

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

WRIT PETITION NO. 11636 OF 2014

M/s. Snowcem Paints Private Ltd ..Petitioner

Vs

Snowcem Paints Kamgar
Karmachari Union .. Respondent

Mr.Shailesh Naidu i/b Mr. Santosh Shetty, Advocate for
Petitioner.

Mr.Bhavesh Parmar i/b Mr. Devmani Shukla, Advocate for
Respondent.

CORAM : R.G.KETKAR,J.
Reserved on : 27/01/2015
Pronounced on : 03/02/2015

ORDER:

1. Heard Mr. Shailesh Naidu, learned counsel for the petitioner and Mr. Bhavesh Parmar, learned counsel for the respondent at length.

2. By this Petition under Articles 226 and 227 of the Constitution of India, the petitioner has challenged the Judgment and order dated 10.11.2014 below Exhibit-U-2 as also the order dated 4.12.2014 below Exhibit U-13 in Complaint (ULP) No.86 of 2014 passed by the learned Member, Industrial Court, Nashik. By order dated 10.11.2014 below Exhibit U-2, the Industrial Court allowed that application and stayed the transfer orders dated

27.10.2014 of all the 11 employees of the petitioner-company till the final decision of the main complaint. The petitioner was also directed not to act upon the said transfer orders. By the order dated 4.12.2014 below Exhibit U-13, the Industrial Court directed the petitioner-company to allot work to 11 workers whose transfer orders were stayed by the order dated 10.11.2014 below Exhibit U-2.

3. In support of this Petition, Mr. Naidu submitted that the respondent-Union filed complaint alleging commission of unfair labour practices by the petitioner under section 28(1) read with Items 3,9 and 10 of Schedule IV of the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971 (for short, "Act"). The respondent mainly challenged the transfer orders dated 27.10.2014. By these orders, as many as 11 employees were transferred from Sinnar to Chennai, Kolkata and Rajasthan. During the pendency of the complaint, the respondent filed application under section 30(2) of the Act praying for stay of transfer orders on the ground of malafides. By order dated 10.11.2014, the Industrial Court allowed the application and stayed the transfer orders dated 27.10.2014. On 17.11.2014, the respondent gave notice under Regulation 115 of the Industrial Court Regulations, 1975 informing the petitioner that on 20.11.2014 the Industrial Court will be moved for

obtaining interim reliefs. He submitted that the respondent filed application praying for directions to the petitioner to permit 11 workers to resume duties; to declare thaReserved order-wp-11636-14t the action of the petitioner amounts to an unfair labour practice; that the petitioner be held guilty of Contempt of Court and accordingly punishment may be inflicted. He submitted that in the said application there is no foundation of any unfair labour practice. No case is made out as regards violation of any statutory right. He submitted that unless foundation is laid about commission of any unfair labor practice, the Court cannot grant any interim relief while exercising powers under section 30(2). In support of this submission, he relied upon a decision of this Court in the case of Kirloskar Oil Engines Ltd Vs. U.B.Dharurkar & Ors, 1986 II CLR 106.

4. He submitted that the petitioner resisted the application by filing reply. In paragraph 6, it was specifically asserted that no work is available at Sinnar for allotting the same to the transferred employees. Issue of salary will also have to be decided as if no work is available and the principle of "no work no pay" will be applicable. He submitted that the petitioner had produced Chartered Engineer's Certificate dated 24.11.2014 enclosing therewith process flow sheet and plant capacity calculation sheet for the years 2013 and 2014.

5. Mr. Naidu submitted that in the main complaint, the respondent prayed for declaration that the petitioner herein has engaged in unfair labour practice in transferring 11 employees from Sinnar, District Nashik, by issuing orders dated 27.10.2014. In the application for interim relief also the respondent prayed for stay of the transfer orders dated 27.10.2014. In other words, neither in the complaint nor in the interim relief application, any prayer was made by the respondent as is made in the application below Exhibit-U-13, namely, allotting work to 11 workers whose transfer orders were stayed by the Industrial Court.

6. Mr. Naidu submitted that the findings recorded by the Industrial Court in paragraph 5 of the order dated 4.12.2014 below Exhibit U-13 are based on conjunctures and surmises. No finding is recorded as regards commission of any unfair labour practice by the petitioner which is a sine qua non for granting interim relief. He submitted that commission of unfair labour practice is a jurisdictional fact as the Court exercising powers under the Act has limited jurisdiction. In so far as the order dated 10.11.2014 below Exhibit U-2 is concerned, he submitted that the Industrial Court wrongly placed burden on the petitioner. In the first place, burden is to be discharged by the petitioner for establishing prima facie case of commission of unfair labour practice. The Industrial Court has wrongly placed burden on the

petitioner to establish that because of requirement and exigencies of the company, 11 employees were transferred. According to him, the Industrial Court has committed fundamental error in placing burden upon the petitioner to prove the ground of transfer. The said order is based on surmises and conjectures. He submitted that in paragraph 18 the Industrial Court observed that the petitioner has not explained what exigency was there at Channai, Kolkata and Rajasthan. The said exigency is not supported by documentary evidence. He submitted that the petitioner was taken by surprise at the time of hearing of interim application otherwise it could have produced the documentary evidence substantiating the case of requirement and exigencies for transferring the employees by the petitioner company. He relied upon Chapter V of the Labour Courts (Practice and Procedure) Rules, 1975 and in particular Rule 75 thereof.

7. Mr. Naidu submitted that (a) transfer is an incidence of employment; (b) every transfer does not need, postulate or pre-suppose hearing; (c) The employee does not have a choice in the matter of transfer; (d) no transfer could be inferred to be actuated with mala fides or passed in violation of the provisions. Case of such violation will have to be made out. (e) The scope of scrutiny in the matter of order of transfer in the High Court or

Tribunal would be extremely limited. In support of this proposition, he relied upon decision of this Court in the case of MSEB Kamgar Sena Vs. Managing Director, Maharashtra State Power Generation Co.Ltd & Ors, 2008 II CLR 444.

8. Mr. Naidu further submitted that each employee is drawing salary about Rs.10000/- per month and is, therefore, outside the purview of the Payment of Bonus Act. In the complaint, it was alleged that the petitioner has not paid bonus for the year 2013-2014 to these employees and is not implementing provisions of the Payment of Bonus Act. He submitted that this aspect was dealt with in paragraph 9 of the reply filed by the petitioner. However, while deciding the application U-2, the Industrial Court did not deal with this aspect. Lastly, he submitted that if no work is available at Sinnar for allotting it to 11 employees, they will be paid legal dues. In that regard, he invited my attention to definition of "lay-off" in Section 2 (kkk) of the Industrial Disputes Act, 1947 read with Clause 19A of Bombay Industrial Employment (Standing Orders) Rules, 1959.

9. On the other hand, Mr Parmar supported the impugned orders. He submitted that the petitioner has not made out any case for interfering with the impugned orders, in exercise of powers under Articles 226 and 227 of the Constitution of India. It cannot be said that the impugned orders are perverse or causing

any prejudice to the petitioner. While deciding Exhibit U-2, the Industrial Court has, prima facie, held that the petitioner has committed unfair labour practice by issuing transfer orders dated 27.10.2014 and the transfer orders are malafide and accordingly stayed the transfer orders. The order dated 4.12.2014 below Exhibit U-13 is merely incidental. He submitted that after the order of 10.11.2014 below Exhibit-U-2, on 12.11.2014 the respondent addressed a letter to the Managing Director of the petitioner enclosing therewith the order dated 10.11.2014. A prayer was made permitting 11 employees to resume duties. This was replied by the petitioner on the same day. In that reply, it was asserted that though the Industrial Court has stayed the transfer orders, it did not direct the petitioner to permit 11 workers to resume duties. It is in these circumstances the application Exhibit U-13 was moved for directing the petitioner to allot work to the 11 employees. He submitted that no contention based on Section 2(kkk) of the Industrial Disputes Act, 1947 read with clause 19A of Bombay Industrial Employment (Standing Orders) Rules, 1959 was advanced before the Industrial Court. In case the petitioner does not allot work to 11 employees, it must pay the legal dues of these employees. What are these legal dues need not be gone into in this petition.

10. I have considered the rival submissions made by the

learned counsel appearing for the parties. I have perused the material on record. As noted earlier, the respondent has filed complaint under section 28(1) read with Items 3,9. and 10 of Schedule IV of the Act. In the c omplaint, the respondent has contended that the monthly rated employees working with the petitioner have organized themselves under the banner of the respondent-Union. The respondent-Union accordingly was registered under the Trade Unions Act, 1926. The registration certificate was received on 31.7.2014. It is the case of the respondent that immediately after coming to know about the formation of the respondent-Union, the petitioner-company started harassing the employees. The petitioner issued the transfer order to Shri Dipak Fakira Hire, President of the respondent-Union with effect from 1.8.2014. The respondent issued notice of strike dated 1.8.2014. By letter dated 17.8.2014, the petitioner agreed not to transfer Shri Dipak Hire. The respondent also alleged that the petitioner has not paid bonus for the year 2013-2014. It is the case of the respondent that the petitioner started harassing the workmen asking them to give up their trade union activities and dissolve their union, otherwise they will be transferred or terminated. In pursuance of the said policy of the petitioner, only with a view to harassing the employees and breaking their union activities, the transfer orders

were issued on 27.10.2014. Out of 11 workers, one is the President, other is Secretary and third one is Jt. Secretary. Rest of the employees are active members of the Union. It is further asserted that the petitioner has given in writing by letter dated 17.8.2014 that it will not transfer Mr. Dipak Hire. However, Mr Dipak Hire is transferred by order dated 27.10.2014. The 11 employees are transferred with malafide intention as they are taken active part in formation of the respondent-Union. They have been transferred from Sinnar, District Nashik to Chennai, Kolkata and Rajasthan. The intention of the petitioner in issuing these transfer orders is to break the Union and the employees should act on dictates of the petitioner company. The respondent has prayed for declaration that the petitioner has engaged in unfair labour practice in transferring the employees and that it be declared that the transfer orders dated 27.10.2014 are illegal and improper. Prayer clause 3 of the complaint reads as under :

"3. Respondent be further directed not to act upon the transfer orders dated 27.10.2014 and allow these employees whose names are stated in Annexure C-1 to C-11 at Sinnar, District Nashik."

11. During the pendency of the complaint, the respondent filed application for interim relief under section 30(2) of the Act. Prayer clause (b) of that application reads as under :

“(b) The transfer orders dated 27.10.2014 issued to 11 employees Sarvashri Dipak Fakira Hire, Santosh Narhari Bari, Kishor Sitaram Shinde, Devendra Ramesh Wagh, Nitin Namdev Pawar, Sanjay Rupchand Bathan, Pravin Uttam Pagare, Firoz Isak Kadri, Uttam Khandu Gite, Sunil Baban Nimbalkar, Pravin Gangadhar Rajbhoj (annexure C-1 to C-11 to the main complaint) be kindly stayed forthwith, **and respondent be directed to allow these 11 employees at Sinnar, District:Nashik till final disposal of the complaint.**”

(emphasis supplied)

The petitioner filed reply opposing that application. In paragraph 9, it was contended that the concerned employees are not covered under the Payment of Bonus Act as the salary of all these employees is above Rs.10,000/- per month but without prejudice the employees have denied to accept the bonus which was offered to them, these employees have been adjusted for a very long period with the hope that the petitioner will receive production orders. In other words, the petitioner was paying ex gratia amount (bonus) to the employees even though, according to them, they were drawing salary of more than Rs.10,000/- per month.

12. In the order dated 10.11.2014 the Industrial Court noted that the President and Secretary of the respondent had demanded bonus vide letter dated 28.9.2014 and it was informed that since they had formed union, the petitioner got angry with them and is threatening to transfer them. After the letter dated

28.9.2014 was given by the office-bearers of the respondent, on 27.10.2014, the 11 employees were transferred out of State. In paragraph 14, the Industrial Court observed that after the demand of bonus was made, in the next month 11 employees were transferred out of State.

13. In paragraph 15, the Industrial Court noted the reason given by the petitioner that because of requirement and exigencies of the company, all the 11 employees were transferred and thus there was no malafide intention while transferring 11 employees at various stations. The industrial Court also noted the contention of the petitioner that there was no enough work at Sinnar plant and it is running only at 20 % of installed capacity and there is requirement of manpower in other plants. It was observed that except bare words of the petitioner, it did not file documentary evidence to prima facie hold that really at Sinnar plant only 20% work of installed capacity was available. No other documents were produced on record to indicate that at the plants out of Maharashtra, much more work is available and therefore manpower is required. For want of such documentary evidence, the Industrial court prima facie held that it cannot be said that at Sinnar plant the company is running only at 20% of installed capacity and at other stations out of Maharashtra much more work is available and therefore

employees are required to be transferred there.

14. Mr. Naidu submitted that the respondent did not discharge the burden in establishing that the transfer orders are malafide. The Industrial Court has wrongly placed burden on the petitioner company to establish requirement and exigencies of the company in transferring 11 workers. The impugned order suffers from misconception of law and justice. It is not possible to accept this submission for more than one reason. In the first place, perusal of the complaint, prima facie, shows that the respondent was registered under the provisions of the Trade Unions Act, 1926 and registration certificate was received on 31.7.2014. Immediately, the petitioner transferred Shri Dipak Hire, President of the respondent, with effect from 1.8.2014. On 1.8.2014 the respondent issued notice of strike. By letter dated 17.8.2014 the petitioner agreed not to transfer Shri Dipak Hire. On 27.9.2014, the office-bearers of the respondent-Union demanded bonus and in the next month the transfer orders were issued on 27.10.2014. Though the petitioner agreed not to transfer Shri Dipak Hire, President of the Union, he was also transferred. The Industrial Court, therefore, held that the transfer orders were issued with malafide intention and in order to break the Union.

15. Secondly, the petitioner came with the case that the

employees were transferred on account of requirement and exigencies. The said fact was within the special and exclusive knowledge of the petitioner. It was expected of the petitioner to substantiate that case by producing documents. However, no documents were produced. I, therefore, do not find that the Industrial Court wrongly placed burden on the petitioner. The reasons given by the Industrial Court in paragraphs 15 and 18 cannot be faulted on any ground. In view thereof, I do not find any merit in challenge to the order dated 10.11.2014 passed by the Industrial Court below Exhibit U-2.

16. That brings me to the order dated 4.12.2014 passed below Exhibit U-13. By that order, the Industrial Court directed the petitioner to allot work to those 11 workers. Mr. Naidu submitted that the reasons given by the Industrial Court in paragraph 5 are patently unsustainable. No finding is recorded as regards commission of any unfair labour practice. He further submitted that neither in the complaint nor in the interim application, any prayer was made for allotting work to the transferred employees. In short, the Industrial Court granted the relief which was not claimed. It is not possible to accept this submission. I have already extracted prayer clause 3 in the main complaint and prayer clause (b) in the application for interim relief. The respondent has prayed for issuing direction to the petitioner to

allow these employees at Sinnar District Nashik. No doubt, the words “to work” are not in the prayer clauses. In my opinion, fair reading of the complaint and the application for interim relief shows that the respondent sought direction against the petitioner to allow them to work at Sinnar. Mr Naidu submitted that no work is available at Sinnar for allotting the same to the transferred employees. Issue of salary will have to be decided as if no work is available and the principle of “no work no pay” will be applicable. On the other hand, Mr Parmar submitted that work is available at Sinnar and the Industrial Court has held that the petitioner has not established the said fact. As noted earlier, the Industrial Court has prima face recorded the findings that the petitioner did not establish its case that no enough work at Sinnar plant is available and that it is running only at 20% of installed capacity. I, therefore, do not find that the Industrial Court committed any error in passing the order dated 4.12.2014 below Exhibit U-13. In my opinion, having regard to the prayers made in the complaint as also interim application extracted herein above, the Industrial Court was justified in issuing direction. The said direction is merely incidental and is issued with a view to ensuring compliance of order dated 10.11.2014 passed below Exh.U-2.

17. After considering the material on record, prima facie, I am of the opinion that attempt of the petitioner is to circumvent the order dated 10.11.2014 passed by the Industrial Court below Exh.U-2. Mr. Parmar submitted that the issue as to what are the legal dues of the transferred workmen was not raised before the Industrial Court and the same need not be gone into in this petition. From perusal of the impugned orders, it does not appear that this issue was agitated before the Industrial Court. In view thereof, the petitioner will either have to allot work to the transferred employees or to pay their legal dues.

18. In the light of the aforesaid discussion, no case is made out for invocation of powers under Articles 226 and 227 of the Constitution of India. The Writ Petition fails and the same is dismissed.

(R.G.Ketkar, J.)