

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

WRIT PETITION NO. 5613 OF 2023

SANTOSH
SUBHASH
KULKARNI

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Sulzer Pumps India Private Limited, a
Company incorporated under the
Companies Act, 1956 having its registered
office at 9, MIDC, Thane-Belapur Road,
Digha, Navi Mumbai 400 708

...Petitioner

Versus

1. Jayendra Arun Jog, adult, Indian
Inhabitant residing at H-15/38, Godrej Hill
Side Colony, L.B.S. Marg, Vikhroli (West),
Mumbai – 400 079

2. Amit Kumar Sirohi, AGM-HR IR, Sulzer
Pumps India Pvt. Ltd., having office at 9,
MIDC, Thane-Belapur Road, Digha, Navi
Mumbai 400 708

3. Unnatha Raja, adult, Head-RES & SP
India, Sulzer Pumps India Pvt. Ltd., having
office at 9, MIDC, Thane-Belapur Road,
Digha, Navi Mumbai 400 708

...Respondents

Mr. J. P. Cama, Senior Counsel, a/w Shweta Rathod, i/b
Elixir Legal Services, for the Petitioner.

Ms. Jane Cox, i/b Ghanashyam Thombare, for Respondent
No.1/Workman.

CORAM: N. J. JAMADAR, J.

RESERVED ON: 27th JUNE, 2023

PRONOUNCED ON: 3rd OCTOBER, 2023

JUDGMENT:-

1. Rule. Rule made returnable forthwith and with the
consent of the learned Counsel for the parties heard finally.

2. This petition under Article 227 of the Constitution of India assails the legality, propriety and correctness of the judgment and order dated 7th December, 2022 passed by the learned Member, Industrial Court, Thane, in Complaint (ULP) No.138 of 2020 declaring that the petitioner – employer had engaged in unfair labour practices under Items 3 and 9 of Schedule IV of the Maharashtra Recognition of Trade Union and Prevention of Unfair Labour Practices Act, 1971 (“the Act, 1971”) in issuing the order dated 30th October, 2020, thereby transferring respondent No.1 – the complainant – employee to Chennai, and setting aside the said transfer order.

3. Shorn of unnecessary details, the background facts can be stated as under:

(a) The petitioner is a company incorporated under the Companies Act, 1958 and is a part of renowned Sulzer Group. The petitioner is engaged in manufacturing and selling of the specialized pumps, spare parts and after sales services. It has a plant in MIDC, Digha. Respondent No.1 – the complainant was appointed as a trainee with the petitioner – employer on 25th May, 1992. One of the terms of employment, specifically mentioned in the letter of appointment, was that the services of

the complainant were transferable to any of the department or sister concerns of the employer.

(b) In the year, 2011 the complainant was promoted as Supervisor – CSS-SAP Data Management, in the Rotating Equipment Services (RES Department). The complainant was responsible for creating, modifying and maintaining Bill of Material (BOM), equipment masters and material masters to support the Parts, Retrofit and Nuclear (PRN) Organization.

(c) Asserting that the work performed by the complainant at the Digha establishment became redundant and the employer had a Supervisor requirement at its Regional Office at Chennai and found the complainant suitable for the said position, the employer issued a transfer order on 30th October, 2020 thereby transferring the complainant to Chennai to discharge the duties relating to RES and also be responsible for cash collections in the Regional Office, assuming the role of Credit Controller/Cash Controller. The complainant was directed to report to his transferred place of posting by 4th November, 2020.

(d) The complainant filed a complaint of unfair labour practice under Item 4(a) Schedule II and Item 3 and 9 of Schedule IV of the Act, 1971, alleging the transfer as *mala fide*

and an act of victimization. The complainant alleged he was a workman. A dressed up designation of Supervisor CSS-SAP was given to him. He did not discharge any managerial or supervisory duties. Since the complainant was involved in Union activities and had initiated proceedings against the employer and management, he was subjected to transfer *mala fide* with a view to break the collective bargaining power and it was a clear act of victimization. The complainant alleged, *inter alia*, that the additional responsibility to act as Credit Controller/Cash Collector amounted to change in conditions of service and, on that count as well, the transfer order was bad and invalid.

(e) The employer resisted the complaint. It was contended that the complainant was transferred in conformity with the terms and conditions of employment. Transfer was necessitated on account of the business exigency. The complainant was not a workman. He was discharging supervisory functions. Thus, a complaint of unfair labour practice was not tenable. It was categorically denied that the complainant was transferred on account of the alleged Union activities to break the collective bargaining power.

(f) Initially by an order dated 3rd November, 2020, the Member, Industrial Court, directed the employer not to give effect to the transfer order till 23rd September, 2020. By an order dated 24th September, 2021, on an interim application (Exhibit-U2), the Industrial Court granted interim relief while directing that the issue of tenability of the complaint on account of the complainant not being a workman be decided as a preliminary issue.

(g) The employer carried the matter to this Court in Writ Petition No.8491 of 2022. By an order dated 3rd February, 2022 this Court set aside the aforesaid order dated 24th September, 2021 with a direction to the Industrial Court to frame an issue as to whether the complainant proves that he was a workman under Section 2(s) of the Industrial Disputes Act, 1947 ("ID Act, 1947"), decide the same and, depending upon the decision on the said issue, decide the entitlement to interim relief. As the complainant agreed to forgo the wages till the decision by the Industrial Court, it was directed that the complainant need not report at his place of work at Thane.

(h) The learned Member, Industrial Court, after appraisal of the pleadings and evidence adduced by the parties, by the impugned judgment and order, was persuaded to return

a finding that the complainant proved that he was a workman and the employer committed unfair labour practice under Items 3 and 9 of Schedule IV of the Act, 1971 and thus quashed and set aside the transfer order.

(i) Being further aggrieved the employer has invoked the writ jurisdiction.

4. I have heard Mr. J. P. Cama, the learned Senior Advocate for the petitioner – employer and Ms. Jane Cox, the learned Counsel for respondent No.1 – complainant. With the assistance of the learned Counsel for the parties, I have perused the pleadings, evidence and material on record. The learned Counsel have also tendered written submissions in elaboration of the submissions canvassed across the bar.

5. Mr. Cama raised a slew of exceptions to the impugned order. Firstly, Mr. Cama would urge, the learned Member, Industrial Court, committed a manifest error in returning a finding that the complainant was a workman without adverting to the clear evidence to the contrary. The learned Member proceeded to decide the issue on the basis of the contention in the affidavit-in-reply without considering the evidence adduced by two witnesses of the employer. Such non-consideration of

crucial evidence, which had a significant bearing on the issue, vitiated the finding.

6. Second, the learned Member, Industrial Court, committed an error in holding that the complainant was a workman since he had no power to sanction leave or initiate disciplinary proceedings. Absence of these powers is not a safe test to determine the question as to whether a person is a workman. To bolster up this submission Mr. Cama placed a strong reliance on the judgment of this Court in the case of ***Standard Chartered Bank vs. Vandana Joshi and another***¹

7. Third, the Industrial Court was clearly in error in holding that the transfer order was *mala fide* and an act of victimization. In that process, the Industrial Court lost sight of the fact that there was an express term of transferability in the appointment order. It is well recognized that transfer is an incidence of service and ought not be interfered with except on the ground of proved *mala fide*. Adverting to the decision of the Supreme Court in the cases of ***Pearlite Liners (P) Ltd. Vs. Manorama Sirsi***² ***and State of U.P. and ors. vs. Gobardhan Lal***³, Mr. Cama would urge that the learned Member, Industrial Court, committed an

12010 I CLR 163.

2(2004) 3 SCC 172.

32004 III CLR 78.

error in interfering with the transfer order on wholly unsustainable grounds.

8. Mr. Cama would urge that act of victimization attributed to an employer is a serious charge. It has to be established with cogent evidence. Such allegations are easy to make than prove. Mere fact that the complainant was an office bearer of the Union *per se* does not make transfer of the complainant *mala fide*. To this end, Mr. Cama banked upon the decision of the Supreme Court in the case of ***Bharat Iron Works vs. Bhagubhai Balubhai Patel and ors.***⁴

9. Fourth, the finding that the entrusting of the responsibility of Credit Controller/Cash Collector amounted to change in conditions of service, is equally vulnerable as it is against the weight of the evidence on record, urged Mr. Cama.

10. Mr. Cama would further urge that the fact that the complainant was not transferred for 30 years, or for that matter no employee was ever transferred from Mumbai to Chennai, could not have been arrayed against the employer. That does not necessarily imply that the employer was denuded of the power to transfer an employee on account of business exigency. It is for the employer to decide how best to utilize human

4 AIR 1976 SC 98.

resources. If the impugned order is not interfered with, Mr. Cama would urge, the employer would be deprived of the power to transfer any employee, and, therefore, the impugned order deserves to be quashed and set aside.

11. Ms. Cox, the learned Counsel for respondent No.1 – complainant, joined the issue with equal tenacity. Without disputing that transferability is one of the terms of employment, Ms. Cox stoutly submitted that it is the *mala fide* design which impairs the transfer. Ms. Cox would urge that the complainant does not claim any insulation for the mere reason that he is a Union leader. Transfer of a Union representative by itself may not constitute an act of victimization. However, in the case at hand, according to Ms. Cox, there are concomitant circumstances which lead to no other inference than that of victimization and *mala fide* design.

12. On the aspect of the tenability of the complaint, Ms. Cox would urge that from the pleadings and the deposition of the witnesses of the employer, it becomes abundantly clear that the complainant had all along been working as a workman. In fact, functions discharged by the complainant were nothing more than that of the qualified data entry operator. Use of management jargon and giving of dressed-up title would not change the

principal nature of the duties discharged by the complainant. It is the main duty which bears upon the determination of the status and not incidental functions. To buttress these submissions, Ms. Cox placed reliance on the judgement of the Supreme Court in the case of *Burmah Shell Oil Storage & Distribution Company of India Ltd. vs. The Burmah Shell Management Staff Association and ors.*⁵.

13. The aforesaid submissions now fall for consideration.

14. To begin with, uncontroverted facts. Indisputably, the complainant came to be appointed as a trainee Marketing Assistant on 25th May, 1992. Incontrovertibly, the appointment order dated 25th May, 1992 contains condition of transferability to any of the employer's department or sister concern. There is not much dispute over the fact in the year 2011 the complainant was designated as, "Supervisor as CSS-SAP Data Management in RES Department", though the parties are at issue over the import of the said purported promotion and designation as Supervisor. By and large, the fact the complainant was involved in Union activities could not be converted. There is no dispute over the issue of transfer order on 30th October, 2020, whereunder the complainant was transferred to regional office

5 1970 (II) LLJ 590.

at Chennai and in addition to normal RES responsibility, the complainant was also to be responsible for cash collection in the regional office and act as a Credit Controller/Cash Collector.

15. In the backdrop of the aforesaid rather uncontroverted facts, the questions as to whether the complainant was a workman and whether the transfer order was *mala fide* exercise of managerial authority crop up for consideration.

16. The learned Memmber, Industrial Court, was persuaded to hold that the material and evidence on record would indicate that, though designated as supervisor, the complainant was, in fact, discharging duty of a workman. The learned Member, Industrial Court, was of the view that absence of a single instance of transfer since 1992 from Mumbai to Chennai coupled with the intent of the employer to curb the Union activities, indicated that the transfer was actuated by *mala fide*. Whether this approach of the learned Member, Industrial Court, is justifiable?

17. At the outset, it is necessary to keep in view the nature of the jurisdiction exercised by this Court. Undoubtedly the writ jurisdiction is of plenary nature. However, this Court does not sit in appeal over the decision of the Industrial Adjudicator. Whether the Industrial Court has committed a patent error of

law or the view taken by the Industrial Court is such that no reasonable person, on the basis of the material available on record, could have come to such conclusion, merits consideration. Reappraisal of the evidence as a Court of appeal, is not at all warranted.

18. With this clarity as to the remit of the enquiry, I propose to delve into the twin questions of status of workman and transfer being vitiated by *mala fide*, in seriatum.

19. On the aspect of determination of status of workmen, within the meaning of Section 2(s) of the ID Act, 1947, the legal position is fairly crystalized. Such determination must be based on the appreciation of the nature of the duties performed by the employee. Nomenclature of the post, which the employee holds, is not of decisive significance. The description of the nature of the duties also does not furnish a surer foundation for determination. Use of grandstanding expressions and management jargon to describe otherwise ordinary and normal functions, is not uncommon. It is, therefore, necessary to correctly appreciate the nature of the core duties discharged by a person whose status is questioned.

20. Section 2(s) of the ID Act, 1947 defines the expression workman to mean any person employed in any industry to do

any manual, unskilled, skilled, technical, operational, clerical or supervisory work for hire or reward. In the case of *H.R. Adyanthaya and ors. vs. Sandoz (India) Ltd.*⁶, the Constitution Bench of the Supreme Court enunciated that to be qualified to be workman under Section 2(s), the person must be employed to do the work which falls in any of the specified categories, manual, unskilled, skilled, technical, operational, clerical or supervisory. To put it in other words, it is not enough that a person is not covered by any of the four exceptions to the definition. It is also fairly well settled that the burden is on the person, who asserts the status of the workman under Section 2(s) to establish with reference to the dominant nature of his duties that the work which the said person performs falls within one of the specified categories under Section 2(s).

21. In the case of *Burmah Shell* (supra) the Supreme Court adverted to a situation where an employee is entrusted to discharge multifarious duties. In such cases, the Supreme Court held, it would be necessary to determine under which classification the employee will fall for the purpose of finding out whether he does not go out of the definition of “workman” under the exceptions. The principle is now well settled that for this purpose, a workman must be held to be employed to do that

⁶(1994) 5 Supreme Court Cases 737.

work which is the work he is required to do, even though he may be incidentally doing other types of work. The Supreme Court referred to its earlier decision in the case of *Ananda Bazar Patrika (P) Ltd. Vs. Workmen*⁷, where the principle was enunciated as under:

“3. The question whether a person is employed in a supervisory capacity or on clerical work, in our opinion, depends upon whether the main and principal duties carried out by him are those of a supervisory character, or of a nature carried out by a clerk. If a person is mainly doing supervisory work, but, incidentally or for a fraction of the time, also does some clerical work, it would have to be held that he is employed in supervisory capacity; and, conversely, if the main work done is of clerical nature, the mere act that some supervisory duties are also carried out incidentally or as a small fraction of the work done by him will not convert his employment as a clerk into one in supervisory capacity.”

(emphasis supplied)

22. In the case of *Arkal Govind Raj Rao vs. CIBA Geigy and India Ltd.*⁸, another three-judge Bench of the Supreme Court re-exposed the principle in the following words,

“6. where an employee has multifarious duties and a question is raised whether he is a workman or someone other than a workman the Court must find out what are the primary and basic duties of the person concerned and if he is incidentally asked to do some other work, may not necessarily be in tune with the basic duties, these additional duties cannot change the character and status of the person concerned. In other words, the dominant purpose of employment must be taken into consideration and the gloss of some additional duties must be rejected while determining the status and character of the person.”

⁷1970(3) SCC 248.

⁸(1985) 3 SCC 371.

23. The aforesaid enunciation indicates that it is the dominant nature of work or duties which determines the status and not the incidental work, which an employee may be called upon to perform. Herein lies the task before the industrial adjudicator or Court to decipher the dominant nature of duties and remove the gloss. Often the industrial adjudicator and Court come across a verbose and labyrinth description of the duties. Still an effort is warranted to remove the gloss and find out the dominant nature of the duties.

24. In the case at hand, it was the stand of the employer that the complainant was responsible for creating, modifying and maintaining BOM's (Bill of Material), equipment masters and material masters to support the PRN (Parts, Retrofit and Nuclear) Organization. In paragraph 5(d) the employer furnished the description of the predominant duties performed by the complainant. It would be contextually relevant to note that there is evidence to indicate what the terms 'BOM', 'RES' and 'material masters' signify. Mr. Unnadhya Raja, witness of the employer, who was in-charge of RES Department, informed the Court that RES means Rotating Equipment Services and it supported after sales of pump equipments sold by the employer. BOM means Bill of Material and that was a structure of

individual part required to produce components or equipments. Master of Material means identification of material, specification, unit of measure, price, tax, varieties of produce and suppliers name etc. details.

25. In the backdrop of aforesaid nature of duties entrusted to the complainant, Mr. Cama would urge that, the complaint conceded in no uncertain terms that he was appointed as a Supervisor – SAP Data Management and one of his duty was relating to BOM (Bill of Material) and he was required to load data in the SAP system. In the face of these admissions, Mr. Cama would urge, it was for the complainant to establish that he was still a workman.

26. I am unable to persuade myself to accede to the submission that since the complainant conceded that he was appointed as supervisor SAP, the issue ought to have been decided against the complainant. As indicated above, neither the nomenclature is decisive nor the description of the duties. It is the core function which is of determinative significance.

27. In the case at hand, there is material to indicate that the complainant neither supervised work of any other employee nor any machine. The nature of the work performed by the

complainant was that of maintaining and updating a Bill of Material (BOM), primarily. The said BOM was in essence record of the spare parts used or procured for a particular pump. As noted above, the RES Department in which the complainant was employed was entrusted with after sales spare parts business of the employer. That remained the core function of the complainant. Use of the various expressions to describe the incidental or peripheral work does not dilute or affect that dominant nature of duty which the complainant was expected to discharge.

28. It is true, the fact that the complainant had no power to sanction leave or initiate disciplinary proceeding is not of conclusive significance and could not have weighed in deciding the status of the complainant. Reliance placed by Mr. Cama on the decision of this Court in the case of *Standard Bank* (supra) wherein it was enunciated with the fact that an employee is not vested with power to sanction leave or to initiate disciplinary proceeding is not conclusive of the question as to whether the work that was performed by the employee falls within one of the categories stipulated in Section 2(s), is well founded. However, in the case at hand, there is material to show that the complainant in fact did not supervise the work of any other

employee much less had the authority to sanction leave or initiate disciplinary proceeding.

29. An endeavour was made to bank upon an admission in the cross-examination of the complainant that he was nominated as a Project Leader for 1701 new ERP Plant Creation, to draw home the point that the complainant was indeed discharging supervisory functions. This admission, even if construed to be one, does not advance the cause of the employer. Mr. Unnadha Raja, employer's witness, informed the Court that the complainant was nominated as the Project Leader for 1701 new ERP Plant Creation to define all transaction codes with respective functions and associated trainings. That exercise was necessarily one of carving out a different plant code 1701 from 1700. The core function, however, remained the same. Maintenance and updation of BOM. Mr. Unnadha Raja conceded in the cross-examination that there was a proposal to start manufacturing of spare parts business at Rabale and the said proposal was referred as roll out of 1701.

30. The upshot of the aforesaid consideration is that the learned Member, Industrial Court, was justified in returning a finding that the essential work of the complainant was that of data entry as per the values made available to the complainant,

and the employer failed to demonstrate as to how the said work involved the element of managerial or supervisory functions.

31. This leads me to the aspect of the transfer being *mala fide* and an act of victimization. Where transferability is a term of employment, the Industrial Tribunal or Court cannot interdict the transfer unless it is found to be *mala fide* or in violation of the statutory prescription.

32. In the case of *Pearlite Liners* (supra) the Supreme Court enunciated that unless there is term to the contrary in contract of service, a transfer order is a normal incidence of service.

33. In *Gobardhan Lal* (supra), which arose out of transfer of a Government employee, the Supreme Court enunciated that a challenge to an order of transfer should normally be eschewed and should not be countenanced by the Courts or Tribunals as though they are appellate authorities over such orders, which could assess the niceties of the administrative needs and requirements of the situation concerned. This is for the reason that Courts or Tribunals cannot substitute their own decisions in the matter of transfer for that of competent authorities of the State and even allegations of *mala fides* when made must be such as to inspire confidence in the Court or are based on the

concrete materials and ought not to be entertained on the mere making of it or on consideration borne out of conjectures or surmises and except for strong and convincing reasons, no interference could ordinarily be made with an order of transfer.

34. Under Item 3 of Schedule-IV of the Act, 1971, the act of transfer of an employee would amount to an unfair labour practice if the transfer is actuated by *mala fide*. The concept of *mala fide* has two facets; one, malice in law and the other, malice in fact. The term *mala fide* has a definite juridical connotation. It envisages want of good faith, personal bias, grudge, oblique or improper motive or ulterior purpose.

35. It is equally well recognized that the allegations of *mala fide* are easy to make than prove. The Tribunal or Court must bestow a thoughtful consideration before interdicting a transfer on the ground of *mala fide*. All the attendant circumstances must enter the judicial determination. It is more so, where there is an express term of transferability.

36. In the case of ***State of Bihar and Another Vs. P.P. Sharma, IAS and Another***⁹, the Supreme Court, observed that the determination of a plea of *mala fide* involves two questions,

91992 Supp (1) SCC 222.

namely (i) whether there is a personal bias or an oblique motive; and (ii) whether the administrative action is contrary to the objects, requirements and conditions of a valid exercise of administrative power.

37. Following the aforesaid Judgment in the case of ***State of Bihar*** (Supra), the Supreme Court in a recent pronouncement in the case of ***Rajneesh Khajuria Vs. Wockhardt Ltd and Others***¹⁰ observed that in terms of the provisions of the Act, 1971, the transfer by itself can not be said to be an act of unfair labour practice unless it is actuated by *mala fide*. Therefore, to sustain a plea of *mala fide*, there has to be an element of personal bias or an oblique motive.

38. In the case of ***Union Of India and Others Vs. Ashok Kumar and Others***¹¹, the Supreme Court enunciated in clear terms that it cannot be overlooked that burden of establishing *mala fide* is very heavy on the person who alleges it. The allegations of *mala fide* are often more easily made than proved, and the very seriousness of such allegations demands proof of a high order of credibility.

10 (2020) 3 SCC 86.

11 (2005) 8 SCC 760.

39. Readverting to the facts of the case, the following factors assume importance. No other employee was ever transferred out of the employer's Dighi establishment to Chennai. Surely, that cannot be the basis of attributing *mala fide* to the employer. However, the attendant circumstances and correlation of the transfer order thereto may render the exercise of the managerial authority vulnerable. It cannot be controverted that the complainant had specifically asserted in the complaint that after the new management took over, there was a hostile attitude towards the Union activities. The complainant claimed to have filed a writ petition being Criminal Writ Petition (St) no.2486 of 2020 in respect of demolition of the Union office allegedly by the employer illegally and unlawfully. The said writ petition was disposed of on 26th September, 2020 with liberty to avail an appropriate remedy as available in law. The complainant thereafter instituted a suit being Special Civil Suit No.330 of 2020 before the Civil Court at Thane. Even before the institution of the said writ petition the complainant had signed a caveat filed on behalf of the Union in the Industrial Court on 8th September, 2020.

40. What is of critical salience is an order passed by the learned Member, Industrial Court, in Complaint (ULP) No.1421

of 2020 dated 5th March, 2021, filed by the Union against the employer. After extracting the correspondence addressed on behalf of the employer, the learned Member, Industrial Court, *inter alia*, observed as under:

“18. The company not only is making allegations against the Union leadership but has also making serious efforts to cut away members from the Union. It is seem to have succeeded in taking away the white-collared persons and the same is apparent, as it is alleged that as soon as the SEUGC claims existence, same white-collared group want to join the same Union. This, itself *prima-facie* shows involvement of the management to bring about a financial crunch to the Union by stopping of contribution of white collared persons.”

19. Another attempt is to stop the levy and contributions payable to the Union. For arguments it could be considered that it is incorrect, considering the conflict of interest to take deposits in persona name, but there is specific remedy to it. Sudden withdrawal of such levy or contributions agreed upon was only with an intention to cause financial crunch to the complainant Union as till it was an issue of ego. Another attempt is seen to be made to cause financial crunch through SEUGC to say that they have approved that no levy will be taken from the bonus for the Union and thus, may be deprived the Union of one of the sources of income.

20. Thus, the company has tried *prima-facie* to (a) make allegations against Union leadership, (b) grant additional funds for opting out of Union, (c) stop finances of the Union.

21. The aspect that company wants to control the Union is also clear from the facts that the company calls out the workers to change the Union leadership as is apparent from the above letters. They not only call the Union leadership a ‘Ravana’ and ‘Meghnath’, but also want them to be removed and actively promote their removal. They quote such plan as “joint moto”, thus in my view *prima-facie* certainly exceeds to the boundaries of the limits of management and Union.”

41. Holding thus the learned Member restrained the employer and its officers from issuing letters and circulars, making verbal

or personal statements, suggestions and allegations in respect of discouraging the workers for their membership with the complainant's Union and from indulging in the propagation or advocating for any particular Committee or members or against any particular Committee or members or office bearers of the Union.

42. The aforesaid observations indicate that there was *prima facie* a concerted effort to break a particular Union and set up a rival one, which the employer found more favourable.

43. Mr. Cama attempted to salvage the position by asserting that no other office bearer of the Union had been transferred. If the employer intended to victimize the office bearers, it could have proceeded against others as well.

44. I find it difficult to accede to this submission. As noted above, in close proximity to the withdrawal of the writ petition and institution of the suit by the complainant, the latter was visited with the transfer order. Evidently, the complainant was at the forefront in picking the cudgels on behalf of the Union. The management would not have been naive enough to transfer all the office bearers of the Union and instantaneously risk the charge of *mala fide*. If the entire material on record is

cumulatively considered, the *mala fide* design, with which the transfer was actuated, becomes explicitly clear.

45. The learned Member, Industrial Court, was also justified in holding that at the place of transfer the complainant was proposed to be entrusted with additional duties, which he had never performed. He was supposed to be the Credit Controller/ Cash Collector. The employer could not bring material on record to show that the said duty was ever performed by the complainant while being posted at Digha. Mr. Unnadha Raja conceded that he had not known whether the complainant ever performed the duties of cash collector and credit controller and the complainant had the experience of the said work. *Prima facie*, entrustment of the said duty constituted a change in the service condition.

46. For the foregoing reasons, I am persuaded to hold that the learned Member, Industrial Court, committed no error in holding that the employer engaged in unfair labour practices under Items 3 and 9 of Schedule IV of the Act, 1971 and quashing and setting aside the transfer order. Thus, no interference is warranted with the impugned order in exercise of writ jurisdiction.

47. Before parting, it must be clarified that the apprehension of Mr. Cama that if the impugned order is not set aside the employer will be precluded from exercising the managerial authority in respect of any other employee, does not seem to be well founded. As and when the question of justifiability of the transfer arises; undoubtedly, it would be required to be determined on the basis of the attendant facts and circumstances, prevailing situation and the circumstances peculiar to the employee concerned.

48. The petition, therefore, deserves to be dismissed.

49. Hence, the following order:

: O R D E R :

- (i) Petition stands dismissed.
- (ii) Rule discharged.
- (iii) In the circumstances of the case, there shall be no order as to costs.

[N. J. JAMADAR, J.]