

**IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
APPELLATE SIDE**

Before:

**The Hon'ble Justice T. S. Sivagnanam
and**

The Hon'ble Justice Hiranmay Bhattacharyya

**MAT 387 of 2022
With
IA No. CAN 2 of 2022**

**Writer Safeguard Private Limited
vs.
State of West Bengal & Ors.**

For the Appellant : Mr. Arijit Chaudhury, Sr. Adv.
Mr. Tarak Dutta,
Mr. Ravi Kumar Dubey,
Mr. Sauradeep Duttaadvocates

For the Respondent No. 3 : Mr. Soumya Majumder
Mr. Victor Chatterjee
Mr. Barnamoy Basakadvocates

For the State : Mr. Susanta Pal
Mr. Prabir Kumar Rayadvocates

Heard on : 20.06.2022

Judgment on : 30.06.2022

Hiranmay Bhattacharyya, J.:-

1. This intra court mandamus appeal has been preferred by the employer challenging the judgment and order dated December 16, 2021 passed by the learned Single Judge in WPA 5129 of 2018.
2. By the impugned judgment and order, the learned Single Judge dismissed the writ petition thereby refusing to interfere with the award passed by the learned First Industrial Tribunal (for short “the tribunal”) in case no. VIII-25/2012.
3. By an order of reference vide G.O. No. 517-I.R./IR/11L-36/12 dated 31.05.2012, the industrial dispute was referred to the tribunal for deciding the issue whether the orders of transfer of some workmen are cases of victimization and the reliefs that the workmen are entitled to.
4. Union filed a claim statement before the tribunal alleging that the company treats their workers as slaves and victimizes them in case they raise their voices against the atrocities of the management. The company had no pay scale and no working hours and has also defaulted in depositing provident fund dues. Due to continuous oppression and atrocities of management, the workers decided to form a union for collective bargaining under the leadership of the workers named in the order of reference. The union was formed on August 14, 2011 and the company after having knowledge of the formation of the union tried to transfer the services of Palas Bayen to Kerala. The union and all workmen protested against such illegal

transfer on 01.10.2011 and the management sat with the union members and signed an agreement wherein transfer of Palas Bayen was withdrawn. Thereafter the company after coming to know that the registration fees for the union was deposited on December 21, 2011 decided to victimise the leading members of the union by transferring 8 workmen vide a letter dated December 23, 2011 illegally as a measure of punishment for formation of union and for involving themselves with the trade union activities. The company sent a letter dated January 2, 2012 along with the letter dated December 23, 2011 relating to transfer of service. The Union protested against such illegal transfer as a measure of victimization and requested the management to withdraw the order of transfer. The transfer order was not withdrawn and the management refused employment to the workmen which compelled them to bring the entire matter to the notice of the conciliation officer for conciliation which ultimately failed and the matter was referred to the tribunal. Union prayed for an award declaring that the transfer of 8 workmen are cases of victimisation, illegal and *mala fide* with a direction to the company to pay back wages and other consequential reliefs.

5. The appellant company contested the case before the tribunal by filing a written statement contending that the workmen named in the order of reference had been transferred to different places vide letters of transfer dated December 23, 2011 in terms of their respective appointment letters. It was further stated therein that those workmen without joining their transferred posts were forcibly

trying to disrupt the normal running of the business of the company. It was further stated therein that there was no alleged union existing and operating in the company on the date of transfer of the employees named in the order of reference and as such the question of victimisation of the said employee for their trade union activities does not arise at all. The said transfers were routine transfers and the question of victimisation as a measure of punishment does not and cannot arise at all.

6. The learned tribunal by the award dated September 12, 2017 held that the order of transfer dated December 23, 2011 of 8 workmen issued by the management are cases of victimisation and as such the management cannot act upon the same. By the said award the management was directed not to give any effect or further effect of the order of transfer dated December 23, 2011 in respect of the aforesaid 8 workmen and the management were directed to allow those 8 workmen to join their normal duties where they used to perform such duties prior to December 23, 2011 and the management was directed to pay to each of the said workmen their back wages to the extent of 25% from the date of last payment made to them till the date of their joining.
7. Being aggrieved against the aforesaid award the management preferred a writ petition being WPA 5129 of 2018 which was dismissed by an order dated December 16, 2021. Management preferred this intra court appeal challenging the aforesaid order dated December 16, 2021.

8. Mr. Chowdury, learned Senior Counsel for the appellant contended that victimisation is a serious charge by an employee against the employer and the pleading in support of a case of victimisation must furnish all particulars upon which the charge is based. He further contended that the onus of establishing a plea of victimisation will be upon the person pleading it. In support of such contention he placed reliance upon a decision of the Hon'ble Supreme Court of India in the case of *Messrs Bharat Iron Works vs. Bhagubhai Balubhai Patel and Ors.* reported at (1976) 1 SCC 518. He contended that the claim statement filed by the Union before the learned Tribunal is devoid of any particulars upon which the allegation of victimisation is made out. He further contended that the union could not prove the case of alleged victimisation by leading evidence in support thereof. Thus, according to Mr. Chowdhury the union failed to discharge its onus of establishing the plea of alleged victimisation which lay upon them. He contended that the learned Tribunal committed an error of law while passing the said award and the learned Single Judge also failed to appreciate the aforesaid well settled proposition of law. According to him, the writ court failed to perform its duties while exercising its power of judicial review. He next contended that the workmen did not perform their duties after the transfer order was issued and in view thereof the learned Tribunal was not justified in directing payment of back wages. According to Mr. Chowdhury the workers are paid for the work entrusted to them. In case the workers failed to do the work allotted to them the management has the power to

deduct wages for absence from duty. He placed reliance upon a decision of the Hon'ble Supreme Court of India in the case of *Bank of India vs. T.S. Kelawala and Ors.* reported at (1990) 4 SCC 744 to buttress his contention that the management has the power to deduct wages for absence from duty. Mr. Chowdhury also relied upon a co-ordinate bench decision in the case of *Indu Bhusan Jana vs. Union of India and ors.* reported at AIR 2009 Cal 24 and contended that the judgment and order passed by the learned Single Judge is liable to be set aside only on the ground that the same was delivered more than six months after the last date of hearing of arguments. Mr. Chowdhury also contended that transfer is a incident and a condition of service and no employee has a legal right for being posted at any particular place and an employee upon being transferred must comply with the said order.

9. Per contra Mr. Majumder, learned counsel for the respondent union seriously disputed the contention of Mr. Chowdhury. He contended that only an error of law which is apparent on the face of record can be corrected by a writ and not an error of fact however, grave it may appear to be. In support of such contention he placed reliance upon a decision of the Hon'ble Supreme Court of India in the case of *Syed Yakoob vs. K.S. Radhakrishnan and ors.* reported at AIR 1964 SCC 477. He contended that the Tribunal after considering the materials on record arrived at a finding of fact that the order of transfer by the management are the cases of victimisation. He, thus, submitted that such finding of fact cannot be interfered with by a writ of

certiorari. In order to explain what is an error apparent on the face of the record which can be corrected by a writ of certiorari, he relied upon a decision of the Hon'ble Supreme Court in the case of *Satyanarayan Laxminarayan Hegde and ors. vs. Mallikarjun Bhavanappa Tirumale* reported at AIR 1960 SC 137. He further contended that the power of the appellate court to interfere is not when the order appealed is not right but only when it is clearly wrong. In support of such contention he referred to a decision of the Hon'ble Supreme Court in the case of *Gujarat Steel Tubes Ltd., etc.etc. vs. Gujarat Steel Tubes Mazdoor, Sabha and ors.* reported at AIR 1980 SC 1896. Mr. Majumder contended that the management cannot refuse to implement an award of reinstatement alleging that there is no vacancy.

10. Heard the learned advocates for the parties and perused the materials placed.
11. The learned Senior counsel for the appellant invited the attention of this court to the pleadings of the workmen before the learned Tribunal to support his contention that the pleadings lacked the material particulars upon which the charge of victimisation is based. By placing relevant portions of the evidence, Mr. Chowdhury, tried to convince this court that the workmen failed to establish the allegation of charge of victimisation by leading evidence.

12. After going through the pleadings of the union in the claim statement this court finds that the detailed particulars starting from the formation of the union, application for registration, holding of bipartite meetings with the management on various dates regarding various issues and the ultimate registration of the union has been specifically pleaded therein. By mentioning the specific dates and events in the pleadings with regard to various steps taken by the workmen for formation of the union and the fact that the earlier order of transfer dated October 01, 2011 for transfer of one Shri Palas Bayen was withdrawn as a result of a settlement between the management and the members of the union and the impugned order of transfer dated December 23, 2011 issued immediately after the issuance of challan on December 21, 2011 for registration of the respondent union, the union alleged that the order of transfer was as a measure of victimisation.

13. Upon going through the evidence of the parties this court finds that the respondent union adduced evidence in support of the charge of victimisation made out in the pleadings.

14. The learned Tribunal after considering the pleadings of the respective parties and examining in details the evidences led by the respective parties and appreciating the same arrived at a finding of fact that the workman formed the union on August 14, 2011 which ultimately got its affiliation by way of issuance of the certificate of registration of trade unions issued by the authority vide exhibit 2. The Tribunal further held that as soon as the company got scent

that the workmen are going to form the union to protect and secure their interest themselves collectively through such union, the company decided to issue such transfer orders in respect of such 8 workmen at a time which, in the opinion of the Tribunal had been done with mala fide intention on the part of the company. The Tribunal further held that the company also failed to explain any reason which necessitated the company to transfer 8 workmen at a time. The Tribunal, thus, concluded by holding that such aspect clearly established the vindictiveness on the part of the company.

15. The learned tribunal after taking note of the meager salary of the workmen rightly held that the management should not transfer a person from Calcutta to distant places as well as different states only because clause 9(a) of the confirmation letter gives right to the company to change the job functions, duties or place of work as it will not be possible to manage the livelihood with such a meager salary by staying and working at such distant places.
16. The learned Tribunal while arriving at the aforesaid findings of fact took note of the various decisions cited by the respective parties on the scope of interference by the court or Tribunal against an order of transfer issued by the company in a case where the transfer is an incident of service.
17. The learned Tribunal, in our considered view, correctly applied the well settled proposition of law that normally the order of transfer should not be interfered with unless it is shown that the transfer

order has been issued by the management as mode and method of punishment or that such transfer order is a mala fide one and by correctly applying the said proposition to the facts of the instant case passed an award directing the management not to give any effect or further effect to the order of transfer passed in respect of the 8 workmen.

18. It is well settled that the jurisdiction to issue a writ of certiorari is a supervisory jurisdiction and the court exercising it is not entitled to act as an appellate court. It is also well settled that a finding of fact reached by the Tribunal as a result of the appreciation of evidence cannot be reopened or questioned in writ proceedings. The Hon'ble Supreme Court in *Syed Yakoob* (supra), on the question about the limits of the jurisdiction of High Courts in issuing a writ of certiorari held as –

“7.

There is, however, no doubt that the jurisdiction to issue a writ of certiorari is a supervisory jurisdiction and the Court exercising it is not entitled to act as an appellate Court. This limitation necessarily means that findings of fact reached by the inferior Court or Tribunal as result of the appreciation of evidence cannot be reopened or questioned in writ proceedings. An error of law which is apparent on the face of the record can be corrected by a writ, but not an error of fact, however grave it may appear to be.....”

19. The learned Tribunal on appreciation of evidence arrived at the findings of fact as observed by this court hereinbefore. The said

factual findings do not suffer from perversity. It is also well settled that a writ court cannot reappreciate the evidence for the purpose of arriving at a different conclusion. Therefore, this court is of the considered view that such findings of fact cannot be corrected by a writ of certiorari as held in *Syed Yakoob*(supra).

20.The learned Senior Counsel for the appellant would contend that the Tribunal committed an error of law by not applying the legal principles laid down by the Hon'ble Supreme Court in *Bharat Iron Works* (supra) with regard to the rules of pleadings in a case of a serious charge of alleged victimisation. There is, however, no quarrel to the proposition of law laid down in *Bharat Iron Works* (supra) that in order to make out a case of victimisation the pleading must contain all particulars upon which the charge of victimisation is based to enable the employer to fully meet them. It is also not in dispute that the onus of establishing a plea of victimisation will be upon the person pleading it.

21.As observed by this court hereinbefore that the union in the claim statement properly and adequately pleaded all particulars upon which the charge of victimisation is based. The respondent union also discharged its onus of establishing the plea of victimisation which lay upon it. Therefore, this Court, with great respect to the learned Senior Counsel of the appellant, is unable to accept his submission that an error of law has been committed by the Tribunal which is self evident and apparent on the face of the record. The Hon'ble Supreme Court in *Satyanarayan Laxminarayan*

(supra) explained what is an error apparent on face of record. The Hon'ble Supreme Court in the said reports held as follows-

“An error which has to be established by a long drawn process of reasoning on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record. As the above discussion of the rival contentions show the alleged error in the present case is far from self-evident and if it can be established, it has to be established, by lengthy and complicated arguments. We do not think such an error can be cured by a writ of certiorari according to the rule governing the powers of the superior court to issue such a writ.”

22. Now, the next question arises as to whether the learned Tribunal was justified in granting back wages to the extent of 25%. Admittedly no work was performed by the workman after the order of transfer was passed on December 23, 2011. The case of the management is that the workmen did not join the place of transfer pursuant to the order of transfer and as such they are not entitled to back wages as the entitlement to wages arise only if the workman put in the work allotted to them. On the other hand the contention of the workmen is that the management refused employment.

23. The decision of the Hon'ble Supreme Court in the case of *Bank of India* (supra) was pressed into service by the learned Senior Counsel for the appellant to support his contention that the management has the power to deduct wages for absence from duty when the absence is a concerted action on the part of the employees and the absence is not disputed.

24.The said decision is not applicable to the case on hand as in the facts of the said reported case the employees of the bank in support of their demands participated in the strike called by their association and the employer deducted the salary of the employees who had participated in the strike.

25.However, in the case on hand the learned tribunal held that the order of transfer are the cases of victimisation. Therefore, the workmen cannot be penalised by way of forfeiture or deduction of full wages for not doing their job at the transferred places. The learned Tribunal after taking note of the evidence in chief of W.W-1 that the workmen are still lying unemployed which statement has not been challenged during cross examination and also that the witness of the management namely C.W-1 in his evidence did not claim that those 8 workmen are working for gain in any other concern held that the workmen are entitled to get 25% back wages. The aforesaid findings returned by the Tribunal is on the basis of appreciation of facts and the same is also supported by cogent reasons. Such finding is not liable to be interfered with by a writ of certiorari.

26.The other argument of Mr. Chowdhury that the 8 workmen cannot be allowed to join their normal duties where the workmen used to perform such duties prior to December 23, 2011 as at present there is no vacancy as other workmen have been performing such duties cannot be accepted by this court on the ground that Entry 13 of Schedule V of the Industrial Disputes Act provides that failure to

implement an award amounts to unfair labour practice. That apart, the tribunal rightly took into consideration the fact that the management did not take any disciplinary action against the aforesaid 8 workmen for non compliance of the order of transfer. In view thereof, this Court holds that the tribunal was justified in directing the management to join their normal duties where they used to perform their duties prior to the issuance of the transfer orders. The management cannot be permitted to raise the plea of non availability of vacancy as a ground for non-implementation of the award of the tribunal.

27. In the case of *Bata Shoe Co.(P) Ltd., vs. D.N. Ganguly and others* reported at AIR 1961(SC) 1158, cited by Mr. Majumdar, the issue was whether the references were incompetent in view of the settlement arrived at during the conciliation proceedings. The said decision is of no assistance to the respondent in this appeal.

28. Mr. Chowdhury learned Senior Counsel may be justified in placing reliance upon the decision of the co-ordinate bench in the case of *Indu Bhusan Jana* (supra) on the ground of delay between hearing of arguments and delivery of judgment by the learned Single Judge in the instant case. In order to satisfy as to whether the judgment and order passed by the learned Single Judge otherwise suffers from infirmity, this court undertook the elaborate exercise of examining the pleadings of the respective parties, the evidences led by them and the award passed by the Tribunal in order to arrive at

a conclusion whether a writ of certiorari ought to have been issued by the learned Single Judge in the instant case.

29. The conclusions arrived at by the learned tribunal are supported by cogent reasons. For the reasons indicated hereinbefore, this court is of the considered view, that the conclusion arrived at by the learned Single Judge cannot be said to be clearly wrong for this court to interfere in an intra court mandamus appeal.

30. This Court accordingly holds that the award of the Tribunal as well as the order passed by the learned Single Judge refusing to interfere with the award of the tribunal do not suffer from infirmity. The instant appeal accordingly fails and the same stands dismissed without, however, any order as to costs.

31. IA No. CAN 2 of 2022 accordingly stands dismissed.

32. Urgent photostat certified copy of this judgment, if applied for, be supplied to the parties on priority basis.

I agree.

(T.S. Sivagnanam, J.)

(Hiranmay Bhattacharyya, J.)

Later:

Date: 30.06.2022

After this judgment was delivered Mr. Majumder, learned counsel appearing for the respondent no. 3 submits that in course of

hearing of the appeal an observation was made that the parties shall not insist for hearing of the application pending before the labour court during the pendency of the appeal and now the labour court may be directed to dispose of the pending application. Since the appeal has been dismissed, the labour court is directed to take up the hearing of the said pending application and dispose of the same as expeditiously as possible.

(T.S. Sivagnanam, J.)

(Hiranmay Bhattacharyya, J.)