

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

WRIT PETITION NO.4363 OF 2017

Uday Shantikumar Dixit

.. Petitioner.

Vs.

Larsen & Toubro Ltd. & Ors.

.. Respondents.

Mr. Sanjay Singhvi, Senior Advocate with Mr.Rahul Kamerkar for the petitioner.

Mr. J.P. Cama, Senior Advocate with Mr.Sudhir Talsania, Senior Advocate with Mr.Sunil Tilokchandani, Ms.Subhasree Chatterjee i/b M/s. Manilal Kher Ambalal & Co. for the respondents.

CORAM : A.K. MENON, J.

DATED : 12TH MARCH, 2018

JUDGMENT :

1. Heard.
2. Rule. Rule made returnable forthwith. Respondents waive service. By consent of the parties taken up for the final hearing.
3. By this petition, the petitioner challenges the judgment and order dated 1st July, 2016 passed by the Industrial Court, Mumbai in Complaint (ULP) No.476 of 2012 dismissing the complaint filed by the petitioner challenging his transfer from Mahape, Navi Mumbai, Maharashtra to Mysore, Karnataka with effect from 31st October, 2012.

4. The brief facts leading up to the present challenge are as follows :

Respondent No.1 was at all the material times the employer of the petitioner. Respondent Nos.2 and 3 are the Chairman and Deputy General Manager, Human Resources & Personnel of respondent no.1. They are stated to be responsible for transferring the petitioner which according to the petitioner was illegal. On 23rd November, 1981 the petitioner joined respondent no.1 (company) as "Assistant Draughtsman" on probation and on completion of probation he was confirmed on 21st May, 1982. In 1987, he was promoted to the post of "Draughtsman-I" and in 1992 to the post of "Draughtsman-II". On 1st April, 1999 he was promoted to the post of "Technical Assistant-I". This according to the petitioner was not promotion but reduction in category. At all material times the petitioner worked in "Static Control Group" of the company. After putting in 20 years of service as a workman in Powai, he came to be transferred to Mahape, Navi Mumbai along with the technical staff and other draughtsmen, all employees of Powai. According to the petitioner, the department was re-named as "Automation System Center (ASC) and later as "Control and Automation department". The petitioner was designated a 'Supervisor' but only for sake of convenience since he was a Union leader and the company did not want him to continue as a "workman" so as to curtail his union activities. According to the petitioner on 24th June, 2002 he was surrounded by the officers of the company in a locked room and asked to retire voluntarily or accept the

new terms of employment. The petitioner refused to resign and therefore he was forced to accept new terms of employment under a “supervisory” cadre. His monthly earnings were also reduced. He was coerced to work under the control and supervision of Mr. Sudhanshu Gupta and the Project Heads of various projects and while discharging his clerical duties, he was engaged in preparation of purchase requests of additional material, services for vehicles, guest houses, maintaining a record of vehicles and guest houses, records of salary of contract employees, expenses incurred at site, depositing cheques received at site, delivering safety equipments to site commissioning engineers and the like. 16 sets of duties are set out by the petitioner. Although he was stated to be in “supervisory” cadre, workmen were getting higher wages including those who were junior to the petitioner. The petitioner contends that he accepted lesser wages under duress and force since he was in need of employment. From 2008 to 2014 he was elected and acted as Vice President of Larsen and Toubro Officers Association (LTOSA). He has relied upon a copy of the registration certificate of LTOSA as a trade union. He took up various issues on behalf of the members of LTOSA and as a result he was disliked and thereafter he was regularly harassed. On one occasion he was asked to attend a certain site in Indore and caused him to travel by road, yet he obliged. The harassment resulted in the petitioner's wife registering certain grievances with the company. By a letter dated 8th October, 2012 he was transferred to Mysore, Karnataka with malafide

intention. The transfer occasioned by virtue of a Talent Acquisition Request (TAR) whereby one Mr. Rajendra Kumar Gupta sought placement of an employee at Mysore in the stores department under the post of Supervisor-cum-Executive.

5. Mr. Singhvi, the learned Senior Advocate for the petitioner submitted that the petitioner did not meet the educational qualifications or age limit contemplated in the TAR and his appointment pursuant to the TAR was with malafide intention to deprive the petitioner of his current posting at Mahape. He submitted that the entire effort was to prevent the petitioner from engaging in and to control his union activities. However, having realised this ploy of the respondent-company, he declined to attend at Mysore. The petitioner contended that he did not have necessary qualification mentioned in TAR since he was already 55 years old and he did not have experience in the administrative field. He submitted that he had been victimised. The petitioner was expected to immediately join to Mysore and take charge. He therefore filed a complaint on or about 19th November, 2012 under MRTU & PULP Act alleging the unfair labour practice under Item Nos.3 and 9 of Schedule IV. He contended that he was workman as defined under Section 2(s) of the Industrial Disputes Act and Section 3(5) of MRTU & PULP Act. He has not done administrative work during 31 years of service. The nature of work at Mysore was different from what he has been accustomed to doing and that he had been transferred on account of union

activities. The complaint set out the nature of work which the complainant had entered into.

6. Although the company had contended that the petitioner had duties supervisory in nature, including purchase material from vendors, sanctioning travel expenses etc, it is his case that none of the activities were under independent charge and all administrative work of overseeing the material receipts/issues/dispatch, accounting for material and logistics services etc. were not of supervisory cadre. After filing of the complaint, an interim application was made which came to be rejected on or about 15th January, 2013. The petitioner then filed a Petition in this Court being Writ Petition No.1546 of 2013 which was dismissed on 11th July, 2013. An SLP in the Supreme Court also came to be rejected on 30th September, 2013. In the circumstances the complaint proceeded to final hearing and vide impugned judgment the four issues raised were answered against the petitioner.

7. Mr. Singhvi, submitted that entire exercise of transferring the petitioner was malafide. The union activities of the petitioner were well known and as a result the petitioner had been singled out for discriminatory treatment. Mr. Singhvi submitted that apart from the fact that the petitioner was being targeted due to his union activities, he was clearly not qualified for the post in the stores department. He had neither experience nor required wherewithal to handle the stores department. Furthermore, he

was beyond age limit which the TAR has specified. He also fell short of experience required for the purpose. The so called promotion to the “supervisor” cadre was not only to deprive the petitioner of the higher wages but also to control his activities as a union representative. Mr. Singhvi therefore submitted that the petitioner was victimised.

8. Stress was laid upon the fact that the impugned order clearly admits of the fact that he has been working as “Assistant Draughtsman” in the Powai unit and he had worked all along as a draughtsman which was in the “workman” cadre. He invited my attention to the observations in the impugned order to the effect that both sides had proceeded on the admitted fact that the petitioner had been promoted. The petitioner contended that the post of “supervisor” was not managerial. He submitted that the impugned order incorrectly records that the petitioner had accepted his promotion without any objection and that he had enjoyed his position till he was transferred to Mysore. He refuted the findings that the petitioner had played role in the management in a supervisory capacity. He submitted that he has no control whatsoever over the work that he was doing since he was always carrying out his duties under the directions of his superiors.

9. Mr. Singhvi invited my attention to the deposition of the company's witness. In cross examination he relied upon the admissions of Mr. Sudhanshu Gupta in which the said witness admitted that the petitioner was acting under his directions and that the petitioner executed work under

control of the said witness and the Project Head. Several such admissions by the company's witness were referred. Mr. Singhvi pointed out that the witness was also unable to answer several questions pertaining to the nature of work carried on by the petitioner including as to whether he was given any training when he was transferred from Powai to Mahape. Mr. Singhvi therefore submitted that this is clearly indicative of the fact that the petitioner had no direct control since the petitioner had no independent powers. Mr. Singhvi submitted that designation as a "supervisor" was clearly misleading and intended to reduce the petitioner's union activities. Mr. Singhvi relied upon the definition of "supervisor" in Black's Law dictionary to mean that a Supervisor is an individual having authority, in the interest of the employer interalia to hire, transfer, suspend, lay off etc. in not merely in a routine or clerical nature but requires the use of independent judgment. Mr. Singhvi submitted that an employee must be in a position to give orders and see that the work is done and including laying down the norms and directing that the norms to be followed with power to take disciplinary action in case of default.

10. In support of his contention Mr. Singhvi relied upon the following judgments:

- (i) *Bombay Dyeing and Manufacturing Co. Ltd. Vs. R.A. Bidoo and Anr.* 1989 Mh.L.J.716;
- (ii) *Aloysius Nunes s. M/s.Thomas Cook India Ltd.* 2000 (3) Mh.L.J. 404;

(iii) Pushpakaran (P.)Vs. Chairman, Coir Board (1979)1 SLR 309.

11. On behalf of the respondents Mr. Cama, learned Senior Advocate submitted that the only challenge in the present petition is to the transfer. He referred to the prayer clauses in the application filed under Section 28 of the MRTU & PULP Act which reveals that the essential challenge is prayer clause (c) whereunder the petitioner sought a direction against the company to withdraw and cancel the order dated 31st October, 2012 transferring the petition from C & A, Navi Mumbai to EAIC-MPS, Mysore. He submitted that Item 9 of the Schedule IV will not apply and the transfer is only aspect that was to be considered by the Industrial Court. He submitted that the impugned order does not suffer from any perversity. He further submitted that even under Item 3 the transfer of an employee can only be challenged as the unfair labour practice if it is malafide and in the present case malafides had not been established. According to Mr. Cama, the petitioner had agreed to go to Mysore as evident from Exhibit-D to the affidavit in reply wherein the petitioner is seen to have addressed a letter to the Human Resources department stating that he has applied for leave due to chest pain and hypertension and therefore he has been advised two weeks bed rest after his recovery, he was ready to go to Mysore and that he did not want to disobey the order. He requested that his leave application be allowed. The medical certificate issued by Civil Hospital, Thane was also annexed.

Therefore, the application for medical leave was the only reason that he was unable to travel.

12. Mr. Cama then submitted that in the next communication from the petitioner dated 19th November, 2012 Exhibit-F to the affidavit in reply while reiterating that he was undergoing treatment, he contended that the was unable to report to Mysore at short notice and sought deferment of the same since he was not a technical person or an Engineer whose immediate presence was required for carrying out job at site. He requested the company to reconsider the decision of his transfer to Mysore. Mr. Cama submitted that on very same day i.e. 19th November, 2012 the petitioner approached the Industrial Court and filed subject complaint. He, therefore, contended that entire exercise was on pretext to avoid reporting for work at Mysore. All along the petitioner has maintained that he has good relations with the respondent company. Even in communication dated 8th November, 2012 seeking medical leave, the petitioner did not alleged any malafide. It has never been the case of the petitioner that he was transferred out of Mumbai due to Union activities. Referring to the impugned order Mr. Cama submitted that the findings of the Tribunal is that the nature of his work was not clerical. The case of the petitioner that he was doing clerical work and therefore was not doing supervisory work and that he is a workman. However, the findings of the tribunal are otherwise. In Paragraph 32(a) the Industrial Court recorded findings based on the evidence and pleadings

that the complainant was carrying on administrative and supervision work and evidence did not support his contention that he was a workman. The findings is to the contrary. Thus, the Industrial Court found that the petitioner was not a workman as defined under Section 2(s) of the Industrial Disputes Act or section 3(5) of the MRTU & PULP Act. The complaint was thus held to be not maintainable. Mr. Cama therefore submitted that there is no substance in the challenge. My attention was also invited to Exhibit-E to the petition being an order promoting the petitioner to “supervisory” cadre and the letter dated 2nd March, 2013 issued by the Larsen and Toubro Officers and Supervisors Association (LTOSA). Mr. Cama pointed out that the promotion took effect from 1st December, 2001 on which date he was also transferred to C & A, Navi Mumbai.

13. In support of his contentions Mr.Cama relied upon the following judgments:

(i) Sonapat Cooperative Sugar Mills Ltd. vs. Ajit Singh (2005) 3 SCC 232;

(ii) Mukesh K. Tripathi vs. Senior Divisional Manager, LIC and Others (2004) 8 SCC 387;

(iii) Vandana Joshi vs. Standard Chartered Bank Ltd. Mumbai 2001(1) Mh.L.J. 415.

14. Having heard learned counsel for the parties, their submissions and having perused the impugned order, I find the order of the transfer set out the

terms and conditions wherein clause (4) deals with the Provident Fund which require him to be enrolled to Larsen & Toubro Officers and Supervisor Staff Provident Fund. Gratuity was also to be paid in accordance with the scheme for supervisory category. That he accepted the transfer and worked in that capacity till his transfer to Mysore. In the meantime he acted on behalf of LTOSA took up various issues of workman and a case of salary difference between a supervisor and a worker. The petitioner was signatory to the said letter wherein the management was requested to consider case of those employees who had lost benefits like bonus etc. owing to salary difference between the supervisor and workers.

15. The Court also found that the evidence of witnesses on behalf of the petitioner did not support his case either. The petitioner has also examined his wife, who deposed of inconvenience to the family. The Court held that the contention was not material. Furthermore, there was no challenge to transfer per se at the material time. It is further seen that on 16th November, 2012 the company while acknowledging the petitioner's letter dated 8th November, 2012 experiencing willingness to work but seeking sometime on account of medical reasons called upon the petitioner to report to the work on 22nd November, 2012 and meanwhile advised him to report to Company's Medical Officer at Andheri for medical check-up.

16. On 19th November, 2012 the petitioner replied, reiterating that he has been suffering from Asthma and hypertension and relied upon medical

certificate. He expressed unwillingness to travel to Andheri for medical check up. He stated that he was unable to report to Mysore and sought reconsideration of the decision. The complaint is seen to be filed on the same date i.e. 19th November, 2012. Thus, it is not a case that the petitioner was so unwell that he could not have attended medical check up at Andheri. The petitioner thereafter moved an application Exhibit U-2 seeking reliefs against the transfer. The application for injunction came to be rejected on 15th January, 2013 and on 28th January, 2013 the petitioner wrote to the H.R. department wanting to continue good relations with the company, protesting promotion from draughtsman to Supervisory cadre and once again requesting that he be permitted continue to work in Mumbai. On 11th March, 2013 the company called upon the petitioner to report at the Mysore establishment. Meanwhile the petitioner challenged the order of the Industrial Court dismissing the application for grant of ad-interim relief in the complaint. This Court rejected the petition directing the Industrial Court to expedite decision on the complaint. Aggrieved by that, the petitioner challenged the order of the High Court in SLP No.29306 of 2013. The SLP was dismissed on 30th September, 2013 and the trial proceeded.

17. It appears that the Union was formed in 2006 and therefore the petitioner cannot contend that he was victimised. The allegation of malafides if at all proceeds on the basis of victimisation and not on the basis

that he was indulging in union activities. It is further observed that in Annexure-I to promotion advice dated 26th November, 2001, the petitioner was paid Special Compensatory Allowance and all other allowances such as dearness allowance, Additional Conveyance allowance, HRA, etc. which were effectively changed to that applicable to the supervisory cadre. Thus different service conditions applied to him from the date of change in cadre .

18. Vide letter dated 2nd March, 2013 addressed by to the HR department. LTOSA complained of financial loss to unionised workers, who were promoted to supervisory cadre. The petitioner is signatory to the said communication in his capacity as Vice President of the Union. If indeed he was aggrieved by the promotion to the supervisory cadre he would have raised the issue in his own case through the LTOSA which he actively represented as Vice President. Furthermore, it is obvious that most employees have been in supervisory cadre would not have complete and absolute control over the affairs of department they were employed in.

19. Reliance placed by Mr. Singhvi on the fact that the petitioner was acting under advice of the superior will not help the petitioner to establish that he was in fact a workman and at all times continue to do task assign to a workman. It is clear that most supervisory jobs will have a reporting hierarchy and save and except for the Managing Director or such other highly placed officials most of others would have to act in accordance with a reporting hierarchy.

20. In *Bombay Dyeing (supra)* the Division Bench of this Court dealt with the role of a supervisor finding that it contemplated a certain number of persons working under a supervisor. If a person is doing any work which does not require him to look after or inspect or examine the work of persons who are subordinate to him or working under him, such person cannot be said to be a supervisor. Supervision necessarily requires reference to persons working under a supervisor as against machines. Supervising a machine does not make him a supervisor. Mr. Singhvi, therefore, submitted that in the facts of the case, it is more than evident that the petitioner was not a supervisor in real sense of the word. In *National Engineering Industries Ltd. (supra)* the Supreme Court had made a reference to its previous judgment in *Burmah Shell Storage and Distribution of India Vs. Burmah Shell Management Staff Association AIR 1971 SC 922* and *D.P. Maheshwari Vs. Delhi Administration AIR 1984 SC 153* observing that one should consider the main work that the person is required to do even though there may be other types of work carried out incidentally. That an Accountant is supposed to sign the salary bills of the staff even while performing the duties of a clerk and that did not make him an employee in a managerial or administrative capacity and person concerned was held to be clerk. In *D.P. Maheshwari (supra)* it was found that the main work should be such that a supervisor could bind the company to take some kind of decision on

behalf of the company. Merely referring to the affairs of the company do not make him a supervisor.

21. *Aloysius Nunes (supra)* quotes *McLeod and Co. Vs. Sixth Industrial Tribunal AIR 1958 Calcutta 273* wherein a Single Judge of the Calcutta High Court considered the expressions “managerial”, “administrative” and “supervisor” holding that the word “supervisory” was advisedly a loose expression with no rigid frontiers and would discourage too much subtlety in trying to precisely define where supervision ends, and management begins. The Apex Court had upheld this view of the Calcutta High Court in *National Engineering (supra)* holding that the test is whether while discharging managerial or administrative duties any supervisory work was performed. Similarly, *Aloysius Nunes (supra)* also relied upon the decision of the Supreme Court in *D.P. Maheshwari (supra)* and *Bombay Dyeing (supra)*.

22. In *Pushpakaran (supra)* the Kerala High Court observed that the right to transfer an employee is a powerful weapon in the hands of the employer and sometimes more dangerous than other punishment. That the Court must tear the veil of deceptive innocuousness and see what exactly motivated the transfer. If the Court is satisfied that the real object of transfer is not what is apparent, the Court must examine what exactly was behind the transfer.

23. I do not see any of these cited judgments coming to the assistance of Mr. Singhvi. In the facts of the case, I find that the petitioner was certainly not carrying out functions of a “workman” at the material time. The petitioner admits to have carrying out responsible activities on behalf of the employer some of which bind the employer qua third parties. Obligations were being incurred by the company as a result of tasks carried out by the petitioner. Various other documents were referred on behalf of the respondents to contend that the petitioner had undertaken more than clerical job inasmuch as he approved travel expenses of other employees and even executives. On 20th July, 2007 on behalf of the company entered into an agreement of lease in respect of premises at Jamnagar. This is an admitted fact and according to the respondents a clear indication of the fact that he was not merely a workman. I am unable to accept the contention of the petitioner that these are clerical duties. It is pertinent to note that the petitioner had on 18th July, 2008 written a letter to one Mr.V.K. Arora, his superior, essentially complaining that he works hard and his work was acknowledged yet he had not been promoted. He complained that the failure to promote him is de-motivating even after 28 years of service. He specified various work undertaken by him in commissioning department and support activities such as identifying materials, major site co-ordination for dispatch of materials to various premises and setting up guest house for bigger sites at Jamnagar, Hyderabad and Chittorgarh. He had introduced

new courier services at Jamnagar reducing courier expenses. Thus, he submitted that despite numerous such activities undertaken by him he did not receive promotion. Furthermore, in his complaint in paragraph 16-G the petitioner has contended that despite being designated as a supervisor the work assigned is in nature of that performed by workman. I am unable to find any substance in this contention in the complaint, since the nature of work clearly indicates the work of “supervisory” cadre was indeed supervisory in nature and in my view there is no substance in the contention that he continued as workman but with designation of a supervisor.

24. In *Sonepat Cooperative Sugar Mills Ltd. (supra)*, the Supreme Court held that a person performing any manual, unskilled, skilled, technical, operational, clerical or supervisory work in any industry would be covered by Section 2(s). Persons employed in a supervisory capacity, draws wages exceeding Rs.1600/- or doing a managerial or administrative work were excluded. It was further observed that the job of a clerk implies stereo typed work without power of control or initiative or creativeness. To ascertain whether a person has been performing a clerical work or not, is required to be determined based on the dominant nature of work. It was not enough and it would not be correct to say that merely because an employee has not been performing managerial or supervisory work, it would make him a workman. Various other examples are also alluded to in case of

Sundarambal vs. Govt. of Goa, Daman and Diu (1988) 4 SCC 42. Applying the test in Sonepat Cooperative Sugar Mills Ltd. (supra) it is evident that in the present case the petitioner could not have been described as a workman in the capacity in which he was working at the time of his transfer. It must be borne in mind that the petitioner has worked in said capacity for several years and was office bearer of LTOSA and had complained that the transfer would deprive him of the protection of the said association. The findings that the petitioner was not doing clerical work in the impugned order cannot be faulted in the facts of the present case.

25. In Mukesh Tripathi (supra) the Supreme Court had yet another occasion to hold that the workman must not only establish that he is employed in establishment for the purpose of doing any work contemplated in the definition and that in case where a person raises a contention that his status has changed, he must plead and prove the fact. The Court already held that the definition of workman under Section 2(s) of the Industrial Disputes Act was exhaustive. In the present case none of the pleadings of the petitioner is to the effect that the transfer was malafide. The challenge is not on the basis of change of nature of employment and that he was been deprived of the benefits available to workmen.

26. In Vandana Joshi (supra) the Division Bench while following the decision in Mukesh Tripathi (supra) reiterated the decision of the Supreme Court in Ganga Kisan Sahkari Chini Mills Ltd. Vs. Jaivir Singh 2007(III) CLR

840 to the effect that the burden of proof to establish nature of appointment was not on the employer. The ratio that flows from the decision in Mukesh Tripathi (supra) and Ganga Kisan Sahakari Chini Mills Ltd. (supra) was that the appellant had to prove that he or she was a workman with reference to dominant nature of duties. In the present case, I have no hesitation in holding that the petitioner has failed to discharge this burden.

27. There is no doubt that petitioner held a transferable job and did initially agreed to report to Mysore. Mr. Cama in the course of submission invited my attention to schedule of amendment proposed by the petitioner in the complaint. In paragraph 5.3(w), the petitioner complained that he had been denied protection and backup of fellow members of LTOSA and he had been deliberately transferred out of purview of LTOSA and therefore would not have protection at Mysore. This he submitted was one more indication of the fact that the petitioner was never keen to join at Mysore. Although Mr. Singhvi pointed out that the amendment had not been permitted that by itself would not make the proposed amendments irrelevant. To my mind, the contents of the proposed amendment are useful in order to evaluate the argument on behalf of the petitioner that he was at all times workman and continue to do the job of workman although he had been granted designation of a supervisor.

28. Furthermore, Mr. Singhvi has contended that the petitioner has never claimed to be doing work of clerical nature but of a workman. He

further submitted that the respondent did not deny that the petitioner is not doing clerical work and that all documents relied upon by the petitioner only indicate that he was executing certain jobs on instructions of superior including that of setting up guest house etc. In conclusion, I am satisfied that the transfer was not malafide. There is also no substance in the contention that the petitioner was victimised. The petitioner simply refused to report for work based on his own judgment of the reason for the transfer. Nothing shown to me justifies the petitioner allegations in his complaint. The impugned order is in my view well reasoned and fair I am of the view that the petitioner has failed to make out a case for interference by this Court. In the circumstances, I pass the following order :

- (a) Petition is dismissed.
- (b) No order as to costs.

(A.K. MENON,J.)