

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

WRIT PETITION NO. 4895 OF 2016

- 1 Dashrath Ramlal Garandwal,
 Age : 29 years, Occupation : Service,
 R/o Bhalgaon, Tal.Dist.Aurangabad.
- 2 Suresh Himmat Borse,
 Age : 29 years, Occupation : Service,
 R/o Shivajinagar Pailad, Amalner,
 District Jalgaon.
- 3 Shyam Jagannath Ahire,
 Age : 30 years, Occupation : Service,
 R/o Plot No.108, Near Ganesh Temple,
 Rajiv Gandhi Nagar, N-2, Cidco,
 Mukundwadi, Aurangabad.
- 4 Vijay Babruwahan Kamble,
 Age : 30 years, Occupation : Service,
 R/o Babanrao Dhakane School,
 Savitrinagar, Chikalthana,
 District Aurangabad.
- 5 Navnath Namdeo Deokar,
 Age : 26 years, Occupation : Service,
 R/o Golegaon, Tal.Khultabad,
 District Aurangabad.
- 6 Anil Sheshrao More,
 Age : 29 years, Occupation : Service,
 R/o Haradf, Tal.Hadgaon,
 District Nanded.
- 7 Ankush Janardhan Rithe,
 Age : 22 years, Occupation : Service,
 R/o Hadgaon Sarak,
 Tal.Dist.Aurangabad.
- 8 Lahu Trimbakrao Shingare,

Age : 25 years, Occupation : Service,
R/o Kandari (B), Tal.Badnapur,
Dist.Jalna.

- 9 Jiwan Prakash Ekbote,
Age : 33 years, Occupation : Service,
R/o 6, E-10/12, Sambhaji Colony,
Aurangabad.
- 10 Yogesh Nivruti Barbaile,
Age : 28 years, Occupation : Service,
R/o Choudhary Colony, Aurangabad.
- 11 Sandeep Tulsiram Katankar,
Age : 27 years, Occupation : Service,
R/o Turkhed, Tal.Anjangaon,
District Amrawati.
- 12 Vithal Devidas Dahiware,
Age : 22 years, Occupation : Service,
R/o Amba, Tal.Partur, Dist.Jalna.
- 13 Krishna Chandrabhan Shinde,
Age : 25 years, Occupation : Service,
R/o Kawitkheda, Post.Balegaon,
Tal.Vaijapur, District Aurangabad.
- 14 Kiran Bhanudas Rade,
Age : 26 years, Occupation : Service,
R/o Plot No.7, N-9, M-2, Hudco,
Aurangabad.
- 15 Trimbak Dattu Sadgir,
Age : 32 years, Occupation : Service,
R/o Aherwadi, Tal.Yeola,
Dist.Nashik.
- 16 Dnyaneshwar Karbhari Borse,
Age : 23 years, Occupation : Service,
R/o Jamdi (J), Tal.Kannad,
District Aurangabad.
- 17 Rameshwar Sampati Kangule,

Age : 28 years, Occupation : Service,
R/o H.No.5/9/150, Pasaydan Building,
Galli No.4, Shivaji Colony, Mukundwadi,
N-2, Cidco, Aurangabad.

18 Shaikh Iqbal Shaikh Unus,
Age : 30 years, Occupation : Service,
R/o Sawargaon, Tal.Kannad,
Dist.Aurangabad.

19 Gajanan Kakarao Sable,
Age : 24 years, Occupation : Service,
R/o Georai Tayaga, Tal.Fulambri,
Dist.Aurangabad.

...PETITIONERS

-VERSUS-

M/s Ahmednagar Forgings Limited.
Presently known as M/s Metalyst Forgings Limited.
Through its Plant Head, B-20,
Five Star MIDC Shendra, Aurangabad.

...RESPONDENT

**WITH
WRIT PETITION NO.5000 OF 2016**

M/s Ahmednagar Forging Limited.
Presently known as M/s Metalyst Forgings Limited.
B-20, Five Star Industrial Area,
Shendra, Tq. And Dist.Aurangabad.
Through its Plan Head :-
Mr.Uday Ganpatrao Kulkarni,
Age : 44 years, Occupation : Service,
R/o C/o M/s Ahmednagar Forging Limited,
B-20, Five Star Industrial Area,
Shendra, Tq. And Dist.Aurangabad.

...PETITIONER

-VERSUS-

1 Dashrath Ramlal Garandwal,

Age : 29 years, Occupation : Service,
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Dist.Aurangabad.

...RESPONDENTS

...
Advocate for the Workers : Shri B R Kawre.
Advocate for the Employer Company : Shri U.S. Malte.

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CORAM: RAVINDRA V. GHUGE, J.

DATE :- 31st August, 2016

Oral Judgment :

1 Rule. Rule made returnable forthwith and heard finally by the
consent of the parties.

2 In the first petition, the Petitioners are the Workers, who are
aggrieved by the impugned judgment of the Industrial Court dated
31.03.2016 by which Complaint (ULP) No.35/2014 has been dismissed
and their transfer orders dated 08.02.2014 are sustained.

3 In the second petition, the Petitioner is the Employer who has
prayed for refund of the money which has been paid to the Workers by
way of an interim arrangement by the order passed by this Court on

27.08.2015 in Writ Petition No.8728/2014 in between these parties. The said amount was paid to the Workers with the direction that the issue of payment of salary from the date of transfer till the decision in the complaint would be subject to the pleadings of the parties and the decision of the Industrial Court. It is, therefore, prayed by the Employer that the amount deposited and/or paid to the Workers, should be refunded to the Employer.

4 For the sake of brevity, in both the petitions, the Workers of the Factory shall be referred to as “the Workers”. The Management shall be referred to as “the Employer”.

5 The contentions of the Workers can be summarized as under:-

- (a) They have been transferred malafide by the Employer in the guise of following the management policy by the order of transfer dated 08.02.2014.
- (b) On 03.02.2014, the Workers had joined the Bhartiya Kamgar Union and had served the letter on the Employer informing him that the Workers working in the said factory have become the members of the said Union.
- (c) On 07.02.2014 in the middle of the night, the Employer has shifted the machines out of the shop floor and has carried

them to the another factory at Sanaswadi, Pune.

- (d) On 08.02.2014, the Employer issued the orders of transfer to each of these Workers on the pretext that the machines have been shifted from the Machine Shop to the Machining Hub at Pune and these Workers are being transferred to the group company.
- (e) The workers were directed to report for duties from 10.02.2014 at Amtek Auto Limited, Gat No.1074-1085, Sanaswadi, District Pune.
- (f) The Employer is shown to be headed by the multinational joint group of Amtek, which has it's headquarter in India. The said group is one of the largest integrated components manufacturers in India and is engaged in the business of manufacturing forging components, flies wheel wring gears and also engaged in the business of machining of variety of large and medium size automobile components.
- (g) Because these workers joined the Bhartiya Kamgar Union, the machines were shifted overnight and the workers were transferred to a different employer.
- (h) Their transfers amount to change in service conditions as they are sought to be handed over to a different employer.
- (i) Section 9-A of the Industrial Disputes Act, 1947 has been

violated since the notice of change in service conditions was not issued.

- (j) The workers have deposed before the Industrial Court by leading evidence and it is established that the workers have been transferred to a different employer and for unjustified reasons.
- (k) In cross-examination of the employer's witness, it is admitted that these workers are employees of the employer and have been shifted to a different factory.
- (l) The Industrial Court has lost sight of the material aspects and has dismissed the complaint by concluding that the workers have not succeeded in proving that their services were engaged only with the respondent/ employer.
- (m) The Industrial Court has proceeded on an erroneous conclusion that these workers were recruited for performing the work at different places and not exclusively for the respondent/ employer.
- (n) Reliance is placed upon the following judgments:-
 - (i) Sunil Kumar Ghosh vs. K.Ram Chandran, **2011(14) SCC 320.**
 - (ii) Crest Communication Limited, Mumbai vs. Ms.Sheetal Shenoy, **2001(4) Mh.L.J. 919.**
 - (iii) Bajaj Auto Limited vs. Shrikant Vinayak Yogi, **2006(3)**

Mh.L.J. 557.

- (iv) S.G.Chemicals & Dyes Trading Employees' Union vs. S.G.Chemicals & Dyes Trading Limited, **(1986) 2 SCC 624.**

6 The Employer has strenuously supported the impugned judgment. The contentions put forth by the Employer can be summarized as under:-

- (a) The respondent/ employer was earlier Neepaz V Forge (I) Limited, a unit of Adhunik Group..
- (b) It was renamed as M/s Ahmednagar Forging Limited.
- (c) The employer does not have subsidiaries of it's own.
- (d) The employer is a subsidiary of Amtek Auto Limited, which is a global company.
- (e) Amtek Auto Limited can be said to be the holding company.
- (f) The letter dated 03.02.2014, said to be the communication of the Union intimating it's formation, was never served upon the employer.
- (g) There has been a policy decision to form a machining hub at Sanaswadi, Pune.
- (h) The employer has not transferred these workers only because of the formation of the Union.
- (i) The transfer order is self explanatory and would indicate

reasons for which the workers have been transferred.

- (j) In order to make manufacturing of the components cost effective, all machines concerning these workers were shifted from the Shendra Industrial Area at Aurangabad to Sanaswadi at Pune.
- (k) There was a counseling session between the employer and the workers and on the basis of which they were informed that the machines are likely to be shifted.
- (l) Along with the workers, three officers have also been transferred.
- (m) The workers have not challenged the transfer or shifting of machineries and they have only challenged their transfer orders.
- (n) Because of lack of pleadings as regards a challenge to the reasons for transfer, the complaint was rightly dismissed by the Industrial Court.
- (o) It is the right of the employer to arrange its business and manufacturing activities and to ensure that the manufacturing becomes cost effective.
- (p) The transfer is a normal incidence of service.
- (q) The service of the workers is transferable under clause (6) of their appointment orders.

- (r) The workers cannot insist on working at a particular place.
- (s) The amount paid to the workers during the pendency of the complaint was under the orders of this Court and hence, after the complaint has been dismissed, the wages paid to the workers need to be recovered from them.
- (t) The petition filed by the employer be allowed and the workers be directed to refund the amounts paid to them.
- (u) Reliance is placed on the following judgments:-
 - (i) Kalabharati Advertising vs. Hemant Vimalnath Narichania, **(2010) 9 SCC 437**.
 - (ii) Unreported judgment of this Court dated 19.01.2016 in the matter of Akole Taluka Education Society vs. State of Maharashtra in **Writ Petition No.3481/2015** along with group of petitions.

7 Having considered the submission of the learned Advocates, I have gone through the voluminous petition paper book which runs into about 556 pages and which virtually constitutes the record and proceedings in the complaint.

8 The appointment order of the workers was issued in March, 2013 by Neepaz V Forge (India) Limited which was a factory established

at Plot No.B-20, Five Star MIDC, Shendra, Aurangabad. The appointment order indicates that the workers were initially trained for a particular training period and thereafter, were appointed in the machine shops in S-I Grade. Clause (6) of the appointment order assumes importance and the same reads as under:-

“6. *Transfer : You will be liable for transfer to any of the sections, departments, divisions, Branch Offices or to any of its factories or place or work (read place of work) in India, on completion of training and confirmation of service.*”

9 The appointment order also prescribes loss of lien which indicates that if the worker overstays the sanctioned leave or for any absence without permission for more than eight calendar days, he shall lose lien on the employment and the company would be free to strike off his name from its rolls without any reference to the worker.

10 Considering the clause of transfer, it becomes necessary to analyze the language used in the said clause. The services of the workers were transferable by virtue of the transfer clause. The said transfer was restricted to sections, departments, divisions, branch offices or to any of its factories or place of work in India.

11 There can be no dispute as regards the transfer to any sections, departments, divisions or branch offices of the company.

However, the transfer to any of its factories or places of work in India, would mean such factories or places of work which belong to the employer factory. It is, therefore, evident that the transfer clause does not permit the employer to transfer any of its workers to any other factory which does not belong to the employer company. A company is a legal entity under the Companies Act, 1956 and its subsidiaries may well be included if the annual balance sheet is common for the employer company and its subsidiary company or factory. It has been established through evidence that the employer company does not have any factories, to which I would be adverting to in the later part of this judgment.

12 There is no dispute that the employer company underwent change of name and was renamed as Ahmednagar Forging Limited. Subsequently, it was renamed as M/s Metalyst Forgings Limited during the pendency of the complaint.

13 With the transfer clause in the background, the order of transfer dated 08.02.2014 deserves consideration. Relevant portion of the transfer order reads as under:-

“This has reference to your appointment letter dtd.8/4/2012 and clause no.6 of the terms and conditions.

In view of present business situation to make balance of business and financial stability of business

situation has forced management to take decision of shifting some machines from machine shop to our Main machining center of Pune.

Your services are transferred to our group company plant at Sanaswadi location with effect from 10th Feb 2014.

You are requested to handover the present charge to your HOD/ person assigned by your HOD and report at Amtek Auto Ltd., Gat No.1074-1085, Sanaswadi, Off Shikrapur-Chakan Road, Tal.Shirur, Dist.Pune at HR department w.e.f. 10th Feb 2014. After reporting to new plant on 10th you may avail joining leave of 3 days. Your payment for the month of Feb 2014 will be credited to your account as per normal procedure after processing the payroll.

We would like to inform you that all the terms and conditions of your existing appointment letter remain unchanged. Your services will be continued without break in services along with all statutory benefits like Gratuity and Provident Fund and seniority of service.”

14 It is, therefore, indicated that the transfer order is being issued exclusively within the ambit of clause (6) of the appointment order reproduced as above. It is then explained that the present business situation requires the balancing of business and to give financial stability of business situation. The Management is forced to take a decision of shifting some machines from the machine shop to it's own main machining hub at Pune. However, in the next clause it is mentioned that the service of the workers was being transferred to the group company plant at Sanaswadi. The workers were, therefore, directed to report at Amtek Auto Limited.

15 There is no dispute that Amtek Auto Limited is not the subsidiary of the respondent/ employer. It is an independent company registered under the Companies Act, 1956.

16 The grievance of the workers is that they have been transferred to a different company altogether and they are not aware as to whether, the said company has any business relations with the respondent employer. It is contended that their services could not be transferred to an independent company and in doing so, it would virtually amount to change in employer.

17 Considering the above position, it is apparent that the respondent employer has taken a specific stand that the terms and conditions of employment of these workers would not be altered in transferring them to Amtek Auto Limited. The learned Advocates for the respective sides have been unable to point out as to whether, any evidence was led before the Industrial Court with regard to who would be the pay master post transfer of the workers. There is no evidence with regard to the privity of contract between the employer and Amtek Auto Limited and as to when was the machining hub established.

18 In my view, the onus and burden lay on the employer since it was the case of the employer that there is no change in the Management with regard to the respondent/ Ahmednagar Forging Limited and there is no change of employer by transferring the workers to Amtek Auto Limited. As such, the employer should have brought evidence before the Industrial Court to indicate that post transfer, it continues to be the pay master and the machining center/ hub belongs to the employer.

19 The pay-slip for the month of July, 2016 has been shown to the Court across the Bar by the workers, which indicates that the wages are being paid by Amtek Auto Limited, Sanaswadi after transfer and not by the respondent employer. Said amount is much less than the wage paid at Aurangabad. Evidence as regards whether, monthly provident fund deductions and contributions were being made by the respondent employer after transfer of the workers, was also not placed before the Industrial Court by the respondent employer.

20 In this backdrop and on this count, the examination and cross-examination of the employer's witness assumes significance. An affidavit in lieu of examination-in-chief was tendered by Mr.Saidarshan Kamlakar Ghodake, who was working as a Manager (HR) of the employer and was duly authorized to depose before the Industrial Court. He stated

in his evidence that he was appointed as a Deputy Manager (HR) and subsequently, was promoted as the Manager (HR) and presently was working in the said capacity. He has reiterated the contentions of the employer set out in the Written Statement, in his examination-in-chief.

21 In paragraph 2 of his examination-in-chief, he submits that the Respondent/ Ahmednagar Forging Limited has several plants in India located at Pune, Ahmednagar and Baddi (Himachal Pradesh), in addition to its manufacturing unit at Shendra, Aurangabad. In paragraph 4, he submits that the workers have been transferred at the Sanaswadi machining hub. It is noteworthy that, in paragraph 5, he submits that 51 employees of the respondent/ employer had submitted their resignation on 04.04.2014 from the Bhartiya Kamgar Union. This would go to indicate that the Bhartiya Kamgar Union has its presence on behalf of the workers at the Shendra plant.

22 In his cross-examination, he submits that Neepaz V Forge (India) Limited was renamed as Ahmednagar Forging Limited because the said factory was taken over by the respondent employer. He had not produced any evidence to indicate that the workers were informed of the change in the name or management. He, however, stated that he was unaware whether, Ahmednagar Forging Limited has been subsequently

dissolved after it became Metalyst Forging Limited.

23 The significant portion of his evidence in cross-examination is found in paragraphs 24, 25, 32, 33 and 34. He has stated in paragraph 24 that the employer has four factories. Two of them are situated at Kharabwadi and Kuruli at Pune. One factory is situated at Shendra, Aurangabad and one factory is situated at Baddi (Himachal Pradesh). He was the Manager (HR) for the factories at Aurangabad, Kharabwadi and Kuruli. The manufacturing of the auto components was done at Aurangabad. The work of crankshaft, axle beam etc. is being done at Kharabwadi and Kuruli factories. The respondent employer is not having subsidiary company. This, therefore, indicates that the so called machining hub at Sanaswadi did not belong to the employer company.

24 He further submits that the respondent employer does not have it's section, department, division or branch at any place other than four factories mentioned above. He then submits that he does not have any knowledge as to whether, the respondent employer has any such department or section at any other place. He then submits that the machine shop section at Aurangabad was in existence till 2014 and because there was increase in machine component rejection percentage, there was increase in losses of machine shop section and also increase in

expenses to run the machine shop. Hence, the machine shop section at Aurangabad was closed. In my view, this would indicate that the machine shop section at Aurangabad was closed and this was not brought to the notice of the workers, who have been transferred and who were working in the said machine shop.

25 It is admitted by the said witness in paragraph 27 that there was a wage settlement between the employer company and the benefits of the settlement were given to 137 workers who were permanent on its rolls. It is not stated that benefits of the settlement were made available to these workers who have been transferred. In paragraph 29 he concedes that the wage settlement benefits were not given to 142 workers as they had not given written consent of acceptance of the settlement. It appears that it was in this backdrop that these workers joined the Bhartiya Kamgar Union so as to be organized and protected.

26 In paragraph 30, the witness has stated that he was not aware whether, the workers had joined the Bhartiya Kamgar Union on 03.02.2014 or whether, the employer management received any communication from the Union. He further denied that the employer management had called upon the workers to resign from the Bhartiya Kamgar Union and they were threatened with dire consequences. He,

however, concedes that transfer orders were issued on 08.02.2014.

27 In paragraph 33, he submits that he was not aware whether, the employer management had given an intimation about closure of the machine shop section either to these workers or to any Government official or whether, any permission was sought for closure of the machine shop department. In my view, being the Manager (HR) of the factory and having been fully authorized to be the sole witness for the employer, evasive answers appear to have been given by the said witness.

28 Nevertheless, in paragraph 34, he concedes that the registered office of the employer is at Pune. The registered office of Amtek Auto Limited is at Delhi. The respondent employer is an independent registered entity under the Companies Act, 1956 and Amtek Auto Limited is also a registered independent entity under the said Act. He then stated that the balance sheets of both these companies are separately prepared. He has then stated that it is not true that the respondent employer has no concern with Amtek Auto Limited.

29 The above evidence which is said to be based on the record would indicate that the respondent employer is an independent company and so is Amtek Auto Limited. Under the Factories Act, the occupier of the

factory is a person who necessarily has to be the Director on the Board of Directors and who is so nominated. It is established that the respondent employer does not have any factory at Sanaswadi.

30 The Factories Act does not recognize collaboration of two companies meaning thereby that a Director on the Board of Directors of Amtek Auto Limited cannot be the occupier in relation to any factory which is owned and conducted by M/s Ahmednagar Forging Limited, unless he is a director on the said Company. There may be a contract for business in between two companies, but that would not lead to any inference, much less establish, that Amtek Auto Limited could be the employer of the workers at issue.

31 It is trite law that the transfer is a normal incidence of service and transfer orders on account of work exigencies cannot be interfered with by the courts since the employer is the best judge of utilizing its own manpower. The concept of optimum utilization of manpower and resources is exclusively within the domain of the employer. In this backdrop, either the terms of settlement or the conditions of service would entitle the employer to depute his employees to any other company or factory not belonging to the employer company. However, there can be no transfer of an employee from one employer to another employer as an

employee cannot have two employers.

32 Transfer from one establishment to another, necessarily presupposes that there is no change in employer-employee relationship and the service conditions of the employees are not altered except by the settlement which is permitted by proviso to Section 9A of the Industrial Disputes Act, 1947 and by virtue of which, the notice of change would not be required for causing alteration in service conditions. In the absence of any settlement, the terms and conditions of the appointment order gain significance. Section 9A provides for granting 21 days notice to the workers if any change in the service conditions falling under any of the 10 clauses of the Fourth Schedule to the Industrial Disputes Act, 1947 and that would be followed by an adjudication over the said notice of change. This admittedly has not happened in the instant case.

33 In the light of the above, it becomes evident that the employer company in this case has transferred the services of these workers to a different company altogether, notwithstanding whether, there is any business agreement inter-se these two companies. The pay slip for July, 2016 placed on record indicates that it is issued by Amtek Auto Limited, Sanaswadi and the date of joining employment with Amtek Auto Limited is shown as 06.05.2016. This pay slip pertains to one of the

workers, namely, Sandeep Tulsiram Katankar. It indicates that the respondent employer, by transferring the workers from Aurangabad to Sanaswadi, has in fact transferred them to a different company.

34 In my view, the Industrial Court has completely lost sight of these material aspects which notwithstanding whether, the workers have specifically questioned in their complaint. Paragraph 3(v) and (w) of the complaint indicates that the workers have set out their averments challenging the transfer orders on the ground that they have been shifted to a different employer. The onus and burden, therefore, lay on the employer to establish that Amtek Auto Limited is the same company as Ahmednagar Forging Limited so as to be the part of the employer's hierarchy. The respondent employer has placed on record the 37th annual report of Ahmednagar Forging Limited for the year 2013-2014, which indicates it's four factories. The factory at Baddi (Himachal Pradesh) has not been shown as the fourth factory as the Nalagad, District Solan (Himachal Pradesh) is said to be the fourth factory. On internal page 16, it is stated that the employer company has no subsidiary company. On page 72 of the report, the names of related parties are mentioned and the holding company is shown to be Amtek Auto Limited. Ahmednagar Forging Limited or even by name Neepaz V Forge (India) Limited or by subsequent name Metalyst Forging Limited, are not shown as subsidiary

companies of Amtek Auto Limited.

35 This fact situation, therefore, indicates that the respondent employer may have business relations with Amtek Auto Limited and for that reasons, it can have business relations with any number of companies. That would not mean that the workers at issue would become employees of those companies. This situation can be tested in the light of the law laid down by the Honourable Supreme Court in the matter of *Workmen of Straw Board Manufacturing Company Limited vs. Straw Board Manufacturing Company Limited*, **AIR 1974 SC 1132 : (1974) 4 SCC 681**, which has considered the industrial concept of functional integrality and has concluded that closing down of one unit, if necessarily leads to closing down of the other unit, the test of functional integrality is established.

36 The Honourable Supreme Court in the matter of Sunil Kumar Ghosh (supra) has observed in paragraph 17 as under:-

“17. *It is settled law that without consent, workmen cannot be forced to work under different management and in that event, those workmen are entitled to retirement/retranchment compensation in terms of the Act. In view of the same, we are of the view that the workmen are entitled to the benefit of such direction and it is the obligation on the part of the Management- Philips India Ltd., to comply with the same. We are also satisfied that the learned single Judge was conscious of the fact that*

these workmen failed to avail the VRS within the stipulated time and also did not retire from the service. However, taking note of the fact that the workmen cannot be compelled to join the transferee company against their wish and without their consent and all along fighting for their cause in various forums such as Civil Court, Labour Court, the Government and the High Court and even in this Court, we are of the view that the learned single Judge was fully justified in passing such order.”

The Apex Court, therefore, has concluded that the workmen cannot be forced to work under a different management.

37 In the matter of Bajaj Auto Limited (supra), the Management had transferred the services of the workers to its dealers, who were independent entities in the eyes of law. This Court, considering the law laid down in *Kundun Sugar Mills vs. Ziyauddin*, **AIR 1960 SC 650**, has observed in paragraph 35 as under:-

“35. The Court below was also justified in, *prima facie*; observing that the dealers are independent entities in the eye of law. They cannot be said to be a part of the establishment of the petitioner company. Such transfers would amount to change in service conditions. The respondents- workmen have raised number of important questions which need adjudication, such as: Whether the petitioner-employer has power to transfer its employees to altogether a new employer or establishment which was never contemplated when the Master and Servant relationship was established. Whether one can dream at the time when Master and Servant relationship was

conceived that he would be transferred to an establishment which was and is never a part of the employer's establishment. Whether any privity of contract in this behalf can be inferred between the parties to the complaint. All these questions are serious question raised in the complaint warranting adjudication thereof in the light of the Apex Court judgment in the case of Kundan Sugar Mills (supra), which is some what near to the facts of the present case; wherein Their Lordships observed as under:

"We have referred to the decisions only to distinguish them from the present case, and not to express our opinion as to the correctness of the decisions therein. It would be enough to point out that in all the said decisions the workers had been employed in a business or a concern and the question that arose was whether in the circumstances of each case the transfer from one branch to another was valid or amounted to victimization. None of these decisions deals with a case similar to that presented in this appeal, namely, whether a person employed in a factory can be transferred to some other independent concern started by the same employer at a stage subsequent to the date of his employment. None of these cases holds, as it is suggested by the learned counsel for the appellant, that every employer has the inherent right to transfer his employee to another place where he chooses to start a business subsequent to the date of the employment. We, therefore, hold that it was not a condition of service of employment of the respondents either express or implied that the employer has the right to transfer them to a new concern started by him subsequent to the date of their employment."

38 The respondent employer has relied upon the judgment of the Honourable Supreme Court in the matter of Kalabharti Advertising

(supra). Paragraph 25 of the said judgment reads as under:-

“Legal Malice:

25. *The State is under obligation to act fairly without ill will or malice- in fact or in law. "Legal malice" or "malice in law" means something done without lawful excuse. It is an act done wrongfully and wilfully without reasonable or probable cause, and not necessarily an act done from ill feeling and spite. It is a deliberate act in disregard to the rights of others. Where malice is attributed to the State, it can never be a case of personal ill-will or spite on the part of the State. It is an act which is taken with an oblique or indirect object. It means exercise of statutory power for "purposes foreign to those for which it is in law intended." It means conscious violation of the law to the prejudice of another; a depraved inclination on the part of the authority to disregard the rights of others, which intent is manifested by its injurious acts. (Vide Addl. Distt. Magistrate, Jabalpur v. Shivakant Shukla, AIR 1976 SC 1207; Smt. S.R. Venkataraman v. Union of India, AIR 1979 SC 49; State of A.P. v. Goverdhanlal Pitti, AIR 2003 SC 1941; Chairman and M.D., B.P.L. Ltd. V. S.P. Gururaja & Ors., (2003) 8 SCC 567; and West Bengal State Electricity Board v. Dilip Kumar Ray, AIR 2007 SC 976)."*

39 Item 3 of Schedule IV of the MRTU & PULP Act, 1971 which has been invoked by the workers reads as under:-

“3. *To transfer an employee mala fide from one place to another, under the guise of following management policy.*”

40 As such, transfer can be assailed on the ground that it has occurred under a malafide intention of the Management and is under the guise of following management policy. An ill will or malice, therefore, has

to be the basis of a malafide transfer. The Apex Court in Kalabharti Advertising case (supra) holds that malice in law would mean something done without lawful excuse and an act which is done wrongfully and willfully without reasonable or probable cause and not necessarily an act done from ill feeling and spite. It is a deliberate act in disregard to the rights of others.

41 It has come on record in evidence and especially in the Written Statement of the employer that several workers had resigned from the Bhartiya Kamgar Union. There was another Union by name Aurangabad Kamgar Sanghatana which appears to have signed the settlement on behalf of its members with the respondent employer. The letter of Bhartiya Kamgar Union claiming to have inducted these workers as its members is dated 03.02.2014. The allegation is that the machines have been shifted urgently on 07.02.2014 and the impugned transfer orders have been issued on 08.02.2014. Even if the strenuous contentions of Shri Malte, learned Advocate for the employer, are taken at their best, it could not be said that it was purely a coincidence that the Bhartiya Kamgar Union was formed on 03.02.2014, machines were shifted on 07.02.2014 allegedly at 02:00 am in the middle of the night and transfer orders were issued on 08.02.2014. In my view, the impugned transfer order dated 08.02.2014 amounts to an unfair labour practice under Item 3

of Schedule IV of the MRTU & PULP Act, 1971.

42 In my view, the above issues have been totally ignored by the Industrial Court. The judgment of the Industrial Court cannot be sustained for the above reasons. Notwithstanding the above, it is necessary to record that one conclusion of the Industrial Court which is totally against the law with regard to the principle of employer-employee relationship, has surprised me. The Industrial Court has totally lost sight of the fact that one employee can have only one employer. Yet, it has concluded at two places in the impugned judgment that “there is no cogent, reliable and satisfactory evidence on record to show that the recruitment of workers is exclusively for Ahmednagar Forging Limited, Aurangabad”. Such an observation leads me to perceive that the Industrial Court seems to have in mind that an employee can be recruited for many number of employers and an employee has to prove that he is employed exclusively with one employer. In fact, double employment has been held to be an act of misconduct in industrial law.

43 Considering the above, the impugned judgment of the Industrial Court dated 31.03.2016 is perverse, erroneous and has caused grave injustice to the workers. The same is, therefore, quashed and set aside. Consequentially, the transfer orders of these workers dated

08.02.2014 stand set aside and the workers are, therefore, reinstated in their positions which they held at the Aurangabad factory as on 07.02.2014.

44 Insofar as the back wages are concerned, there is no dispute that some of the workers have joined at the place of transfer and some have not joined. Considering the fact that the transfer orders in itself are illegal, the workers would be entitled to portion of their wages even if the principle of “no work, no pay” is made applicable to them. As such, by placing reliance upon the judgment of the Honourable Apex Court in the matter of *Nicholas Piramal India Limited v/s Hari Singh*, 2015 (2) CLR 468, I am awarding 50% back wages to these workers from the date of their transfer till their reinstatement considering the period in which they had not worked for the respondent employer at Amtek Auto Limited at Sanaswadi. For the duration of work that they have worked at Sanaswadi, they would be entitled for gross wages that were being paid to them in January, 2014.

45 Needless to state, since the respondent is the employer, the burden of paying back wages and wages for work done, would necessarily be on the respondent employer notwithstanding that some of the workers have worked at Sanaswadi factory. Such back wages shall be calculated on

the basis of their gross wages payable as in January, 2014.

46 In the light of the above, Writ Petition No.4895/2016 filed by the workers is, therefore, allowed. Rule is made absolute accordingly.

47 Consequently, Writ Petition No.5000/2016 filed by the respondent employer stands dismissed. Rule is discharged.

48 Nevertheless, in order to allow the employer to properly calculate the back wages and other wages and to pay the same to the workers considering that some of workers had worked at Sanaswadi and some have not been working, the amount deposited before the Industrial Court shall be withdrawn by the employer only for the purpose of enabling it to calculate the back wages and pay the same to these workers within a period of SIX WEEKS from today, failing which the said amount would carry simple interest @ 3% from the date they were payable.

49 At this juncture, the learned Advocate for the employer prays for keeping this judgment in abeyance for eight weeks. The learned Advocate for the workers opposes the same.

50 Considering the fact that I have come to the conclusion that

the employer had transferred the services of these workers to a completely different company and a different entity not being the employer of the workers and considering the fact that they have been litigating for more than two years and six months, the request of the respondent employer is rejected.

kps

(RAVINDRA V. GHUGE, J.)