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

WRIT PETITION NO. 7790 OF 2009

Castrol India Limited
Technopolis Knowledge Park
Mahakali Caves Road, Chakala
Andheri (East), Mumbai-400 093 ....Petitioner

V/s.

Mumbai Port Trust and General
Employees Union,
Port Trust Kamgar Sadan,
Nawab Tank Road, Mazgaon,
MUMBAI-400 010. ....Respondent

* * * * *

Mr. R.S. Pai a/w. Mr. Hemant Telkar i/by. Haresh Mehta & Co., Advocate for the petitioner.
Mr. P.B. Shah, Advocate for the respondents.

CORAM :- SMT. R.P. SONDURBALDOTA, J.

DATED :- 19th January, 2015.

JUDGMENT :-

1] This petition is directed against the Award dated 2nd January, 2009 passed by the Presiding Officer, Central Government Industrial Tribunal (CGIT), Mumbai in Complaint CGIT-2/2/2007 in Reference CGIT No.2/17 of 2004.

2] The facts stated in brief leading to the present petition are as under :-

The petitioner is a Public Limited company, engaged in the manufacture and sale of lubricant oil. It owns and controls five factories, a technology centre and has a wide network of Clearing & Forwarding (C & F) Agents who stock and distribute the company's finished goods as per the instructions issued to them. The petitioner has three regional offices at New Delhi, Kolkatta and Chennai. Until the year 2003, the petitioner had offices at four places in Mumbai including its registered office at Walkeshwar. On finding it inconvenient to integrate and co-ordinate its activities from four different places, the petitioner acquired one larger premises in Bombay suburbs and shifted its four offices to the premises in a phased manner during the period, December - 2002 to February - 2003. On integrating the four offices in Mumbai in one premises, some of the employees of the petitioner became surplus. Therefore, the petitioner introduced Voluntary Retirement Scheme (VRS) covering both, the management and non-management staff from 30th October, 2002 for a limited period. Under the VRS, 29 management staff and 7 non-management staff opted for voluntary retirement which included staff from Walkeshwar office and Tardeo office. Fourteen of the employees employed at Walkeshwar office could not be shifted to the new premises. They comprised of 6 security guards, 6 peons including a pantry boy and 2 clerks. But later, all the 6 security guards, 1 clerk and 1 peon availed of VRS benefits and ceased to be the employees of the petitioner. Of the remaining 6 persons, 5 are peons including a peon-cum-pantry-boy and a clerk. As they could not be gainfully employed by the petitioner at its new premises, it continued to pay their normal wages until alternate employment could be found for them.

3] In the month of January, 2003 the respondent Union raised an industrial dispute which was admitted in conciliation and the matter was referred to Industrial Tribunal for adjudication in the following terms :

> "Whether the action of the management of Castrol India Ltd in closing down their establishment at White House, Walkeshwar, Mumbai and not providing the employment to the 14 regular workmen viz. Shri. S.R. Banavadikar and 13 others (List annexed) at any other place of their business is legal and justified ? If not, what these 14 workmen are entitled to ?"

4] Considering the nature of the dispute raised by the Union, the petitioner proposed to gainfully utilise services of the 6 persons at its other places of business by protecting their existing emoluments. One of them was, transferred to the Company's plant at Calcutta and the remaining 5 to the C & F Agents operating at different places. The petitioner had ensured that, despite transfer to C & F Agents, the persons would be continued to be its employees. All the six employees challenged the transfers by filing Writ Petition No. 5359 of 2006 in this Court. During the course of hearing of that petition, the Counsel for the petitioner herein made a statement that since the concerned workmen were objecting to the transfers to C & F locations, the petitioner would examine the possibility of transferring them to its plants at Kolkatta and Chennai. Accordingly, the remaining 5 persons were transferred to the plants at Kolkatta and Chennai.

5] The reference made in the terms mentioned above, came to be numbered as Reference CGIT No.2/17 of 2004. In February, 2007 the Union filed a complaint under Section 33A of the Industrial Disputes Act (for short "the I.D. Act") in the pending reference. That complaint was registered as Complaint CGIT No.2/2/2007. In the complaint, the Union alleged that the petitioner had breached Section 33A of the I.D. Act and sought quashing and setting aside of the transfer letters to the 6 employees and sought directions for payment of salary to them from 1st March, 2005. The petitioner contested the complaint by filing its written statement. The parties had already led evidence in the reference i.e. Reference CGIT No.2/17 of 2004. The evidence in that reference was adopted as evidence in the complaint. The Tribunal by its Award dated 2nd January, 2009 allowed the complaint, set aside the transfer order and directed that payment be made to the workmen from March, 2005 until they remain in the employment of the petitioner.

6] The petition herein is directed against the order of CGIT on the complaint alone. It has filed an independent petition being Writ Petition No.5373 of 2009 against the order of CGIT on the reference.

7] By the impugned order, the Tribunal, on appreciation of the pleadings and the evidence, held that the appointment letters of the six persons did not contain a clause of transfer which could have empowered the petitioner to transfer them to any other place of business. It noted that the employees from the category of peons and pantry boy had been transferred the remote places like Kolkatta and Chennai, and observed that no instance had been pointed out by the petitioner of transfer any of the employees from Walkeshwar office to such remote places. Transfer to such remote places, according to the Tribunal, makes lot of change not only to the service conditions but also to the life of the employee and his family dependent upon him. Besides, the petitioner had stopped their payment from March-2005. It held that Section 33A of the I. D. Act expects that during the pendency of the proceedings the parties should maintain service conditions unchanged and any change made therein would be illegal. Therefore the transfer of the employees and stoppage of payment for noncompliance with transfer was illegal.

8] The petitioner has raised several grounds of challenge to the impugned order. It contends that the Tribunal failed to appreciate that the complaint as filed was not maintainable. The complaint under Section 33A of the I. D. Act could be filed only by an employee who is aggrieved by alleged contravention of Section 33 of the I. D. Act and not by the Union. Therefore, the same was liable to be dismissed as such. The Tribunal erred in holding that the appointment letters of the employees and the standing orders applicable did not permit the petitioner to transfer the employees. According to the petitioner, the Model Standing Order applicable does not prohibit transfer of employees from one establishment to another. Besides the transfer is an implied condition of service. Therefore, there was no breach of the provisions of Section 33 of the I. D. Act. It is next contended by the petitioner that the Tribunal lost sight of the fact that by transferring the employees concerned the petitioner had not altered, to their prejudice, the service conditions applicable to them immediately before commencement of the proceedings of the reference. According to the petitioner, the Tribunal also failed to appreciate that the only other alternative that the petitioner was to take the extreme action of the retrenching them by following the due process of law. The petitioner in fairness had resorted to the transfer to it's other establishment/ business by fully protecting the existing terms and conditions of service so that they could be gainfully employed without detriment to the existing emoluments.

9] Mr. Pai, the learned advocate for the petitioner submits that though the petitioner had specifically raised the question of maintainability of the complaint by the Union, the Tribunal neither framed any issue thereon nor decided the same. Mr. Pai draws attention to para 2(a) of the reply filed by the petitioner to the complaint, wherein, it is urged as follows.

> *"a) The said Complaint has been filed by the Complainant Union which is contrary to the provisions of Section 33A of the I. D. Act as a Complaint under the said Section can be filed only by an employee who is aggrieved by any alleged contravention of the provisions of Section 33 of the I. D. Act and not by a Union. It is therefore liable to be dismissed in limine on this ground alone.*

10] Section 33A of the I. D. Act reads as under :

> ***"[33A. Special Provision for Adjudication as to whether Conditions of Service, etc., changed during Pendency of Proceedings. -*** *Where an employer contravenes the provisions of section 33 during the pendency of proceedings [before a Conciliation Officer, Board, an arbitrator, Labour Court, Tribunal or National Tribunal], any employee aggrieved by such contravention, may make a complaint in writing, [in the prescribed manner, -*
>
> *(a) to such conciliation officer or Board, and the conciliation officer or Board shall take such complaint into account in mediating in, and promoting the settlement of, such industrial dispute; and*
>
> *(b) to such arbitrator, Labour Court, Tribunal or*

> *National Tribunal and on receipt of such complaint, the arbitrator, Labour Court, Tribunal or National Tribunal, as the case may be, shall adjudicate upon the complaint as if it were a dispute referred to or pending before it, in accordance with the provisions of this Act and shall submit his or its award to the appropriate Government and the provisions of this Act shall apply accordingly]"*

Bare perusal of the provision of Section 33A indicates that it is designed to provide an instant remedy to a workman aggrieved by contravention of Section 33 of the I. D. Act. The right to complain against the contravention being conferred on the employee, only such employee has a right to make an application under Section 33A of the I. D. Act. A registered Trade Union, of which such aggrieved employee is a member has no right to file such application. Mr. Pai, submits in fairness, that an employee can specifically authorise an agent to make such an application on his behalf and complaint filed by the Union or its Secretary duly authorised by an aggrieved workman can be said to be properly presented. But in the absence of any proof to show that the office bearer of the Union was authorised to file the application, the same cannot be considered to be a valid application. In this connection he relies upon decision of our High Court reported in ***Harbansa and others vs Jaswant Sugar Mills Ltd. reported in 1958 (1) LLJ 728 (Kanpur)*** and decision of Assam High Court in ***National Power Supply Corporation, Ltd. vs State of Assam and others*** reported in ***1963 (II) LLJ page 10 (H.C. Assam).***

11] Mr. P. B. Shah, the learned advocate for the respondent, relying upon decision of the Karnataka High Court in ***B. D. K. Process***

Controls Private vs Bharatiya Mazdoor Sangh reported in ***2002 (94) FLR 416,*** submits that as a matter of construction pure and simple, there is no justification for assuming that the workman himself must file the complaint. This decision of Karnataka High Court runs on the same lines as the decisions cited by Mr. Pai. It holds that if the workman aggrieved authorised the Union in writing to move the Tribunal by way of filing application under Section 33A of the I. D. Act, for all purposes that application is to be treated as an application by the aggrieved workman. The Karnataka High Court has relied upon Rule 60 of the Industrial Disputes (Karnataka Rules), 1957, for the purposes which specifically permits complaint under Section 33A of the I. D. Act to be made either by the workman himself or by some other person proved to the satisfaction of the Tribunal to be acquainted with the facts of the case.

12] In the case on hand, the respondent does not rely upon any provision that permits filing of such complaint by a person other than the aggrieved employee. Nor does it claim that any specific authority was given to it by the six employees to file the complaint. In the circumstances, the complaint filed by the union must be held to be not maintainable and liable to be dismissed on that ground alone.

13] On merit Mr. Pai submits that an application under Section 33A of the I. D. Act cannot be maintained without proof of contravention of Section 33 of I. D. Act. He relies upon decision of the Apex Court in ***Blue Star Employees Union vs Ex Officio, Principal Secretary to Government and anr. reported in 2000 (II) LLJ page 1398***

SC, wherein the Apex Court has held that, Section 33A of the Act in fact, involves consideration of two aspects of the matter firstly, whether there has been any violation or contravention of the provisions of Section 33 of the Act and secondly, whether the act complained of is justified or not. Therefore, violation or contravention of the provisions of Section 33 of the Act would be the justification for the Authority concerned to entertain an application under Section 33A of the Act. The relevant observations of the Apex Court read as under :

> *"4. A complaint can be made to the Tribunal under Section 33-A of the Act if there has been violation or contravention of the provisions of Section 33 of the Act and if it is found that there has, in fact, been such a contravention the Tribunal can proceed to adjudicate the dispute contained in a complaint on its merits. Thus violation or contravention of the provisions of Section 33 of the Act would be the basic question that arises for consideration and before giving any relief to an aggrieved employee under this section, the Tribunal has to find out whether the employer's action falls within one of the following provisions contained in Section 33 of the Act.*
>
> *(i) If the dispute, pending adjudication has nothing to do with the alteration in conditions of service of a workman in contravention of Section 33(1)(a) of the Act or alteration of conditions of service of a 'protected workman' within Section 33(1) of the Act;*
>
> *(ii) Discharges or punishes a workman by dismissal or otherwise for a misconduct connected with the pending dispute without obtaining prior express permission in writing of the Appropriate Authority as required by Section 33(1)(b) of the Act;*
>
> *(iii) Discharges or punishes a 'protected workman' by dismissal or otherwise for a misconduct not connected with the pending dispute, without obtaining prior express permission in writing of the Appropriate Authority as required by Section 33(3)(b) of the Act read with Section 33(1)(b) of the Act; or*
>
> *(iv) Discharge or punishes a workman by dismissal or otherwise for a misconduct not connected with the pending dispute, without complying with the provisions of proviso to Section 33(2)(b) of the Act.*

> *5. Thus, the contravention of the provisions of Section 33 of the Act is the foundation for exercise of the power under Section 33 of the Act. If this issue is answered against the employee, nothing further survives for consideration or action by the Tribunal under Section 33 of the |Act. In other words, an application under Section 33-A of the Act without proof of contravention of Section 33 of the Act would be incompetent."*

14] The facts of the case on hand can attract only the first part of provision (i) enumerated above by the Apex Court i.e. alteration in conditions of service of a workman in contravention of Section 33 (1)(a) of the I.D. Act. The relevant provision reads as under :-

> "**33. Conditions of service, etc. to remain unchanged under certain circumstances during pendency of proceedings**.-During the pendency of any conciliation proceedings before a conciliation officer or a Board or of any proceeding before [an arbitrator or] a Labour Court or Tribunal or National Tribunal in respect of an industrial dispute, no employer shall,
> (a)in regard to any manner connected with dispute, alter, to the prejudice of the workmen concerned in such dispute, the conditions of service applicable to them immediately before the commencement of such proceedings; "

For this provision to be applicable, the conditions needed to be satisfied would be :

> (i)Pendency of proceedings before the authorities mentioned therein.
>
> (ii)the workman to be concerned with the dispute in the proceedings pending.
>
> (iii)alteration in the conditions of service of such workman, applicable to him, immediately before the commencement of proceedings.

(iv)the alteration being in regard to any matter connected to the dispute pending.

(v)the alteration being to the prejudice of such workman.

Only on satisfaction of all the above conditions, the employees herein were entitled to the relief claimed by them.

15] The action impugned on the part of the petitioner is of transfer of the employees from one office to another. It is now to be seen, whether the action amounts to (i)change in the condition of service, (ii)the change, if any, being prejudicial to the employees, and (iii)the change, if any, being in regard to any matter connected to the dispute pending.

16]. Mr. Pai, relying upon decision of the Apex Court in ***Pearlite Liners (Petitioner) Ltd. vs Manorama Sirsi*** reported in ***(2004) 3 SCC page 172,*** submits that unless there is a term to the contrary in the contract of service, a transfer is a normal incident of service. In the absence of the term prohibiting the transfer of employee, the transfer order cannot be called into question. The other decision of the Apex Court relied upon by him is in the case of ***State of U.P. and anr. vs. Siya Ram and anr.*** *reported in* ***2004 (7) Supreme Court Cases 405,*** wherein the Apex Court has held that transfer being an incident of service, unless shown to be *malafide* or violative of statutory provisions cannot be open to interference by Court. The third decision cited by Mr. Pai is of our High Court in ***The Janata Commercial Co-Operative Bank through its Managing Director, Akola vs The Member, Industrial Court & Anr.*** *reported in* ***1996 Labour Industrial***

Cases 2812 Bombay High Court, which similarly holds that transfer is never a condition of service but is rather an incident of service. Thus, it is always open to the employer to transfer the employee in the interest of the administration and no vested right is created in favour of the employee to a particular place of posting. Order of transfer is ordinarily not to be interfered with by the Court unless it is violative of Rules or is *malafide*.

17] Mr. Shah on the other hand relies upon the decision of the Apex Court in ***Kundan Sugal Mills vs Ziyauddin reported in AIR 1960 Supreme Court, page 650*** and decision of our High Court in ***Priscy D'Souza & ors. vs. Indamer Company Pvt. Ltd. & ors. reported in* 2002 III CLR page 490.** The Apex Court by the decision cited has held that the employer, in the facts of the case before it, had no right to transfer the employee. It was noted that the transfer had been from one entity to another entity which was different. The two mills were situate at different places with accounts separately maintained and governed by different service conditions, though they happened to be under the common management, therefore, they were treated as different entities. The decision in the case of ***"Priscy D'Souza & Ors."*** *(supra)* arose out of an interim order. This Court while appreciating the legal position that transfer in service is an incident of an employment opined that hardship of the employee also cannot be ignored altogether. It also noted that the Apex Court has time and again stressed that the transfers cannot be and should not be interfered unless they are contrary to the Rules or *malafide* or with ulterior motive to punish the incumbent. In the facts of the case, this Court found that the petitioner before it had genuine personal problems which ought to have been considered sympathetically by the management.

18] The service conditions of the employees herein do not specifically mention that the service is transferable. But at the same time, there is no term prohibiting the transfer. In the circumstances, since the petitioner has offices at several places the transfer of the employees must be held to be an incident of transfer and the same cannot amount to change of service condition. Since the transfer does not amount to change in service conditions, the further enquiry into, whether the action is prejudicial to the employees or whether the action is in regard to the matter in dispute, need not be undertaken.

19). In any case, no *malafides* can be attributed to the petitioner in the facts of the case. The decision was purely an administrative decision. The petitioner had integrated four offices scattered in the city of Mumbai to one premises. This resulted into some of the employees becoming surplus. It had therefore offered a scheme for voluntary retirement, which had been accepted by all such employees except the six persons concerned in this petition. Though the petitioner could not gainfully employ them in the new premises, it had continued to pay normal wages until alternate employment could be found for them. There is no dispute that the petitioner has factories located at different places and runs a technology centre. It also has a wide network of Clearing and Forwarding Agents who stock and distribute the company's finished goods as per the instructions issued to them. While considering the convenience of the employees the petitioner had initially transferred them to work with the Clearing & Forwarding Agents with an assurance that neither their service conditions nor their wages would be affected in any way. But unfortunately a dispute was raised by the employees that the Clearing and Forwarding Agents cannot be said the same entity. Thereafter, the petitioner transferred them to its branches located at Chennai and Kolkatta. The action of the petitioner was clearly a *bonafide* action by keeping in mind the interest of its employees. Unfortunately, none of these actions have been considered by the Tribunal in the impugned order. Therefore, even on merit the impugned order cannot be sustained. Consequently, the petition is allowed. The Rule is made absolute in terms of prayer clause (a).

[Smt. R. P. SondurBaldota, J]