

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

**WRIT PETITION NO. 269 OF 2023
ALONGWITH
INTERIM APPLICATION NO. 8261 OF 2024**

Mr. Vishwas Laxman Gadade,
Age : 44 yrs, (DOB : 13.03.1977),
Occ : Circle Officer, R/at :
Ashiyana Village, Katrang-
Khopoli, Tal. Khalapur, Dist.-
Raigad, Mob : 9561647934. emal,
adv.kjagdale @ gmail.com

.....Petitioner

: Versus :

1. The State of Maharashtra,
Through the Principal Secretary,
Revenue Department,
Mantralaya, Mumbai-400 032.
2. The District Collector, Collector
Office at Raigad.
3. Mr. C.S. Khot, Age-53, Occ.
Service, Circle Officer, Khopoli,
Tahasil Offic, Khalapur, Dist.
Raigad.
4. Mr. Tushar M. Kamat, Age : 39
yrs, Occ. Service, Circle Officer,
Wawoshi, Tahasil Office,
Khalapur, Dist. Raigad.
5. Mr. Kiran G. Patil, Age- 49 yrs,
Occ. Service, Circle Officer
Chowk, Tahasil Office,
Khalapur, Dist. Raigad

....Respondents

Mr. Mihir Desai, Senior Advocate with *Mr. Sachin K. Hande, Ms. Poonam Pal, Ms. Tanvi Pathak and Ms. Sankruti Yagnik, for the Petitioner.*

Dr. Birendra Saraf, Advocate General with *Mr. N.C. Walimbe, Addl. Govt. Pleader, Smt. Reena A. Salukhe, AGP, Mr. Jay Sanklecha 'B' Panel Advocate, Ms. Malaika Castellino and Mr. Anshuman Sambre, for State-Respondent Nos.1 and 2.*

Mr. C.T. Chandratre, for Respondent Nos.3 and 4.

**CORAM : A. S. CHANDURKAR,
 SANDEEP V. MARNE &
 JITENDRA S. JAIN, JJ.**

Reserved On : 4 January 2025.

Pronounced On : 16 January 2025.

JUDGMENT: *(Per : Sandeep V. Marne, J.)*

A. PROLOGUE

1) The issue of transfer of employees, particularly of government servants, often attracts attention of Courts and Tribunals and has contributed to a large section of jurisprudence on service law. Expectation of an employee to retain his/her posting, or to have a desired posting, contributes to large volume of litigation on issues of transfer and postings. Courts and Tribunals in India are therefore flooded with petitions filed by employees, who feel wronged by their

transfers. The Supreme Court has time and again reiterated that transfer is an incident of service and that the appointing authority has wide discretion in the matter of deciding posting of employees. If a Government servant is appointed on a transferable post, it is for the Government to decide where he/she is to be transferred and posted and Courts and Tribunals cannot interfere with the discretion exercised by the transferring authority. Transfers are deemed to have been effected in public interest and towards efficiency of public administration. Since transfer is an incident of service, an order of transfer cannot be interfered with by Courts unless it is shown to be clearly arbitrary or vitiated by malades or against the professed norms. The scope of judicial review in challenge to transfer orders lies in extremely narrow compass. There is no dearth of decisions of the Supreme Court where the above principles are repeatedly enunciated. See *Shilpi Bose and others Versus. State of Bihar and others*¹, *Abani Kanta Ray Versus. State of Orissa & Others*², *Union of India Versus. N.P. Thomas*³, *Union of India Versus. S.L. Abbas*⁴ and *State of U.P. and others Versus. Gobardhan Lal*⁵. The principles are reiterated by the Apex Court in recent decision in *Sri Pubi Lombi Versus. State of Arunachal Pradesh & Ors.*⁶

2) On account of recognition of virtually unbridled and unguided power of the transferring authority to transfer and post employees as per its discretion, cases of abuse of such power and

¹ 1991 Supp (2) SCC 659

² 1995 Supp (4) SCC 169

³ 1993 Supp (1) SCC 704

⁴ (1993) 4 SCC 357

⁵ (2004) 11 SCC 402

⁶ SLP (C) No. 4129 of 2024 decided on 13 March 2024.

arbitrary transfers were on rise and therefore to regulate the same, Governments and its departments came out with guidelines and policies broadly regulating the power of transfer. However, such policies and guidelines, which the transferring authorities are supposed to follow while effecting transfers, have been repeatedly held to be unenforceable in Courts, on account of lack of statutory support. The Apex Court in *T.S.R. Subramanian Versus. Union of India*⁷, while dealing with the issue of administrative reforms for preservation of integrity, fearlessness and independence of civil servants at the Centre and State levels, directed the Central and State Governments to issue appropriate directions to secure providing of minimum tenure of service to various civil servants. The Apex Court held :

35. We notice, at present the civil servants are not having stability of tenure, particularly in the State Governments where transfers and postings are made frequently, at the whims and fancies of the executive head for political and other considerations and not in public interest. The necessity of minimum tenure has been endorsed and implemented by the Union Government. In fact, we notice, almost 13 States have accepted the necessity of a minimum tenure for civil servants. Fixed minimum tenure would not only enable the civil servants to achieve their professional targets, but also help them to function as effective instruments of public policy. Repeated shuffling/transfer of the officers is deleterious to good governance. Minimum assured service tenure ensures efficient service delivery and also increased efficiency. They can also prioritise various social and economic measures intended to implement for the poor and marginalised sections of the society.

3) However long before delivery of the judgment by the Apex Court in *T.S.R. Subramanian*, several State Governments had already started enacting Acts governing transfers of its employees and providing for fixed tenure of posting. The Governor of Maharashtra

⁷ (2013) 15 SCC 732

first promulgated Maharashtra Government Servants Regulation of Transfers and Prevention of Delay in Discharge of Official Duties Ordinance, 2003 on 25 August 2003. The Ordinance was replaced by the State Legislature by enacting the Maharashtra Government Servants Regulation of Transfers and Prevention of Delay in Discharge of Official Duties Act, 2005 (**Transfer Act**) which came into effect from 1 July 2006. The Transfer Act deals with twin aspects of regulating transfer of government servants and prevention of delay in discharge of official duties. The Transfer Act *inter alia* provides for minimum tenure for state government employees but also preserves right of the Government to issue premature and midterm transfers in administrative exigencies in exceptional circumstances after following the prescribed procedure. Thus, in the State of Maharashtra, a right got created in favour of government employees to serve on a post for prescribed tenure. Transfer Act thus brought in transparency in public administration in the State of Maharashtra and has largely suppressed the earlier mischief of unguided and unchannelled discretion to transfer Government servants at the discretion of the transferring authorities.

4) Ever since enactment of the Transfer Act, the litigation relating to transfer of State Government has, by and large, centered around challenges to transfers effected in breach of prescribed tenure by resorting to exceptional power by the transferring authorities. Excepting once class of state government servants, there has been no debate about the length of tenure prescribed by the Transfer Act for which the employees can serve on a post. The class of employees in respect of whom disputes have arisen about the exact tenure

prescribed by the Transfer Act are those in Group C of the State Government service. Such Group-C employees are divided in two categories under the Transfer Act – employees in secretariat services and employees in non-secretariat services.

5) By interpreting the provisions of the Transfer Act, the Group C employees in non-secretariat services started demanding posting on the same post for two full tenures and this is where divergent views have been expressed in two Division Bench judgments of this Court, necessitating the present reference to the Larger Bench.

B. QUESTION FORMULATED FOR DECISION IN REFERENCE

6) During the course of hearing of this Petition, the Division Bench noticed divergent views expressed in two previous judgments of the Division Benches of this Court in *Santosh Nandalal Dalal Versus. State of Maharashtra and Others*⁸ and *Sachin Sadashiv Raut Versus. The State of Maharashtra and Anr.*⁹ with regard to interpretation of provisions of Sections 3 and 4 of Transfer Act. Since the divergent views could not be reconciled and since the issue of interpretation of provisions of Section 3(1) of the Transfer Act frequently arises, the Division Bench felt it necessary that the issue is resolved by the larger Bench. Accordingly, by order dated 8 March 2024, the Division Bench formulated the following question for answer by the Larger Bench :

⁸ Writ Petition No. 8813 of 2014 decided on 6 May 2015

⁹ Writ Petition No.10330 of 2019 decided on 8 November 2019

“Whether the provisions of section 3(1) read with first proviso of the Maharashtra Servants Regulation of Transfers and Prevention of Delay in Discharge of Official Duties Act, 2005 confers a right on a Group-C employee holding a non-secretarial post to complete two full tenures, each tenure consisting of three years or whether the said proviso to Section 3(1) merely permits the State to continue such employee at the office or department for a period of six years without there being any corresponding right with such employee to complete two full tenures ?”

C. FACTUAL BACKGROUND

7) Facts of the case are referred in brief for understanding of the background in which the above question arises for our consideration. Petitioner was initially recruited as Talathi on 23 April 1998 and was promoted to the post of Circle Officer. On his promotion as Circle Officer, he was posted at Karjat on 26 March 2013 and worked as such till 2 June 2014. He was thereafter transferred and posted as Circle Officer, Mhasala, Tehsil-Mhasala and worked as such from 3 June 2014 to 2 June 2016. He opted for mutual transfer and was posted as *Tenancy Awwal Karkoon* in the office of Sub-Divisional Officer, Shrivardhan on 6 June 2016 and worked as such till 1 June 2018. Petitioner was thereafter transferred and posted as Circle Officer, Khopoli, Tehsil-Khalapur by order dated 31 June 2018 and joined the said post on 4 June 2018. On completion of tenure of 3 years as Circle Officer, Khopoli, Order dated 9 August 2021 was issued transferring him from Khopoli and posting him as Circle Officer, Indapur, Tehsil-Mangaon. In place of the Petitioner, Respondent No.3 came to be transferred and posted as Circle Officer,

Khopoli by a separate order passed on 9 August 2021. Petitioner submitted representation against the transfer order.

8) Petitioner instituted Original Application No. 616/2021 before the Maharashtra Administrative Tribunal, Mumbai (**the Tribunal**) challenging the transfer order dated 9 August 2021, *inter-alia* on the ground that he was entitled to tenure of 6 years as per the first Proviso to Sub-section (1) of Section 3 of the Transfer Act. It appears that various other Original Applications were also filed claiming tenure of 6 years by non-secretariat Group-C employees. The Tribunal clubbed Original Application filed by the Petitioner with other Original Applications raising same issue and by judgment and order dated 13 January 2022, dismissed the same. Aggrieved by the judgment and order dated 13 January 2022 passed by the Tribunal, the Petitioner has filed the present petition.

9) During the course of hearing of the present petition on 8 March 2024, the Division Bench of this Court noticed divergent views expressed in two previous Division Bench judgments in *Santosh Nandalal Dalal* (supra) and *Sachin Sadashiv Raut* (supra) and accordingly we are tasked upon to answer the question formulated by the Division Bench in order dated 8 March 2024.

D. SUBMISSIONS

D.1 SUBMISSIONS ON BEHALF OF PETITIONER-EMPLOYEE

10) Mr. Mihir Desai, the learned Senior Advocate appearing for the Petitioner would submit that the view taken by the Division

Bench in *Sachin Sadashiv Raut*, about employees in Non-Secretariat service in Group-C being entitled to two full tenures of 3 years each, is the correct view and that the view earlier taken by the Division Bench in *Santosh Nandalal Dalal* is not in consonance with the provisions of Sections 3 and 4 of the Transfer Act. He would submit that the first proviso to sub-section (1) of Section 3 creates a right in favour of employees in Non-Secretariat services in Group-C to remain on a post for two full tenures and such employees can be transferred out from the post occupied by them only after completion of two full tenures of 3 years each. He would submit that the true purport of sub-section (1) of Section 3 is to declare a normal tenure in respect of Group-C employees and the two provisos to the said sub-section create a further right in favour of employees specified therein (Non-Secretariat Services in Group-C and Secretariat Services) to enjoy the tenures specified therein. That in respect of employees in Non-Secretariat services in Group-C, they are assured two full tenures under the first proviso and that therefore it is impermissible to transfer them before completion of two full tenures on the same post unless any eventuality specified under Section 4 of the Act takes place. Mr. Desai would submit that the first proviso to Section 3(1) carves out an exception to the normal rule of tenure of 3 years specified in sub-section (1) of Section 3. He would also rely upon judgment of the Apex Court in *Laxminarayan R. Bhattad and others Versus. State of Maharashtra and another*¹⁰ in support of his contention that a proviso can serve the purpose of qualifying or excepting certain provisions for the main enactment. He would therefore submit that the first proviso is thus an exception to the normal tenure of 3 years specified in sub-section (1) of Section 3. He would therefore submit that the Legislature has

¹⁰ (2003) 5 SCC 413

consciously provided for two full tenures to employees in Non-Secretariat services in Group-C by inserting first proviso to Section 3(1) of the Transfer Act and that the legislative intent of permitting tenure of 6 years to such employees cannot be frustrated by interpreting provisions of the Act in any other manner.

11) Mr. Desai would then submit that the very objective behind enactment of Transfer Act is to arrest the mischief of unguided and unbridled power of transfer of Government Servants and that therefore transfer must be effected strictly in accordance with the provisions of the Act. To bring home the point of objective behind enactment of Transfer Act, he would rely upon judgment of Division Bench of this Court in Purushottam Govindrao Bhagwat Versus. State of Maharashtra and others¹¹. He would submit that the legislative intent of the provision is to ensure that employees do not face arbitrary transfers before the completion of their full tenure, thus contributing to administrative continuity and the employee's professional development.

12) Alternatively, Mr. Desai would submit that in the event of first proviso to sub-section (1) of Section 3 being interpreted to mean vesting of power in the State Government rather than creation of right in favour of the employee, the employee would still have legitimate expectation to serve on a post for two full tenures. He would submit that even if first proviso to sub-section (1) of Section 3 is read to mean that the same empowers the State Government to effect transfers on completion of two full tenures, the Government is expected not to transfer an employee before he/she completes the tenure of 6 years. In

¹¹ (2013) 3 Bom C.R. 442

support of his contention of legitimate expectation, Mr. Desai would reply upon judgment of the Apex Court in Ms. X Versus. Registrar General, High Court of Madhya Pradesh and another¹². He would also place reliance on judgment of the Apex Court in Dr. Nagorao Shivaji Chavan Versus. Dr. Sunil Purushottam Bhambre and others¹³ in support of his contention that statutory provision of tenure is required to be observed unless special exigencies enumerated in Section 4 of the Act arises. He would also rely upon judgment of Division Bench of this Court in V.B. Gadekar Versus. Maharashtra Housing and Area Development Authority and another¹⁴ in support of his contention that in absence of any administrative exigency referable to the provisions of Section 4 of the Act, a Government Servant in Group-C (Non-Secretariat) must be permitted to serve for two full tenures on a post. Mr. Desai would further submit that the first proviso to sub-section (1) of Section 3 cannot be read to mean the maximum tenure for which employee in Non-Secretariat Group-C can be retained on a post as the tenure provided for in Section 3 is both minimum as well as maximum. He would submit that the fact that Section 5(1) of the Act provides for extension of tenure would itself mean that the tenure prescribed under Section 3(1), as well as under the two provisos, is not just minimum but also maximum tenure. He would therefore submit that the tenure of full two terms (six years) under the first proviso to Section 3(1) is both minimum as well as maximum tenure for employees in Non-Secretariat services Group-C. Mr. Desai would therefore urge that the provisions of Section 3(1) of the Transfer Act be interpreted to mean that the first proviso confers right on employees

¹² (2022) 14 SCC 187

¹³ (2019) 13 SCC 788

¹⁴ (2008) 2 Mh.L.J. 640

of Non-Secretariat services in Group-C to enjoy two full tenures (six years) on the post held by them.

D.2 SUBMISSIONS ON BEHALF OF RESPONDENT NOS. 1 AND 2-STATE

13) Dr. Birendra Saraf, the learned Advocate General would appear on behalf of Respondent Nos.1 and 2. He would submit that provisions of Section 3(1) of the Transfer Act would mean that the employees in Non-Secretariat services in Group-C would be entitled to maximum tenure of 3 years on a post, subject to the provisions of Section 4 of the Act. He would submit that the Court must bear in mind the objects of the enactment while interpreting the provisions thereof. Inviting our attention to the Preamble of the Act, he would submit that the same is enacted with a view to *inter-alia* regulate transfers of Government Servants as there was no enactment earlier and the Act has been enacted with the objective of doing away the arbitrary power of authorities to transfer the Government Servants. Relying on judgment of Division Bench of this Court in Ku. Geeta and another Versus. State of Maharashtra, through Dy.Secretary, Public Health Department, Mumbai G.T. Rugnalays Building Complex and others¹⁵, he would submit that the remedy of regulating transfers in accordance with the Act is provided for to suppress the mischief of any unguided, unchanneled power to transfer the Government servants or employees. He would also rely upon judgments of the Apex Court in State of U.P. Versus. Gobardhan Lal (supra) and Gujarat Electricity Board and another Versus. Atmaram Sungomal Poshani¹⁶ and

¹⁵ 2015 SCC Online Bom 2955

¹⁶ (1989) 2 SCC 602

of this Court in *V.B. Gadekar* (supra), in support of his contention that transfer is an essential incident of service and transfer from one place to another is necessary in public interest and efficiency in public administration.

14) Dr. Saraf would submit that the main provision under Section 3(1) of the Transfer Act is in furtherance of public interest principle that frequent transfer of an employee is contrary to efficient administration and prone to abuse. That the provisos are in furtherance of public interest principle that transfer of employees at regular intervals is necessary for efficient administration. Dr. Saraf would submit that the correct interpretation of the first proviso to Section 3(1) of the Transfer Act is to mean that at the end of the term of 3 years, it is open for the transferring authority to transfer the Group-C Non-secretariat employee to another post, whether in the same office or Department or outside. That thus such employees can be continued in the same office or department for a period of 6 years but cannot be so continued in the same office or department for more than two terms. That therefore a Non-Secretariat employee in Group-C can be continued in the same post or on a different post in a department or office for a maximum of two terms i.e. 6 years. That the second proviso to Section 3(1) relates to employees in Group-C from Secretariat services who cannot be continued even on the same post for more than 3 years, and in any case cannot be continued in the same department for more than 6 years. Dr. Saraf would therefore submit that the main provision under Section 3(1) provides for tenure of a post, whereas the provisos set out the location/department to which an employee must be transferred at the end of completion of two

consecutive three-year tenures in a particular office/department. Relying on provisions of Section 4(2) of the Act, Dr. Saraf would submit that though the Government is mandated to prepare a list of Government Servants due for transfer in the months of April and May, the same would merely mean that the employees included therein are to be considered for transfer but in the light of provisions of Section 3(1) read with Section 5, it is open for the State Government to continue such employee whose name is included in such list beyond the normal tenure. That therefore the second proviso sets out merely an outer limit for which an employee would continue on post or in any office or department. That the main provision under Section 3(1) confers right on the employee to continue on a post for 3 years (subject to the provisions of Section 4) whereas the proviso casts an obligation on the State Government to transfer the employee from one post to another or from one department or another at the expiry of the periods and in the manner set out therein. He would submit that this is a most holistic reading of provisions of Section 3 of the Transfer Act.

15) Dr. Saraf would then rely upon judgment of the Apex Court in Dwarka Prasad Versus. Dwarka Das Saraf¹⁷ in support of his contention that a proviso must be limited to a subject matter of enacting clause and construction of a proviso must be read and considered by having regard to the principal matter dealt with in the main section. That the proviso by itself does not and cannot mean a separate and independent enactment. He would also rely upon judgment of the Apex Court in Commissioner of Commercial Taxes and others Versus. Ramkishan Shrikisan Jhaver and others¹⁸, Commissioner of

¹⁷ (1976) 1 SCC 128

¹⁸ 1967 SCC OnLine SC 3

Income Tax, Kerela and Coimbatore (in all the appeals) Versus. P. Krishna Warriar (in all the appeals)¹⁹, Delhi Metro Rail Corporation Limited Versus. Tarun Pal Singh and others²⁰ and of this Court in Broach Co-operative Bank, Ltd. Broach Versus. Commissioner of Income-tax, Bombay Mofussil²¹ in support of his contention that ordinarily a proviso is not interpreted as citing a general rule and it is only in exceptional circumstances that proviso can be unrelated to the subject matter of preceding section. He would therefore submit that the second proviso to Section 3(1) must be construed with reference to a preceding part of the main Section to which it is been appended. Dr. Saraf would therefore submit that the when the two provisos are read in conjunction with the main provisions of Section 3(1) of the Transfer Act, it cannot be construed that the provisos create any independent right in favour of any Government Servant, but merely deals with the outer limit for which the Government Servants enumerated therein can be continued on a particular post in a particular office or department. That the provisos are qualifications/ exceptions to continue the employee beyond the normal tenure and that a holistic reading of the entire provision implies that while Section 3(1) provides for a minimum tenure on any post, the provisos incorporate the maximum tenure in an office or department.

16) Dr. Saraf would conclude by submitting that reading the main provision alongwith provisos harmoniously would imply that all employees can be transferred after completion of 3 years in a particular post and in case of Group-C Non-Secretariat employees, though they need not necessarily be transferred from their post on

¹⁹ 1964 SCC Online SC 49

²⁰ (2018) 14 SCC 161

²¹ 1949 SCC Online Bom 29

completion of 3 years, but can be continued on such post for maximum of 6 years. However, once such employee is continued in the same office/department for a period of 6 years, he must be transferred to another office or department. That in case of employees belonging to Secretariat Services, they cannot be continued even on same post for more than 3 years and have to be transferred to some other post either in the same department or outside the department subject to a caveat that on completion of 6 years of service in the same department, they must be transferred out of that department as well. He would submit that it is not the legislative intent to confer two full tenures to Group-C employees in Non-Secretariat services. Had there been such legislative intent, the same could have been easily stated in Section 3 itself. Dr. Saraf would therefore urge that the question framed is answered by holding that the first proviso to Section 3(1) does not confer vested right on Group-C employees holding Non-Secretariat posts to complete two tenures (6 years) but merely enables the State Government to continue such employee at the office or department for a period of 6 years.

D.3 SUBMISSIONS ON BEHALF OF RESPONDENT NOS. 3 AND 4

17) Mr. Chandratre, the learned counsel appearing for Respondent Nos. 3 and 4 would adopt the submissions of Dr. Saraf and would take us through the Reply filed by his clients before the Tribunal on interpretation of provisions of Section 3 of the Transfer Act. He would submit that if the intention of the Legislature was to provide two tenures of 3 years, it would have clearly stated so. That several posts falling under Group-C are executive and sensitive posts

such as Talathi, Circle Officer, Excise Inspectors etc. and the Legislature has consciously capped the entitled tenure to Group-C Non-Secretariat employees to only 3 years. He would therefore urge that the interpretation made by the Division Bench in *Santosh Nandalal Dalal* be upheld by rejecting the interpretation in *Sachin Sadashiv Raut*. He would additionally submit that the judgment in *Sachin Sadashiv Raut* is rendered in the peculiar facts of that case where the Petitioner therein was sought to be transferred even before completion of normal tenure of 3 years.

E. REASONS AND ANALYSIS

18) Since the question referred to the larger Bench for resolution relates to interpretation of provisions of Section 3(1) of the Transfer Act, it would be necessary to take stalk of various provisions of the Act, which are relevant for our purposes.

E.1. PROVISIONS OF THE TRANSFER ACT

19) For regulating the transfers and postings of Government Servants and for preventing delay in discharge of official duties, Transfer Act has been enacted, which came into effect on 1 July 2006. Section 3 of the Transfer Act deals with tenure of posting and provides thus :

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 :

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:

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.

20) Section 4 of the Transfer Act deals with tenure of transfer and provides 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 Officers 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 of 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.

21) Section 5 of the Transfer Act deals with extension of tenure and provides thus :

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.

22) Thus, tenure for All India Service officers and state government servants in Groups A, B and C is provided for in Section 3 of the Transfer Act. Section 4(1) of the Act imposes a prohibition on the transferring authority from transferring a government servant before completion of tenure prescribed in Section 3. Sub-Sections (2), (3) and (4) of Section 4 prescribe the manner in which the transfers of employees, who have completed their tenures as prescribed in Section 3, are to be effected. Sub-Section (5) of Section 4 confers special power on the competent authority to effect transfers in special cases before completion of tenure by the government servant.

23) Turning to provisions of Section 3 of the Transfer Act prescribing the tenure of posting, the normal tenure for All India Service officers as well as Groups-A, B and C state government servants or employees is prescribed as 3 years under the provisions of sub-section (1) of Section 3. The two Provisos to sub-section (1) of Section 3 deal with Group-C employees in non-secretariat services and employees in secretariat services. Secretariat services mean and include the State services belonging to Mantralaya Departments. The first proviso to sub-section (1) of Section 3 provides for transfer of employee belonging to non-secretariat services on the post held by him/her on completion of two full tenures at the office or department to another office or department. The second proviso to sub-section (1) of Section 3 deals with employees belonging to secretariat services and provides that such employees cannot be continued on same post for more than 3 years and shall not, in any case, be continued in the same department for more than two consecutive tenures. By interpreting the provisions of the first proviso to sub-section (1) of Section 3, the employees belonging to non-secretariat services in

Group-C started demanding two full tenures of three years (total six years) on a post and while deciding the issue as to whether a right exists in favour of such employees to demand two full tenures, divergent views are expressed by the Division Benches in *Santosh Nandalal Dalal* and *Sachin Sadashiv Raut*.

24) It would therefore be apposite to first consider the views expressed by the Division Benches in *Santosh Nandalal Dalal* and *Sachin Sadashiv Raut*.

E.2 VIEW EXPRESSED BY THE DIVISION BENCH IN *SANTOSH NANDALAL DALAL*

25) The issue as to whether employees belonging to Non-Secretariat services in Group-C are entitled to two tenures fell for consideration of the Division Bench in *Santosh Nandalal Dalal* (supra). The case involved transfers of Inspectors of Weights and Measure in Legal Meteorology Department of the State Government, who had completed three years of tenure on their posts. The Respondent No. 3 therein, who was transferred from Chalisgaon (Jalgaon) to Shirpur (Dhule District), approached the Tribunal contending *inter alia* that being a Non-secretariat Group-C employee, he was entitled to enjoy two full tenures of three years at Chalisgaon. A Single Judge of the Tribunal proceeded to accept the contention of Respondent No. 3 therein by referring to judgment of its Division Bench, which had in fact held to the contrary. Petitioner therein, who was transferred at the original place of posting of Respondent No. 3 i.e. Chalisgaon, got affected by the Order passed by the Single Judge

of the Tribunal and petitioned this Court. In its judgment delivered on 6 May 2015, the Division Bench of this Court (*T.V. Nalawade and Indira K. Jain, JJ.*) interpreted provisions of Sections 3 and 4 of the Transfer Act and held in para-12 as under :

12. The combined reading of provisions of sections 3(1) and 4(1) shows that the normal tenure in a post of a government servant shall be 3 years. The first proviso to section 3(1) of the Act shows that an employee of Group 'C' from non secretariat service may be retained at that office or department for two full tenures (one full tenure consists of 3 years). The proviso does not give right to the employee to get two full tenures at that office or department but it only allows the employer, competent authority, to continue the Group 'C', non secretariat employee to continue at the office or department for six years. The second proviso shows that if the employee of Group 'C' is from secretariat service he cannot be continued in the same post for more than 3 years and he shall not be continued in the same department for more than two consecutive tenures. The plain reading of section 3(1) and both the provisos shows that Group 'C' employee who is not from secretariat service can be kept at that office or department for six years but if he belongs to secretariat service he cannot be kept in the same post for more than three years though he can be kept in the same department for two consecutive tenures. These restrictions are in public interests. These provisions on one hand, show that the State, competent authority can use these provisions for keeping one employee at the same station for two full tenures but the State is not expected to continue him after completion of two full tenures. Thus, the provision of section 3(1) with the two provisos, does not show that any right is conferred on Group 'C' employee from non secretariat service to work at one station for six years.

26) Thus, in *Santosh Nandalal Dalal*, the Division Bench held that the first proviso to sub-section (1) of Section 3 did not create any right in favour of employees in non-secretariat services in Group-C to claim two full tenures on any post but merely permitted the employer to continue them for a maximum tenure of 6 years in the same office

or department. The Division Bench therefore accepted the contention of the Petitioner therein that employee in non-secretariat service in Group-C is entitled to only one tenure of 3 years under the provisions of sub-section (1) of Section 3 and became liable to transfer on completion of normal tenure of 3 years. The Division Bench accordingly set aside the order passed by the Tribunal and dismissed the Original Application filed by Respondent No.3 therein.

E.3 VIEW EXPRESSED BY THE DIVISION BENCH IN *SACHIN SADASHIV RAUT*

27) Interpretation of provisions of Section 3 of the Transfer Act once again fell for consideration before another Division Bench of this Court (*S.V. Gangapurwala, J. as he then was, and Anil S. Kilor, J.*) in *Sachin Sadashiv Raut* (supra). In that case, the Petitioner therein was a Clerk working in Mahatma Phule Krishi Vidyapeeth, Rahuri and was transferred from Rahuri to Dhule within about 1 year of his posting on a particular post. The transfer order was questioned before the Division Bench, *inter-alia* on the ground that being a Group-C employee, he was entitled to two tenures of 3 years as per the provisions of Section 3 of the Transfer Act. In the above factual background, the Division Bench held in paras-9 and 10 as under :

9. Section 3 of the Act 2005 provides the tenure of posting. Sub Section 1 of Section 3 of the Act 2005 provides that for a Group A, B and C State Government Servants or employees, the normal tenure in a post shall be three years. Proviso to sub section 1 of Section 3 of the Act 2005 further clarifies that, if an employee is in 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.

Section 4 of the Act 2005 requires that, no Government servant shall ordinarily be transferred unless he has completed his tenure of posting as provided in Section 3.

10. In the present case, admittedly, the petitioner is a Class – III (Group - C) employee. He is in a non secretariat service. As such, he has right to complete two full tenures at the office. The petitioner, it appears is transferred on 01.07.2015 from Savali Vihir, Tq. Rahata to M.P.K.V. Rahuri. His two full terms would be completed on 30th June, 2021. We may not consider at this stage the transfer order dated 17.07.2018 from one department to another at M.P.K.V. Rahuri.

28) It appears that judgment of the Division Bench in *Santosh Nandalal Dalal* was not brought to the notice of the Division Bench which decided the case of *Sachin Sadashiv Raut*. As observed above, the Division Bench in *Santosh Nandalal Dalal* had held that the first proviso to sub-section (1) of Section 3 did not create right in favour of employees in Non-Secretariat service in Group-C to claim two tenures of 3 years, whereas the Division Bench in *Sachin Sadashiv Raut* interpreted the provisions of sub-section (1) of Section (3) of the Transfer Act to mean that an employee in non-secretariat service of Group-C can be transferred on a post only on completion of two full tenures.

29) After going through the findings recorded by the judgments in *Santosh Nandalal Dalal* and *Sachin Sadashiv Raut* it appears that the issue which we are tasked upon to answer was clearly involved before the Division Bench in *Santosh Nandalal Dalal*. In that case, the Division Bench has considered and answered the issue as to whether the first proviso to Section 3(1) creates any right in favour of employees in non-secretariat services in Group-C to continue on the

same post for 6 years. As against this in *Sachin Sadashiv Raut*, the Petitioner therein was not only an employee of Mahatma Phule Krishi Vidyapeeth (though governed by provisions of Transfer Act) but was sought to be transferred before completion of even normal tenure of 3 years. While deciding the case in *Sachin Sadashiv Raut*, the attention of the Division Bench was not invited to the view taken by the coordinate Bench in *Santosh Nandalal Dalal*. Factually in *Sachin Sadashiv Raut*, the Division Bench was not even required to consider the issue as to whether an employee in non-secretariat services (Group-C) is entitled to two full tenures under the first proviso to Section 3(1) of the Act, as the employee concerned came to be posted on the post concerned on 17 July 2018 and he was sought to be transferred on 1 August 2019. The Division Bench in *Sachin Sadashiv Raut*, has possibly dealt with the right of the Petitioner therein to serve for two full tenures at Rahuri possibly on account of the fact that he came to be transferred to Rahuri on 1 July 2015 and if his previous transfer within Rahuri (effected on 17 July 2018 from Fruit Research Project, MKVP, Rahuri to the office of University Engineering MKVP, Rahuri) is ignored, he had completed 3 years of posting at Rahuri, by the time his transfer to Dhule was effected by order dated 1 August 2019. This appears to be the reason why the Division Bench has gone into the issue as to whether the Petitioner therein was entitled to serve at Rahuri for two full tenures in accordance with first proviso to Section 3(1) of the Transfer Act. However, while doing so, neither any argument was raised nor the Division Bench was tasked upon to decide the issue of interplay between the main provision in Section 3(1) and the effect of the first proviso thereto. Therefore, in *Sachin Sadashiv Raut*, there is no discussion by the Division Bench

about effect of the first proviso on the main provision of Section 3(1) of the Transfer Act. In that sense, one may well contend (and it is actually contended so by Respondent Nos. 3 and 4 before us) that there is no actual divergence of views by the two Division Benches on the effect of the first proviso on main provision under Section 3(1) of the Transfer Act. However the Division Bench did set aside the transfer of employee therein by holding that he was entitled to serve for two full tenures at Rahuri. Also, the judgment in *Sachin Sadashiv Raut* is often quoted by Non-secretariat Group-C employees to claim two tenures on a post. Therefore the Division Bench in the present case felt it to appropriate that the controversy is more advantageously resolved by the Larger Bench.

E.4 FUNCTION OF PROVISO IN RELATION TO THE MAIN PROVISION

30) As observed above, the main provision prescribing tenure is under sub-section (1) of Section 3 of the Transfer Act. Interpretation of the two provisos to Section 3(1) is the hotbed of controversy amongst the rival parties. Before proceeding further to determine the exact interpretation of the two provisos and their effect on the main provision under Section 3(1) of the Act, it would be necessary to understand the exact use and function of a proviso in an enactment.

31) Both the sides have relied upon judgments in support of their respective claims about the effect of the two provisos appended to sub-section (1) of Section 3 of the Transfer Act. According to Mr. Desai, the provisos carve out an exception to the normal tenure

provided for in Section 3(1) and that therefore, the provisos also create a right in favour of employees covered by it. On the contrary, it is the contention of Dr. Saraf that the provisos are mere qualifications/exceptions on the entitlement of the State Government to continue an employee on a post, or in an office or department beyond the periods specified therein.

32) By now it is well-settled position that a proviso must be read in context of the subject matter of the enacting clause and it must be construed in relation to the principal matter to which it is a proviso. In an ordinary course, proviso by itself does not constitute a separate or independent enactment. However, in exceptional circumstances, proviso can be read to incorporate a substantive provision so long as it deals with the subject of the main provision. It would be apposite to refer to the decisions relied upon by the learned counsel appearing for the rival parties for understanding the nature and function of a proviso.

33) In *Laxminarayan R. Bhattad* (supra) relied upon by Mr. Desai, the Apex Court by referring to its judgment in *S. Sundaram Pillai Versus. V. R. Pattabiraman*²² has held as under:

55. A proviso, as is well known, may serve different purposes:

- (i) qualifying or excepting certain provisions from the main enactment;
- (ii) it may entirely change the very concept or the intendment of the enactment by insisting on certain mandatory conditions to be fulfilled in order to make the enactment workable;
- (iii) it may be so embedded in the Act itself as to become an integral part of the enactment and thus acquire the tenor and colour of the substantive enactment itself; and

²² (1985) 1 SCC 591

(iv) it may be used merely to act as an optional addendum to the enactment with the sole object of explaining the real intendment of the statutory provision.

(See *S. Sundaram Pillai v. V.R. Pattabiraman* [(1985) 1 SCC 591 : AIR 1985 SC 582] .)

34) It is relying on ratio of the judgment in *Laxminarayan R. Bhattad* that Mr. Desai has contended that since one of the purposes which a proviso serves is qualifying or excepting certain provisions from the main enactment, the purpose of inserting the two provisos to Section 3(1) is to carve out an exception to the normal tenure provided in the main Section 3(1).

35) In *Dwarka Prasad* (supra), the Apex Court has held in paras-16, 17 and 18 as under :

16. There is some validity in this submission but if, on a fair construction, the principal provision is clear, a proviso cannot expand or limit it. Sometimes a proviso is engrafted by an apprehensive draftsman to remove possible doubts, to make matters plain, to light up ambiguous edges. Here, such is the case. In a country where factories and industries may still be in the developmental stage, it is not unusual to come across several such units which may not have costly machinery or plant or fittings and superficially consist of bare buildings plus minor fixtures. For example, a beedi factory or handicraft or carpentry unit — a few tools, some small contrivances or collection of materials housed in a building, will superficially look like a mere “accommodation” but actually be a humming factory or business with a goodwill as business, with a prosperous reputation and a name among the business community and customers. Its value is qua business, although it has a habitation or building to accommodate it. The personality of the thing let out is a going concern or enterprise, not a lifeless edifice. The Legislature, quite conceivably, thought that a marginal, yet substantial, class of buildings, with minimal equipments may still be good businesses and did not require protection as in the case of ordinary building tenancies. So, to

dispel confusion from this region and to exclude what seemingly might be leases only of buildings but in truth might be leases of businesses, the Legislature introduced the exclusionary proviso.

17. While rulings and text books bearing on statutory construction have assigned many functions for provisos, we have to be selective, having regard to the text and context of a statute. Nothing is gained by extensive references to luminous classics or supportive case-law. Having explained the approach we make to the specific “proviso” situation in Section 2(a) of the Act, what strikes us as meaningful here is that the Legislature by the amending Act clarified what was implicit earlier and expressly carved out what otherwise might be mistakenly covered by the main definition. The proviso does not, in this case, expand, by implication, the protected area of building tenancies to embrace “business” leases.

18. We may mention in fairness to Counsel that the following, among other decisions, were cited at the Bar bearing on the uses of provisos in statutes: *CIT v. Indo-Mercantile Bank Ltd*, [AIR 1959 SC 713 : 1959 Supp (2) SCR 256, 266 : (1959) 36 ITR 1] ; *Ram Narain Sons Ltd. v. Asstt. CST* [AIR 1955 SC 765 : (1955) 2 SCR 483, 493 : (1955) 6 STC 627] ; *Thompson v. Dibdin* [(1912) AC 533, 541 : 81 LJKB 918 : 28 TLR 490] ; *Rex v. Dibdin* [1910 Pro Div 57, 119, 125] and *Tahsildar Singh v. State of U.P.* [AIR 1959 SC 1012 : 1959 Supp (2) SCR 875, 893 : 1959 Cri LJ 1231] . The law is trite. A proviso must be limited to the subject-matter of the enacting clause. It is a settled rule of construction that a proviso must prima facie be read and considered in relation to the principal matter to which it is a proviso. It is not a separate or independent enactment. “Words are dependent on the principal enacting words to which they are tacked as a proviso. They cannot be read as divorced from their context” (*Thompson v. Dibdin*, 1912 AC 533). If the rule of construction is that prima facie a proviso should be limited in its operation to the subject-matter of the enacting clause, the stand we have taken is sound. To expand the enacting clause, inflated by the proviso, sins against the fundamental rule of construction that a proviso must be considered in relation to the principal matter to which it stands as a proviso. A proviso ordinarily is but a proviso, although the golden rule is to read the whole section, inclusive of the proviso, in such manner that they mutually throw light on each other and result in a harmonious construction.

The proper course is to apply the broad general Rule of construction which is that a section or enactment must be construed as a whole, each portion throwing light if need be on the rest.

(emphasis added)

36) In *Commissioner of Commercial Taxes* (supra), the Apex Court has held that though a proviso is an exception to the main part of the Section but in exceptional cases, a proviso may be a substantive provision itself. The Apex Court has held as under :

Generally speaking, it is true that the proviso is an exception to the main part of the section; but it is recognised that in exceptional cases a proviso may be substantive provision itself. We may in this connection refer to *Rhondda Urban District Council v. Taff Vale Railway Co.**, where section 51 of the Act there under consideration was framed as a proviso to preceding sections. The Lord Chancellor however pointed out that “though section 51 was framed as a proviso upon preceding sections, but it is true that the latter half of it though in form a proviso, is in substance a fresh enactment, adding to and not merely qualifying that which goes before.”

* L.R. [1909] A.C. 253.

Again in *Commissioner of Income-tax v. Nandlal Bhandari & Sons**, it was observed that “though ordinarily a proviso restricts rather than enlarges the meaning of the provision to which it is appended, at times the legislature embodies a substantive provision in a proviso. The question whether a proviso is by way of an exception or a condition to the substantive provision, or whether it is in itself a substantive provision, must be determined on the substance of the proviso and not its form.”

Finally, in *State of Rajasthan v. Leela Jain***, the question arose whether the proviso in the Act under consideration there was a limiting provision to the main provision or was a substantive provision in itself. This court observed that “so far as a general principle of construction of a proviso is concerned, it has been broadly stated that the function of a proviso is to limit the main part of the section and carve out something which but for the proviso would have been within the operative part.” But it was further observed that the proviso in that particular case was really not a proviso in the accepted sense but an independent legislative

provision by which to a remedy which was prohibited by the main part of the section, an alternative was provided.

These three cases show that in exceptional circumstances a proviso may not be really a proviso in the accepted sense but may be a substantive provision itself. It seems to us that the proviso under consideration now is of this exceptional nature. As we have already held, there is no provision in the main part of the sub-section for searching purely residential premises. Therefore when the proviso provides for such search it is providing for something independent of the main part of the sub-section. Further the second part of the proviso which talks of searches made under this sub-section shows that the power of inspection provided in the main part of the sub-section is tantamount to a power of search. We have already come to the conclusion independent of the proviso. All that we need say here is that the proviso also shows that that interpretation is correct. We may add that we are not precluded from looking at the proviso in interpreting the main part of the sub-section. We may in this connection refer to the following passage in Maxwell on Interpretation of Statutes, eleventh edition, at page 155, where it is observed:

“There is no rule that the first or enacting part is to be construed without reference to the proviso.

The proper course is to apply the broad general rule of construction, which is that a section or enactment must be construed as a whole, each portion throwing light, if need be, on the rest.

*[1963] 47 I.T.R. 803 .**(1965) 1 S.C.R. 276; A.I.R. 1965 S.C. 1296, 1300.

The true principle undoubtedly is that the sound interpretation and meaning of the statute, on a view of the enacting clause, saving clause and proviso, taken and construed together is to prevail.”

(emphasis added)

37) In *Commissioner of Income Tax, Kerala and Coimbatore* (supra), the Apex Court has held in para-5 as under :

5. Presumably on the basis of this suggestion the amending Act of 1953 substituted clause (i-a) by clause (b) of the proviso. But it is not an inflexible rule of construction that a proviso in a statute should always be read as a limitation upon the effect of the main enactment. Generally the natural presumption is that but for the

proviso the enacting part of the section would have included the subject-matter of the proviso; but the clear language of the substantive provision as well as the proviso may establish that the proviso is not a qualifying clause of the main provisions, but is in itself a substantive provision. In the words of Maxwell, “the true principle is that the sound view of the enacting clause, the saving clause and the proviso taken and construed together is to prevail”. So construed we find no difficulty, as we will indicate later in our judgment, in holding that the said clause (b) of the proviso deals with a case of business which is not vested in trust for religious or charitable purposes within the meaning of the substantive clause of Section 4(3)(i).

(emphasis added)

38) In *Delhi Metro Rail Corporation Limited* (supra), the Apex Court has discussed several of its decisions rendered in the past on the issue of construction of proviso and has held in para-21 as under :

21. What follows from the aforesaid enunciation is that effect of a proviso is to except all preceding portion of the enactment. It is only occasionally that proviso is unrelated to the subject-matter of the preceding section, it may have to be interpreted as a substantive provision. **Ordinarily, a proviso is not interpreted as stating a general rule.** Provisos are often added as saving clauses. A proviso must be construed with reference to the preceding parts of the clause to which it is appended. The proviso is ordinarily subordinate to the main section. A construction placed on proviso which brings general harmony to the terms of the section should prevail. A proviso may sometime contain substantive provision. Ordinarily, proviso to a section is intended to take out a part of the main section for special treatment. Normally, a proviso does not travel beyond the main provision to which it is a proviso. A proviso is not interpreted as stating a general rule, it is an exception to the main provision to which it is carved out as a proviso. Proviso cannot be construed as enlarging the scope of enactment when it can be fairly and properly constructed without attributing that effect. It is not open to read in the words of enactment which are not to be found there and which would alter its operative effect.

(emphasis added)

39) In *Broach Co-operative Bank, Ltd. Broach* (supra), Chief Justice M. C. Chagla, speaking for the Division Bench, has held as under :

2. But to my mind the proper canon of construing a section which has several provisos is to read the section and the provisos as a whole, try and reconcile them and give a meaning to the whole of the section along with the provisos which is a comprehensive and logical meaning.

40) The conspectus of the above discussion on the nature and function of a proviso is that in ordinary circumstances, a proviso is not a separate or independent enactment and it must be read and considered in relation to the principle that it is usually an exception or condition to the substantive provision. It is equally recognised that in exceptional circumstances, a proviso may be a substantive provision itself. What is therefore required to be done is to read the whole Section inclusive of the proviso in such a manner that the main enactment, together with proviso, mutually throw light on each other and result in a harmonious construction.

E.5 WHETHER TWO PROVISOS TO SECTION 3(1) CREATE RIGHT IN FAVOUR OF EMPLOYEES?

41) We now proceed to examine whether the first proviso to Section 3(1) of the Transfer Act creates any right in favour of employees in non-secretariat services Group-C, to serve for two full tenures of 3 years each (total six years) on a particular post.

42) Section 3 of the Transfer Act uses the words ‘post’, ‘office’ and ‘department’ in different contexts. The word ‘post’ and ‘department’ are defined under Section 2 of the Act, whereas the word ‘office’ has not been so defined. Under Section 2(c) of the Act, the word ‘department’ has been defined as under :

(c) “Department” or “Administrative Department” means the Department of the Government of Maharashtra as specified in the First Schedule to the Maharashtra Government Rules of Business;

43) Similarly, the word ‘post’ has been defined under Section 2(g) of the Act as under :

(g) “post” means the job or seat of duty to which a Government servant is assigned or posted;

44) Section 2(h) of the Act defines the term ‘Secretariat Services’ as under :

(h) “secretariat services” means the State services belonging to the Mantralaya Departments;

45) Section 2(i) of the Act defines the term ‘transfer’ to mean posting of a Government Servant from one post, office or department to another office, post or department. Section 2(i) provides thus :

(i) “Transfer” means posting of a Government servant from one post, office or Department to another post, office or Department;

46) Thus, all three types of movements of an employee from one post to another or from one office to another or from one department to another constitutes a transfer within the meaning of

Section 2(i) of the Transfer Act. As observed above, the words, post, office and department are used in section 3(1) and in the two provisos for different purposes. This is clear from the following :

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 :

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**':

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.

47) An '**office**' or '**department**' may have multiple '**posts**' on which an employee can be posted. Movement of an employee from one post to another within the same office or department also constitutes transfer within the meaning of Section 3(1) of the Transfer Act. Section 3(1) provides for '**normal tenure**' on a '**post**' and not in an '**office**' or '**department**'. As against this, completion of two full tenures in the first Proviso is at an '**office**' or '**department**'.

48) Under sub-section (1) of Section 3 of the Transfer Act, the normal tenure for All India Service Officers and all Group-A, B and C Government Servants or employees is provided as 3 years. Sub-section (1) of Section 4 provides that no Government Servant shall ordinarily be transferred unless he has completed his tenure of posting as provided under Section 3. Therefore, Section 3(1) read in conjunction with Section 4(1) creates a right in favour of a government servant to

continue on a post for a period of 3 years in ordinary circumstances. There are exceptions to this minimum tenure of 3 years. Under sub-section (5) of Section 4, the Competent Authority can effect transfer of government servants before completion of their tenure on a post by following the procedure laid down under Section 4. Thus, subject to the provisions of Section 4, every IAS officer, as well as employees in Groups-A, B and C have a right to remain on a post for a period of 3 years. Thus, Section 3(1) of the Act, when read in conjunction with Section 4, creates a qualified right in favour of all IAS officers and Group A, B and C employees to remain on the same post for 3 years.

49) It is the contention of the Petitioner that the two provisos to Section 3(1) carve out an exception to the 'normal tenure' in a post and while carving out such exception, the provisos also create a right in favour of a government servants covered by those provisos to continue on a post for a period specified therein. As against this, it is the contention of the State Government that while Section 3(1) creates a right in favour of a government servant to serve for normal tenure of 3 years on a post, the two provisos merely create a mandate for a Government to retain such government servants for a maximum period specified in the provisos.

50) The first proviso deals with an employee in non-secretariat services in Group-C whereas the second proviso deals with all employees belonging to secretariat services. As observed above, Section 2(h) of the Act defines secretariat services to mean state services belonging to Mantralaya Department. Therefore, every government servant or employee belonging to secretariat services

irrespective of the group to which he/she may belong, is covered by second proviso to Section 3(1) of the Act. Thus, while the first proviso is limited to only Group-C employees in non-secretariat services, the second proviso applies to all employees in secretariat services. So far as the employees in non-secretariat services, Group-C are concerned, the first proviso provides that such employees '*shall be transferred from the post held by him/her on completion of two full tenures in that 'office' or 'department', to another 'office' or 'Department'*'. Similarly, in respect of the employees belonging to secretariat services, they cannot be '*continued*' in the same 'post' for more than 3 years and shall not be continued in the same 'Department' for more than two consecutive tenures. What must immediately be noticed is the conscious use of different words/expressions under Section 3(1) and the expressions in the two provisos. While sub-section (1) of Section 3 uses the expression '*normal tenure in a post*', the first proviso uses the expression '*shall be transferred from the post*'. Similarly, the second proviso uses the words '*shall not be continued in the same post*'. Thus, the legislative intent is quite apparent from conscious use of distinct words/expressions in the main Section and two provisos. The main provision under Section 3(1) seeks to create a right in favour of Government Servant by providing for his 'normal tenure' in a post, whereas the two provisos either create a mandate for transfer (first proviso) or prohibition on continuance (second proviso) for the State Government. Therefore, while Section 3(1) seeks to create a right in favour of a government servant to continue on a post for a normal tenure of 3 years, the two provisos do not create any such right to continue on a post, but merely outlines the maximum period for which either the employees in non-

secretariat services in Group-C or the employees in secretariat services can be continued on a post, office or department.

E.6 CONSTRUCTION OF FIRST PROVISO TO SECTION 3(1)

51) Harmonious reading of the entire Section 3 together with the provisions of Sections 4 and 5 of the Transfer Act makes the position clear that the two provisos to sub-section (1) of Section 3 do not create any exception in favour of employees *qua* the normal tenure provided for in sub-section (1) of Section 3. Sub-section (1) of Section 3 applies to All India Service officers, as well as to '*all Groups A, B and C State Government Servants or employees*'. The two provisos to sub-section (1) of Section 3 cover all Group-C State Government servants and employees. While the first proviso deals with employees in Non-secretariat Group-C service, the second proviso covers employees belonging to secretariat services. Thus, except those Group-C employees who happen to be a part of Secretariat services (belonging to Mantralaya Department), all other Group-C employees in service of the State Government are covered by the first proviso. If the two provisos were inserted with the objective of providing a different tenure than the normal tenure provided for under Section 3(1), the Legislature would not have included '*all Group-C employees*' in Section 3(1). The fact that Section 3(1) includes all Group-C employees would essentially mean that the normal tenure for every Group-C employee (whether he belongs to secretariat services or non-secretariat services) is 3 years. Since the normal tenure of every Group-C employee is dealt with by Section 3(1), which is the main

enactment, it cannot be contended that the two provisos also provide a different normal tenure for the employees who are already covered by Section 3(1).

52) Thus, the purpose behind enacting Section 3(1) and the purpose behind inserting the two provisos is entirely different. Therefore, it cannot be construed that the two provisos carve out exception to the normal tenure provided for Group-C employees (whether secretariat or non-secretariat) provided for in Section 3(1). The two provisos deal with a different subject matter, which is not dealt with by Section 3(1). The subject matter, which the two provisos deal with, is the maximum period for which an employee in Group-C (secretariat or non-secretariat) can be retained in a post, office or department.

53) The first proviso to Section 3(1), which applies to an employee in non-secretariat services in Group-C provides that such employee must be transferred from the post held by him on completion of two full tenures in an office or department to another office or department. This would essentially mean that while the normal tenure for Group-C non-secretariat employee in respect of a post continues to be 3 years under Section 3(1), the moment he completes two such full tenures in an 'office' or 'department', he is to be necessarily moved out of such office or department. To illustrate, a Junior Clerk who is posted in a particular Collector Office in a particular Section will have a normal tenure of 3 years on the 'post' occupied by him and subject to the provisions of Section 4, he cannot be transferred out from that 'post' till he completes the normal tenure

of 3 years. However, it may happen that provisions of Section 3(1) are misused by the transferring authority of such employee for retaining him in the same office for indefinite period of time by rotating him from one table to another or from one section to another. To prevent such mischief, the Legislature has mandated that such a Junior Clerk cannot be retained in the same office or department for a period more than 6 years and the moment he completes two full tenures in the same office or department, he must be transferred out of such office or department. This is true purport of Section 3(1) of the Transfer Act read together with the first proviso.

54) Coming to the second proviso to Section 3(1) of the Act, the same deals with employees belonging to secretariat services (from Mantralaya Department). In respect of all secretariat employees in Mantralaya, regardless of whether they are Group-A, B or C, they cannot be continued in the same 'post' for more than 3 years and must be moved out to another 'post' in the same department upon completion of posting of 3 years. However, once such employee completes two consecutive tenures in the same department, he has to be transferred to another department on completion of 6 years of posting. To illustrate, a Clerk posted in the Home Department on a particular post cannot be allowed to hold same 'post' for more than 3 years. However, he can be continued in the same department on different posts upto 6 years. However, the moment such Clerk completes 6 years of posting in a department, he has to be necessarily transferred to another department. This is the true meaning and construction of second proviso to Section 3(1) of the Act.

55) Thus, the fine distinction between the first and the second proviso is that there is no embargo in the first proviso in respect of non-secretariat Group-C employees from being retained in the same post even after completion of 3 years and in a given case, the Government may decide to continue non-secretariat Group-C employee in the same post even after completion of 3 years of tenure. However, when it comes to an employee in secretariat services (whether he belongs to Group-A, B or C), he cannot be continued even on same post for more than 3 years. Otherwise, both the provisos seek to impose an outer limit of two tenures (6 years) in respect of Group-C non-secretariat employees as well as of secretariat employees for being continued in the same office or department.

56) Interpretation of the two provisos to Section 3(1) to mean extension of 'normal tenure' would also render provisions of Section 5(1) otiose. The power of extension of tenure in exceptional circumstances is to be found in Section 5(1) and the same cannot be read under the two provisos. The normal tenure of all Group-C employees (secretariat and non-secretariat) under Section 3(1) is three years, which can be extended only under Section 5(1), that too under the exceptional circumstances enumerated under Section 5. Accepting the interpretation sought to be placed by Petitioner about the two provisos constituting exception to normal tenure prescribed under Section 3(1), would fall foul of provisions of Section 5, which alone recognises and enumerates exceptions to normal tenure.

57) Mr. Desai has contended that the two provisos cannot be read to mean imposing mere outer limit for retention of an employee

in a post, office or department, since Section 5 otherwise provides for extension of tenure laid down under Section 3 in exceptional cases. He therefore contends that the two provisos must be read to mean carving out an exception to the normal tenure provided for under Section 3(1) of the Act. We are unable to agree. Section 5 is an exceptional provision which applies to an employee who has completed normal tenure on a 'post' or posting of two tenures in an 'office' or 'department'. Therefore, under Section 5(1) of the Act, the maximum permissible time limit for retention of secretariat and non-secretariat employees on a 'post' or at an 'office' or 'department' can be extended in exceptional circumstances as enumerated under Clauses-(a) to (c), as well as in accordance with the provisions of sub-section (2) of Section 5. Thus, an employee on the verge of retirement, who is due for transfer from a 'post' on account of completing 3 years' tenure or out of the 'department' or 'office' on account of completion of two full tenures thereat, the Government may treat this as an exceptional circumstance and continue him in the same post or department or office by exercising power under Section 5(1) of the Act. Similarly, if the Government is of the opinion that large number of employees in Group-C non-secretariat services or in secretariat services have become due for transfer out of an office or department on completion of 6 years of posting, it may exercise special powers under the provisions of sub-section (2) of Section (5) and ensure that not more than 30% of such employees due for transfer are actually transferred out from that office or department at the same time in a year.

58) What must also be appreciated is the fact that Group-C employees in non-secretariat services occupy several key and sensitive posts such as Talathi and Circle Officer dealing with effecting and certifying mutation entries in Revenue Department, Dy. Inspectors in State Excise Department dealing with regulation of liquor businesses, Police Constables, Tax Assistant in Finance Department, etc. Several such Group C non-secretariat employees occupy sensitive posts, which in common parlance are termed as 'Executive Postings'. The objective of the Transfer Act *inter alia* is to ensure that no employee shall be permitted to develop vested interest on a particular post by continuing him on that post for a long time. It is therefore inconceivable that the Legislature has intended any special dispensation for Group-C non-secretariat employees (which class comprise of every Group C employee in state service except those posted in Mantralaya departments) to have longer than 3 years (6 years) tenure on a post.

59) As observed above, the normal tenure for every Group C employee is 3 years and employees covered by the two provisos leave no other Group C employee in State Government service. Therefore construing the two provisos to mean an exception to the normal tenure prescribed in Section 3(1) of the Act would result in incongruous situation and would lead to absurdity. It is well recognised principle that the interpretation of a statute which results in absurdity or ambiguity should be avoided. It is also well settled principle of harmonious construction that effect shall be given to all the provisions and a particular provision of the statute should be construed with reference to the other provisions so as to make it workable. A particular provision cannot be picked up and interpreted

to defeat another provision made in that behalf under the statute. It is the duty of the Court to make such construction of a statute which shall suppress the mischief and advance the remedy. Useful reference in this regard can be made to the judgment of the Apex Court in *British Airways Plc. Versus. Union of India*²³, which finds reference in judgment of Division Bench of this Court in *Purshottam Govindrao Bhagwat* (supra). Therefore the first proviso cannot be picked up in isolation and read in violence to and without reference to provisions of Sub-section (1) of Section 3 of the Act.

60) The plain reading of Section 3(1) together with the two provisos does not result in absurdity or ambiguity and therefore it is not necessary to invoke the principle of purposive interpretation. However even if the principle of purposive interpretation was to be invoked, the interpretation that we have made on plain reading of Section 3(1) together with the two provisos fully meets the purpose for which the Act is enacted. In fact interpreting the provisions of Section 3 in the manner suggested by the Petitioner would defeat the purpose behind enacting the Act.

61) In our view therefore, the above interpretation of Section 3(1) and its two provisos makes harmonious reading of the entire statutory scheme of provisions of Sections 3, 4 and 5 of the Transfer Act and upholds the purpose behind enactment of the Act.

E.7 PRINCIPLE OF LEGITIMATE EXPECTATION

62) Alternate submission of Mr. Desai is that if the two provisos are interpreted to mean absence of right in employee's

²³ (2002) 2 SCC 95

favour, but mere mandate for the Government not to continue the employee in same office or department for more than 6 years, there exists legitimate expectation in favour of an employee that he would not be disturbed from a post before completion of 6 years term. We fail to understand as to how the two provisos can possibly create any reasonable or legitimate expectation in favour of either Group-C non-secretariat employee or secretariat employees. We have already held that both the provisos do not create any right in favour of any employees governed by the provisos nor carve out an exception to the normal tenure prescribed under Section 3(1). The two provisos are in the nature of a mandate for the State Government not to continue the employees covered by the provisos beyond the maximum time limit prescribed in the provisos. Merely because the maximum time limit is prescribed in the proviso for retention of an employee in an office or department, the same cannot create any legitimate expectation that the employee can be continued on a post for period of 6 years. Under the first proviso to Section 3(1), it may happen that the Appointing Authority may continue as Non-Secretariat Group-C employee in the same office or department for a period of 6 years either in the same post or on different posts. However, the same would not mean that any legitimate or reasonable expectation is created in favour of such Group-C non-secretariat employees for being retained on the same post despite completion of normal tenure of 3 years. The interpretation as sought to be suggested by Mr. Desai would in fact defeat the very objective of the Act. The present petition deals with the case of Circle Officer in Revenue Department. If Mr. Desai's contention is accepted, though the objective of the Act is to ensure that no employee is continued on a post for more than 3 years so as to

avoid creation of vested interests, the employee would still continue on that post for upto 6 years under legitimate expectation. A Circle Officer posted in a particular circle (group of villages) definitely develops vested interests over a period of time in relation to maintenance of revenue records of those group of villages. He has power to certify mutation entries effected by the Tehsildar. Therefore, once it is held that such Circle Officer does not have a right to remain on a post occupied by him for more than 3 years, it is inconceivable that he could continue on the same post by invoking the principle of legitimate or reasonable expectation.

63) Reliance by Mr. Desai on the judgment of the Apex Court in *Ms. X Versus. Registrar General, High Court of Madhya Pradesh* (supra) is inapposite. In case before the Apex Court, a transfer policy was formulated by the Madhya Pradesh High Court and the policy guidelines were not enforceable in law. The transfer policy was for providing guidance to the transferring authority in the matter of effecting of transfers and *inter alia* provided for a tenure at a particular posting. The Apex Court however held that the Madhya Pradesh High Court, being a State within the meaning of Article 12 of the Constitution of India, the judicial officers governed by the provisions of transfer policy had reasonable and legitimate expectation to have the transfers effected strictly in accordance with such policy. In the present case, transfers are effected by the provisions of the Transfer Act which are enforceable in law. Once such transfers are governed by the provisions of the Act, the transfers must be effected strictly in accordance with the provisions of the Act and there is no room for any legitimate expectation for any employee governed by the Act,

based on conduct or precedence. In our view, therefore the judgment of the Apex Court in *Ms. X Versus. Registrar General, High Court of Madhya Pradesh* would have no application for resolution of the issue at hand.

E.8 JUDGMENTS RELIED UPON BY PETITIONER

64) What remains now is to deal with the judgments relied on by Mr. Desai. *Dr. Nagorao Shivaji Chavan* (supra), according to Mr. Desai, is the only possible judgment rendered by the Apex Court dealing with interpretation of provisions of the Transfer Act. The issue before the Apex Court was whether the provisions of Section 3 of the Act impose a total embargo on the Government from effecting transfer before completion of the normal tenure. The employee therein was facing allegations of financial irregularities and insubordination, which was held to be substantiated after conduct of enquiry and therefore it was decided not to retain him as Civil Surgeon, Jalgaon for completion of 3 years of normal tenure and accordingly his transfer was effected to Mumbai after one year of his posting as Civil Surgeon, Jalgaon. The Apex Court considered the provisions of Sections 3 and 4 of the Transfer Act and held in paras-9 and 12 as under :

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.

12. 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 1 of not joining the place where he was transferred for five years, no interference with the order of transfer is called for.

65) In our view, the judgment of the Apex Court in *Dr. Nagorao Shivaji Chavan* does not provide any assistance for resolution of the issue at hand. The judgment merely expounds the law that there is no total embargo on transfer of Government Servant before completion of normal tenure of 3 years provided for under Section 3(1) of the Act and that for administrative exigencies, transfer can be effected in breach of the normal tenure by exercising power under Section 4 of the Act.

66) The judgment of Division Bench of this Court in *Purushottam Govindrao Bhagwat* (supra) is cited by Mr. Desai mainly to highlight the objectives behind the enactment of the Transfer Act. The Division Bench held in para-15 of the judgment as under:

15. It can thus be seen that while interpreting the aforesaid provision of the said Act, this Court would also have to apply *Heydon's* rule or the mischief rule. It will have to be seen as to what was the position before making the enactment of the Act. What was the mischief and defect for which the law did not provide earlier and what remedy the legislature has found to cure the disease and the true reason of the remedy. After applying this, the courts will have to make such interpretation, which shall suppress the mischief and advance the remedy. This legal principle has been consistently followed by the Apex Court and various High Courts while interpreting the statutes. It can be seen that prior to the aforesaid enactment coming into force, there was no enactment to regulate the transfers of the Government servants and the Government servants were transferred at the sweet will of the authorities concerned. In order to do away with the arbitrary powers of the authorities, an enactment to regulate such transfers was found necessary. With that purpose, to suppress the mischief of an unguided, unchannalized power to transfer the Government servants, the said Act was enacted. The remedy provided was to regulate the transfers in accordance with the said enactment.

67) The Division Bench further held in para-16 as under :

It is, thus, clear that the legislative intent is clear that ordinarily an employee should not be transferred prior to completion of his tenure. However, this would be permissible in special cases when the competent authority records the reasons for the same and obtains prior approval of the immediately superior Transferring Authority.

68) The judgment of the Division Bench in *Purushottam Govindrao Bhagwat* merely seeks to highlight the objective behind enactment of the Transfer Act and the Division Bench held that the Transfer Act is enacted to prevent the mischief of arbitrary exercise of power of transfer. The judgment therefore does not provide any

assistance for deciding the issue of interpretation of the two provisos to Section 3(1) of the Act. The issue in the present case is not whether transfer of Government Servant can be effected in breach of normal tenure prescribed under Section 3(1). The issue is about the exact normal tenure applicable for employees in Non-Secretariat services in Group-C.

69) Both, Mr. Desai as well as Dr. Saraf have relied upon judgment of Division Bench of this Court in *V.B. Gadekar* (supra) in which this Court held that transfer is an essential incident of service and the provisions of the Act are regulatory and not prohibitory in their application. This Court recognized the discretion vested in the transferring authority to make exception to the normal tenure of 3 years wherever special circumstances exist. Thus, the judgment once again deals with the issue of permissibility to transfer a Government Servant before completion of normal tenure of 3 years on account of existence of exceptional circumstances and the judgment does not really provide any assistance for deciding the question referred to us.

F. CONCLUSION

70) The conspectus of the above discussion is that the two provisos to sub-section (1) of Section 3 do not create any right in favour of employees in non-secretariat services in Group-C to claim two full tenures on the same post and the normal tenure of such non-secretariat Group-C employees is only 3 years as provided for in Section 3(1) of the Act. It is for the transferring authority to decide

whether such Group-C non-secretariat employee is to be transferred from the post held by him on completion of 3 years of service on that post or not. However, the moment such Group-C non-secretariat employee completes posting of 6 years on the same post, or on different posts in same office or department, the transferring authority is under a mandate under the first proviso to Section 3(1) to transfer him to another office or department. In case of employees belonging to secretariat services, the transferring authority is under mandate not to continue any employee or officer on the same post for more than 3 years and he/she must be transferred to another post either in the same department or outside the said department on completion of tenure of 3 years. However, on completion of two consecutive tenures (6 years) in the same department, such employee in secretariat services must be transferred to another department.

71) In our view, therefore the interpretation of provisions of Section 3 of the Transfer Act by Division Bench in *Santosh Nandalal Dalal* lays down correct position of law. As observed above, the Division Bench in *Sachin Sadashiv Raut* has not in fact made any detailed discussion on interpretation of the provisions of Sections 3, 4 and 5 and in any case, the view expressed by the Division Bench in *Sachin Sadashiv Raut* that every Group-C employee in non-secretariat services has a right to complete two full tenures of office, does not lay down correct law.

G. ANSWER TO THE QUESTION FORMULATED FOR REFERENCE

72) We accordingly proceed to answer the question referred to us as under :

The first proviso to sub-section (1) of Section 3 of the Transfer Act does not confer a right on employees in non-secretariat services in Group-C to complete two full tenures, each tenure consisting of 3 years. The first proviso to sub-section (1) of Section 3 of the Transfer Act merely permits the transferring authority to continue such employee in non-secretariat services in Group-C at the same office or department or even in the same post for a maximum period of 6 years, without there being any corresponding right with such employee to complete two full tenures.

73) Having answered the question referred to us, we direct that the Writ Petition alongwith Interim Application be placed before the Division Bench for deciding the petition in accordance with answer to the Reference. We place on record our appreciation for the cooperation extended by the learned counsel appearing for parties for hearing of the Reference on a non-court working day.

[JITENDRA JAIN, J.] [SANDEEP V. MARNE, J.] [A.S.CHANDURKAR, J.]

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