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

**WRIT PETITION NO.3900 OF 2017
WITH
WRIT PETITION NO.4481 OF 2017**

1) M/s. Radium Creation Ltd.

2) Mr. Anil Jagdish Rai

3) Mr. Dhruv Anil Seth

.. Petitioners

V/s.

Engineering Workers Association

.. Respondent

.....

Mr. Sudhir Talsania, Senior Advocate, a/w Pramod Anaokar I/b. Rahul Oak for the petitioners.

Ms. Nayana Buch a/w S. K. More for the respondent.

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CORAM : A. K. MENON, J.

DATE : 21ST JANUARY, 2019.

P.C.:

1. The challenge in the Writ Petition no.3900 of 2017 is to an order dated 6th March, 2017 passed in Complaint (ULP)no.280 of 2015 and 81 of 2016. These complaints alleged unfair labour practices by the petitioners under items 3, 9 and 10 of Schedule IV of the MRTU & PULP Act, 1972 (the Act) and challenges an orders of transfer of 48 employees each on 19th December, 2015 and 19th March, 2016.

2. The brief facts in Complaint (ULP)no.280 of 2014 are that the complaints were filed by the respondent union. The respondent union has challenged the transfer of 48 employees of which 46 were women employees by an order dated 19th December, 2015. The petitioner company is engaged in business of manufacturing and polishing imitation jewellery. As a result of continuous complaints a settlement was arrived in 2010. Upon expiry of the settlement, a charter of demand was submitted on 19th November, 2012. However, no settlement was arrived at resulting in a strike by the employees. Consequently new persons were recruited and the union filed a complaint before the Industrial Court, Thane, which restrained the petitioners from engaging new persons in place of the striking employees and also restrained the petitioners from removing plant and machinery.

3. It appears that thereafter sometime in July 2014 the respondents suspended operations and later declared a partial lock out with effect from 20th July, 2014 to the extent of members of the union. The lock out was challenged but the challenges before the Courts below and the High Court failed. In the Supreme Court, the petitioners were directed to calculate and deposit the wages of the employees from 1st August, 2014 onwards. At that stage the petitioner was willing to lift the lock out in respect of 150 out of 202 workers by offering to transfer from Turbhe to a factory at Chembur which would be started on the

basis that it was nearer to the place where they reside. The workers resumed the duties at Turbhe and the lock out was lifted. 40 workers were then placed under suspension. Thereafter on or about 19th December, 2015, 48 workmen were transferred to the petitioners unit at Sanjan, Gujarat. The transfers were allegedly malafide with the motive of punishing and victimizing the respondents.

4. On behalf of the petitioners, the workers case was disputed and the petitioners contended that they were required to shift operations to Sanjan where they had installed new plant and machinery on account of action threats by the Pollution Control Board due to which the company felt that transfer was also contemplated under the settlement of 2010 and that specific provisions of transfer could not be ignored. The allegations of malafide are denied and therefore, the company sought dismissal of the complaint.

5. In Complaint (ULP)No.81 of 2016, the limited challenge was to transfer of 48 workmen 33 of whom were women employees. The complaint was opposed by the petitioners. The impugned judgment allows both complaints in part. It declares that the petitioners had engaged in unfair labour practices under item 3 of Schedule IV of the Act and that the transfer orders dated 19th December, 2015 and 19th March, 2016 in respect of 48 employees were

malafide. The petitioners were also directed to pay costs. By the first subsequent order, the Industrial Court on an application made by the petitioners stayed the operation of the impugned order till 6th April, 2017 and thereafter protection has been granted by this Court on 4th April, 2017. The interim protection has since been extended from time to time.

6. Mr. Talsania, the learned Senior Counsel, on behalf of the petitioners assailed the impugned judgment submitting that the only reason for passing the impugned order is that the transfer was malafide and that the petitioners had made a statement in the Supreme Court in the year 2015 that they would provide work to the employees at a plant in Chembur which was closer to their residence and that the said statement was incorrect because the petitioners knew that the plant did not exist as on date the statement was made. According to Mr. Talsania, the Industrial Court was impressed with the respondents submission that the petitioners had made a false statement to the Supreme Court at the hearing of the SLP. That save and except for the Industrial Courts interpretation of the statement made to the Supreme Court there was no valid reason to allow the complaint. Mr. Talsania submitted that the petitioners were genuinely desirous of shifting the employees to the Chembur plant which they intended to reopen and that the observations in the order passed in SLP had been mis-interpreted by the respondents. Mr. Talsania submitted that save and

except for mis-interpretation, there was no justification in passing the order.

7. In Writ Petition no.4481 of 2017, the challenge as aforesaid was to the order dated 15th March, 2017. Complaint (ULP)no.167 of 2016 alleging unfair labour practices under items 3, 5, 9 and 10 of Schedule IV of the Act and in relation to transfer of 17 male employees vide order dated 21st May, 2016, 25 women employees vide order dated 17th June, 2016 and 8 other women employees vide order dated 15th July, 2016. The factual background remaining the same, the submissions made by the counsel are in common in both these matters. It was the transfer that was assailed and the Industrial Court found that the allegations were partly proved and the transfer orders were held to be malafide.

8. On behalf of respondent, Ms. Buch opposed the petition by supporting the impugned judgment pointing out that the conduct of the petitioners was highly objectionable and they had deliberately misled the Supreme Court when they submitted that the petitioners intended to absorb the employees in the Chembur plant after lifting the lock out. It was this statement and assurance given to the Supreme Court that had been misused by the petitioners to contend that they would absorb the petitioners and resolve the dispute. She submitted that the intention was at all times to deceive the workmen and deprive them of

their employment by promising to restart business at the Chembur unit which was projected as one closer to the residential areas of the workmen rather than the earlier place of employment at Navi Mumbai. She submitted that the respondents were then unaware that the Chembur plant was not in existence. The plant had been shut and the land had been sold. However, later it was revealed that when the said statement was made to the Court, the unit at Chembur had already been sold. She invited my attention to the notes of cross examination of the petitioners witness (their Director) copy of which is annexed to the petition dated 21st November, 2016 in paragraph 53 the deponent states as follows:-

"I started Chembur plant in the year 2003. I cannot say today as to how many workers were working at the relevant time in said plant. Approximately in 2007-08, I shifted the said plant to Turbhe. It is not true to say that, inspite of shifting of plant to Turbhe, plant of Chembur was also working. It is true that, in the year 2007-08, I totally shut down the plant of Chembur. During the same period, I sold the land and building of Chembur."

9. Thus, it became evident that when the statement was first made before the Supreme Court resulting in the lock out being lifted, the deponent, a Director of the company was well aware that reopening of the Chembur plant was not possible. Ms. Buch invited my attention to Exhibit 1 to the affidavit in reply filed by Ramesh Kashinath Joshi on behalf of the respondent which is a

copy of the order passed on 27th July, 2015 and recording a statement in SLP no.8379 of 2015 filed against the judgment and order dated 3rd December, 2015 in Writ Petition no.9196 of 2014. The Supreme Court was made believe that the petitioner was willing to lift the lock out in respect of 150 employees to be named in a list which was to be filed on the next date and that the counsel on behalf of the workmen had then submitted that she will take instructions if the workmen were willing to be transferred to the factory at Chembur. Although today it is in dispute that no such instructions were thereafter communicated to the Supreme Court. Ms. Buch stressed upon the fact that the workmen were actually deceived by the proposal of transferring workmen to Chembur and it is only during the trial that true facts came to light. The workmen relented but they had been deceived into believing that they would be shifted to the plant at Chembur. Thus, she submitted that the petitioners were clearly guilty of unfair labour practice since soon after, the workmen were transferred to Sanjan. The learned counsel therefore submitted that the offer on behalf of the petitioners was made to deprive the workmen of their livelihood by adopting unfair labour practices. On this basis, she submitted that the impugned order calls for no interference.

10. On behalf of the respondents, Ms. Buch relied upon the decision of the Supreme Court in *Kundan Sugar Mills v/s. Ziyauddin*¹ and the observations

1 AIR 1960 SC 650

in paragraph 7 that the right to transfer employees to a new concern started by the employer was not an express or implied condition of service. She therefore submitted that in the instant case the commencement of business at Sanjan by itself will not entitle to petitioners to transfer some of the employees as a matter of right. She then relied upon the decision of this Court in ***Crest Communication Ltd. v/s. Ms. Sheetal Shenoy***² and she submitted that the Court had held that the petitioner in that case had no inherent power to transfer the respondent. There was no contractual term permitting transfer and that certain rules and regulations relied upon by the employer had no binding effect on the respondent therein since they were posterior to the date of joining service and her express consent was not obtained. Furthermore, it was found that the transfer order was malafide and that it would have to be presumed that there was an agreement not to transfer the respondent from Mumbai. She submitted that if there is any regulation made mandating the right to transfer these could not be after joining service. Merely because the employees did not protest against the rules being brought into force it was not possible to imply a term of transferability. It must be established that the employer entertained an intention to proliferate its activities. The petitioners' plea in that case was to the effect that there was an absolute right to transfer which contention was rejected. Ms. Buch pressed into service the said observations in support of her contention that there was no vested right to transfer the workers as proposed.

2 2001 II CLR 1036

11. Mr. Talsania was quick to refute the contentions of Ms. Buch that the statement before the Supreme Court could be construed as an attempt to mislead the Court since the respondents had never come back to the petitioners on the offer of transfer. He submitted that this was an offer held on and although the counsel for the respondents had sought time to take instructions, there was no come back on the issue and the transfer to Chembur was therefore no longer in contemplation of the parties. He reiterated that the closure of the unit at Chembur resulted from and was necessitated due to the environmental concerns and that is how the plant was set up at Sanjan. He submitted that the transfer was bonafide contemplated in the terms and conditions of service and therefore could not be faulted. He contended that there was no other motive as sought to be made out.

12. I have heard the learned counsel for the parties. In the course of submissions, I had to occasion to call upon Mr. Talsania to explain the reasons for the statement having been made in the Supreme Court and why the impugned order is bad for placing reliance on the offer made by the petitioners at the hearing of that Special Leave Petition. When asked about the stand of the petitioners on oath, Mr. Talsania relied upon the counter affidavit filed on behalf of the petitioners by one Anil Jagdish Seth, Director of the petitioners in which he stated as follows:—

"I say that the Departments of being Electroplating, Casting and Soldering have now been shifted at Sanjan in Gujarat with installation of new plant and machinery therein I say that due to pollution/ environmental problem, these Departments have been shifted to Sanjan in Gujarat. I say that the Electroplating, Casting and Soldering has been modernized/ upgraded technologically so as to improve quality of the product. I say that 75 employees who were working in the said Departments and who are presently under lock out, shall be accommodated by giving them other jobs without affecting their other service conditions."

13. In the affidavit, the deponent after dealing with the effect of the imposition of the lock out, states that several complaints and threats issued by the union to other workmen who were peacefully working in terms of the settlement of 2010, the company had put before the Court a proposal for consideration of the Court to resolve the situation amicably. The affidavit goes on to state that departments of electroplating, casting and soldering had been shifted to Sanjan which was a modern plant and 75 employees from those departments which were under lock out would be accommodated. In the case of remaining employees, about 150 of them, the company was willing to withdraw the lock out. Save and except those were engaged in riotous behaviour, the rest would be accommodated either at the factory at Navi Mumbai or in Mumbai " *in another factory which is presently not in operation*". In respect of certain other employees, the petitioners proposed voluntary retirement. It appears that this offer of restarting factory in Mumbai

specifically contemplated only the factory at Chembur and in this behalf I find that in the cross examination of their witness, the witness also stated as follows:-

"It is true that we have no intention to close our unit at Turbhe." Thus it became evident that the Turbhe unit would continue to operate. Few were transferred to Sanjan and the remaining were to be accommodated at the Chembur plant. However, in fact, what has been done is to hold out a promise to accommodate those workmen in the Chembur plant. It was not clearly possible as on date of filing of the counter application dated 14th May, 2015 and also on the date of making the offer to the Supreme Court on 27th July, 2015."

14. A total of 146 out of 202 employees were affected by lock out which came to be lifted when the SLP against the order passed in Writ Petition no.9196 of 2014 was being heard. The union had examined two witnesses who were duly cross examined. The petitioners examined their Director whose cross examination has admitted to shifting of the plant from Chembur to Turbhe. He had admitted that in 2007-08 the plant at Chembur had been shut down and that the land and building of the Chembur plant had been sold. If the land and building were sold in 2007-08 obviously the petitioner could not transfer persons after lifting the lock out to the Chembur plant. There was no such plant in existence. Thus, the contention before the Supreme Court proposing to restart the Chembur plant was a false one. Had it been accepted, it could never have been enforced. Admittedly the proposal was not carried

forward but what the petitioner did achieve is disposal of the SLP leaving it to the Industrial Court to consider the complaints. The offer made on 27th July, 2015 may not have been accepted although it was to be subjected to discussions with the respondent but by an order dated 14th October, 2015, the SLP came to be disposed, allowing the appeal to a limited extent and after considering whether the amount deposited by the petitioner can be released to the workmen concerned. The Court observed that the workmen concerned had suffered a lock out for nearly a year but that would have depended on whether the lock out was legal or justified and this was one aspect that was to be considered by the Industrial Court. The Supreme Court directed the amount deposited in the Supreme Court to be transferred to the Industrial Court and utilised for the purposes of disbursement as directed by the Supreme Court in its order. The release of the amounts in favour of the workmen was subject to the workmen filing an undertaking that if the Court finds that the lock out to be legal, the amount will be refunded. Thus, allowing the appeal, the complaint was expedited.

15. In my view, the order of the Industrial court cannot be faulted. It considers the factual background and comes to a finding that the petitioners had engaged in unfair labour practices. In doing so, it was no doubt influenced by the fact that a statement was made before the Supreme Court offering to absorb the employees in the plant at Chembur. Ex-facie this was a dishonest

approach because the deponent of the counter affidavit was obviously aware that the plant in Chembur was not in existence since he himself had deposed albeit later in point of time that the plant and land had been sold. What is material is that the plant was shut down in the year 2007-08 and was sold during the same period. Thus, when the matter was before the Apex Court, the deponent was well aware that there was no possibility of restarting activities at Chembur. Mr. Talsania had submitted that this offer could not be the basis of a decision in the complaint since the offer was not accepted by the respondents but what is worthy of mention is that even though this offer was not accepted soon after 27th July, 2015 when it was made in Court, the record indicates that the Supreme Court disposed the SLP finally and the final order of the Supreme Court records the fact that the respondent company was ready and willing to transfer such workmen as who may choose to opt for transfer at Chembur. Although the Court had no occasion to consider acceptance of the offer what was material, at that stage was the fact that the company had deposited a sum of Rs.1,40,32,249/- for the relevant period which are wages for the specified period. The issue of transfer never came up then. The SLP was disposed leaving it to the Industrial Court to decide all disputes before it. The Industrial Court has since taken into consideration all these aspects and come to the conclusion that the petitioners had deliberately misled the Supreme Court. These aspects are dealt with by the Industrial Court in paragraph 25 to 27 and 34. As far as

the right to transfer is concerned, the impugned judgment records that the terms and conditions of service included the power of transfer. I do not find any reason to take a different view.

16. The case law cited by Ms. Buch was relevant in the facts of those cases of transfer. The defence in that case appears to be different. Kundan Sugar Mills was a partnership concern but the new business was a different entity and started at a different location. The facts not being identical. I do not see how the Kundan Sugar Mills is of assistance. Crest Communication (supra) held that the terms of service applicable did not providing for transfer. In the instant case it has been found that right to transfer was unaffected. However, the fact remains that despite the right to transfer when the matter was before the Supreme Court the plant at Sanjan was very much in existence. This can be seen from the counter affidavit filed before the Supreme Court in which paragraph 10A contains the following words.

"I say that there were about 202 employees who were affected by the lock out. It is submitted that out of 202 employees, about 12 employees have resigned from the services of the company and have settled their dues. I say that the Departments of being Electroplating, Casting and Soldering have now been shifted at Sanjan in Gujarat with installation of new plant and machinery therein I say that due to pollution/ environmental problem, these Departments have been shifted to Sanjan in Gujarat. I say that the

Electroplating, Casting and Soldering has been modernized/ upgraded technologically so as to improve quality of the product. I say that 75 employees who were working in the said Departments and who are presently under lock out, shall be accommodated by giving them other jobs without affecting their other service conditions.”

17. Thus, it becomes obvious that the strategy adopted was premeditated in having withdrawing the lock out by inducing the respondents to believe that “in another factory which is presently not in operation but which will be restarted before recalling the workmen to work there” really meant the Chembur factory. A fact which becomes evident from the order of the Supreme Court dated 14th October, 2015. This is the aspect which the impugned judgment considers.

18. For the aforesaid reasons, I am of the view that the finding that the petitioners had committed unfair labour practices under item 3 by malafidely transferring members to the plant at Sanjan cannot be faulted. I find no reason to interfere with the impugned judgment. In the result, the challenge fails and I pass the following order:–

- (i) Writ Petition no.3900 of 2017 and 4481 of 2017 are dismissed.
- (ii) No orders as to costs.

(A. K. MENON, J.)