induced to transfer the ~~by~~ applicant by the Respondent No. 3 and the legality of transfer of the I.A.S. Officer is certainly a matter which can be gone into by this Tribunal. It is settled by a series of judgements of the Hon'ble Supreme Court that transfer is not a condition of service but it is an incident of service but the power to transfer must be exercised in public interest and for administrative reasons and in accordance with mandatory statutory rules and the same can be challenged on the ground of malafides. In this connection, reference can be made to "B Varadha Rao V/s. State of Karnataka" {AIR 1986 SC 1955 } and Full Bench decision <sup>in</sup> Kamlesh Trivedi V/s. Indian Council of Agricultural Research & Anr. appearing at page 80 of Vol.I of Full Bench Judgements published by Bahri Brothers and the case of Rajendra Roy V/s. Union Of India decided by the Supreme Court { AIR 1993 SC 1236 }. The allegation of the applicant is that the transfer of the applicant was because of malafides borne by the Respondent No. 3, who was annoyed with the applicant

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because he had occasion to point out the illegal directions given by the Respondent No. 3 to decide the various judicial matters in a particular way and he had also pointed out that under the Bombay Commissioners of Divisions Act, 1957, the Additional Commissioner as a judicial authority is not subordinate to the Commissioner. We regret to note that both the Respondent Nos. 2 and 3 have evaded the issue and have tried to question the competence of the Tribunal to go into such allegations. We affirm that the Tribunal certainly has competence to go into such allegations to the extent that they are in support of the basic allegation of malafide exercise of powers. When the Divisional Commissioner had issued a written order asking the Additional Commissioner not to exercise particular powers, namely; the power to grant ad-interim ex-parte stay and when no special or general orders giving him such powers are pointed out to us, then the Tribunal will be free to draw its conclusion that the Respondent No. 3 was in the habit of issuing directions and instructions in excess of jurisdiction and the Tribunal can further draw a legitimate inference that when the Respondent No. 3 was pointed out the illegality and invalidity of instructions and directions, he began to bear a grudge against the applicant, which got translated into a course of action, which had adverse consequente on the applicant. Infact, the State Government in its additional affidavit dt. 11.11.1996 in para 6 has stated that the Respondent No. 3 will reply in the matter of specific examples given by the applicant of illegal directions having been issued by Respondent No. 3.

Unfortunately, as we have noticed, the respondent no. 3 has chosen to deny the allegations barely without going into the particulars. We, therefore, have no alternative but to draw our own conclusions. The contention that the allegation about illegal exercise of powers is an after-thought cannot ~~bear~~ scrutiny because in the O.A. itself the applicant has given ~~three~~ examples, namely; the case pertaining to Nilanga Taluka, in Latur District and the case of A.P.M.C. in which the Respondent No. 3 presumed to exercise powers without jurisdiction and the circular dated 16.05.1996 by which the applicant was directed not to grant ex-parte ad-interim stay. It is interesting to note in this connection, that the order of transfer was issued shortly after this order of Respondent No. 3, namely; on 27.06.1996. The conclusion that is irresistible, therefore, is that the Respondent No. 3 bore a grudge against the applicant and that the transfer of the applicant would certainly have something to do with this attitude. We, therefore, asked the Counsel for the Respondent No. 2 to produce before us the file underlaying the transfer of the applicant from Aurangabad to Bombay. The Counsel for the respondents produced before us a file of Desk X of G.A.D. of the Government of Maharashtra which contains a list of 49 officers in which at Sl.No. 10 one Shri I.S. Chahal who is a Chief Executive Officer, Nasik, has been transferred as Additional Commissioner,

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Aurangabad and the reason for transfer is shown as "on transfer of Shri Engineer". At sl. no. 11 is the name of the applicant who is shown as transferred to the vacant post of Joint Director Industries, Bombay. Since what was before us was only a bare list, signed by the competent authorities alongwith the list of communication either from the officers and other persons suggesting transfers and O/C's of transfer orders, the precise reason for transfer of the applicant, namely; as to why Shri Engineer should be transferred from Aurangabad to Mumbai to create a vacancy and why in the vacancy so created Shri Chahal should be transferred from Nasik to Aurangabad, are not clear from the file. We, therefore, asked the Counsel for the respondents as to whether there was any note-sheet on which such reasons were given. The learned counsel for the respondents not only stated that there was no such note-sheet but he went further and stated that in the case of I.A.S. officers there was no practice to maintain such note-sheet and if such note-sheet was maintained, the country will go to dogs. We are constrained to observe that the counsel for the respondents has over-reached himself in such a reckless statement. We take judicial notice of the fact that the Secretariat work in the State Government (Mantralaya) is governed by the Manual of Office Procedure amended from time to time and this manual envisages maintenance of files into two parts, namely; note-sheet part and correspondence part and there are

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no separate instructions that files relating to transfer of I.A.S. officers should not follow Manual of Office Procedure. It could have been a different matter in case the respondents were claiming privilege but no such plea was made nor any such prayer made. It could be a case that in this particular case, the transfer orders were crystallised after ~~an~~ <sup>102</sup> informal consultation between appropriate authorities namely; the Chief Secretary and the Chief Minister and that the notes of such informal consultations were not maintained but instead of saying this, the counsel for the respondents has gone off a tangent and we do not appreciate this attitude. We, however, take it that such notes are not available or the State Government is not in a position to produce the same. We are therefore, required to draw our own conclusion and pass appropriate orders on the basis of the materials before us.

12. At the argument stage, the Counsel for the applicant relies on the case of N.K. Singh V/s. Union Of India & Others I (1994) 28 ATC 246 I and especially, para 9 thereof, which reads as follows :-

" Transfer of a public servant from a significant post can be prejudicial to public interest only if the transfer was avoidable and the successor is not suitable for the post. Suitability is a matter for objective assessment by the hierarchical superiors in administration. To introduce and rely on the element of prejudice to public interest as a

vitiating factor of the transfer of a public servant, it must be first pleaded and proved that the replacement was by a person not suitable for the important post and the transfer was avoidable. Unless this is pleaded and proved at the threshold, no further inquiry into this aspect is necessary and its absence is sufficient to exclude this factor from consideration as a vitiating element in the impugned transfer. Accordingly, this aspect requires consideration at the outset."

The Counsel for the applicant would urge that the transfer of the applicant was certainly not in public interest because the person who took over from him was a far junior officer, both in relation to the Collectors

in Aurangabad Division and also in relation to other Additional Commissioners in various Divisions. For this purpose, the applicant, in his rejoinder dated 10.12.1996 enclosed two annexures showing that Shri I.S. Chahal, who took over from the applicant, belonged to 1989 batch and all the Collectors in the Division were senior to him, some of them belonging to 1984 batch and 1985 batch and only one Collector belonged to the same batch as Shri I.S. Chahal. So far as the Additional Commissioners are concerned, all other Additional Commissioners belonged to 1982 or 1983 batch but Shri I.S. Chahal belonged to 1989 batch. The Counsel

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for the applicant, therefore, would urge that no public interest could be said to have been served because it could not be in a public interest to post a junior officer as Additional Commissioner.

13. The Counsel for the respondents also relies on the N.K. Singh's case but on para 24, which is reproduced below :-

" The private rights of the appellant being unaffected by the transfer, he should have been well advised to leave the matter to those in public life who felt aggrieved by his transfer to fight their own battle in the forum available to them. The appellant belongs to a disciplined force and as a senior officer would be making several transfers himself. Quite likely many of his men, like him, may be genuinely aggrieved by their transfers. If even a few of them follow his example and challenge the transfer in courts, the appellant would be spending his time defending his actions instead of doing the work for which he holds the office. Challenge in courts of a transfer when the career prospects remains unaffected and there is no detriment to the government servant must be eschewed and interference by courts should be rare, only when a judicially manageable and permissible ground is made out. This litigation was ill-advised."

The Counsel for the applicant also relies on the cases of State of Madhya Pradesh & Others V/s. Sr. S.S. Kourav & Ors., Jasbir Singh V/s. State of Himachal Pradesh, Union Of India & Others V/s. S. L. Abbas, Srichand & Others V/s. Union Of India & Others <sup>and</sup> Rajendra Roy V/s. Union Of India.

We need not go into all these cases because it is well settled that transfer can be challenged on the ground of malafide and when it can be said to be issued in arbitrary exercise of powers, without application of mind. We are not inclined to accept the contention of N.K. Singh's the applicant that para 9 of ~~the~~ judgement is attracted in this case. We have no material before us to hold that Shri Chahal was in any manner ~~unqualified of~~ <sup>unqualified of</sup> ~~unsuitable~~ <sup>the</sup> to hold the post of an Additional Commissioner other than <sup>the</sup> two sheets showing the seniority of Shri Chahal viz-a-viz. Collectors in the Division and other Additional Commissioners in the State. As observed by the Supreme Court in N.K. Singh's case, para 23, - "Transfer of a government servant in a transferable service is a necessary incident of the service career. Assessment of quality of men is to be made by the superiors taking into account several factors including suitability of the person for a particular post and exigencies of administration. Several imponderables requiring formation of a subjective opinion in that sphere may be involved, at times. The only realistic approach is to leave it to the wisdom of that hierarchical superiors to make that decision. Unless the decision is vitiated by malafides or infraction of any professed norm or principle governing the transfer, which alone can be scrutinised judicially, there are no judicially manageable standards for scrutinizing all transfers and the courts lack the necessary expertise

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for personnel management of all government departments."

14. From the material before us, we hold it as established that Respondent No. 3 bore a grudge against the applicant. We are also not prepared to accept that the Commissioner has nothing to do with the transfer of an Additional Commissioner. The applicant in his rejoinder has filed before us the government orders in G.A.D. No. TRF-1088/Case No. 6/88/12 dated 09.06.1988 which shows that the Divisional Commissioner is even concerned with the transfer of an officer of another department if he is to be retained in a district in excess of four years. It cannot, therefore, be accepted that the Divisional Commissioner has nothing to do with the transfer of Additional Commissioner directly working under him. The contention of the applicant that the authorities in Mantralaya had some interest in transferring Shri Chahal from Nasik to Aurangabad has also gone uncontraverted. We are, therefore, required to hold that the transfer of the applicant from Aurangabad to Bombay is clearly malafide and actuated by extraneous considerations. It also appears to have been ordered without application of mind, as will be seen from the next para of the judgement.

15. The difficulties of the applicant that his wife was allergic to coastal climate and that he was on the verge of retirement and therefore, he should not have been disturbed or atleast he should have been transferred

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to some other place like Pune, for which he had been repeatedly requesting the Government, does not appear to have been given due weight by the Government. From this point of view also, the order of transfer appears to have been mindless. It is true that there is no rule that <sup>a</sup> retiring Government servant has a right to be posted at a place of his choice on the verge of retirement, although the counsel for the applicant has brought to our notice para 26.28 of the Fourth Central Pay Commission Report, which is reproduced below :

" A suggestion has been received that Central Government employees having all India transfer liabilities should not be transferred away from their home towns during the last 3 years of their service to enable them to settle their affairs satisfactorily before retirement. Such a policy has already been followed by some state governments. Government may consider the advisability of transferring a central government employee with all India transfer liability to his home state during the last 3 years of service."

16. We consider that the recommendation of the Fourth Pay Commission could certainly be said to have persuasive value. The applicant also relies on the judgement of the Division Bench of Bombay High Court in Maganbhai Chhanabhai Patel V/s. Videsh Sanchar Nigam Ltd. [ 1992 II CLR 513 ]. Para 4 of the judgement is reproduced below :-

"It is undoubtedly true that the employer has got the power to transfer an employee, but it is equally true that normally the transfer are not effected in respect of employees holding Class-III and Class-IV posts. It is undoubtedly true that the transfer of the appellant does not suffer from vice of malafides, but in our Judgement, taking into consideration the fact that the appellant has crossed age of 56 years, that the appellant is residing in Bombay for last 35 years with his family members, and the fact that there are no complaints against the appellant in respect of his service record, it would be extremely harsh to transfer the appellant to Poona at the fag end of his service. In our Judgement, the transfer in these circumstances is not called for and accordingly, the transfer is required to be struck down. We make it clear that we are not granting relief to the appellant by accepting the challenge to the transfer for the lack of authority, but we are setting aside the order of the transfer only out of humanitarian consideration."

17. Although the judgement is not strictly applicable, for the reasons given <sup>earlier</sup> we allow the O.A. and hold that the order transferring the applicant from Aurangabad to Mumbai is vitiated by malafides and by having been passed by extraneous considerations and without application of mind to the circumstances of the individual case of the applicant. The same is therefore, quashed and set aside. The respondents are also directed to consider the case of the applicant for transfer/posting to a place other than Mumbai keeping in view the personal

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difficulties of the applicant, namely; his wife's illness and also keeping in view that he is an officer belonging to Scheduled Tribes and that he is on the verge of retirement, namely; in January, 1988. We expect that under any circumstances, the applicant would not be transferred and posted to Mumbai or any coastal town. With these directions, the O.A. is disposed of. There will be no order as to costs.

18. Before parting with the case, we would like to refer to M.P. No. 857/96 filed by the Respondent No. 2 on 03.12.1996 in relation to certain orders passed by this Tribunal on 14.11.1996 directing to treat the applicant as on 'Compulsory Waiting' after exhaustion of Earned Leave of four months. This order was passed when the counsel for the respondents expressed his inability to give the particulars relating to the position of sanctioning leave to the applicant and the grievance of the applicant was that, he was put to hardship as he was without any leave pay. In the M.P. it is stated that the applicant was sanctioned commuted leave upto 19.08.1996 and he could be sanctioned earned leave from 20.08.1996. The Counsel for the respondents tried to make out that the Court had passed an order which had no basis in the A.I.S. Rules. We are sorry to state that order for grant of compulsory waiting was passed in the context when the respondents' counsel expressed his inability to help the Tribunal with the facts relating to sanction of leave. It would have been

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better for the counsel for the respondents to seek short time and obtain instructions from the Government instead of trying to oppose a reasonable request from the applicant. Therefore, the question of this Tribunal passing any order in violation in A.I.S. (Leave) Rules does not arise and it hardly needs to be stated that grant of leave to the applicant now or in future, is to be governed by the applicable rules. In other words, that period following 120 days earned leave should be counted as Compulsory Waiting.

M. R. Kolhatkar  
(M. R. KOLHATKAR)  
MEMBER (A).

B. S. Hegde  
(B. S. HEGDE)  
MEMBER (J).

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